

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 2, 12, 51, 54, and 61**

**RIN 3150-AI43**

**[NRC-2008-0415]**

**Amendments to Adjudicatory Process Rules and Related Requirements**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC or the Commission) is amending its adjudicatory rules of practice. This rule makes changes to the NRC's adjudicatory process that the NRC believes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings. This rule also corrects errors and omissions that have been identified since the major revisions to the NRC's rules of practice in early 2004.

**DATES:** The effective date is **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

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## **I. Background**

In a final rulemaking published in the *Federal Register* on January 14, 2004, 69 FR 2181 (2004 part 2 revisions), the NRC substantially modified its rules of practice governing agency adjudications—Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2. In the years that followed, the NRC concluded that further changes to its rules of practice and procedure were warranted.

On February 28, 2011, the NRC proposed amendments to its rules of practice and procedure in 10 CFR Part 2. (76 FR 10781). After evaluating public comments on the proposed rule and making some modifications, the NRC is promulgating a final rule. These changes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings. The final rule corrects errors and omissions that have been identified since the 2004 major revisions to the NRC's rules of practice.

## **II. Effectiveness of the Final Rule**

The new and amended requirements in the final rule will not be retroactively applied to

presiding officer determinations and decisions issued prior to the effective date of the final rule (e.g., a presiding officer order in response to a petition or motion), nor will these requirements be retroactively imposed on participants, such that a participant would have to compensate for past activities that were accomplished in conformance with the requirements in effect at the time, but would no longer meet the new or amended requirements in the final rule. Further, in ongoing adjudicatory proceedings, if there is a dispute over an adjudicatory obligation or situation arising prior to the effective date of the new rule, the former rule provisions would be used. However, the new or amended requirements will be effective and govern all obligations and disputes that arise after the effective date of the final rule. For example, if a Board issues a scheduling order before the effective date of the final rule that incorporates § 2.336(d), which currently requires parties to update their disclosures every 14 days, that obligation would change to every month on a day specified by the Board (unless the parties agree otherwise) once the effective date of the rule is reached. Therefore, Licensing Boards should be aware of the effective date of the final rule and take the necessary steps to notify parties of their obligations once the final rule becomes effective.

### **III. Responses to Public Comments**

The public comment period for the proposed rule closed on May 16, 2011. In response to the proposed rule, the NRC received three comment letters—one from an organization representing industry (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11137A119), one from a public interest group that has participated in NRC proceedings (ADAMS Accession No. ML11137A118), and one from an individual with experience participating in NRC proceedings (ADAMS Accession No. ML11119A231). None of the commenters supported the rule exactly as proposed. One commenter suggested changes to

the proposed rule, responded to the NRC's questions for public comments, commented on the NRC's proposed changes to part 2, and provided one comment that is outside the scope of this rulemaking. Another commenter suggested changes to the proposed rule, responded to some of the NRC's questions for public comment, commented on the NRC's proposed changes to part 2, and provided additional comments that are outside the scope of this rulemaking. The final commenter provided one comment that is outside the scope of this rulemaking. Copies of the comment letters with the NRC's comment identifiers (which are listed after each comment summary in this *Federal Register* notice) can be found in ADAMS at Accession No. ML12005A227.

#### **A. Responses to Specific Requests for Comments**

In Section VI of the Supplementary Information for the proposed rule, the NRC presented two issues for which it solicited stakeholder comments. The following paragraphs restate these issues, summarize the comments received from stakeholders, and present the NRC's resolution of the public comments.

##### **1. Scope of Mandatory Disclosures**

Section 2.336 contains the general procedures governing disclosure of information before a hearing in contested NRC adjudicatory proceedings. Under current § 2.336(b)(3), the NRC staff must disclose all documents supporting the staff's review of the application or proposed action that is the subject of the proceeding without regard to whether the documents are relevant to the parties' admitted contentions. In the proposed rule, the NRC solicited public comment on whether it should revise § 2.336(b)(3) to limit the staff's mandatory disclosure obligations to documents that are relevant to the admitted contentions.

After reviewing the public comments and considering the proposal to make changes to the scope of the staff's disclosure obligations, the NRC has decided to adopt a revised § 2.336 that will limit the scope of the staff's mandatory disclosures to documents relevant to the admitted contentions. The NRC believes that this change will reduce the burden on both the NRC staff and other parties to NRC proceedings. This change will allow participants to focus on the issues in dispute instead of being forced to sort through thousands of pages of documents that are not relevant to the matters being adjudicated. The NRC staff will continue to provide documents to the public through public ADAMS, and nothing in this rulemaking affects the scope of the staff's ongoing record-retention and disclosure obligations outside the adjudicatory process. This change affects only the scope of the documents that must be included in the staff's mandatory disclosures in NRC proceedings.

The NRC also requested comments on whether it should add a new requirement to the end of § 2.336(d) to clarify that the duty of mandatory disclosure with respect to new information or documents relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention or at a time specified by the presiding officer or the Commission. None of the commenters objected to this proposal. The NRC is adopting this change.

a) Would applying NRC staff disclosures under § 2.336(b)(3) to documents related only to the admitted contentions aid parties other than the NRC staff by reducing the scope of documents that they receive and review through the mandatory disclosures?

*Comment: The commenter supports narrowing the staff's disclosure obligations and agrees that the staff's "voluminous" disclosures burden the other parties. The commenter believes that the*

*NRC's proposal would "aid parties other than the NRC Staff by reducing the scope of documents" that must be reviewed. (NEI-Q1a)*

**NRC Response:** As previously discussed, the NRC has considered this issue and has decided to narrow the NRC staff's disclosure obligations. The NRC believes that limiting the staff's mandatory disclosures to only documents relevant to the admitted contentions will reduce the burden on both the NRC staff and the other parties to the proceeding. The NRC staff will have to produce fewer documents and the other parties will have to review fewer documents. Further, the documents provided to the parties by the NRC staff will be relevant to the admitted contentions, which will allow parties to focus on the disputed issues in the proceeding without having to review documents with no relevance to the admitted contentions.

This change does not affect the NRC staff's continued obligation to provide documents to the public through public ADAMS, the NRC's official agency records system, outside the adjudicatory process. Additional information about using public ADAMS to find documents related to a specific licensing action or licensee is discussed in the NRC's response to the comments on Question 1(b).

*Comment: The NRC staff is not meeting its current disclosure obligations. Further, no documents are actually "produced." Instead, the staff provides a list of ADAMS accession numbers that are supposed to (but sometimes don't) link to the documents. Staff could more effectively reduce the burdens of disclosure by implementing a more effective process and by more efficiently using computers and electronic documents. Staff should also better integrate public disclosure of all non-confidential and non-privileged documents into its routine work.*

*If the scope of disclosures is reduced and if the staff continues its "crabbed interpretation" of*

*its disclosure obligations, then public participants will have no choice but to file weekly Freedom of Information Act (FOIA) requests for all NRC staff documents. (Roisman-Q1a)*

**NRC Response:** As previously discussed, the NRC has decided to adopt the proposal regarding the scope of the staff's disclosure obligations. Nothing in this proposal reduces the scope of the staff's obligations to disclose documents through public ADAMS outside the adjudicatory process. The NRC recently updated public ADAMS to make it easier for interested stakeholders to find NRC documents.

Disclosure of documents through public ADAMS is not a new practice, and if parties believe that incorrect ADAMS references have been provided, they should contact the NRC staff to obtain a correct ADAMS reference or a copy of the document (if the ADAMS reference cannot be provided).

b) Is the broad disclosure obligation imposed on the NRC staff by current § 2.336(b) warranted in light of (a) the other parties' more limited disclosure obligations and (b) the parties' ability to find these same documents in an ADAMS search?

*Comment: The commenter believes that the staff's broad disclosure obligations do not appear to be warranted because of the other parties' more limited obligations and the availability of documents through ADAMS. (NEI-Q1b)*

**NRC Response:** As discussed in the responses to the comments on Question 1(a), the NRC agrees with the commenter and has adopted the revised disclosure obligations in the final rule.



*Comment: The premise of this question is incorrect; the staff does not satisfy its disclosure obligations under § 2.336(b). Further, ADAMS is neither comprehensive nor reliable; finding documents is laborious, and the search features in ADAMS are still inadequate. Members of the public are required to review hundreds of irrelevant documents to find what they're seeking. And the disclosure of documents through ADAMS is inconsistent: documents suddenly appear in the system months or years after they were created. These problems make it "impossible to rely on ADAMS as a source of all relevant documents on any subject." Nor can parties rely upon the Electronic Hearing Docket, which is often incomplete. The NRC has not established procedures for when documents will be added to the Docket and which documents will be posted. Similarly, the staff's Hearing File is incomplete and limited to ADAMS accession numbers without any description of the documents that are being disclosed. The NRC's disclosures are in disarray and are neither comprehensive nor reliable, and, therefore, "cannot be a substitute for full disclosure of documents in individual licensing proceedings by Staff." (Roisman-Q1b)*

**NRC Response:** Adopting this proposal will reduce the number of irrelevant documents that members of the public need to review to find what they're seeking. Public ADAMS is a search tool separate from the Electronic Hearing Docket. Public ADAMS contains the NRC's non-sensitive official agency records. In contrast, the Electronic Hearing Docket contains only the non-sensitive adjudicatory filings, as well as the staff's non-privileged disclosures related to ongoing adjudicatory proceedings (i.e., under this final rule, those documents that are relevant to the admitted contentions or disputed issues in ongoing adjudicatory proceedings). All of the documents in the Electronic Hearing Docket are also in public ADAMS. Therefore, if a member of the public wants to search for a document that has been disclosed in an ongoing adjudicatory proceeding (i.e., a document that is relevant to an admitted contention or disputed issue in an

ongoing adjudicatory proceeding), then that person can search for this document on the Electronic Hearing Docket or in public ADAMS. If a member of the public wants to find a document that might not have been included in the staff's disclosures in an ongoing adjudicatory proceeding, then that person should search in public ADAMS.

Further, the NRC has recently updated public ADAMS and the Electronic Hearing Docket, which should make it easier for members of the public to find documents. The new public ADAMS is incorporated into the NRC's public website search, which allows the public to search for ADAMS documents from the NRC's homepage using simple Google-like searches. The new public ADAMS (available at <http://wba.nrc.gov:8080/wba/>) also allows the public to browse documents by release date and to perform simple and advanced searches. The advanced search engine in public ADAMS allows the public to search by docket or license number, which provides an easy way to limit queries to documents related to a specific facility or proceeding. The Electronic Hearing Docket's new interface allows the public to search all ongoing adjudicatory proceedings for adjudicatory documents, including the staff's public disclosures in these proceedings.

c) Would a shorter, more relevant privilege log aid parties to the proceeding?

*Comment: The commenter has no objection to the use of a shorter, more relevant privilege log.*

(NEI-Q1c)

**NRC Response:** As discussed in the responses to Questions 1(a) and (b), the NRC agrees with the commenter and has adopted the revised disclosure obligations in the final rule. The reduced scope of NRC staff disclosures will result in shorter, more relevant privilege logs.

*Comment: This question is unclear. If the NRC is asking whether staff should withhold fewer documents, then the answer is yes. But if the NRC is asking whether the staff should withhold the same number of documents but include fewer of them on the privilege log, then the answer is no. And if the NRC is asking whether the staff should be given more discretion to decide what is relevant, then the answer is no, unless the staff can demonstrate that it is “actually committed to full disclosure of all relevant documents.” The NRC should provide improved privilege logs with more detailed descriptions of the documents being withheld. Further, the privilege logs in the Indian Point proceeding have not included the recipients of the privileged documents, which makes it difficult to determine if the privilege is valid (the initial disclosures did contain this information, but it has not been provided since).*

*The NRC should consult with experts in discovery, such as law professors or the Sedona Conference, to develop a more efficient and effective process for disclosing documents.*

(Roisman-Q1c)

**NRC Response:** The NRC disagrees with this comment. All non-sensitive official NRC records pertinent to the application will remain available via public ADAMS. Shorter privilege logs are a natural result of limiting the scope of documents subject to disclosure under the mandatory disclosure provisions to those relevant to the admitted contentions. The final rule will not change anything about the content or scope of privilege logs; the ratio of documents disclosed to privileged documents should not change, and the total number of documents should be reduced.

This rulemaking is not the proper forum to raise problems with the staff’s disclosures in a specific proceeding. If a party has concerns about staff disclosures in a specific proceeding,

those concerns should be raised with the presiding officer for that proceeding.

d) Would potential parties prefer to maintain the status quo?

*Comment: No. There are substantial problems with part 2. "It needs to be changed in major ways." (Roisman-Q1d)*

**NRC Response:** This comment is outside the scope of this rulemaking. The purpose of this rulemaking is to correct errors and omissions in the NRC rules and to make changes that will promote fairness, efficiency, and openness in NRC proceedings. A wholesale change to part 2 is not the intent of this rulemaking effort. The NRC may consider making other changes to part 2 in a future rulemaking.

e) Would limiting the mandatory disclosures of documents as described in Federal Rule of Civil Procedure 26(a)(1)(A)(ii) be the preferred option?

*Comment: The commenter believes that limiting the scope of the NRC staff's disclosure obligations to be consistent with the Federal Rules of Civil Procedure "is the preferred alternative." Further, the commenter suggests that if the NRC makes this change, it should be applied to all parties to NRC proceedings. (NEI-Q1e)*

**NRC Response:** The NRC considered modifying its disclosure obligations for all proceedings to mirror the Federal Rules of Civil Procedure. But after considering this option, the NRC has decided not to adopt Federal-Rules-style discovery at this time. The scope of the change that

would be required to adopt Federal-Rules-style discovery is too broad for a limited rulemaking like this one. The NRC may, however, consider adopting Federal-Rules-style discovery as part of a future comprehensive revision to part 2.

*Comment: No. The NRC should focus on implementing and enforcing the current obligations. An even better option would be a wholesale revision to the entire part 2 process to provide for increased public participation from the beginning of the process. This increased participation would solve much of the “disclosure problem” because public participants would be actively involved in the process from the beginning and documents would be routinely available to the public. Under this proposal, the disclosure obligations that track the Federal Rules would already have been satisfied by the time a hearing notice is issued. (Roisman-Q1e)*

**NRC Response:** As discussed in the previous comment responses, the NRC has decided to limit the scope of NRC staff disclosures to documents relevant to the admitted contentions. The primary purpose of this limited-scope rulemaking is to correct specified errors and omissions in the NRC rules based on the agency’s experience in operating under the 2004 part 2 revisions. This rulemaking is not intended to be a wholesale revision to the NRC’s adjudicatory rules of practice. The changes proposed in this comment go well beyond the intended scope of this rulemaking and would be more appropriate for a future major revision to part 2.

## **2. Alternative Approaches on Interlocutory Appeals**

The NRC requested public comments regarding possible amendments to § 2.311. Section 2.311 provides requirements for the interlocutory review of rulings by a presiding officer granting or denying a hearing request or intervention petition, including requests or petitions

filed after the deadline in § 2.309(b). Current § 2.311(c) allows the requestor or petitioner to appeal an order wholly denying an intervention petition or hearing request. Therefore, if the presiding officer grants the intervention petition and denies the admissibility of one or more proposed contentions, the petitioner may not appeal the denial of any proposed contentions until the presiding officer issues a final initial decision at the end of the proceeding. Conversely, any party other than the petitioner may immediately appeal the order on the grounds that the requestor or petitioner lacks standing or that all of the petitioner's proposed contentions were inadmissible. Although this basic scheme for interlocutory review of intervention petitions and hearing requests has been in place since 1972 (see 37 FR 28710; December 29, 1972), there have been some suggestions that a change to the current practice might be warranted either to provide earlier appellate review of contention admissibility or to discourage frivolous appeals. The NRC proposed two options for public comment: Option 1 would have amended § 2.311(c) and (d) to allow any party to appeal an order granting a hearing request or intervention petition, in whole or in part, within 25 days of the issuance of the order; and Option 2 would have deleted § 2.311(d)(1) to remove the right of parties other than the petitioner to appeal orders granting an intervention petition. The NRC requested comment on these options, possible rule language that would implement each option, and the resource implications of both options for all participants and for the Commission.

After reviewing the two options and the one public comment received on this proposal, the NRC has decided not to modify its standards for interlocutory appeals. The one public comment received on this issue (from an industry group) did not support changing the appeals process. The lack of public comments on this issue suggests that there is not a clamor for a change in the standards for interlocutory appeals. Thus, while an argument can be made in support of a change, the NRC finds no compelling justification to change the current process.

*Comment: The commenter does not believe that any changes to the NRC's interlocutory review provisions are necessary. But if the NRC does change these provisions, the commenter would support Option 1. The commenter believes that the benefits of Option 1 might not outweigh the potential delays that could be caused by the increased workload for the Commission.*

*Further, the commenter does not support Option 2 because Commission review of initial decisions on petitions to intervene is important to ensure timely and efficient hearings. The commenter believes that this option would result in a significant expansion of the number and type of contentions litigated before licensing boards. These additional contentions would be contrary to the NRC's goal of increasing the efficiency of the hearing process. This option would also remove the "harmonizing" effect of Commission review, which corrects for the differences between licensing boards. (NEI-Q2)*

**NRC Response:** As previously discussed, the NRC agrees with the commenter and has decided not to change its interlocutory appeals standards.

## **B. Responses to Remaining Comments**

*§ 2.305—Service of documents; methods; proof.*

*Comment: The commenter disagrees with the NRC's proposal to clarify that it is inadequate to include a certificate of service stating only that the document is being served through the NRC's E-Filing system; instead, the commenter believes that parties can include a certificate of service stating nothing more than that the document has been served through the E-Filing system. The submitting party cannot know whether the other parties' e-mail addresses are correct or if the system has functioned properly. Therefore, the submitting party cannot state with confidence*

*anything more than that the party uploaded the document to the E-Filing system. The NRC should, therefore, not require parties to attest to having performed service on the other parties when they have no control over whether the system is working correctly or contains the parties' up-to-date contact information. (NEI-1)*

**NRC Response:** The NRC has considered this issue and has decided to adopt a modified version of the commenter's proposal. After the effective date of this rule, parties will no longer be required to include names and contact information in certificates of service for documents served through only the NRC E-Filing system. If a document is served on participants through only the E-Filing system, then the certificate of service need only state that the document has been served through the E-Filing system. If the document is served on participants by only a method other than the E-Filing system, then the document must be accompanied by a certificate of service that includes the name, address, and method and date of service for the participants served. And if the document is served on some participants through the E-Filing system and other participants by another method of service, then the certificate of service must include a list of participants served through the E-filing system, and it must state the name, address, and method and date of service for all participants served by the other method of service. Further, the NRC notes that it retains a record of all of the parties and participants who receive a filing submitted through the E-Filing system.

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

*Comment: The commenter believes that the NRC should not eliminate the eight late-filed factors, especially not for late-filed hearing requests or intervention petitions. The commenter is concerned that simplifying the late-filed criteria could result in additional litigation of late-filed*



*contentions, which could broaden the scope of a proceeding at a late date with no benefit to the development of a sound record. The simplified late-filed criteria could also result in the admission of additional contentions that duplicate the concerns of already-admitted parties. The removal of the other late-filed criteria increases the likelihood that new requests or petitions would be granted late in the process. The current approach does not preclude the filing of new contentions, petitions, or requests, and would continue to allow the admission of legitimate late-filed contentions, requests, and petitions. (NEI-2)*

**NRC Response:** The NRC disagrees with the commenter. The commenter believes that the simplification of the standards for filings after the deadline to focus solely on good cause would depart from longstanding Commission practice and could lead to additional hearing requests, intervention petitions, and contentions being granted or admitted. In the final rule, a filing after the deadline may be granted only if the participant demonstrates good cause by satisfying the current three § 2.309(f)(2) factors. As the NRC explained in the proposed rule, whether filings after the deadline are deemed to have met the current § 2.309(c)(1) requirements has usually depended on the existence of good cause, not the other factors. The commenter has not supported its assertion that this revision could result in additional hearing requests, intervention petitions, and contentions being granted or admitted; the commenter does not identify any cases where a petitioner demonstrated good cause but its filing was denied based on the other factors. The NRC is adopting this change because it will allow participants in NRC proceedings to focus on the most relevant question with regard to whether a filing after the deadline will be granted—whether the filing has demonstrated good cause by meeting the three factors from current § 2.309(f)(2).

*Comment: The commenter believes that the proposed three-step “good-cause” test could lead to the admission of many contentions that would be inadmissible under the current eight-factor late-filed test. At the very least, the NRC should clarify that where the agency uses old information in a new document (e.g., an NRC National Environmental Policy Act (NEPA) document that cites information from an applicant’s environmental report), the “old information” in a new document cannot be used to satisfy the good-cause criteria. (NEI-3)*

**NRC Response:** The first part of this comment—whether many contentions inadmissible under the current rules would be admitted under the revised standards for filings after the deadline—is addressed in the previous comment response. As for the second part of this comment, the commenter is correct that in most cases where the NRC compiles or uses previously available information in a new document, the previously available information cannot be used as the basis for a new or amended contention filed after the deadline. This idea is captured in current § 2.309(f)(2)(i), which this rulemaking moves to final § 2.309(c)(1)(i).

The Commission recently reinforced this point in *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 71 NRC \_\_ (Sept. 30, 2010) (slip op.). In this decision, the Commission overruled an Atomic Safety and Licensing Board decision that admitted a contention based on previously available information (or “old information,” using the commenter’s terms) that was compiled for the first time in the Staff’s Safety Evaluation Report (SER). The Commission stated that, had it upheld the Board’s decision, the “ruling would effectively allow a petitioner or intervenor to delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention. To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on ‘information . . . not previously available.’ Further, such an interpretation is

inconsistent with our longstanding policy that a petitioner has an ‘iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.’” *Id.* at \_\_\_ (slip op. at 17-18) (internal citations, footnotes, and emphasis omitted).

This Commission decision does not mean that all contentions based on previously available information are inadmissible; rather, this decision focuses on a document that “collects, summarizes and places into context the facts [or previously available information] supporting [a] contention.” *Id.* Where previously available information provides the basis for a new conclusion or analysis, such as in an NRC NEPA document, a participant might be able to construct a legitimate contention challenging the new conclusion or analysis without explicitly basing the contention on the previously available information. For example, an NRC NEPA document with a new conclusion based on previously available information not contained in the applicant’s environmental report, such as information from a previously available, but unreferenced, study, might be a proper subject for a contention. Under final § 2.309(c)(1), a contention that challenges a new NRC staff conclusion must, in addition to meeting the other § 2.309(c)(1) factors, still demonstrate that new information encompassed in the new conclusion is “materially” different from information that was previously available.

*Comment: The commenter agrees with the proposed revision, but believes that the revision should also not allow “new contentions based on information that became available to the parties during the course of the NRC Staff’s review.” The commenter believes that this proposal will ensure that parties or potential parties raise issues in a timely fashion after the information first becomes available, instead of waiting for the staff to complete its review.*

*The NRC should also clarify that the requirements in this section are in addition to the*

§ 2.309(c) criteria and also apply to NRC SERs. (NEI-4)

**NRC Response:** This comment is outside the scope of this rulemaking. The NRC is making specific amendments to its adjudicatory procedures to update the standards for filings after the deadline, refine the mandatory disclosure process, and make other minor process improvements and corrections. The suggestions presented in this comment go well beyond the limited changes that are being made in this rulemaking and would likely result in further delay because a new proposed rule would have to be prepared before a final rule implementing these suggestions could be adopted. Many of the changes in this final rule are being adopted to correct problems identified within the current rules.

The NRC included § 2.309(c)(5) in the proposed rule to provide clarity to the participants about an issue that has caused confusion for both participants and presiding officers. After further reflection, the NRC has decided not to adopt this change as part of the final rule. Instead, the NRC has added a clarifying discussion to this *Federal Register* notice that should make it clear to the participants and presiding officers that the standards in final § 2.309(c) apply to both environmental and safety contentions filed after the deadline in § 2.309(b).

Further, the NRC wants to make it clear to participants in its adjudicatory proceedings that when a draft or final NRC NEPA document contains information that was previously available and that is not significantly different from information in the applicant's environmental report, there is a presumption that the participant could have used that information to support a contention challenging the environmental report. Similarly, if information becomes available during the staff's review that a participant could use as the basis for challenging the environmental report, the participant must file a timely request under § 2.309 for admission of a new or amended contention after the deadline and cannot await the issuance of the staff's

NEPA analysis to initiate the challenge. However, a participant may file a contention based on a significant difference between the environmental report and the draft or final NRC NEPA document if the participant files a timely contention after the NRC NEPA document's issuance and the contention is based on new information that is materially different from previously available information; thus, the contention would satisfy the standards in final § 2.309(c)(1) for new or amended contentions.

Finally, the NRC disagrees with the commenter that proposed § 2.309(c)(5) or a similar standard should apply to SERs. It is well-established in NRC case law that safety contentions must challenge the adequacy of the application, not the adequacy of the staff's review. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472 (2001); *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995). Generally, any information in the SER that could provide material support for a new contention is in the application (or the applicant's responses to requests for additional information), and is, thus, available prior to publication of the SER. Conversely, intervenors are expected to challenge the NRC's NEPA process, which means that contentions can challenge the adequacy of the staff's NEPA review. Section 2.309(f)(2) merely states that when possible NEPA contentions must be based on the applicant's environmental report. Therefore, the rationale for allowing new or amended contentions filed after the deadline based on a significant difference between the environmental report and a draft or final NRC NEPA document does not apply to NRC SERs.

*Comment: The current process places undue focus on the procedural technicalities of § 2.309(f), which destroys the public's ability to participate in the process. The proposed amendments do little to address the fundamental problems with part 2. The rules should be*

*amended to allow public participation from the day the applicant starts the license application or license amendment process. The commenter provided proposed rule language to implement this suggestion. (Roisman-1)*

**NRC Response:** This comment is outside the scope of this rulemaking. This rulemaking is not intended to be a wholesale revision to the NRC’s adjudicatory rules of practice. The changes proposed in this comment go well beyond the intended scope of this rulemaking and would be more appropriate for a future major revision to part 2.

*Comment: The contention submission deadline should be extended until 30 days after the applicant and the NRC staff have completed their work on the application and its review. The commenter provided proposed rule language to implement this suggestion. (Roisman-2)*

**NRC Response:** This comment is outside the scope of this rulemaking. The purpose of this rulemaking is to correct errors and omissions in the NRC rules and to make changes that will promote fairness, efficiency, and openness in NRC proceedings. This rulemaking is not intended to be a wholesale revision to the NRC’s adjudicatory rules of practice. The changes proposed in this comment go well beyond the intended scope of this rulemaking and would be more appropriate for a future major revision to part 2.

**§ 2.323—Motions.**

*Comment: The time for filing motions in § 2.323(a) should be changed to 30 days after the “occurrence or circumstance from which the motion arises” and § 2.323(a) should be amended to clarify that this timing requirement applies to all motions. (Roisman-4)*

**NRC Response:** The first part of this comment is outside the scope of this rulemaking—the proposal to extend the timing for filing motions to 30 days, instead of 10 days, after the “occurrence or circumstance from which the motion arises.” This proposal is a substantial change, which should be subject to notice and comment. Because this proposal is outside the scope of this rulemaking and has not been subject to notice and comment, the NRC has decided not to make this change as part of this final rulemaking. The proposal might be considered as part of future revisions to part 2.

The NRC agrees with the second part of this comment—that § 2.323(a) should be amended to clarify that the timing requirement applies to all motions. As previously stated, the purpose of this rulemaking is to correct errors and omissions in the NRC rules. The NRC is thus amending § 2.323(a) to state that “all motions,” instead of “a motion,” must be made within ten days after the occurrence or circumstance from which the motion arises. However, because, in practice, § 2.309(c) motions (e.g., motions for leave to file new or amended contentions) have not been subject to the motion requirements in § 2.323, the NRC is amending § 2.323 to clarify that these motions are not subject to the requirements of this section. For instance, the 10-day timing requirement in § 2.323(a) does not apply to § 2.309(c) motions, but rather final § 2.309(c)(1) does.

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

*Comment: The commenter believes that the NRC should expand the requirements in this section to adopt the four-part test from NRC case law for deciding whether to grant a waiver.*

*See, e.g., Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005):*

1. *The rule's strict application would not serve the purposes for which it was adopted.*
2. *The person seeking the waiver has alleged "special circumstances" that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule.*
3. *Those circumstances are "unique" to the facility rather than common to a large class of facilities.*
4. *A waiver of the rule is necessary to reach a significant safety or environmental problem.*

(NEI-5)

**NRC Response:** This comment is outside the scope of this rulemaking. The purpose of this rulemaking is to correct errors and omissions in the NRC rules and to make changes that will promote fairness, efficiency, and openness in NRC proceedings. Because this proposal is outside the scope of this rulemaking, the NRC has decided not to make this change as part of this final rulemaking. The proposal might be considered as part of future revisions to part 2.

§ 2.336—*General discovery.*

*Comment: The NRC needs to clarify the staff's discovery obligations in contested proceedings. This clarification should note that (1) the staff must comply with the disclosure obligations in § 2.336(a) with respect to any contention where the staff is participating as a party; and (2) the staff must comply with its disclosure obligations under § 2.336(b)(3) for all documents in its possession or possessed by staff experts or consultants that were reviewed or generated as part of the analysis of the application. (Roisman-5)*

**NRC Response:** As discussed in the response to the comments on Question 1, the NRC has



decided to limit the staff's mandatory disclosure obligations to documents that are relevant to the admitted contentions. Further, the NRC notes that, by its terms, § 2.336(a) applies to "all parties, other than the NRC staff."

*Comment: The commenter agrees with the NRC's proposal to expand the 14-day disclosure period in § 2.336. But the commenter believes that a "monthly" update would be easier for the parties than the "30-day" requirement in the proposed rule. (NEI-6)*

**NRC Response:** The NRC agrees with the commenter that a "monthly" disclosure makes more sense than a 30-day requirement. The NRC has therefore adopted a modified version of the commenter's suggestion. Under the final rule, parties will be required to produce monthly disclosures on a day determined by the presiding officer, unless the parties agree otherwise. Documents obtained, discovered, or generated in the two weeks before an update do not need to be included in that update, but must be included in the following disclosure update.

*Comment: The Commenter believes that the five-business-day cutoff for capturing documents for disclosure does not provide enough time for parties to complete their review of documents prior to disclosure. Instead of the five-business-day cutoff, the commenter suggests a time period for disclosures of "15 days before the last disclosure update to 15 days before the filing of the update." (NEI-7)*

**NRC Response:** The NRC agrees with the commenter that more time might be needed to review documents prior to disclosure. As discussed in the response to the previous comment, the NRC is adopting a modified version of the commenter's suggestion.

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

*Comment: The commenter does not believe that the NRC has a “compelling rationale” for expanding the time allowed for the Commission to act on a decision of a presiding officer or a petition for review. The commenter believes that 90 days is more appropriate than the 120 days proposed by the NRC because the Commission should be expected to act quickly if it has reason to review a presiding officer’s decision on its own motion. (NEI-9)*

**NRC Response:** The NRC disagrees with the commenter. The 120 days in the proposed rule is a reasonable amount of time for Commission review. The 40-day time frame in current § 2.341(a)(2) has necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs), which often leaves the Commission insufficient time for an effective review of the filings. A 120-day Commission review period provides for a reasonable time period to review the filings without the unintended consequence of frequent or lengthy extensions. As has always been the case, the Commission may act before the end of the 120-day review period if the review takes less time. In cases where time is of the essence, the Commission may act before 120 days have passed. The NRC has retained the 120-day review period in the final rule.

*Comment: The commenter supports the NRC’s proposal to add a “deemed denied” provision to part 2, but believes that 120 days for Commission review is too long. Instead, the commenter believes that the Commission review period should be 90 days. (NEI-8)*

**NRC Response:** The NRC disagrees with the commenter. The 120 days in the proposed rule is

a reasonable amount of time for Commission review. As a practical matter, the 30-day time frame in the prior deemed denied provision necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs). A 120-day Commission review period allows sufficient time to review the filings at the outset, without the unintended consequence of frequently needing extensions. As noted in the proposed rule, the Commission may act before the end of the 120-day review period if the review takes less time. The NRC has retained the 120-day review period in the final rule.

*§ 2.704—Discovery-required disclosures.*

*Comment: The commenter does not support this proposed amendment because it would shorten the time to complete discovery-related disclosures, which would increase the burden on the parties. Further, the commenter believes that the additional discovery methods available in subpart G reduce the need for automatic disclosure supplements.*

*If the NRC adopts these changes in the final rule, the commenter requests that the relevant time period for disclosures mirror that in the final § 2.336 proposed by the commenter. (NEI-10)*

**NRC Response:** The NRC agrees with the commenter and has reconsidered its proposal to alter the deadline for initial disclosures under subpart G. After further consideration, the NRC has decided not to change the subpart G deadline for mandatory disclosures: initial disclosures in subpart G proceedings are due 45 days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329. The NRC has determined that shortening the time for initial disclosures would not result in greater efficiency in subpart G proceedings and could effectively reduce the flexibility that subpart G presently gives parties to develop a proposed discovery plan for their subpart G proceeding.

The 45-day period in the current rule provides a deadline by which mandatory disclosures must be made should the parties not agree on a proposed discovery plan. Subpart G allows the parties to agree on changes to, among other things, 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.” See 10 CFR 2.705(f)(1)(i). The parties must also confer and determine “what changes should be made in the limitations on discovery imposed under these rules.” 10 CFR 2.705(f)(1)(iii). The 45-day period in the rule provides a default deadline for initial disclosures should the parties not agree on a proposed discovery plan within the time frame specified in § 2.705(f). Section 2.705(f) requires the parties to meet and develop a proposed discovery plan no more than 30 days after the issuance of a prehearing conference order and to submit to the presiding officer a written report outlining the plan within ten days of the meeting. Thus, the parties currently have up to 40 days from the issuance of a prehearing conference order to file an agreed-upon proposed discovery plan. Should the time period for mandatory disclosures be reduced from 45 days to 30 days, parties may be required to make their initial disclosures before the time by which subpart G permits them to file an agreed-upon proposed discovery plan for the proceeding.

The NRC has also considered the commenter’s concerns about mandatory disclosure supplements, and has decided to adopt modified disclosure update provisions in final §§ 2.704 and 2.709. The final disclosure update provisions in §§ 2.704 and 2.709 parallel the schedule in § 2.336(d). Final §§ 2.704 and 2.709, like final § 2.336(d), require monthly disclosure updates on a date specified by the presiding officer, unless the parties agree to a different date or frequency. These sections allow the parties to agree (e.g., in the proposed discovery plan) to change the date and frequency for disclosure updates. Thus, if the parties in a subpart G proceeding prefer the scheme used in current subpart G, they can agree to use the current

process, under which parties are not required to do monthly updates on a specified date. If the parties don't want to be required to provide monthly disclosure updates, they can agree to a different update frequency. Regardless, the NRC expects that most disclosures will be up-to-date by the time pretrial disclosures are due under § 2.704(c); § 2.704(c)(2) requires pretrial disclosures to be made at least 30 days before commencement of the hearing at which the issue is to be presented, unless otherwise directed by the presiding officer or the Commission.

The NRC is also amending § 2.709(a)(6) to contain the same 45-day period as in current § 2.704(a)(3). In addition, the NRC is amending § 2.336(b) to exclude all subpart G proceedings from the § 2.336 disclosure provisions, which parallels the exclusion in § 2.336(a).

*§ 2.1205—Summary disposition.*

*Comment: Part 2 currently contains separate language to describe the summary disposition process under subparts G and L. The regulations should be amended to provide one set of summary-disposition criteria for both subparts. (Roisman-3)*

**NRC Response:** The NRC agrees with the commenter and is modifying subpart L to mirror the requirements in subpart G. Affidavits will no longer be required with motions for summary disposition filed in subpart L proceedings. As discussed in the section-by-section analysis, the NRC strongly recommends that parties to NRC proceedings, particularly those conducted under subpart L, continue to include affidavits with their motions for summary disposition.

*§ 2.1407—Appeal and Commission review of initial decision.*

*Comment: The commenter does not believe that it's necessary to extend the time to file an appeal in subpart N proceedings because these proceedings are typically "narrow, expedited*

*proceedings.” Alternatively, the commenter suggests that any extension be left to the discretion of the Commission. (NEI-11)*

**NRC Response:** The NRC disagrees with the comment. The additional 10 days provided by the final rule will allow parties additional time to prepare more thoughtful, focused briefs, which will help the Commission to resolve appeals in a more timely manner. Further, the additional 10 days will not result in excessive delays in the completion of licensing actions.

*Comment: The regulations should be amended to allow pleadings in support of motions only when the supporting pleading is making a new argument or point and only if the party filing the supporting pleading first attempts to have the proponent of the motion include its argument or point in the initial pleading. Similar changes should be made to “pleadings in opposition.”*

*(Roisman-6)*

**NRC Response:** This comment is outside the scope of this rulemaking. This rulemaking is not intended to be a wholesale revision to the NRC’s adjudicatory rules of practice. The changes proposed in this comment go well beyond the intended scope of this rulemaking and would be more appropriate for a future major revision to part 2. Because this proposal is outside the scope of this rulemaking, the NRC has decided not to make this change as part of this final rulemaking.

#### *Miscellaneous Comments*

*Comment: One commenter submitted a law review article as part of his comment submission. The article argued that the NRC’s current hearing process is neither efficient nor fair because*

*the current regulations were intended to prevent or severely restrict the public's participation in the decision-making process. The article also proposed a number of steps that the NRC could take to address these problems and implement a more fair and efficient process: 1) The NRC staff should decline to accept license applications that are not complete in all material respects. Post-docketing amendments and NRC staff requests for additional information (RAI) would still be allowed, but should be reduced by this proposal. 2) The NRC should amend the regulations to require increased and earlier disclosures from the applicant. The application could be treated like a complaint in a lawsuit subject to Federal Rule of Civil Procedure 26(a)(1), which would result in the disclosure of all information in the applicant's possession or control that is relevant to the "allegations contained in the application." 3) The NRC should allow potential intervenors 120 days after the disclosures described in step 2 to file contentions. Potential intervenors should be required to include a "high degree of specificity" in their proposed contentions. 4) Responses to the petition to intervene would be allowed to reference only facts or opinions from the original application and disclosures. 5) Parties on the same side of an issue (including the NRC staff and States) would be required to file a single brief. 6) Any license amendments or responses to requests for additional information would be required to be accompanied by all the disclosures that would have been included had the information been included with the original application. 7) If amendments or RAI responses are based on information that could have been included with the application and its disclosures, then the potential and current intervenors would be allowed another 120 days to file new or amended contentions or new petitions to intervene. 8) Amendments to the application would be subject to the same timeliness requirements as new or amended contentions. 9) Upon demonstration that full discovery is the best or most efficient way to obtain the needed information and that additional discovery or cross-examination is needed to fully develop the record, parties would be entitled to the "full*

*panoply of discovery allowed in federal court.” 10) Public parties (other than governmental entities) would be entitled to \$150,000 “technical assistance” grants to pay for the assistance of experts. (Roisman-7)*

**NRC Response:** This comment is outside the scope of this rulemaking proceeding. The NRC is making specific amendments to its adjudicatory procedures to update the standards for filings after the deadline, refine the mandatory disclosure process, and make other minor process improvements and corrections. The suggestions presented in this article go well beyond the limited changes that are being made in this rulemaking and would require a complete rewrite of the NRC’s adjudicatory procedures, which is not the purpose of this rulemaking effort.

Implementing these wholesale changes to the NRC’s adjudicatory procedures would result in further delay because a new proposed rule would have to be prepared before a final rule implementing these suggestions could be adopted. Many of the changes in this final rulemaking are being adopted to correct problems identified within the current rules. For example, in most proceedings, the parties negotiate around the 14-day disclosure requirement to provide additional time to prepare disclosure updates. This final rule addresses this problem and provides additional guidance to parties by providing for monthly disclosure updates that capture all of the documents produced or obtained two weeks before the deadline.

The NRC may, however, consider these proposals when it next considers a comprehensive revision to its rules of practice and procedure—where these major changes would more appropriately be considered.

*Comment: The Commission’s parallel rulemaking process for reactor design certifications, which separates design issues from the combined license (COL) hearings, violates Section*



*189a of the Atomic Energy Act and 10 CFR Part 52. The Commission should amend its regulations to require the design certification rulemaking to be complete before the start of the COL application process. Under the current process, the scope of issues that can be adjudicated in a license application hearing is limited, illogical, and unfair.*

*The North Anna COL proceeding, where the applicant changed reactor designs after the hearing started, is an extreme example of this practice. The NRC is “subverting the letter and intent” of 10 CFR Part 52 and is depriving the public of its opportunity to review and comment on the licensing proceedings. Notice of the publication of the Design Control Document for the new design, which is effectively a new application, should have been published in the Federal Register. The publication of this notice should have triggered another opportunity for the public to intervene in the proceeding. Why has the Commission not published a notice of opportunity for hearing for this new application? (BREDL-1)*

**NRC Response:** This comment is outside the scope of this rulemaking. Specific adjudications, such as the North Anna COL proceeding, are outside the scope of this rulemaking. In addition, the wholesale change to the process requested by this commenter is outside of the scope of this rulemaking. The NRC is making specific amendments to its adjudicatory procedures to update the standards for filings after the deadline, refine the mandatory disclosure process, and make other minor process improvements and corrections. The Commission adopted the part 52 licensing procedures in 1989 (54 FR 15372; April 18, 1989) and amended the procedures in 2007 (72 FR 49351; August 28, 2007). This update to the NRC’s adjudicatory process is not intended to change the basic licensing framework established in the 1989 rulemaking.

## **IV. Discussion of Changes and Corrections of Errors**

### **A. Part 2—Title**

The current title of 10 CFR Part 2, “Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders,” does not accurately reflect the scope of part 2, nor does it track the language of the Administrative Procedure Act (APA). The NRC is adopting a new title for 10 CFR Part 2, “Agency Rules of Practice and Procedure,” which better reflects the scope of the subparts and mirrors the language of the APA.

### **B. Subpart C—Sections 2.300 through 2.390**

#### **1. Section 2.305—Service of documents; methods; proof.**

Current § 2.305(c)(4) refers to “any paper,” which could be interpreted to exclude electronic documents filed through the NRC’s E-Filing system. To eliminate this ambiguity, final § 2.305(c)(4) will refer to “each document,” instead of “any paper.” The NRC has evaluated the public comments received on this issue and has decided to amend this section to allow participants to file limited certificates of service with documents filed through the E-Filing system. This limited certificate of service for documents served through only the E-Filing system does not need to contain the names and addresses of the participants served; a simple statement that the document has been served through the E-Filing system is all that is required. Documents that are not filed through the E-Filing system must include a traditional certificate of service—complete with the names, addresses, and method and date of service for all participants served. And documents that are served through both the E-Filing system and another method of service must include both a list of participants served through the E-Filing system and the name, address, and method and date of service for anyone served by the other method.

The NRC retains a record of all participants served through the E-Filing system. Further,

after a participant serves a document through the E-Filing system, the system sends to all served participants a notification e-mail, which contains the names and e-mail addresses of all the participants that were served the document through the E-Filing system. The NRC also encourages the presiding officer and all participants to keep a record of the attorneys and representatives of record for each party to the proceeding. This practice will allow parties to quickly identify the appropriate contact for other parties without having to search in the Electronic Hearing Docket or ADAMS.

Further, the NRC notes that § 2.304 requires that electronic documents be signed using a participant's digital certificate; in such circumstances, it is not necessary to submit an electronic copy of the document that includes a traditional signature.

Current paragraph 2.305(g)(1) does not provide an address for service upon the NRC staff when a filing is not being made through the E-Filing system and no attorney representing the NRC staff has filed a notice of appearance in the proceeding. Final paragraph (g)(1) is amended to provide addresses to be used to accomplish service on the NRC staff when a filing is not being made through the E-Filing system and no attorney representing the NRC staff has filed a notice of appearance in the proceeding.

2. Section 2.309—Hearing requests, petitions to intervene, requirements for standing, and contentions.

Section 2.309 contains the generally applicable procedures for requesting hearings and submitting petitions to intervene in NRC proceedings, and sets forth the requirements for submitting contentions and establishing legal standing to participate in NRC proceedings. The NRC is making several changes to § 2.309.

a. Section 2.309(b)—Timing.

After reviewing the proposed rule, which would have added a cross-reference to the timing provision in § 2.205 to § 2.309(b)(5), the NRC realized that there are other sections in part 2 that impose different filing deadlines than those found in current § 2.309(b). Current § 2.309(b)(5) references orders issued under § 2.202, but does not reference other sections that might impose different deadlines to file a request for a hearing, a demand for a hearing, or a petition to intervene. For example, § 2.205 notices of violation, like § 2.202 orders, provide “twenty (20) days . . . or other time specified in the notice” for individuals to file an answer. This provision does not match the 60 days allowed by § 2.309(b), which could be interpreted as applying to § 2.205 notices of violation. Because there are a number of provisions in part 2 that impose different filing deadlines, the NRC is removing § 2.309(b)(5) and amending § 2.309(b) to clarify that the more specific provisions of part 2, such as §§ 2.103(b), 2.202, and 2.205, control when there is a discrepancy between the specific and general timing provisions.

b. Sections 2.309(c) and (f)—Filings After the Deadline; Submission of Intervention Petition, Hearing Request, or Motion for Leave to File New or Amended Contentions.

Current § 2.309(c)(1) contains eight balancing factors that determine whether to grant or admit “nontimely” hearing requests, intervention petitions, or contentions. These factors include the three factors for standing—also found at § 2.309(d)(1)(ii) through (iv)—and the following five factors: good cause for the failure to file on time; the availability of other means to protect the requestor’s or petitioner’s interest; the extent to which the requestor’s or petitioner’s interest will be represented by other parties; the extent to which the requestor’s or petitioner’s interest will broaden the issues or delay the proceeding; and the extent to which the requestor’s or petitioner’s participation may reasonably be expected to assist in developing a sound record.

In practice, whether a “nontimely” hearing request, intervention petition, or contention is granted or admitted usually depends on whether the participant has shown good cause. The “good cause” factor is given the most weight out of the current factors, and “[i]f a petitioner cannot show good cause, then its demonstration on the other factors must be ‘compelling.’” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005) (footnote with citation omitted). A showing that many of the other factors support granting the request or admitting the contention is rarely sufficient to overcome a lack of good cause. See, e.g., *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010) (the Commission noted that “it would be a rare case where we would excuse a non-timely petition absent good cause”); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 239-40 (2000). Good cause is not defined in the regulations, but has been defined by the NRC in case law as a showing that the petitioner “not only . . . could not have filed within the time specified in the notice of opportunity for hearing, but also that it filed as soon as possible thereafter.” *Millstone*, CLI-05-24, 62 NRC at 564-65.

In addition, current § 2.309(f)(2) identifies three factors to be considered in determining whether to admit a new or amended contention filed after the initial filing. These factors include whether the new or amended contention is based on information that was not previously available, whether the information that was not previously available is materially different from information that was previously available, and whether the new or amended contention has been submitted in a timely fashion after the availability of the new information.

This final rule simplifies the requirements governing hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in § 2.309(b) by 1) referring to “nontimely filings” as “filings after the deadline;” 2) clarifying the applicability of

§ 2.307 to certain filings (i.e., hearing requests, intervention petitions, and motions for leave to file new or amended contentions) that might be or are being filed after the deadline;

3) amending § 2.309(c) to permit filings after the deadline only if the filing satisfies the three factors found in current § 2.309(f)(2)(i) through (iii); 4) clarifying that the general requirements for motions in § 2.323 do not apply to § 2.309(c) filings; and 5) adding clarifying information regarding the need to address interest and standing.

As of this final rule, the NRC will no longer use the terms “late-filed” or “nontimely” with regard to filings (i.e., hearing requests, intervention petitions, and motions for leave to file new or amended contentions) and will instead focus on whether the filing was filed before or after the deadline in § 2.309(b). Therefore, the NRC will refer to contentions previously referred to as “late-filed contentions” as new or amended contentions filed after the deadline and “late-filed” hearing requests and intervention petitions as new hearing requests or new intervention petitions filed after the deadline. The current NRC case law using the terms “late-filed” or “nontimely” continues to apply in ruling on filings after the deadline. The NRC will discontinue using the terms “late-filed” or “nontimely” with regard to contentions for two reasons: 1) to avoid the potential negative implication created by these terms and instead to place emphasis on the fact-specific determination required by final § 2.309(c)(1); and 2) to allow all the requirements for filings after the deadline (currently contained in §§ 2.309(c) and 2.309(f)(2)) to be combined into one place in the regulations (in final § 2.309(c)(1)). The NRC is also making a conforming change to § 2.326(d) to replace the reference to nontimely filings with a reference to new or amended contentions filed after the deadline in § 2.309(b).

Final § 2.309(c) also clarifies that participants must file a motion for leave to file new or amended contentions after the deadline. Because a new petitioner is not a party to the proceeding, new hearing requests and new intervention petitions filed after the deadline do not

need to be accompanied by or included in a motion for leave to file. The petitioner must, however, still show standing and demonstrate that it has satisfied the three factors in final § 2.309(c)(1) before its contentions will be considered.

The revisions to § 2.309 do not affect participants' ability to request modifications to deadlines under § 2.307, including the deadline in § 2.309(b) for filing a hearing request, intervention petition, or new or amended contention. A participant may file such a request under § 2.307 in advance of a deadline—for example, if the participant is unable to meet a deadline because of health issues—or shortly after a deadline—for example, if unanticipated events, such as a weather event or unexpected health issues, prevented the participant from filing for a reasonable period of time after the deadline. The NRC notes that “good cause” in § 2.307 does not share the same definition that is used for “good cause” in final § 2.309(c), so certain extraordinary circumstances such as a weather event or health issues might meet the definition of “good cause” in § 2.307 (even though these circumstances would not satisfy the definition of “good cause” in final § 2.309(c)). Final § 2.309(c)(2) makes clear that participants should file such requests for extending a filing deadline due to reasons not related to the substance of the filing under § 2.307, not § 2.309. It should be emphasized that the weather events and health issues described in this paragraph are examples that might satisfy the “good cause” standard in § 2.307. The presiding officer will ultimately determine on a case-by-case basis whether a participant has demonstrated good cause for a § 2.307 request to extend a filing deadline.

After a requested extension of a filing deadline under § 2.307 is granted, if the participant files by the extended date, then the participant's filing will be treated as if the participant filed by the deadline that was extended—in other words, the participant would need to satisfy the requirements that would have applied had the participant filed by the deadline that was extended. So, if a participant requested to extend the applicable deadline in § 2.309(b), this

request was granted, and the participant filed by the extended date, then the participant would not need to satisfy final § 2.309(c)(1) because the filing would be treated as if it were filed before the applicable deadline in § 2.309(b) and thus final § 2.309(c)(1) would not be triggered.

However, if a participant requested to extend a specific deadline set by the presiding officer that was later than the deadline in § 2.309(b) (such as a specific deadline set by the presiding officer for contentions based on a newly issued NRC NEPA document), this request was granted, and the participant filed by the extended date, then the participant would need to satisfy final § 2.309(c)(1) since the § 2.309(b) deadline would have passed with or without the § 2.307 extension.

Final § 2.309(c) requires all filings after the deadline in § 2.309(b) to satisfy the current § 2.309(f)(2)(i)-(iii) factors. In the proposed rule, the NRC proposed making good cause the sole factor in § 2.309(c) for filings after the deadline and adopting the three factors found in current § 2.309(f)(2) as the standard for determining whether good cause exists under § 2.309(c). After further consideration, the NRC has decided that while the three factors from current § 2.309(f)(2) will be the sole bases for deciding whether to consider filings after the deadline with respect to the substance of the filing; a clarification will be added to final § 2.309(c)(2) to make it clear that requests to change the deadline itself should be made under § 2.307.

The change to current § 2.309(c) and current § 2.309(f)(2) simplifies the review of filings after the deadline. Assuming that a participant or party has demonstrated standing under § 2.309(d), all of the standards for filings after the deadline are in final § 2.309(c). By eliminating the factors in current § 2.309(c)(1)(v)-(viii) and consolidating the standards for filings after the deadline in final § 2.309(c), the final rule allows the parties, participants, and presiding officer to focus their resources on the most relevant questions with regard to whether a filing after the



deadline will be considered—whether the filing meets the three factors from current § 2.309(f)(2).

Further, final § 2.309(c)(2) clarifies that § 2.323, which contains the general requirements for motions, does not apply to hearing requests, intervention petitions, or motions for leave to file new or amended contentions filed after the deadline in § 2.309(b). Section 2.309 governs hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline. For example, the provisions in final § 2.309(i) (not those in § 2.323(c)) apply to answers (and replies to answers) to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline.

Final paragraph (c)(3) makes it clear that, apart from satisfying the current § 2.309(f)(2) factors, a petitioner seeking admission to the proceeding after the deadline in § 2.309(b) needs to satisfy the standing and contention admissibility requirements. Final paragraph (c)(4) applies to a participant or a party who seeks admission of a new or amended contention filed after the deadline, and who has already satisfied the standing requirements in § 2.309(d).

Final § 2.309(f)(2) continues to clarify that all contentions must be based on the documents or other information available at the time the petition is filed. This section makes it clear that, if possible, participants must file environmental contentions arising under NEPA based on the applicant's environmental report. This section further clarifies that a petitioner or participant may file new or amended environmental contentions after the deadline in § 2.309(b) (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in final § 2.309(c).

As part of the proposed rule, the NRC included a new § 2.309(c)(5), which would have required (similar to the language in current § 2.309(f)(2)) new or amended contentions

challenging a draft or final NRC NEPA document to show that there is a significant difference between the applicant's environmental report and the NRC NEPA document. This proposed section would treat the "significant difference" language in current § 2.309(f)(2) as an additional requirement, beyond the proposed § 2.309(c) requirements, for environmental contentions filed after the deadline. After further consideration, the NRC has decided not to adopt proposed § 2.309(c)(5) and instead is clarifying that the "significant difference" language in current § 2.309(f)(2) is not a separate standard, but is captured by the three factors in final § 2.309(c)(1). Under the final rule, participants are still required to file their initial environmental contentions on the applicant's environmental report, even though the NRC staff's NEPA documents are the subject of the environmental portion of the hearing. New or amended environmental contentions filed after the deadline, like new or amended safety contentions filed after the deadline, need to satisfy the requirements in final § 2.309(c). The NRC does not believe that there should be an additional requirement that must be satisfied for new or amended environmental contentions filed after the deadline.

However, as previously specified in current § 2.309(f)(2), participants may file a new or amended contention after the deadline in § 2.309(b) based on a draft or final NRC NEPA document if the participant demonstrates good cause by 1) showing that the information that is the subject of the new or amended contention was not previously available; 2) showing that there is information in the draft or final NRC NEPA document (i.e., environmental impact statement, environmental assessment, or any supplements to these documents) that differs significantly (i.e., is "materially different") from the information in the applicant's documents; and 3) filing the contention in a timely manner after the NRC NEPA document's issuance.

c. Section 2.309(d)—Standing.

Current § 2.309(d) sets forth the standing requirements and also contains some

requirements that do not generally relate to standing. To clarify and to better articulate the generally applicable standing requirements, the NRC is making several revisions to § 2.309(d). The general standing criteria in § 2.309(d)(1) remain the same. Final § 2.309(d)(2) adopts the requirements of the first sentence of current § 2.309(d)(3), which requires the presiding officer to consider the paragraph (d)(1) factors when determining whether a petitioner has an interest affected by the proceeding. Final paragraph (d)(3) retains the existing provision that in enforcement proceedings, the licensee or other person against whom the action is taken is deemed to have standing. Current § 2.309(d)(2) contains special requirements for States, local governmental bodies, and Federally-recognized Indian Tribes that seek status as parties in proceedings. But some of these requirements (e.g., the need to propose one or more contentions, and the need to designate a single representative) do not relate to standing. The current § 2.309(d)(2) provisions are revised and moved to a new § 2.309(h), which is discussed in the next section.

i. Section 2.309(d)(2) moved to 2.309(h)—State, local governmental body, and Federally-recognized Indian Tribe.

As stated, the current § 2.309(d)(2) provisions for government participation, which do not contain generally applicable standing requirements like the rest of § 2.309, are revised and moved to a new § 2.309(h). Final § 2.309(h)(1), which is based on the existing § 2.309(d)(2)(i), requires any State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party to submit at least one admissible contention. This section also includes the requirement that each governmental entity must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the NRC would admit as a party 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 Federally-recognized Indian Tribe, as applicable. This section also requires, as provided in the statement of considerations for the 2004 part 2 revisions, that:

Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate potential parties. Each must separately satisfy the relevant contention requirement, and each must designate its own representative (that is, the Governor must designate a single representative, and the State official must separately designate a representative).

(69 FR 2182, 2222; January 14, 2004).

Final § 2.309(h)(2) is based on the existing § 2.309(d)(2)(ii), which states that in any potential proceeding for a facility (the term “facility” is defined in § 2.4) located within its boundaries, the State, local governmental body, or Federally-recognized Indian Tribe seeking party status need not further establish its standing. As revised, final § 2.309(h)(1) and (h)(2) delete the word “affected” from the phrase “Federally-recognized Indian Tribe.” The use of “affected” in this context is proper only in a high-level radioactive waste disposal proceeding. See 10 CFR 2.1001 (definition of “party” includes an “affected” Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. § 10101)). For the same reason, the NRC is removing “affected” from final § 2.315(c) (regarding interested government participation) and from the definition of “Participant” added to § 2.4 in the E-Filing Rule (August 28, 2007; 49139, 49149). Current § 2.309(d)(2)(iii) is redesignated as § 2.309(h)(3).

ii. Section 2.309(h) moved to 2.309(i)—Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions.

Current § 2.309(h), which governs the filing of answers (and replies to answers) to hearing

requests and petitions to intervene, is redesignated as § 2.309(i) and is further revised. Current § 2.309(h)(1) refers to “proffered contentions,” has a preamble limiting paragraph (h) to filing deadlines for hearing requests and intervention petitions, and does not include a clear reference to new or amended contentions filed after the deadline in § 2.309(b). The same deadlines should apply to answers (and replies to answers) to motions for leave to file new or amended contentions filed after the deadline in § 2.309(b) as apply to answers (and replies to answers) to intervention petitions and hearing requests filed after the deadline. The NRC is therefore amending this section to include answers (and replies to answers) to motions for leave to file new or amended contentions after the deadline. Because this change covers filings after the deadline in § 2.309(b), the reference to “proffered contentions” in final paragraph (i)(1) (current paragraph (h)(1)) is no longer necessary and is removed. The reference in current paragraph (h)(1) to “paragraphs (a) through (g)” is changed to “paragraphs (a) through (h)” due to the addition of new paragraph (h).

d. Section 2.309(i) moved to new 2.309(j)—Decision on request/petition.

Current § 2.309(i) is redesignated as § 2.309(j). Final § 2.309(j) contains a new citation reference made necessary by the new § 2.309(h). Current § 2.309(i) provides that the presiding officer will, in most cases, issue a decision on requests for hearing and petitions to intervene within 45 days after service of the request or petition, absent an extension of time from the Commission. Since this rule was introduced in 2004, however, presiding officers have not expressly sought extensions from the Commission; rather, the practice has been to issue a notice of the expected date that a decision will be issued. *See, e.g.,* Notice (Expected Date for Decision on Hearing Requests) (Jan. 3, 2011) (unpublished) (ADAMS Accession No. ML110030120). Section 2.309(j) is therefore revised to reflect this practice. The revised rule

also extends the time for action by the presiding officer, and provides that if the presiding officer cannot issue a decision on each hearing request or intervention petition within 45 days of the conclusion of the pre-hearing conference, the presiding officer shall issue a notice advising the Commission and the parties as to when the decision will issue. If no pre-hearing conference is conducted, the 45-day period begins after the filing of answers and replies under current § 2.309.

3. Section 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 (SUNSI) and safeguards information (SGI).

Current § 2.311(b) allows parties to appeal orders of the presiding officer to the Commission concerning a request for hearing, petition to intervene, or a request to access SUNSI or SGI within ten days after the service of the order. Any party who opposes the appeal may file a brief in opposition within ten days after service of the appeal. Experience has demonstrated that the filing time provided under this section is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore extending the time to file an appeal and a brief in opposition to an appeal from ten to 25 days. The NRC does not expect the change in appeal deadlines to result in any delays in making licensing decisions. Some Commission appeals of presiding officer initial decisions are completed before there is a final decision on the proposed action, and thus would not affect the timing of the final agency action. For example, this could occur when an appeal on the contested portion of a reactor licensing hearing (part 52 COL or

part 50 construction permit) is completed before the Commission holds the mandatory hearing. Further, the NRC believes that the increased time to develop higher quality briefs may assist in shortening the time for Commission review in situations where the timing of a final agency action might be affected by the appellate process.

4. Section 2.314—Appearance and practice before the Commission in adjudicatory proceedings.

Current paragraph 2.314(c)(3) allows anyone disciplined under § 2.314(c) to file an appeal with the Commission within ten days after issuance of the order. Experience since the 2004 revisions of part 2 has demonstrated that ten days frequently is not adequate for parties to prepare quality appeals. The NRC is therefore extending the time to file an appeal of an order disciplining a party from ten to 25 days. The NRC believes that extending the time for appeals will result in higher-quality appeals.

5. Section 2.315—Participation by a person not a party.

Current § 2.315(c) allows interested State, local governmental bodies, and Federally-recognized Indian Tribes that have not been admitted as parties under § 2.309 a reasonable opportunity to participate in hearings. The NRC is amending § 2.315(c) to clarify that States, local governmental bodies, or Federally-recognized Indian Tribes that are allowed to participate in hearings take the proceeding as they find it, consistent with longstanding NRC case law. See, e.g., *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980).

6. Section 2.319—Power of the presiding officer.

Section 2.319(l) is updated to clarify the scope of the power of the presiding officer to refer rulings or certify questions to the Commission, consistent with the change to § 2.323, discussed in the next section.

7. Section 2.323—Motions.

The NRC is amending § 2.323(a) to clarify that § 2.309(c) motions (e.g., motions for leave to file new or amended contentions filed after the deadline in § 2.309(b)) are not subject to the requirements of this section. Section 2.309(b) motions are subject to the requirements in § 2.309. For example, the 10-day timing requirement in § 2.323(a) does not apply to motions for leave to file new or amended contentions filed after the deadline; instead, the presiding officer must make a fact-specific determination under final § 2.309(c)(1) as to whether the participant had good cause for filing the motion after the deadline or whether the participant submitted the filing in a timely fashion after the information upon which the contention is based became available.

The NRC is also amending § 2.323(f) to clarify the criteria for referrals in this paragraph, and to make the referral criteria consistent with the Commission's standards for consideration of these referrals. The criterion on "prompt decision . . . necessary to prevent detriment to the public interest or unusual delay or expense" is removed. The second criterion on "the decision or ruling involves a novel issue that merits Commission review" is revised to make clear that 1) this criterion concerns the *presiding officer's* decision, and 2) the presiding officer's decision must raise or create "significant and novel" issues that may be either "legal or policy" in nature.



8. Section 2.335—Consideration of Commission rules and regulations in adjudicatory proceedings.

Section 2.335 details the procedures through which a challenge to the Commission's regulations may be raised as part of an adjudicatory proceeding. The current text of the rule limits these challenges to "a party to an adjudicatory proceeding," which would seem to exclude petitioners from challenging the Commission's regulations. The Commission recognizes that challenges to the Commission's regulations are frequently contained in petitions to intervene and requests for hearing. Further, the Commission recognizes that petitioners may have a legitimate interest in raising such challenges before they are granted party status and that Atomic Safety and Licensing Boards have allowed petitioners to raise these concerns before being admitted as parties. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007).

Also, a contention that challenges any Commission rule is outside the scope of the proceeding because, absent a waiver, 'no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.' Similarly, any contention that amounts to an attack on applicable statutory requirements must be rejected by a licensing board as outside the scope of the proceeding. A petitioner may, however, within the adjudicatory context submit a request for waiver of a rule under 10 C.F.R. § 2.335, and outside the adjudicatory context file a petition for rulemaking under 10 C.F.R. § 2.802 or a request that the NRC Staff take enforcement action under 10 C.F.R. § 2.206.

*Id.* (citations omitted). The NRC is therefore amending this section to clarify that, in accordance with NRC practice, "participants to an adjudicatory proceeding," not just parties, may seek a waiver or an exception for a particular proceeding.

9. Section 2.336—General Discovery.

Current § 2.336(b) contains the NRC staff's mandatory disclosure obligations. For instance, under current § 2.336(b)(3), the NRC staff must disclose all documents supporting the staff's

review of the application or proposed action that is the subject of the proceeding without regard to whether the documents are relevant to the admitted contentions.

The 2004 revision to part 2 imposed mandatory disclosure requirements on all parties that were intended to reduce the overall burden of discovery in NRC adjudicatory proceedings. The NRC is concerned that the overall burden of discovery in NRC proceedings has not actually been reduced. The NRC believes that the primary source of the burden stems from the NRC staff's disclosure of hundreds or thousands of documents that are not relevant to any admitted contention. Disclosure of voluminous material by the staff also burdens other parties to the proceeding with having to search through hundreds or thousands of irrelevant documents to find the material that is relevant to the admitted contentions (other parties' disclosures are already limited to documents relevant to the admitted contentions; the staff's disclosures are not).

All parties also are required to produce privilege logs (a list of discoverable documents that are not being disclosed because the party asserts a privilege to protect the documents). Due to the large number of documents that are captured by the current regulations, the NRC staff must prepare a log of privileged documents, most of which are completely irrelevant to the admitted contentions. Limiting the NRC staff's disclosure obligations to the admitted contentions will reduce the number of documents produced by the NRC staff, and also will provide the other parties to the proceeding with a list of relevant documents that were withheld, which will make it easier for the parties to identify any withheld documents that they may seek to obtain. This change also will align the scope of the NRC staff's disclosure obligations with those of the other parties to the proceeding. At the same time, the parties' opportunity to obtain publicly available documents will not be affected because these changes will not affect the scope of documents that will be available to parties and other members of the public through public ADAMS outside the adjudicatory process.

The NRC is therefore amending § 2.336(b) to limit the scope of the staff's mandatory disclosure obligations to documents relevant to the initially admitted contentions and admitted new or amended contentions filed after the deadline in § 2.309(b). As a general matter, § 2.336(b) applies to all documents meeting the description in that provision whenever they're created, whether that be before or after the submission of the application.

Current § 2.336(d) requires parties to update their mandatory disclosures every 14 days. Experience with adjudications since early 2004 has demonstrated that the current disclosure provisions are much more burdensome for litigants than was initially anticipated. Part of the burden is the frequency of required updates to the mandatory disclosures. The NRC is therefore replacing the requirement to disclose information or documents within 14 days of discovery with a continuing duty to provide a monthly disclosure update. Final § 2.336(d) directs the presiding officer to select a day during the month (e.g., the first day of the month or the first Thursday in the month) when disclosure updates will be due. Alternatively, the parties may agree to a different due date or frequency for the disclosure updates.

Each disclosure update under final § 2.336(d) includes documents subject to disclosure under this section that have not been disclosed in a prior update. Documents that are developed, obtained, or discovered during the two weeks before the due date are not required to be included in that update (but if they are not included in the first update after they're discovered, then they must be included in the next update).

This change to § 2.336(d) will reduce the burden and increase the usefulness of updated disclosures. The NRC is also adding a sentence to the end of § 2.336(d), to clarify that the duty to update disclosures relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention, or when otherwise specified by the presiding officer or the Commission.

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

Current § 2.340(a) and (b) currently imply that the presiding officer must reach a decision prior to the issuance of a license or license amendment, but this is not necessarily always the case. For operating licenses associated with production and utilization facilities, both the Atomic Energy Act and the NRC's regulations allow for the issuance of a license amendment upon a determination of "no significant hazards consideration." See, e.g., 42 U.S.C. § 2239, 10 CFR 50.91. Further, 10 CFR Part 2 Subparts L and N allow the staff to act on certain applications prior to the completion of any contested hearing, assuming that all other relevant regulatory requirements are met. See 10 CFR 2.1202(a), 2.1210(c)(3), and 2.1403(a). The NRC is revising § 2.340 to clarify that production and utilization facility applications for license amendment—to amend a construction permit, operating license, or renewed license—where the NRC has made a determination of no significant hazards consideration may be acted upon prior to the completion of a contested hearing. The NRC also revised § 2.340 to clarify that the NRC may not act on the application until the presiding officer issues an initial decision in contested proceedings for the initial issuance or renewal of a construction permit, operating license, or renewed license, and proceedings for the amendment of an operating or renewed license where the NRC has not made a determination of no significant hazards consideration. The NRC is also making conforming amendments to paragraphs (d) and (e) of this section to clarify that in proceedings involving a manufacturing license under 10 CFR Part 52 subpart C, and in proceedings not involving production and utilization facilities, the NRC staff—provided it is able to make all of the necessary findings associated with the licensing action—may act on a license, permit, or license amendment prior to the completion of a contested hearing.

Finally, this section is amended to clarify that the presiding officer may make findings of fact and conclusions of law on 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 only to the extent that the Commission, upon a required referral by the presiding officer, approves an examination of and decision on the referred matters.

11. Section 2.341—Review of decisions and actions of a presiding officer.

a. Section 2.341(a)—Time to act on a petition for review.

Section 2.341(a)(2) currently provides the Commission with 40 days to act on a decision of a presiding officer or a petition for review. The current 40-day time frame has necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs), which often leaves the Commission insufficient time for an effective review of the filings. A 120-day Commission review period provides for a reasonable time period to review the filings without the unintended consequence of frequent or lengthy extensions. The NRC therefore is extending the time for Commission review from 40 days to 120 days. As has always been the case, the Commission may act before that time or extend that period as it deems necessary.

b. Section 2.341(b)—Petitions for review.

Section 2.341 contains requirements pertaining to the review of decisions and actions of a presiding officer by the Commission. Current § 2.341(b)(1) allows parties to file a petition for review of a full or partial initial decision by a presiding officer or any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part. Under the

current regulations, a petition for review must be filed with the Commission within 15 days of service of the decision. Similarly, current § 2.341(b)(3) allows other parties to file an answer supporting or opposing Commission review within ten days after service of a petition for review. And the petitioning party is allowed to file a reply brief within five days of service of any answer. Experience has demonstrated that the time allowed by the NRC's rules for petitions for review of a presiding officer's order (15 days) is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore extending the time to file a petition for review and an answer to the petition from 15 days and ten days to 25 days. The NRC is also extending the time to file a reply to an answer from five to ten days.

The NRC does not expect the change in appeal deadlines to result in any unnecessary delays in making licensing decisions. Some Commission appeals of presiding officer initial decisions are completed before there is a final decision on the proposed action, and thus would not affect the timing of the final agency action. For example, this could occur when an appeal on the contested portion of a reactor licensing hearing (part 52 COL or part 50 construction permit) is completed before the Commission holds the mandatory hearing. Further, the NRC believes that the increased time to develop higher quality briefs may assist in shortening the time for Commission review in situations where the timing of a final agency action might be affected by the appellate process. Finally, even when a final presiding-officer decision approving a license comes before the Commission on a petition for review, the license can be issued immediately, notwithstanding the pendency of a petition for review. See 10 CFR 2.340(f), 2.341(e).

c. Section 2.341(c)—Petitions for review not acted upon deemed denied.

As stated in the 2004 part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786 (see 69 FR 2225; January 14, 2004). But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. Accordingly, the NRC is adding a new § 2.341(c)(1); current § 2.341(c)(1) is redesignated as § 2.341(c)(2), and current § 2.341(c)(2) is redesignated as § 2.341(c)(3). Final § 2.341(c)(1) adopts the deemed denied provisions of the former § 2.786(c) with the exception of the 30-day time limit, which is extended to allow 120 days for Commission review. As a practical matter, the 30-day time frame necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs). A 120-day Commission review period allows sufficient time to review the filings at the outset, without the unintended consequence of frequently needing extensions. The NRC therefore is adopting the deemed denied provisions of former § 2.786 with a 120-day time limit as final § 2.341(c)(1).

d. Section 2.341(f)—Standards for Atomic Safety and Licensing Board certifications and referrals.

The NRC is revising paragraph (f) of this section to address a perceived inconsistency in the standards for Atomic Safety and Licensing Board certifications and referrals to the Commission and Commission review of these issues. Current § 2.323(f) allows a presiding officer to refer a ruling to the Commission if 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. By contrast, current § 2.341(f) states that referred or certified rulings “will be reviewed” by the

Commission only if the referral or certification “raises significant and novel legal or policy issues, *and* resolution of the issues would materially advance the orderly disposition of the proceeding (emphasis added). In essence, the current rules set forth different standards for presiding officers to apply when determining whether to certify a question or refer a ruling, from those that the Commission will use to determine whether it will accept review of a certified question or referred ruling. Further, this language has been interpreted to allow the Commission to accept referrals or certifications only if *both* standards in current § 2.341(f) are met, even though current § 2.323(f) allows a presiding officer to refer or certify a ruling if any of the criteria in current § 2.323(f) is met. *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009). To remedy the inconsistency between the two regulations, as discussed with respect to § 2.323(f), the standards for referral by the presiding officer are revised to parallel the standards the Commission will consider in determining whether to take review of a certified question or referred ruling. Final § 2.341(f) provides the Commission with maximum flexibility by allowing, but not requiring, the Commission to review an issue if it raises significant legal or policy issues, or if resolution of the issue would materially advance the orderly disposition of the proceeding.

#### 12. Section 2.346—Authority of the Secretary.

Current § 2.346(j) authorizes the Secretary to “[t]ake action on minor procedural matters.” Section 2.346(j) has served an important function because the need for the Commission to issue orders and hold affirmation sessions to dispose of adjudicatory matters can sometimes result in undesirable delays in resolving minor matters before the Commission. Many of these minor matters, by their very nature, do not have the precedential or policy significance that reasonably warrants Commission attention. Thus, by delegating authority to the Secretary to



decide certain minor matters that come before the Commission, § 2.346(j) has promoted efficiency in NRC adjudications.

However, the rule's current language (i.e., "take action on minor procedural matters") could be read to suggest that the Secretary's authority includes a more limited set of matters than intended, as matters must be both "minor" and "procedural" to qualify. To clarify the regulation, in the proposed rule, the NRC proposed amending § 2.346(j) to read as follows: "[t]ake action on procedural and other minor matters." However, proposed § 2.346(j) could suggest that all procedural matters—no matter their precedential or policy significance—are appropriate for resolution by the Secretary. Upon further consideration, the NRC has decided to revise proposed § 2.346(j) to avoid misleading interpretations, without altering its intended meaning. Final § 2.346(j) thus reads: "[t]ake action on other minor matters." This revision is designed to clearly authorize the range of minor matters that are appropriate for resolution by the Secretary.

Under the final rule, the Secretary will have authority to decide "other minor matters" (not covered by the other provisions in § 2.346) that come before the Commission, whether procedural or otherwise. The question of whether a given matter is "minor" will depend upon the matter's precedential or policy significance. Accordingly, even a matter that might arguably not be considered minor from a purely procedural standpoint, such as an unopposed withdrawal of a construction and operating license application, may fall within the scope of final § 2.346(j) because of its lack of precedential or policy significance. A number of recent orders issued by the Secretary informed the NRC's decision to adopt final § 2.346(j):

- March 10, 2011 order in the *Vermont Yankee* license renewal case denying a petition to stay final Commission decisions in the case and provide an opportunity for a hearing on license renewal application amendments filed by the applicant after the close of the hearing record. The Secretary's order recognized the petition as effectively a petition to

reopen the record and submit new or amended contentions filed after the deadline, with an associated stay request to allow time for these desired actions. Because the petition made no attempt to address the necessary criteria for either reopening the record or admitting new or amended contentions filed after the deadline, the Secretary's order denied the petition on the ground that it was procedurally defective on its face. See Order of the Secretary (Mar. 10, 2011) (unpublished) (ADAMS Accession No. ML110691322).

- September 10, 2010 order in the *GE-Hitachi* uranium enrichment case designating an Office of Nuclear Security Incident Response (NSIR) employee to serve as an advisor to the licensing board pursuant to 10 CFR 2.904. See Order of the Secretary (Sept. 10, 2010) (unpublished) (ADAMS Accession No. ML102530358).
- March 30, 2010 order in the *Comanche Peak* combined license case granting a “housekeeping stay” of a licensing board order. The board order, which the NRC staff was appealing to the Commission, had (among other things) directed the staff to make certain disclosures to the intervenors. The staff had requested a stay of the board order's effectiveness pending the Commission's review of the staff's appeal, and the Secretary's “housekeeping stay” allowed the staff to hold off on making the disclosures—and thereby preserve the *status quo ante*—until the Commission could act on the stay request. See Order of the Secretary (Mar. 30, 2010) (unpublished) (ADAMS Accession No. ML100890634).

- March 5, 2010 order in the *Powertech* uranium recovery matter denying a prospective petitioner's request that the Commission order the NRC staff to place three hard copies of the application materials (rather than two hard copies) in South Dakota reading rooms. See Order of the Secretary (Mar. 5, 2010) (unpublished) (ADAMS Accession No. ML100640426).
- September 11, 2009 order in the *Pa'ina* materials licensing proceeding extending the period of time for filing a petition for review of a licensing board order where a petition for reconsideration of that board order was still pending before the board. See Order of the Secretary (Sept. 11, 2009) (unpublished) (ADAMS Accession No. ML092540322).
- September 4, 2009 order in the *South Texas* combined license case tolling the running of the time for appealing licensing board contention admissibility decisions to the Commission, where the board had bifurcated its decision on an initial intervention petition, ruling on some of the contentions but not others, and where seven additional new or amended contentions filed after the deadline were also pending before the board. See Order of the Secretary (Sept. 4, 2009) (unpublished) (ADAMS Accession No. ML092470592).
- April 27, 2009 order in the *Comanche Peak* combined license case, denying a petition seeking a Commission stay of the adjudication pending completion of the design certification rulemaking for the design being referenced in the application. The Secretary denied the petition on the ground that the Commission, in accord with a Commission policy expressed in its Final Policy Statement on the Conduct of New Reactor Licensing

Proceedings, had recently denied comparable requests in two other recent cases (CLI-09-4 – *Fermi*; CLI-08-15 – *Shearon Harris*). See Order of the Secretary (Apr. 27, 2009) (unpublished) (ADAMS Accession No. ML091170518).

- September 11, 2008 order in the *Shearon Harris* combined license case denying a facially defective motion for reconsideration. NRC regulations require that leave to file a motion for reconsideration be obtained from the Commission before such a motion is filed, but the movant had neither sought nor obtained Commission leave to file the motion. In addition, NRC regulations require motions for reconsideration to address a compelling circumstance rendering the prior decision invalid, but the movant had simply restated its previous arguments and incorporated by reference its previous filings on the matter. See Order of the Secretary (Sept. 11, 2008) (unpublished) (ADAMS Accession No. ML082550620).
- February 13, 2008 order in the *South Texas* combined license case withdrawing the hearing notice in light of the staff's decision to suspend its review of portions of the application that the applicant was not yet prepared to support. This hearing notice withdrawal had the effect of indefinitely postponing the deadline for filing petitions to intervene in the case. See Order of the Secretary (Feb. 13, 2008) (unpublished) (ADAMS Accession No. ML080450208).

There are a number of procedural matters that would not be considered minor, due to their precedential or policy significance, and thus would not fall within the Secretary's

authority under final § 2.346(j). The following Commission decisions are examples of procedural matters that were not considered minor:

- January 24, 2011 order denying the request in a petition for rulemaking to suspend all license renewal proceedings where applications were submitted ten years in advance of license expiration, pending review of the petition for rulemaking. Resolving the suspension request required the Commission's analysis of the legal standard for suspending a proceeding. See *Petition for Rulemaking to Amend 10 CFR 54.17(c)*, CLI-11-01, 73 NRC \_\_\_\_ (Jan. 24, 2011) (slip op.).
- January 7, 2010, July 23, 2009, October 7, 2004, and January 30, 2004 notices of hearing and orders in the *GE-Hitachi Global Laser Enrichment GLE Commercial Facility*, *AREVA Enrichment Services Eagle Rock Enrichment Facility*, *USEC American Centrifuge Plant*, and *Louisiana Energy Services National Enrichment Facility* materials license proceedings. In these hearing notices, the Commission included not only case management direction, but also specific guidance to the licensing boards on certain non-minor matters. See *GE-Hitachi Global Laser Enrichment (GLE Commercial Facility)*, CLI-10-04, 71 NRC 56 (2010); *AREVA Enrichment Servs. (Eagle Rock Enrichment Facility)*, CLI-09-15, 70 NRC 1 (2009); *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 NRC 426 (2004); *La. Energy Servs., L.P. (National Enrichment Facility)*, CLI-04-3, 59 NRC 10 (2004).
- September 23, 2009 order in the *Pa'ina* materials license proceeding denying a request to transfer the case from the licensing board to the Commission. Resolving the transfer request required the Commission's own determination as to whether it, rather than the

licensing board, would conduct the remainder of the proceeding. See *Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-19, 70 NRC 864 (2009).

- June 5, 2008 order in the High-Level Waste Repository proceeding denying a motion to disqualify a law firm from representing the applicant due to conflicts of interest. Resolving the motion to disqualify required Commission analysis on whether the claimed conflicts of interest jeopardized the NRC's statutory responsibility to protect public health and safety. See *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-11, 67 NRC 379 (2008).

When exercising her delegated authority to issue orders under § 2.346(j), the Secretary provides the Commissioners' offices with a draft of the order (generally three business days before the Secretary's action on the order). Internal Commission Procedures at I-2 (ADAMS Accession No. ML11269A125). This prior notification provides the Commission with an opportunity to issue the order itself if the Commission disagrees with the Secretary's determination that the matter at issue is "minor."

In addition to amending § 2.346(j) to clarify the Secretary's authority over minor matters, the NRC is removing the reference to § 2.311 in § 2.346(e). Moreover, there are no deadlines for Commission action on appeals under final § 2.311.

### 13. Section 2.347—*Ex parte* communications.

Section 2.347 prohibits what are known as *ex parte* communications between persons outside the NRC and NRC adjudicatory personnel on matters relevant to the merits of an ongoing hearing; this section currently applies to § 2.204 demands for information. Unlike the

NRC actions subject to §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e), and 2.312 (which continue to be referenced in final § 2.347(e)(1)(i) and (ii)), hearing rights do not attach to a demand for information because it is not an order; it is a pre-enforcement document requesting information. (56 FR 40663, 40670, 40682; August 15, 1991). The NRC is therefore amending the *ex parte* communication provisions in § 2.347(e)(1)(i) and (ii) by deleting the two references to § 2.204. Formerly, § 2.204 pertained to orders for modification of licenses and orders to show cause, and these orders did involve the right to a hearing. (50 FR 38113; September 20, 1985). Thus, when the NRC promulgated § 2.780—the precursor to § 2.347—in 1988, the references to § 2.204 were proper. But in 1991, the references became erroneous when the provisions for orders for modification of licenses were deleted and replaced by the § 2.204 provisions regarding demands for information. Accordingly, the NRC is making conforming changes to § 2.347(e)(1)(i) and (ii).

#### 14. Section 2.348—Separation of functions.

The separation of functions provisions in § 2.348 prohibit certain communications between specified sets of NRC personnel on matters relevant to the merits of an ongoing adjudicatory hearing. Similar to the § 2.347 amendment discussed in the previous section, the NRC is correcting the separation of functions provisions in § 2.348(d)(1)(i) and (ii) by deleting the two references to § 2.204. As previously explained, unlike the other specified NRC actions, hearing rights do not attach to a demand for information. When the NRC promulgated § 2.781—the precursor to § 2.348—in 1988, the references to § 2.204 were proper. But the references became erroneous in 1991 for the reasons stated in the previous section with respect to § 2.347(e)(1)(i) and (ii). Accordingly, the NRC is now making conforming changes to § 2.348(d)(1)(i) and (ii).

### **C. Subpart G—Sections 2.700 through 2.713**

#### **1. Section 2.704—Discovery—required disclosures.**

Current § 2.704(a) through (c) set forth the required disclosures that parties other than the NRC staff must make in formal NRC adjudications (proceedings conducted under subpart G of 10 CFR Part 2).

In the proposed rule, the NRC suggested an amendment to this section that would have changed the due date for initial disclosures in subpart G proceedings from 45 days after the issuance of a prehearing conference order following the initial prehearing conference to 30 days after the order granting a hearing. After further consideration, and review of the public comments on this proposal, the NRC has decided not to change the deadline for initial disclosures in subpart G proceedings. The NRC has determined that modifying the 45-day period would have limited the time available to the parties to develop a proposed discovery plan and could have resulted in situations where initial disclosures would be due before the due date for the parties to submit a proposed discovery plan to the presiding officer in subpart G proceedings.

The NRC has, however, decided to adopt a modified disclosure update provision in final § 2.704(a)(3), which is similar to the proposed rule and parallels the timing provisions in final § 2.336(d). Current § 2.704(e) requires a party that has made a disclosure under § 2.704 to supplement its disclosures “at appropriate intervals . . . within a reasonable time” after the party learns that in some material respect the information disclosed was incomplete or incorrect (provided the additional or new information was not made available to other parties during the discovery process or in writing). Final § 2.704(a)(3) directs the presiding officer to select a day during the month (e.g., the first day of the month or the first Thursday in the month) when



disclosure updates will be due, but allows the parties to agree to a different due date or frequency for disclosure updates. Documents that are developed, obtained, or discovered during the two weeks before the due date are not required to be included in the update (but if they are not included in the first update after they're discovered, then they must be included in the next update). Final § 2.704(e)(1) clarifies that supplemental disclosures must be made in accordance with the schedule established in final § 2.704(a)(3).

This change to § 2.704 will reduce the burden and increase the usefulness of updated disclosures. The NRC is also adding a sentence to the end of § 2.704, to clarify that a party's duty to update disclosures relevant to a disputed issue end when the presiding officer issues a decision resolving that disputed issue, or when otherwise specified by the presiding officer or the Commission.

2. Section 2.705—Discovery-additional methods.

Current § 2.705(b)(2) allows the presiding officer to “alter the limits in these rules on the number of depositions and interrogatories.” But the rules do not limit the number of depositions or interrogatories. The NRC is therefore amending this section to allow the presiding officer to set reasonable limits on the number of interrogatories and depositions. This change removes the confusion in this section and improves the efficiency of NRC adjudicatory proceedings.

3. Sections 2.709—Discovery against NRC staff—and 2.336—General Discovery.

a. Sections 2.709(a)(6)—Required initial disclosures in enforcement proceedings—and 2.336—General Discovery.

The NRC is amending the NRC staff's mandatory disclosure obligations for proceedings conducted under part 2 subpart G. Current § 2.336(b) applies to NRC staff disclosures in

subpart G proceedings, while § 2.336(a) (discovery for parties other than the NRC staff) does not apply to any proceeding conducted under subpart G. Section 2.336(b) requires initial disclosures to be made in NRC proceedings within 30 days of the issuance of the order granting a hearing request or intervention petition. Because subpart G (final §§ 2.704 and 2.709) requires initial disclosures to be made within 45 days of the issuance of the prehearing conference order following the initial prehearing conference (not within 30 days of the order granting a hearing), the NRC is amending § 2.336(b) to remove subpart G proceedings from the general discovery requirements in that paragraph. This exclusion in final § 2.336(b) parallels the exclusion in current § 2.336(a).

A corresponding amendment is being made to § 2.709 to specify the NRC staff's disclosure obligations in a subpart G proceeding, including the 45-day period for initial disclosures. The new section—final § 2.709(a)(6)—parallels the initial document disclosure requirements in §§ 2.704(a)(2) and (a)(3) for parties other than the NRC staff. Mirroring the language in § 2.704(a)(2), final § 2.709(a)(6)(i) requires the staff to disclose all NRC staff documents, data compilations, or other tangible things in possession, custody, or control of the NRC staff that are relevant to the disputed issues alleged with particularity in the pleadings, unless the NRC staff asserts a claim of privilege or protected status over the document, data compilation, or other tangible thing. The NRC notes that the references to “pleadings” in this section and other sections of part 2 include answers to orders, petitions to intervene, and requests for hearing. Although parties other than the NRC staff are also required by § 2.704(a)(1) to identify individuals likely to have discoverable information relevant to disputed issues, the NRC considers a similar disclosure requirement for the NRC staff to be unnecessary. The discoverable portions of any pertinent Office of Investigations report or related inspection report should identify many of the individuals likely to have discoverable information relevant to

disputed issues. Final § 2.709(a)(6)(i) also requires that if a claim of privilege or protected status is made by the NRC staff for any documents, a list of these documents must be provided with sufficient information for assessing the claim of privilege or protected status.

Final § 2.709(a)(6)(ii) requires the NRC staff to provide monthly disclosure updates. Final § 2.709(a)(6)(ii) directs the presiding officer to select a day during the month (e.g., the first day of the month or the first Thursday in the month) when disclosure updates will be due.

Alternatively, the parties may agree to a different due date or frequency for the disclosure updates. Documents that are developed, obtained, or discovered during the two weeks before the due date are not required to be included in that update. But if they are not included in the first update after they're discovered, then they must be included in the next update.

This change to § 2.709 will reduce the burden and increase the usefulness of updated disclosures. The NRC is also adding a sentence to the end of § 2.709, to clarify that the duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that disputed issue, or when otherwise specified by the presiding officer or the Commission.

b. Section 2.709(a)(7)—Form and type of NRC staff disclosures.

Section 2.709(a)(7) specifies the manner in which the NRC staff may disclose information in subpart G proceedings. For publicly available documents, data compilations, or other tangible things, the NRC staff meets its duty to disclose such information to the other parties and the presiding officer by identifying the location, the title, and a page reference to the subject information. If the publicly available documents, data compilations, or other tangible things can be accessed at either the NRC Web site, <http://www.nrc.gov>, or at the NRC Public Document Room, the staff will provide the parties and the presiding officer with any citations necessary to

access this information. This paragraph parallels § 2.704(a)(2) for disclosures by parties other than the NRC Staff.

#### **D. Subpart L—Sections 2.1200 through 2.1213**

##### **1. Subpart L—Title.**

Part 2 subpart L contains the adjudicatory procedures that the NRC uses to conduct most of its licensing proceedings. The procedures in subpart L were substantially revised in 2004 (69 FR 2182; January 14, 2004), and are intended to be used with the generally applicable provisions in subpart C. Under the provisions of part 2 as revised in 2004, a hearing conducted under subpart L meets the APA requirements for an “on the record” or “formal” hearing. *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004). Subpart L hearings are therefore “formal,” even though the NRC provides more formal adjudicatory procedures under subpart G. The NRC inadvertently failed to change the title of subpart L in 2004. To eliminate any confusion caused by the current title of subpart L, the NRC is revising the title of subpart L to “Simplified Hearing Procedures for NRC Adjudications.” The revised title reflects that these proceedings are less formal than the formal part 2 subpart G hearings, but are still formal “on the record” hearings under the APA, and not “informal” hearings as might be inferred from the current title.

##### **2. Section 2.1202—Authority and role of NRC staff.**

Section 2.1202 pertains to the authority and role of the NRC staff in less formal hearings. The introductory text of current § 2.1202(a) could be erroneously interpreted as suggesting that the staff is required to advise the presiding officer on the merits of contested matters. The NRC is therefore revising § 2.1202(a) to require that in subpart L proceedings, the staff’s notice to

parties regarding relevant staff licensing actions must include an explanation of why the public health and safety is protected and why the action is in accord with the common defense and security, despite the "pendency of the contested matter before the presiding officer."

A conforming change to the introductory text of § 2.1403(a) is also being made to require the NRC staff to provide this explanation when the same situation arises in subpart N proceedings.

3. Sections 2.1205 and 2.710—Summary disposition; Motions for summary disposition; Authority of the presiding officer to dispose of certain issues on the pleadings.

The summary-disposition motion requirements in subpart L (current § 2.1205) do not require the inclusion of a statement of material facts—an inadvertent omission during the 2004 part 2 revisions. Before the 2004 amendments to 10 CFR Part 2, the NRC's requirements governing motions for summary disposition required these motions to be accompanied by a "separate, short and concise statement of material facts as to which the moving party contends that there is no genuine issue to be heard." Final § 2.1205 restores the requirement for a statement of material facts for which the moving party contends that there is no genuine issue. This section does not include the requirement for a "separate" statement of material facts in dispute, as the rule already requires that the statement be "attached" to the motion. The NRC is making a conforming change to § 2.710 to remove the word "separate," which makes §§ 2.710 and 2.1205 identical in this regard.

Further, the NRC received public comments asking for the removal of the affidavit requirement from § 2.1205 to make the affidavit requirements consistent for motions for summary disposition under subparts G and L. After considering the public comments, the NRC has decided to remove the affidavit requirement from § 2.1205. Despite the removal of this

affidavit requirement, the NRC strongly recommends that parties to NRC proceedings, particularly those conducted under subpart L, continue to include affidavits with their motions for summary disposition.

4. Section 2.1209—Findings of fact and conclusions of law.

Section 2.712(c) specifies the format for proposed findings of fact and conclusions of law in subpart G proceedings, but a similar format provision does not exist in subpart L. The NRC, therefore, is amending § 2.1209 by adding the format requirements now contained in § 2.712(c). These format requirements will aid presiding officers in subpart L proceedings by ensuring that proposed findings of fact and conclusions of law clearly and precisely communicate the parties' positions on the material issues in the proceeding, with citations to the factual record.

4. Section 2.1210—Initial decision and its effect.

In 2007, the NRC removed § 2.1211 from its regulations (72 FR 49483; August 28, 2007). Paragraph 2.1210(d) contains a reference to this section, and should have been amended as part of the 2007 rulemaking. The NRC is therefore amending this section to remove the reference to § 2.1211.

5. Section 2.1213—No significant hazards consideration determinations not subject to stay provisions.

The NRC is adding a new paragraph (f) to § 2.1213. Final paragraph (f) excludes, from the stay provisions, matters limited to whether a no significant hazards consideration determination for a power reactor license amendment was proper. No significant hazards consideration determinations may be made in license amendment proceedings for production or utilization

facilities that are subject to the 10 CFR Part 50 requirements; challenges to these determinations are not allowed in accordance with 10 CFR 50.58(b)(6). Excluding no significant hazards consideration determinations from the stay provisions also is consistent with federal case law holding that these findings, which are not appealable to the Commission, are final agency actions. *Ctr. for Nuclear Responsibility, Inc. v. NRC*, 586 F. Supp. 579, 580-81 (D.D.C. 1984).

#### **E. Subpart M—Sections 2.1300 through 2.1331**

The following changes are being made to subpart M of 10 CFR Part 2, which sets forth the procedures that are applicable to hearings on license transfer applications.

1. Sections 2.1300 and 2.1304—Provisions governing hearing procedures for subpart M hearings.

Current § 2.1300 states that the provisions of subpart M, together with subpart C, govern all adjudicatory proceedings on license transfers, but current § 2.1304 states that the procedures in subpart M “will constitute the exclusive basis for hearings on license transfer applications.” Current § 2.1304, part of the original subpart M, was effectively replaced by current § 2.1300 in the 2004 part 2 revisions, and could have been removed as part of that rulemaking. The NRC is now removing § 2.1304 and amending § 2.1300 to clarify that in subpart M hearings on license transfers, both the generally applicable intervention provisions in subpart C and the specific subpart M hearing procedures govern.

2. Section 2.1316—Authority and role of NRC staff.

Section 2.1316(c) provides the procedures for the NRC staff to participate as a party in

subpart M hearings. The NRC is updating these procedures to mirror the requirements of § 2.1202(b)(2) and (3), which set forth the NRC staff's authority and role in subpart L hearings. Final § 2.1316(c)(1) requires the NRC staff—within 15 days of the issuance of the order granting requests for hearing or petitions to intervene and admitting contentions—to notify the presiding officer and the parties whether it desires to participate as a party in the proceeding. If the staff decides to participate as a party, its notice will identify the contentions on which it will participate as a party. If the NRC staff later desires to be a party, the NRC staff would notify the presiding officer and the parties, and identify the contentions on which it wished to participate as a party, and would make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice. Once the NRC staff chooses to participate as a party in a subpart M license transfer proceeding, it would have all the rights and responsibilities of a party with respect to the admitted contention or matter in controversy on which the staff chose to participate. As with § 2.1202, “the NRC staff must take the proceeding in whatever posture the hearing may be at the time that it chooses to participate as a party.” (69 FR 2228; January 14, 2004).

3. Section 2.1321—Participation and schedule for submission in a hearing consisting of written comments.

Current § 2.1321 contains a typographical error in paragraph (b). The NRC is amending this paragraph to correct the typographical error.

#### **F. Subpart N—Sections 2.1400 through 2.1407**

Section 2.1407—Appeal and Commission review of initial decision.

Current § 2.1407(a)(1) allows parties to appeal orders of the presiding officer to the



Commission within 15 days after the service of the order. Similarly, current § 2.1407(a)(3) allows parties opposing an appeal to file a brief in opposition within 15 days of the filing of the appeal. Experience has demonstrated that the time allowed by the NRC's rules for appeals from a presiding officer's order is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore extending the time to file an appeal and a brief in opposition to an appeal from 15 to 25 days. The NRC does not expect the proposed change in appeal deadlines to result in any delays in making licensing decisions. Some Commission appeals of presiding officer initial decisions are completed before there is a final decision on the proposed action, and thus would not affect the timing of the final agency action. For example, this could occur when an appeal on the contested portion of a reactor licensing hearing (part 52 COL or part 50 construction permit) is completed before the Commission holds the mandatory hearing. Further, the NRC believes that the increased time to develop higher quality briefs may assist in shortening the time for Commission review in situations where the timing of a final agency action might be affected by the appellate process.

## **G. Other Changes**

### **1. Section 2.4—Definitions.**

The current definition of “Participant” applies to an “individual or organization,” and does not explicitly apply to governmental entities that have petitioned to intervene in a proceeding. The NRC is correcting this definition by adding a parenthetical reference to “individual or organization,” so that it reads: “individual or organization (including governmental entities).”

The current definition of “NRC personnel” in § 2.4 contains outdated references to §§ 2.336 and 2.1018. The revision of “NRC personnel” updates this definition by removing references to §§ 2.336 and 2.1018, neither of which references the term “NRC personnel.”

### **2. Section 2.101—Filing of application.**

In 2005, § 2.101 was amended to remove paragraph (e) and redesignate paragraphs (f) and (g) as paragraphs (e) and (f). (70 FR 61887; October 27, 2005). The internal references to paragraph (g) were not updated to reflect the new paragraph designations. References in this section to § 2.101(g) are being corrected to reference § 2.101(f). There are no references to former § 2.101(f) in this section.

In 2007, the NRC revised § 2.101 by adding a new paragraph (a)(9) and reserving paragraphs (a)(6)–(8). As part of this revision, the NRC should have moved paragraph (a–1) to follow paragraph (a)(9). (72 FR 57415; October 9, 2007). Because the current placement of paragraph (a–1) could cause confusion, the NRC is moving paragraph (a–1) to follow paragraph (a)(9). This change does not alter the meaning or intent of this regulation.

### **3. Section 2.105—Notice of proposed action.**

The NRC is making three changes to § 2.105: 1) the introductory text of paragraph (a) is

revised by inserting a reference to the NRC's Web site; 2) the introductory text of paragraph (b) is revised to clarify that the referenced notice pertains to one published in the *Federal Register*; and 3) the introductory text of paragraph (d) is corrected to reference § 2.309(b).

4. Section 2.802—Petition for rulemaking.

Section 2.802(d), in accordance with the new definition of "Participant" in final § 2.4 and the amendment to the procedures for challenging the NRC's regulations in final § 2.335, is amended to replace the word "party" with "participant."

5. Corrections of other outdated and incorrect references.

In 2008, the NRC amended its regulations to reflect the reorganization of the Office of Nuclear Materials Safety and Safeguards and the creation of the Office of Federal and State Materials and Environmental Management Programs. (73 FR 5709; January 31, 2008). As part of these amendments, the NRC made a number of changes to part 2, but these changes were incomplete. The NRC is therefore amending §§ 2.101(a)(3) and (4), 2.106(a), 2.106(d), 2.107(c), 2.108(a), 2.108(b), 2.108(c), 2.318(b), 2.337(g)(1), (2), and (3), and 2.811(c) to include references to the Office of Federal and State Materials and Environmental Management Programs or to the Director of the Office of Federal and State Materials and Environmental Management Programs, or to replace references to the Office of Nuclear Materials Safety and Safeguards with references to the Office of Federal and State Materials and Environmental Management Programs, as appropriate.

In 2007, the NRC amended § 2.104 and removed and consolidated a number of paragraphs, including the redesignation of paragraph (e) as paragraph (c). (72 FR 49472; August 28, 2007). The NRC did not correct all of the cross-references to former paragraph (e),

which should have been updated to reference current paragraph (c). The NRC is therefore amending §§ 2.103(a), 2.106(a), (c), and (d), and 61.25(c) to provide the correct reference to § 2.104(c) instead of the former § 2.104(e).

Current § 51.102(c) contains an outdated reference to “Subpart G of Part 2.” The reference is corrected to refer generally to part 2. Also, the reference to the former Atomic Safety and Licensing Appeal Board is removed from current § 51.102.

Current §§ 51.4, 51.34, 51.109(f), and 51.125 contain outdated references to the former Appeal Board, which are being removed from these sections.

#### 6. Section 12.308—Agency Review.

Current § 12.308(a) contains an outdated reference to § 2.786, which was redesignated as § 2.341 in 2004. The NRC is replacing the now incorrect reference to § 2.786 with the correct reference to § 2.341. This section also references the 40-day review period in current § 2.341, which the NRC is increasing to 120 days in this rulemaking. To avoid any inconsistencies between the time for Commission review in final § 2.341 and § 12.308, the NRC is expanding the review period in § 12.308 from 40 to 120 days.

#### 7. Section 54.27—Hearings.

Current § 54.27 (pertaining to license renewal hearings for nuclear power reactors) contains an outdated reference to a 30-day period to request a hearing. As discussed in the 2004 part 2 revisions, the time in which to request a hearing under § 2.309(b) was extended to 60 days from the date a notice of opportunity for hearing is published (either in the *Federal Register* or on the NRC’s website). (January 4, 2004; 69 FR 2200). Final § 54.27 is corrected to reflect the proper 60-day period to request a hearing, and a reference to § 2.309 is added. Final § 54.27 retains

the provision that in the absence of any hearing requests, a renewed operating license may be issued without a hearing upon 30-day notice and publication in the *Federal Register*.

8. Part 2—Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders.

Throughout part 2, the terms “Presiding Officer” and “presiding officer” are used interchangeably, but with different capitalization, unlike part 51, which uses the term “presiding officer” uniformly without capitalization. The NRC is changing all references to the term “Presiding Officer” to “presiding officer” to make part 2 consistent with part 51.

## **V. Section-by-Section Analysis**

### **A. Introductory Provisions—Sections 2.1 through 2.8**

#### Section 2.4—Definitions.

This section modifies the definition of *Participant* in § 2.4, which currently applies to individuals or organizations that petition to intervene or request a hearing, but are not yet parties. The new definition clarifies that any individual or organization—including States, local governments, and Federally-recognized Indian Tribes—that petitions to intervene or requests a hearing shall be considered a participant. Further, Federally-recognized Indian Tribes do not have to be “affected” Federally-recognized Indian Tribes to participate in NRC licensing actions. The term “affected” is reserved for Federally-recognized Indian Tribes that seek to participate in the high-level waste proceeding; it does not apply to the NRC’s other licensing actions.

The current definition also indicates that States, local governmental bodies, or affected Federally-recognized Indian Tribes that seek to participate under § 2.315(c) shall be considered participants. This section does not grant these governmental bodies § 2.315(c) participant status; this status is obtained only when the interested governmental body is afforded the

opportunity to participate in the proceeding by the presiding officer. Governmental bodies that have requested § 2.315(c) participant status, but have not yet been granted or denied such status by the presiding officer, are considered only a § 2.4 participant until their § 2.315(c) request is approved. This section also removes incorrect references to §§ 2.336 and 2.1018 in the definition of *NRC personnel*.

**B. Subpart A—Sections 2.100 through 2.111**

1. Section 2.101—Filing of application.

This section is amended to move paragraph (a–1) to follow paragraph (a)(9) and to correct typographical errors in paragraphs (a)(3) and (a)(4), and incorrect references to § 2.101(g), which should reference § 2.101(f). These changes do not alter the meaning or intent of this regulation.

2. Section 2.103—Action on applications for byproduct, source, special nuclear material, facility and operator licenses.

This section is amended to correct an outdated reference to § 2.104(e), which should reference § 2.104(c). This change does not alter the meaning or intent of this regulation.

3. Section 2.105—Notice of proposed action.

This section is updated to include a reference to the NRC’s Web site. Paragraph (b) of this section is updated to clarify that the referenced “notice” is one that is published in the *Federal Register*, and paragraph (d) is amended to include a reference to the time period in § 2.309(b).

4. Section 2.106—Notice of issuance.

Paragraph (a) is amended to add a reference to the Director, Office of Federal and State Materials and Environmental Management Programs. Paragraph (d) is amended to replace the reference to the Director, Office of Nuclear Material Safety and Safeguards, with a reference to the Director, Office of Federal and State Materials and Environmental Management Programs.

Paragraphs (a), (c), and (d) are amended to correct an outdated reference to § 2.104(e), which should reference § 2.104(c). This change does not alter the meaning or intent of these paragraphs.

5. Section 2.107—Withdrawal of application.

Paragraph (c) is amended to add a reference to the Director, Office of Federal and State Materials and Environmental Management Programs.

6. Section 2.108—Denial of application for failure to supply information.

Paragraphs (a), (b), and (c) are amended to add references to the Director, Office of Federal and State Materials and Environmental Management Programs.

**C. Subpart C—Sections 2.300 through 2.390**

1. Section 2.305—Service of documents; methods; proof.

Section 2.305, which currently requires any paper served in an NRC proceeding to include a signed certificate of service, is amended to clarify that filings not submitted through the E-Filing system must include a signed certificate of service that provides the name, address, and method and date of service for every participant served with the document. Final § 2.305 provides that if a document is submitted through only the E-Filing system, then its certificate of

service must state only that the document was submitted through the E-Filing system. If the document is served through both the E-Filing system and some other method of service, then its certificate of service must include both a list of participants served through the E-Filing system and the name, address, and method and date of service for all participants served through the other method.

Under § 2.304(d)(1), persons submitting electronic documents to the NRC through the E-Filing system do not need to physically sign their documents; signature with a participant's digital ID certificate satisfies the requirement that a document be signed.

Section 2.305(g)(1), which does not currently provide an address for service upon the NRC staff when a filing is not being made through the E-Filing system and no attorney representing the NRC staff has filed a notice of appearance, is updated to provide participants with an address to use in these circumstances.

2. Section 2.309—Hearing requests, petitions to intervene, requirements for standing, and contentions.

a. Section 2.309(b)—Timing.

The NRC is removing § 2.309(b)(5) and amending § 2.309(b) to clarify that the more specific timing provisions of part 2, such as §§ 2.103(b), 2.202, and 2.205, control when there is a discrepancy between a more specific timing provision and the general timing provisions in § 2.309(b).

b. Section 2.309(c) and (f)—Filings After the Deadline: Submission of Intervention Petition, Hearing Request, or Motion for Leave to File New or Amended Contentions.

Section 2.309(c) is updated to consolidate the requirements for filings after the deadline and



to clarify the intent of the regulations. Final § 2.309(c) incorporates the current § 2.309(f)(2)(i) through (iii) factors into final § 2.309(c)(1)(i) through (iii). Final § 2.309(c)(1) requires that a filing after the deadline (i.e., an intervention petition, hearing request, or motion for leave to file new or amended contentions filed after the deadline) must demonstrate that the three final § 2.309(c)(1)(i)–(iii) factors have been met. Meeting the final § 2.309(c)(1)(i)–(iii) factors demonstrates the existence of good cause justifying the filing after the deadline in § 2.309(b).

Final § 2.309(c)(1)(i) is met if the participant demonstrates that the information upon which the new or amended contention is based was not previously available. Final § 2.309(c)(1)(ii) is satisfied if the information that supports the filing after the deadline (and was not previously available) is materially different from previously available information. And final § 2.309(c)(1)(iii) is satisfied if a participant submits this filing in a timely fashion based on the availability of the subsequent information.

Final § 2.309(c)(2) clarifies that changes to a deadline based on good cause considerations not related to the substance of the filings continue to be governed by § 2.307, and that § 2.323, which contains the general requirements for motions, does not apply to hearing requests, intervention petitions, or motions for leave to file new or amended contentions filed after the deadline in § 2.309(b).

Final § 2.309(c)(3) clarifies that a hearing request or intervention petition filed after the deadline must specify at least one contention if the petitioner seeks admission as a party, and requires a petitioner to meet the standing and contention admissibility requirements in §§ 2.309(d) and (f); a petitioner who has already satisfied the § 2.309(d) standing requirements does not have to do so again (as specified in final § 2.309(c)(4)).

Final § 2.309(c)(4) requires that any new or amended contentions filed by a party or participant after the deadline must meet the admissibility requirements in § 2.309(f), and clarifies

that a party or participant who has already demonstrated standing does not need to address the standing requirements in § 2.309(d) again.

Final § 2.309(f)(2) continues to require that all contentions be based on the documents available at the time when the petition is filed. Final § 2.309(f)(2) clarifies that environmental contentions must be based on the applicant's environmental report, but new or amended environmental contentions may be filed after the deadline in § 2.309(b) in accordance with the requirements in final § 2.309(c) (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents).

c. Section 2.309(h)—Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.

Current paragraphs (d)(2)(i) and (ii) apply only to “affected” Federally-recognized Indian Tribes, which is proper only in the context of a high-level radioactive waste disposal proceeding. Final § 2.309(h), which is the current § 2.309(d)(2), is revised to clarify that, in the case of § 2.309(h)(1) and (2), any Federally-recognized Indian Tribe that wishes to participate in any potential proceeding for a facility located within its boundaries does not need to further establish its standing. Final § 2.309(h)(3), which is the current § 2.309(d)(2)(iii), applies only to a high-level waste disposal proceeding and retains the references to affected Federally-recognized Indian Tribes; the references in this section mirror the language used in the § 2.1001 definition of *Party*.

d. Section 2.309(i)—Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions.

Current § 2.309(h) is redesignated as § 2.309(i) and is amended to clarify that it includes

answers (and replies to answers) to intervention petitions and hearing requests filed after the deadline in § 2.309(b). Further, the reference to “proffered contentions” in paragraph (i)(1) is amended to reference “motions for leave to file new or amended contentions” because contentions filed before the deadline will be part of an intervention petition or hearing request. Finally, cross references to other paragraphs in § 2.309 are updated to reflect the addition of new paragraph (h).

e. Section 2.309(j)—Decision on request/petition.

Current § 2.309(i) is redesignated as § 2.309(j) and is updated to reflect new § 2.309(h). Further, this section is revised to require a presiding officer to advise the Commission and the parties if a decision on a hearing request or intervention petition cannot be issued within 45 days of the conclusion of the pre-hearing conference. The presiding officer’s notification must also notify the parties when a decision will be issued.

3. Section 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.

Final § 2.311(b) extends the time to file an appeal and a brief in opposition to an appeal from ten to 25 days.

4. Section 2.314—Appearance and practice before the Commission in adjudicatory proceedings.

Final § 2.314(c)(3) extends the time to file an appeal to an order disciplining a party from ten to 25 days.

5. Section 2.315—Participation by a person not a party.

Final § 2.315(c) clarifies that interested States, local government bodies, and Federally-recognized tribes, who are not parties admitted to a hearing under § 2.309 and who seek to participate in the hearing, must take the proceeding as they find it. Consistent with NRC case law, these participants (under final § 2.315(c)) cannot raise issues related to contentions or issues that were resolved prior to their entry as participants in the proceeding—if a State, local governmental body, or Federally-recognized Indian Tribe chooses to participate in a proceeding late in the process, their participation is subject to any orders already issued and should not interfere with the schedule established for the proceeding.

6. Section 2.318—Commencement and termination of jurisdiction of presiding officer.

Paragraph (b) is amended to add a reference to the Director, Office of Federal and State Materials and Environmental Management Programs.

7. Section 2.319—Power of the presiding officer.

Final § 2.319(r) reincorporates former § 2.1014(h) without any changes to the original language or intent. This section requires that an admitted contention that constitutes pure issues of law, as determined by the presiding officer, must be decided on the basis of briefs or oral argument.

8. Section 2.323—Motions.

Final § 2.323(a) is amended to clarify that § 2.309(c) motions are not subject to the requirements of § 2.323.

Final § 2.323(f) allows the presiding officer to independently, or in response to a petition from a party, certify questions or refer rulings to the Commission if the issue satisfies one of the two § 2.323(f)(1) criteria. In each case, the presiding officer would make the initial determination as to whether the issue or petition raises significant and novel legal or policy issues, or if prompt decision by the Commission is necessary to materially advance the orderly disposition of the proceeding.

9. Section 2.326—Motions to reopen.

Final § 2.326(d) is updated to replace a reference to “nontimely contentions” with a reference to “new or amended contentions filed after the deadline in § 2.309(b).” As previously discussed, the NRC is no longer using the term “nontimely contentions,” which has been replaced with the term “new or amended contentions filed after the deadline in § 2.309(b).”

10. Section 2.335—Consideration of Commission rules and regulations in adjudicatory proceedings.

Current § 2.335 limits the requests for waivers or exceptions from NRC regulations to parties to a proceeding. Final § 2.335 clarifies that participants to an adjudicatory proceeding, including petitioners, may seek a waiver or exception from the NRC’s regulations for a particular proceeding. This change adopts the NRC’s practice of allowing petitions to intervene and requests for hearing to contain § 2.335 requests for waivers or exceptions from the NRC’s regulations.

11. Section 2.336—General Discovery.

This section is amended to change the scope of the NRC staff’s disclosure obligations in

§ 2.336(b). The disclosure obligations in final § 2.336(b) mirror those in § 2.336(a), which do not apply to proceedings conducted under subparts G and J and are limited to documents related to the admitted contentions. The NRC is therefore amending paragraphs 2.336(b)(1) through (4) to limit the documents that must be disclosed to those “that are relevant to the admitted contentions.”

This section is amended to require the filing of monthly mandatory disclosure updates, with the disclosure due date to be selected by the presiding officer; though, the parties to a proceeding may agree to a different due date or disclosure frequency. These updates include all disclosable documents and information not included in a prior update. Documents and information that are discovered, obtained, or developed in the two weeks prior to a disclosure update may be included in the next update. Parties not disclosing any documents are expected to file an update informing the presiding officer and the other parties that the party is disclosing no documents that month. The duty to update disclosures relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention, or as specified by the presiding officer or the Commission.

#### 12. Section 2.337—Evidence at a hearing.

Paragraph (g) is amended to add references to the Director, Office of Federal and State Materials and Environmental Management Programs.

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

Final § 2.340 clarifies that in some circumstances, the NRC may act on a license, renewed license, or license amendment prior to the completion of any contested hearing. Paragraphs (a)

and (b) concern construction and operating licenses, renewed licenses, combined licenses, and amendments to these licenses. These paragraphs are amended to clarify that, in the case of a license amendment involving a power reactor, the NRC may complete action on the amendment request without waiting for the presiding officer's initial decision once the NRC makes a determination that the amendment involves no significant hazards consideration. In proceedings for the initial issuance or renewal of a construction permit, operating license, or renewed license, and proceedings for the amendment of an operating or renewed license where the NRC has not made a determination of no significant hazards consideration, these paragraphs are amended to clarify that the NRC may not act on the application until the presiding officer issues an initial decision in the contested proceeding.

Paragraph (c), which deals with initial decisions under 10 CFR 52.103(g), is amended to clarify that the presiding officer may make findings of fact and conclusions of law on the matters put into controversy by the parties, and any matter designated by the Commission to be decided by the presiding officer. Further, the amended paragraph clarifies that matters not put into controversy by the parties shall be referred to the Commission for its consideration. The Commission could, in its discretion, treat any of these referred matters as a request for action under § 2.206 and would process the matter in accordance with § 52.103(f).

Paragraphs (d) and (e), which concern manufacturing licenses under 10 CFR Part 52 and proceedings not involving production or utilization facilities, are amended to clarify that the NRC will issue, deny, or condition any permit, license, or amendment in accordance with a presiding officer's initial decision. These paragraphs are also amended to clarify that the NRC may issue a license amendment before a presiding officer's initial decision becomes effective.

This revision clarifies that in all cases, the presiding officer is limited to matters placed into controversy by the parties, and serious matters not put into controversy by the parties that

concern safety, common defense and security, or the environment that the Commission has approved for review upon the presiding officer's referral of the matter.

Finally, paragraph (f) is amended to correct an inadvertent omission in the 2004 part 2 revisions. Final § 2.340(f) now includes a decision directing the issuance of a renewed license under part 54 in the list of initial decisions that are 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.

14. Section 2.341—Review of decisions and actions of a presiding officer.

a. Extension of time to file a petition for review, answer, and reply.

Final § 2.341(b) extends the time to file a petition for review and an answer to a petition from 15 to 25 days, and extends the time to file a reply to an answer from five to ten days.

b. Petitions for Commission review not acted upon deemed denied.

Final § 2.341 reincorporates the “deemed denied” provision of former § 2.786(c), with an additional 90 days for Commission review before petitions for review are deemed denied. The additional 90 days would allow the Commission 120 days of review time before a petition for review is deemed denied.

Similarly, the time for the Commission to act on a decision of a presiding officer or a petition for review is expanded to 120 days to bring this section into alignment with the new timeline in final § 2.341(c)(1).



c. Interlocutory review.

Final § 2.341(f) allows, but does not require, the Commission to review certifications or referrals that meet any of the standards in this paragraph.

15. Section 2.346—Authority of the Secretary.

This section clarifies that the Secretary’s authority under § 2.346(j). For matters that fall within § 2.346(j), the Secretary may decide them without further Commission action, thus avoiding the need for formal Commission orders and affirmation sessions. Under current § 2.346(j), the Secretary’s authority covers “minor procedural matters.” To clarify the broader intent of this rule, the NRC proposed replacing “minor procedural matters” with “procedural and other minor matters.” After further consideration, the NRC has decided to adopt a modified version of the proposed rule, which will now authorize the Secretary to take action on “other minor matters” (not covered by the other provisions in § 2.346). The final rule retains the same meaning as the proposed rule, but avoids any misleading impressions that the proposed rule might have created. Also, the reference to § 2.311 is removed from § 2.346(e) because appeals under § 2.311 do not have deadlines for Commission action.

16. Sections 2.347 and 2.348—*Ex parte* communications; Separation of functions.

These sections currently reference § 2.204 demands for information, which are not orders and do not entail hearing rights. Because demands for information are not adjudicatory matters, the restrictions on *ex parte* communications and the separation-of-functions limitations do not apply. The references to § 2.204 are removed from both sections.

#### **D. Subpart G—Sections 2.700 through 2.713**

##### **1. Section 2.704—Discovery—required disclosures.**

This section, which continues to require initial disclosures to be made within 45 days after the issuance of a prehearing conference order following the initial prehearing conference, is amended to require the filing of monthly mandatory disclosure updates on a date specified by the presiding officer, though the parties to a proceeding may agree to a different due date or disclosure frequency. These disclosure updates include all disclosable documents not included in a prior update. Documents that are discovered, obtained, or developed in the two weeks prior to a disclosure update may be included in the next update. Parties not disclosing any documents are expected to file an update informing the presiding officer and the other parties that the party is disclosing no documents for the period covered by that update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that disputed issue, or as specified by the presiding officer or the Commission.

The NRC is also updating § 2.704(e)(1) to clarify that a party's disclosures must be supplemented in accordance with the schedule in final § 2.704(a)(3).

##### **2. Section 2.705—Discovery—additional methods.**

This section, which currently states that the “presiding officer may alter the limits . . . on the number of depositions and interrogatories,” is amended to remove any implication created by the word “alter” that these rules impose a limit on the number of depositions and interrogatories; the rules do not impose any such limitation. Instead, the final rule clarifies that the presiding officer “may *set* limits on the number of depositions and interrogatories.”

3. Section 2.709—Discovery against NRC staff.

a. Section 2.709(a)(6)—Initial disclosures.

This new paragraph requires the NRC staff to provide initial disclosures within 45 days after the issuance of a prehearing conference order following the initial prehearing conference. The NRC staff disclosures include all NRC staff documents relevant to disputed issues alleged with particularity in the proceedings (except for those documents, data compilations, or other tangible things, for which there is a claim of privilege or protected status), including any Office of Investigations Report and supporting Exhibits, and any Office of Enforcement documents regarding the order. The staff is also required to file a monthly disclosure update, with the disclosure due date to be selected by the presiding officer; however, the parties to a proceeding may agree to a different due date or disclosure frequency. These disclosure updates include all disclosable documents not included in a prior update. Documents that are discovered, obtained, or developed in the two weeks prior to a disclosure update may be included in the next update. Parties not disclosing any documents are expected to file an update informing the presiding officer and the other parties that that party is disclosing no documents the period covered by that update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that disputed issue, or as specified by the presiding officer or the Commission. The staff is also required to provide, with initial disclosures and disclosure updates, a privilege log that lists the withheld documents and includes sufficient information to assess the claim of privilege or protected status. These requirements parallel the final § 2.704 requirements for parties other than the NRC staff.

4. Section 2.710—Motions for summary disposition.

This section is amended to conform to the amendments to final § 2.1205, which requires

parties to attach a statement of material facts to a motion for summary disposition. This change has no effect on the current practice of including a statement of material facts with a motion; it clarifies that the statement needs to be attached to the motion and does not have to be “separate.”

**E. Subpart H—Sections 2.800 through 2.819**

1. Section 2.802—Petition for rulemaking.

This section currently allows petitioners for a rulemaking to request the suspension of an adjudicatory proceeding to which they are a party. This section is amended to allow any petitioner for a rulemaking that is a participant in a proceeding (as defined by § 2.4) to request suspension of that proceeding.

2. Section 2.811—Filing of standard design certification application; required copies.

Paragraph (c) is amended to add a reference to the Director, Office of Federal and State Materials and Environmental Management Programs.

**F. Subpart L—Sections 2.1200 through 2.1213**

1. Section 2.1202—Authority and role of NRC staff.

This section currently requires the NRC staff to include its position on the matters in controversy when it notifies the presiding officer of its decision on a licensing action, which could be incorrectly interpreted as requiring the staff to advise the presiding officer on the merits of the contested matters. This amended section clarifies the authority and role of the NRC staff in less formal hearings; staff notices regarding licensing actions have to include an explanation of why the public health and safety is protected and why the action is in accord with the common

defense and security, despite the “pendency of the contested matter before the presiding officer.”

2. Section 2.1205—Summary Disposition

This section is amended to remove the requirement that parties submit an affidavit with motions for summary disposition, which makes the affidavit requirements in final § 2.1205 consistent with the requirements in § 2.710. Despite the removal of this affidavit requirement, the NRC strongly recommends that parties to NRC proceedings, particularly those conducted under subpart L, continue to include affidavits with their motions for summary disposition.

3. Section 2.1209—Findings of fact and conclusions of law.

This section currently does not specify the formatting requirements for findings of fact and conclusions of law. Final § 2.1209 incorporates the § 2.712(c) formatting requirements for findings of fact and conclusions of law to ensure that proposed findings of fact and conclusions of law clearly and precisely communicate the parties’ positions on the material issues in the proceeding, with exact citations to the factual record.

4. Section 2.1210—Initial decision and its effect.

Paragraph (d) of this section is amended to remove a reference to a regulation that no longer exists; this change does not alter the meaning or intent of this regulation.

5. Section 2.1213—Application for a stay.

Current § 2.1213 does not exclude, from the stay provisions, matters limited to whether a “no significant hazards consideration” determination for a power reactor license amendment

was proper. Section 50.58(b)(6) prohibits challenges to these determinations; section 2.1213 is therefore amended to exclude, from the stay provisions, matters limited to whether a no significant hazards consideration determination was proper.

**G. Subpart M—Sections 2.1300 through 2.1331**

1. Section 2.1300—Scope of subpart M.

The NRC is removing § 2.1304 and amending § 2.1300 to clarify that the generally applicable intervention provisions in subpart C and the specific provisions in subpart M govern in subpart M proceedings.

2. Section 2.1304—Hearing procedures.

The NRC is removing § 2.1304 and amending § 2.1300 to clarify that the generally applicable intervention provisions in subpart C and the specific provisions in subpart M govern in subpart M proceedings.

3. Section 2.1316—Authority and role of NRC staff.

This section currently allows the NRC staff to submit a simple notification at any point in the proceeding to become a party. The NRC is adopting the requirements in § 2.1202(b)(2) and (3) that require the NRC staff, within 15 days of the issuance of the order granting requests for hearing or petitions to intervene and admitting contentions, to notify the presiding officer and the parties whether it desires to participate as a party in the proceeding. The staff's notice must identify the contentions on which it will participate as a party; the staff can join the proceeding at a later stage by providing notice to the presiding officer, identifying the contentions on which it wishes to participate as a party, and making the disclosures required by final § 2.336(b)(3) through (5).

4. Section 2.1321—Participation and schedule for submission in a hearing consisting of written comments.

The second sentence of paragraph (b) is amended to correct a typographical error; this change does not alter the meaning or intent of this regulation.

#### **H. Subpart N—Sections 2.1400 through 2.1407**

1. Section 2.1403—Authority and role of the NRC staff.

This section, which is essentially identical to § 2.1202, is amended to mirror the changes made to that section.

This section is also updated to correct the reference to § 2.101(f)(8), which should reference § 2.101(e)(8); this change does not alter the meaning or intent of this regulation.

2. Section 2.1407—Appeal and Commission review of initial decision.

Proposed § 2.1407(a) extends the time to file an appeal and an answer to an appeal from 15 to 25 days.

#### **I. Parts 12, 51, 54, and 61**

1. Section 12.308—Agency review.

This section is amended to expand the time for the Commission to review an initial decision on a fee application, either at the request of the applicant, the NRC counsel, or on its own initiative, to 120 days, which aligns this section with the new timeline in final § 2.341(c)(1).

This section is also amended to correct an outdated reference to § 2.786, which should reference § 2.341. This change does not alter the meaning or intent of this regulation.

2. Section 51.4—Definitions.

This section is amended to remove an outdated reference to the former Atomic Safety and Licensing Appeal Board in the definition of *NRC Staff*. This change does not alter the meaning or intent of this regulation.

3. Section 51.34—Preparation of finding of no significant impact.

This section is amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes do not alter the meaning or intent of this regulation.

4. Section 51.102—Requirement to provide a record of decision; preparation.

This section is amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes do not alter the meaning or intent of this regulation.

5. Section 51.109—Public hearings in proceedings for issuance of materials licensed with respect to a geologic repository.

This section is amended to remove an outdated reference to the former Atomic Safety and Licensing Appeal Board. This change does not alter the meaning or intent of this regulation.



6. Section 51.125—Responsible official.

This section is amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes do not alter the meaning or intent of this regulation.

7. Section 54.27—Hearings.

This section replaces an outdated reference to a 30-day period to request a hearing with a reference to the correct 60-day period to request a hearing. This section retains the provision that in the absence of any hearing requests, a renewed operating license may be issued without a hearing upon 30-day notice published in the *Federal Register*.

8. Section 61.25—Changes.

This section is amended to correct an outdated reference to § 2.104(e), which should reference § 2.104(c). This change does not alter the meaning or intent of this regulation.

## **VI. Plain Language**

The Presidential memorandum dated June 1, 1998, entitled "Plain Language in Government Writing" directed that the government's documents be written in clear and accessible language. This memorandum was published on June 10, 1998 (63 FR 31883). In complying with this directive, editorial changes have been made to 10 CFR Part 2 to improve the organization and readability of the sections being revised. These types of changes are not discussed further in this document.

## **VII. Voluntary Consensus Standards**

The National Technology Transfer and Advancement Act of 1995, Pub. Law 104-113, requires that Federal agencies use technical standards that are developed by voluntary, private sector, consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this rule, the NRC is approving changes to its procedures for the conduct of hearings in 10 CFR Part 2. This action does not constitute the establishment of a government-unique standard as defined in Office of Management and Budget (OMB) Circular A-119 (1998).

## **VIII. Environmental Impact: Categorical Exclusion**

This rule involves an amendment to 10 CFR Part 2, and thus qualifies as an action for which no environmental review is required under the categorical exclusion set forth in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rulemaking.

## **IX. Paperwork Reduction Act Statement**

This rule does not contain any information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

## **Public Protection Notification**

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

## **X. Regulatory Analysis**

This rule emanates from the desire to make corrections, clarifications, and conforming changes to the NRC's rules of practice and to improve the hearing process. Those amendments that merely reflect either clarifications or corrections to the adjudicatory regulations are not changes to the existing processes. These amendments would not result in a cost to the NRC or to participants in NRC adjudicatory proceedings, and a benefit would accrue to the extent that potential confusion over the meaning of the NRC's regulations is removed.

The more substantial changes in this rule do not impose costs upon either the NRC or participants in NRC adjudications, but instead bring benefits. Allowing monthly disclosure updates under § 2.336(d) will reduce burdens on participants. Fairness and equitable treatment are furthered by the changes made to the 10 CFR 2.309 filing provisions and to the 10 CFR Part 2 discovery provisions. These discovery amendments improve adjudicatory efficiency, as do the amendments made to the format requirements for findings in final § 2.1209.

The option of preserving the status quo is not preferred. Failing to correct errors and clarify ambiguities will result in continuing confusion over the meaning of the rules, which could lead to the unnecessary waste of resources. Also, experience has shown that the agency hearing process can be improved through appropriate rule changes. The NRC believes that this rule improves the fairness, efficiency, and openness of NRC hearings without imposing costs on either the NRC or participants in NRC adjudicatory proceedings.

## **XI. Regulatory Flexibility Act Certification**

In accordance with the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the NRC certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule applies in the context of NRC adjudicatory proceedings concerning

nuclear reactors or nuclear materials. Reactor licensees are large organizations that do not fall within the definition of a small business found in Section 3 of the Small Business Act, 15 U.S.C. 632, within the small business standards set forth in 13 CFR Part 121, or within the size standards established by the NRC (10 CFR 2.810). Based upon the historically low number of requests for hearings involving materials licensees, it is not expected that this rule will have any significant economic impact on a substantial number of small businesses.

## **XII. Backfit Analysis**

The NRC has determined that the backfit rule does not apply to this rule because the amendments do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this rule.

## **List of Subjects**

### 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

### 10 CFR Part 12

Adversary adjudications, Award, Equal Access to Justice Act, Final disposition, Net worth, Party

### 10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials,

Nuclear power plants and reactors, Reporting and recordkeeping requirements.

#### 10 CFR Part 54

Administrative practice and procedure, Age-related degradation, Backfitting, Classified information, Criminal penalties, Environmental protection, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

#### 10 CFR Part 61

Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Parts 2, 12, 51, 54, and 61.

## **PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 2 continues to read as follows:

**Authority:** Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10143(f); sec. 102, Pub. L. 91–

190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.321 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101–410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note). Subpart C also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712, also issued under 5 U.S.C. 557. Section 2.340 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553, and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart N also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–560, 84 Stat. 1472 (42 U.S.C. 2135).

2. The heading for part 2 is revised to read as set forth above.
3. In part 2, wherever it may appear, the phrase “Presiding Officer” is revised to read as

“presiding officer”.

4. In § 2.4, paragraph (2) of the definition of “NRC personnel” and the definition of “Participant” are revised to read as follows:

**§ 2.4 Definitions.**

\* \* \* \* \*

*NRC personnel* means:

\* \* \* \* \*

(2) For the purpose of §§ 2.702 and 2.709 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and

\* \* \* \* \*

*Participant* means an individual or organization (including a governmental entity) that has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status by an Atomic Safety and Licensing Board or other presiding officer. Participant also means a party to a proceeding and any interested State, local governmental body, or Federally-recognized Indian Tribe that seeks to participate in a proceeding under § 2.315(c). For the purpose of service of documents, the NRC staff is considered a participant even if not participating as a party.

\* \* \* \* \*

5. In § 2.101, paragraph (a–1) is moved to follow paragraph (a)(9) and paragraphs (a)(3), (a)(4), (b), (d), (f)(2)(i)(D), (f)(2)(ii), and (f)(5) are revised to read as follows:

**§ 2.101 Filing of application.**

(a) \* \* \*

(3) If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, 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 this section are complete and acceptable for docketing, a docket number will be assigned to the application or part thereof, and the applicant will be notified of the determination. With respect to the tendered application and/or environmental report or part thereof that is acceptable for docketing, the applicant will be requested to:

\* \* \*

(4) The tendered application for a construction permit, operating license, early site permit, standard design approval, combined license, or manufacturing license will be formally docketed upon receipt by the Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, of the required additional copies. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addresses. The date of docketing shall be the date when the required copies are received by the Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate. Within 10 days after docketing, the applicant shall submit to the Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials



and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, an affidavit that distribution of the additional copies to Federal, State, 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 New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate. Amendments to the application and environmental report shall be filed and distributed and an affidavit shall be furnished to the Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, in the same manner as for the initial application and environmental report. If it is determined that all or any part of the tendered application and/or environmental report 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.

\* \* \*

(9) \* \* \*

(a-1) *Early consideration of site suitability issues.* An applicant for a construction permit under part 50 of this chapter or a combined license under part 52 of this chapter for a utilization facility which is subject to § 51.20(b) of this chapter and is of the type specified in § 50.21(b)(2) or (3) or § 50.22 of this chapter or is a testing facility, may request that the Commission conduct an early review and hearing and render an early partial decision in accordance with subpart F of this part on issues of site suitability within the purview of the applicable provisions of parts 50, 51, 52, and 100 of this chapter.

(1) *Construction permit.* The applicant for the construction permit may submit the information

required of applicants by the provisions of this chapter in three parts:

(i) Part one shall include or be accompanied by any information required by §§ 50.34(a)(1) and 50.30(f) of this chapter which relates to the issue(s) of site suitability for which an early review, hearing, and partial decision are sought, except that information with respect to operation of the facility at the projected initial power level need not be supplied, and shall include the information required by §§ 50.33(a) through (e) and 50.37 of this chapter. The information submitted shall also include:

(A) Proposed findings on the issues of site suitability on which the applicant has requested review and a statement of the bases or the reasons for those findings,

(B) A range of postulated facility design and operation parameters that is sufficient to enable the Commission to perform the requested review of site suitability issues under the applicable provisions of parts 50, 51, and 100, and

(C) Information concerning the applicant's site selection process and long-range plans for ultimate development of the site required by § 2.603(b)(1).

(ii) Part two shall include or be accompanied by the remaining information required by §§ 50.30(f), 50.33, and 50.34(a)(1) of this chapter.

(iii) Part three shall include the remaining information required by §§ 50.34a and (in the case of a nuclear power reactor) 50.34(a) of this chapter.

(iv) The information required for part two or part three shall be submitted during the period the partial decision on part one is effective. Submittal of the information required for part three may precede by no more than 6 months or follow by no more than 6 months the submittal of the information required for part two.

(2) *Combined license under part 52.* An applicant for a combined license under part 52 of this chapter may submit the information required of applicants by the provisions of this chapter in

three parts:

(i) Part one shall include or be accompanied by any information required by §§ 52.79(a)(1) and 50.30(f) of this chapter which relates to the issue(s) of site suitability for which an early review, hearing, and partial decision are sought, except that information with respect to operation of the facility at the projected initial power level need not be supplied, and shall include the information required by §§ 50.33(a) through (e) and 50.37 of this chapter. The information submitted shall also include:

(A) Proposed findings on the issues of site suitability on which the applicant has requested review and a statement of the bases or the reasons for those findings;

(B) A range of postulated facility design and operation parameters that is sufficient to enable the Commission to perform the requested review of site suitability issues under the applicable provisions of parts 50, 51, 52, and 100; and

(C) Information concerning the applicant's site selection process and long-range plans for ultimate development of the site required by § 2.621(b)(1).

(ii) Part two shall include or be accompanied by the remaining information required by §§ 50.30(f), 50.33, and 52.79(a)(1) of this chapter.

(iii) Part three shall include the remaining information required by §§ 52.79 and 52.80 of this chapter.

(iv) The information required for part two or part three shall be submitted during the period the partial decision on part one is effective. Submittal of the information required for part three may precede by no more than 6 months or follow by no more than 6 months the submittal of the information required for part two.

(b) After the application has been docketed each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste

disposal licensee, except applicants under part 61 of this chapter, which must comply with paragraph (f) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, telephone number, and e-mail address (if available) of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph the applicant should not make public distribution of those parts of the application subject to § 2.390(d). 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, an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

\* \* \* \* \*

(d) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors,

Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will give notice of the docketing of the public health and safety, common defense and security, and environmental parts 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 (f) 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.

\* \* \* \* \*

(f) \*

(2)(i) \*

(D) Serve a notice of availability of the application and environmental report on the chief executives or governing bodies of the municipalities or counties which have been identified in the application and environmental report as the location of all or part of the alternative sites if copies are not distributed under paragraph (f)(2)(i)(C) of this section to the executives or bodies.

(ii) All distributed copies shall be completely assembled documents identified by docket number. However, subsequently distributed amendments may include revised pages to previous submittals and, in these cases, the recipients will be responsible for inserting the revised pages. In complying with the requirements of paragraph (f) of this section the applicant may not make public distribution of those parts of the application subject to § 2.390(d).

\* \* \* \* \*

(5) The Director, Office of Nuclear Material Safety and Safeguards or Director, Office of

Federal and State Materials and Environmental Management Programs, as appropriate, will cause to be published in the *Federal Register* a notice of docketing which identifies the State and location of the proposed waste disposal facility and will give notice of docketing to the governor of that State and other officials listed in paragraph (f)(3) of this section and will, in a reasonable period thereafter, publish in the *Federal Register* a notice under § 2.105 offering an opportunity to request a hearing to the applicant and other potentially affected persons.

6. In § 2.103, paragraph (a) is revised to read as follows:

**§ 2.103 Action on applications for byproduct, source, special nuclear material, facility and operator licenses.**

(a) If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, finds that an application for a byproduct, source, special nuclear material, facility, or operator license complies with the requirements of the Act, the Energy Reorganization Act, and this chapter, he will issue a license. If the license is for a facility, or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, or for a construction authorization for a HLW repository at a geologic repository operations area under parts 60 or 63 of this chapter, or if it is to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Nuclear Material Safety and Safeguards, or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, will inform the State, Tribal and local

officials specified in § 2.104(c) of the issuance of the license. For notice of issuance requirements for licenses issued under part 61 of this chapter, see § 2.106(d).

7. In § 2.105, the introductory text of paragraphs (a), (b), and (d) are revised to read as follows:

**§ 2.105 Notice of proposed action.**

(a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, before acting thereon, publish in the *Federal Register*, as applicable, or on the NRC Web site, <http://www.nrc.gov>, or both, at the Commission's discretion, either a notice of intended operation under § 52.103(a) of this chapter and a proposed finding that inspections, tests, analysis, and acceptance criteria for a combined license under subpart C of part 52 have been or will be met, or a notice of proposed action with respect to an application for:

\* \* \* \* \*

(b) A notice of proposed action published in the *Federal Register* will set forth:

\* \* \* \* \*

(d) The notice of proposed action will provide that, within the time period provided under § 2.309(b):

\* \* \* \* \*

8. In § 2.106, paragraphs (a) and (d) are revised to read as follows:

**§ 2.106 Notice of issuance.**

(a) The Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will inform the State

and local officials specified in § 2.104(c) and publish a document in the Federal Register announcing the issuance of:

\* \* \* \* \*

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the Federal Register notice of, and will inform the State, local, and Tribal officials specified in § 2.104(c) of any action with respect to an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area, 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, or an amendment to such license for which a notice of proposed action has been previously published.

(d) The Director, Office of Federal and State Materials and Environmental Management Programs will also cause to be published in the Federal Register notice of, and will inform the State and local officials or tribal governing body specified in § 2.104(c) of any licensing action with respect to a license to receive radioactive waste from other persons for disposal under part 61 of this chapter or the amendment of such a license for which a notice of proposed action has been previously published.

9. In § 2.107, paragraph (c) is revised to read as follows:

**§ 2.107 Withdrawal of application.**

\* \* \* \* \*

(c) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be



published in the Federal Register a notice of the withdrawal of an application if notice of receipt of the application has been previously published.

10. In § 2.108, paragraphs (a), (b), and (c) are revised to read as follows:

**§ 2.108 Denial of application for failure to supply information.**

(a) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, may deny an application if an applicant fails to respond to a request for additional information within thirty (30) days from the date of the request, or within such other time as may be specified.

(b) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the *Federal Register* a notice of denial when notice of receipt of the application has previously been published, but notice of hearing has not yet been published. The notice of denial will provide that, within thirty (30) days after the date of publication in the *Federal Register*.

(1) The applicant may demand a hearing, and

(2) Any person whose interest may be affected by the proceeding may file a petition for leave to intervene.

(c) When both a notice of receipt of the application and a notice of hearing have been published, the presiding officer, upon a motion made by the staff under § 2.323, will rule whether an application should be denied by the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and

Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, under paragraph (a) of this section.

11. In § 2.305, the heading and paragraphs (c)(4) and (g)(1) are revised to read as follows:

**§ 2.305 Service of documents, methods, proof.**

\* \* \* \* \*

(c) \* \* \*

(4) Each document served (as may be required by law, rule, or order of the presiding officer) upon a participant to the proceeding must be accompanied by a signed certificate of service.

(i) If a document is served on participants through only the E-Filing system, then the certificate of service must state that the document has been filed through the E-Filing system.

(ii) If a document is served on participants by only a method other than the E-Filing system, then the certificate of service must state the name, address, and method and date of service for all participants served.

(iii) If a document is served on some participants through the E-Filing system and other participants by another method of service, then the certificate of service must include a list of participants served through the E-filing system, and it must state the name, address, and method and date of service for all participants served by the other method of service.

\* \* \* \* \*

(g) \* \* \*

(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. If no attorney representing the NRC Staff has filed a notice of appearance in the proceeding and service is not being made through the E-Filing System, service will be made using the following addresses, as applicable: by delivery to the Associate General Counsel for Hearings, Enforcement & Administration, One White Flint North, 11555 Rockville Pike, Rockville MD 20852-0001; by mail addressed to the Associate General Counsel for Hearings, Enforcement & Administration, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; by e-mail to *OgcMailCenter.Resource@nrc.gov*; or by facsimile to 301-415-3725.

\* \* \* \* \*

12. In § 2.309, paragraphs (b), (c), (d)(2), (d)(3), and (f)(2) are revised, paragraphs (h) and (i) are redesignated as paragraphs (i) and (j), respectively, and revised, a new paragraph (h) is added, and paragraph (b)(5) is deleted to read as follows:

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

\* \* \* \* \*

(b) Timing. Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

\* \* \* \* \*

(c) Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions. (1) Determination by presiding officer. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination

by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

(2) Applicability of sections 2.307 and 2.323.

(i) Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.

(ii) Section 2.323 does not apply to hearing requests, intervention petitions, or motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section.

(3) New petitioner. A hearing request or intervention petition filed after the deadline in paragraph (b) of this section must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs (d) and (f) of this section.

(4) Party or participant. A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section. If the party or participant has already satisfied the requirements for standing under paragraph (d) of this section in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.

\* \* \* \* \*

(d) \* \* \*

(2) Rulings. In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule

on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

(3) Standing in enforcement proceedings. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

\* \* \* \* \*

(f) \* \* \*

(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, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

\* \* \* \* \*

(h) Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.

(1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing

Board ruling on the request will admit as a party to the 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 Federally-recognized Indian Tribe. Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate participants.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe also must demonstrate standing.

(3) 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.

(i) Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request, petition, or motion—

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding may file an answer to a hearing request, intervention petition, or motion for leave to file amended or new contentions filed after the deadline in § 2.309(b) within 25 days after service of the request, petition, or motion. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under § 52.103 of this chapter, the participant who filed the hearing request, intervention petition, or motion for leave to file new or amended contentions after the deadline 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.

(j) Decision on request/petition.

(1) In all proceedings other than a proceeding under § 52.103 of this chapter, the presiding officer shall issue a decision on each request for hearing or petition to intervene within 45 days of the conclusion of the initial pre-hearing conference or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies under paragraph (i) of this section. With respect to a request to admit amended or new contentions, the presiding officer shall issue a decision on each such request within 45 days of the conclusion of any pre-hearing conference that may be conducted regarding the proposed amended or new contentions or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies, if

any. In the event the presiding officer cannot issue a decision within 45 days, the presiding officer shall issue a notice advising the Commission and the parties, and the notice shall include the expected date of when the decision will issue.

(2) The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under § 52.103 of this chapter. The Commission's decision may not be the subject of any appeal under § 2.311.

13. In § 2.311, paragraph (b) is revised to read as follows:

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

\* \* \* \* \*

(b) These appeals must be made as specified by the provisions of this section, within 25 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 25 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 hearing are allowed.

\* \* \* \* \*

14. In § 2.314, paragraph (c)(3) is revised to read as follows:

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

\* \* \* \* \*

(c) \* \* \* \*



(3) Anyone disciplined under this section may file an appeal with the Commission within 25 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.

\* \* \* \* \*

15. In § 2.315, paragraph (c) is revised to read as follows:

**§ 2.315 Participation by a person not a party.**

\* \* \* \* \*

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and Federally-recognized Indian Tribe that has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. The participation of any State, local governmental body, or Federally-recognized Indian Tribe shall be limited to unresolved issues and contentions, and issues and contentions that are raised

after the State, local governmental body, or Federally-recognized Indian Tribe becomes a participant. Each State, local governmental body, and Federally-recognized Indian Tribe shall, in its request to participate in a hearing, 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 they will participate in advance of any hearing held.

\* \* \* \* \*

16. In § 2.318, paragraph (b) is revised to read as follows:

**§ 2.318 Commencement and termination of jurisdiction of presiding officer.**

\* \* \* \* \*

(b) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, the Director, Office of Federal and State Materials and Environmental Management Programs, 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.

17. In § 2.319, paragraph (l) is revised, paragraph (r) is redesignated as paragraph (s), and a new paragraph (r) is added to read as follows:

**§ 2.319 Power of the presiding officer.**

\* \* \* \* \*

(l) Refer rulings to the Commission under § 2.323(f)(1), or certify questions to the Commission for its determination, either in the presiding officer’s discretion, or on petition of a party under § 2.323(f)(2), or on direction of the Commission.

\* \* \* \* \*

(r) Establish a schedule for briefs and oral arguments to decide any admitted contentions that, as determined by the presiding officer, constitute pure issues of law.

\* \* \* \* \*

18. In § 2.323, paragraphs (a) and (f) are revised to read as follows:

**§ 2.323 Motions.**

(a) Scope and general requirements. (1) Applicability to section 2.309(c). Section 2.309 motions for new or amended contentions filed after the deadline in § 2.309(b) are not subject to the requirements of this section. For the purposes of this section the term “all motions” includes any motion *except* § 2.309 motions for new or amended contentions filed after the deadline.

(2) Presentation and disposition. All motions must be addressed to the Commission or other designated presiding officer. All motions 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.

\* \* \* \* \*

(f) Referral and certifications to the Commission. (1) If, in the judgment of the presiding officer, the presiding officer’s decision raises significant and novel legal or policy issues, or prompt decision by the Commission is necessary to materially advance the orderly disposition of

the proceeding, then the presiding officer may promptly refer the ruling to the Commission. This standard also applies to matters certified to the Commission. The presiding officer shall notify the parties of the referral or certification 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 a question to the Commission for early review. The presiding officer shall apply the criteria in § 2.341(f)(1) in determining whether to grant the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

\* \* \* \* \*

19. In § 2.326, paragraph (d) is revised to read as follows:

**§ 2.326 Motions to reopen.**

\* \* \* \* \*

(d) A motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).

20. In § 2.335, paragraphs (b), (c), and (e) are revised to read as follows:

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

\* \* \* \* \*

(b) A participant 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 be 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 participant 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 participant 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.

\* \* \* \* \*

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

21. In § 2.336, the introductory text to paragraph (b) and paragraph (d) are revised to read as follows:

**§ 2.336 General discovery.**

\* \* \* \* \*

(b) 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, the NRC staff must, within 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 or provide to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

(1) The application (if applicable) and applicant or licensee requests that are relevant to the admitted contentions and are associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee that is relevant to the admitted contentions and 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) that both support the NRC staff's review of the application or proposed action that is the subject of the proceeding and are relevant to the admitted contentions;

(4) Any NRC staff documents that both represent the NRC staff's determination on the application or proposal that is the subject of the proceeding and are relevant to the admitted contentions; and

\* \* \* \* \*

(d) The duty of disclosure under this section is continuing. Parties must update their disclosures every month after initial disclosures on a due date selected by the presiding officer

in the order admitting contentions, unless the parties agree upon a different due date or frequency. The disclosure update shall be limited to documents subject to disclosure under this section and does not need to include documents that are developed, obtained, or discovered during the two weeks before the due date. Disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update. The duty to update disclosures relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention, or at such other time as may be specified by the presiding officer or the Commission.

\* \* \* \* \*

22. In § 2.337, subparagraphs (g)(1), (g)(2), and (g)(3) are revised to read as follows:

**§ 2.337 Evidence at a hearing.**

\* \* \* \* \*

(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, Director, Office of Federal and State Materials and Environmental Management Programs, 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 or contested matter prepared in advance of the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention or contested 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, Director, Office of Federal and State Materials and Environmental Management Programs, 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 admitted contentions or contested 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 or contested matter prepared in advance of



the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention or contested 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, Director, Office of Federal and State Materials and Environmental Management Programs, 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 admitted contentions or contested matters with respect to the adequacy of the environmental impact statement or environmental assessment.

23. Section 2.340 is revised to read as follows:

**§ 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.

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for an operating license or renewed license (including an amendment to or renewal of an operating license or renewed 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 and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also make findings of fact and conclusions of law on 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 under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding for the initial issuance or renewal of a construction permit, operating license, or renewed license, or the amendment of an operating or renewed license where the NRC has not made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the amendment of a construction permit, operating license, or renewed license where the NRC has made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate (appropriate official), after making the requisite findings and complying with any applicable provisions of § 2.1202(a) or § 2.1403(a), may issue the amendment before the presiding officer's initial decision becomes effective. Once the presiding officer's initial decision becomes effective, the appropriate official shall take action with respect to that amendment in accordance with the initial decision. If the presiding officer's initial decision becomes effective before the appropriate official issues the amendment, then the appropriate official, after making the requisite findings, shall issue, deny, or appropriately condition the amendment in accordance with the presiding officer's initial decision.

(b) Initial decision—combined license under 10 CFR part 52.

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a combined

license under part 52 of this chapter (including an amendment to or renewal of combined license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also make findings of fact and conclusions of law on 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 under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding for the initial issuance or renewal of a combined license under part 52 of this chapter, or the amendment of a combined license where the NRC has not made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the amendment of a combined license under part 52 of this chapter where the NRC has made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate (appropriate official), after making the requisite findings and complying with any applicable provisions of § 2.1202(a) or § 2.1403(a), may issue the amendment before the presiding officer's initial decision becomes effective. Once the presiding officer's initial decision becomes effective, the appropriate official shall take action with respect to that amendment in accordance with the initial decision. If the presiding officer's initial decision

becomes effective before the appropriate official issues the amendment, then the appropriate official, after making the requisite findings, shall issue, deny, or appropriately condition the amendment in accordance with the presiding officer's initial decision.

(c) Initial decision on findings 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, and any matter designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties, but identified by the presiding officer as matters requiring further examination, shall be referred to the Commission for its determination; the Commission may, in its discretion, treat any of these referred matters as a request for action under § 2.206 and process the matter in accordance with § 52.103(f) of this chapter.

(d) Initial decision—manufacturing license under 10 CFR part 52.

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a manufacturing license under subpart C of part 52 of this chapter (including an amendment to or renewal of a manufacturing license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer also shall make findings of fact and conclusions of law on 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 under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding for the initial issuance or renewal of a manufacturing license under subpart C of part 52 of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the initial issuance or renewal of a manufacturing license under subpart C of part 52 of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, may issue the license, permit, or license amendment in accordance with § 2.1202(a) or § 2.1403(a) before the presiding officer's initial decision becomes effective. If, however, the presiding officer's initial decision becomes effective before the license, permit, or license amendment is issued under § 2.1202 or § 2.1403, then the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, shall issue, deny, or appropriately condition the license, permit, or license amendment in accordance with the presiding officer's initial decision.

(e) Initial decision—other proceedings not involving production or utilization facilities.

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In a proceeding 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, but identified by the presiding officer as requiring further examination, must be referred to the Director, Office of

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

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding under this paragraph, the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue, deny, or appropriately condition the permit, license, or license amendment in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding under this paragraph, the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, may issue the permit, license, or amendment in accordance with § 2.1202(a) or § 2.1403(a) before the presiding officer's initial decision becomes effective. If, however, the presiding officer's initial decision becomes effective before the permit, license, or amendment is issued under § 2.1202 or § 2.1403, then the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue, deny, or appropriately condition the permit, license, or amendment in accordance with the presiding officer's initial decision.

(f) Immediate effectiveness of certain presiding officer decisions. A presiding officer's initial decision directing the issuance or amendment of a limited work authorization under § 50.10 of

this chapter, 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, a renewed license under part 54, or a license under part 72 of this chapter 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 § 52.103(g) of this chapter 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, Office of New Reactors, or the Director, Office of Nuclear Reactor Regulation, as appropriate, shall issue a limited work authorization under § 50.10 of this chapter, 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, Office of New Reactors, or the Director, Office of Nuclear Reactor Regulation, as appropriate, shall make the finding under § 52.103(g) of this chapter that the 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) of this chapter 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, a motion for stay under § 2.342, or the filing of a petition under § 2.206.

(k) Issuance of other licenses. The Commission the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue a license, including a license under part 72 of this chapter 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.



24. In § 2.341, paragraphs (a), (b)(1), (b)(3), (c), and (f)(1) are revised to read as follows:

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

(a)(1) Review of decisions and actions of a presiding officer are treated under this section; provided, however, that no party may request further Commission review of a Commission determination to allow a period of interim operation under § 52.103(c) of this chapter. This section does not apply to appeals under § 2.311 or to appeals in the high-level waste proceeding, which are governed by § 2.1015.

(2) Within 120 days after the date of a decision or action by a presiding officer, or within 120 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 25 days after service of a full or partial initial decision by a presiding officer, and within 25 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.

\* \* \* \* \*

(3) Any other party to the proceeding may, within 25 days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than 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 10 days of service of any answer. This reply brief may not be longer than 5 pages.

\* \* \* \* \*

(c)(1) If within 120 days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition is deemed to be denied, unless the Commission, in its discretion, extends the time for its consideration of the petition and any answers to the petition.

(2) If a petition for review is granted, the Commission may 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.

(3) Unless the Commission orders otherwise, any briefs on review may not exceed 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 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.

\* \* \* \* \*

(f) \* \* \*

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

\* \* \* \* \*

25. In § 2.346, paragraphs (e) and (j) are revised to read as follows:

**§ 2.346 Authority of the Secretary.**

\* \* \* \* \*

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

\* \* \* \* \*

(j) Take action on other minor matters.

26. In § 2.347, paragraphs (e)(1)(i) and (e)(1)(ii) are revised to read as follows:

**§ 2.347 Ex parte communications.**

\* \* \* \* \*

(e)(1) \*

(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), 2.205(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), 2.205(e), or 2.312.

\* \* \* \* \*

27. In § 2.348, paragraphs (d)(1)(i) and (d)(1)(ii) are revised to read as follows:

**§ 2.348 Separation of functions.**

\* \* \* \* \*

(d)(1) \*

(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), 2.205(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), 2.205(e), or 2.312.

\* \* \* \* \*

28. In § 2.704, paragraphs (a)(3) and (e)(1) are is revised to read as follows:

**§ 2.704 Discovery-required disclosures.**

(a) \* \* \*

(3) Unless otherwise stipulated by the parties or directed by order of the presiding officer, these disclosures must be made within 45 days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329. A party must 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. The duty of disclosure under this section is continuing. A disclosure update must be made every month after initial disclosures on a due date selected by the presiding officer, unless the parties agree upon a different due date or frequency. The disclosure update shall be limited to documents subject to disclosure under this section and does not need to include documents that are developed, obtained, or discovered during the two weeks before the due date. Disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that disputed issue, or at such other time as may be specified by the presiding officer or the Commission.

\* \* \* \* \*

(e) \* \* \*

(1) When a party learns that in some material respect the information disclosed under paragraph (a) is incomplete or incorrect, and if additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing, a party shall supplement its disclosures in accordance with the disclosure update schedule in paragraph (a)(3).\* \* \*

29. In § 2.705, paragraph (b)(2) is revised to read as follows:

**§ 2.705 Discovery-additional methods.**

\* \* \* \* \*

(b) \* \* \*

(2) 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 set limits 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:

\* \* \* \* \*

30. In § 2.709, paragraphs (a)(6) and (a)(7) are added to read as follows:

**§ 2.709 Discovery against NRC staff.**

(a)\* \* \*

(6)(i) The NRC staff shall, except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, provide to the other parties within 45 days after the

issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329 and without awaiting a discovery request:

(A) Except for those documents, data compilations, or other tangible things for which there is a claim of privilege or protected status, all NRC staff documents, data compilations, or other tangible things in possession, custody, or control of the NRC staff that are relevant to disputed issues alleged with particularity in the pleadings, including any Office of Investigations report and supporting exhibits, and any Office of Enforcement documents, data compilations, or other tangible things regarding the order. When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as the NRC website, <http://www.nrc.gov>, 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; and

(B) A list of all documents, data compilations, or other tangible things otherwise responsive to paragraph (a)(6)(i)(A) of this section 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.

(ii) The duty of disclosure under this section is continuing. A disclosure update must be made every month after initial disclosures on a due date selected by the presiding officer, unless the parties agree upon a different due date or frequency. The disclosure update shall be limited to documents subject to disclosure under this section and does not need to include documents that are developed, obtained, or discovered during the two weeks before the due date. Disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that dispute issue, or

at such other time as may be specified by the presiding officer or the Commission.

(7) 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 (including the ADAMS accession number, when available), the title and a page reference to the relevant document, data compilation, or tangible thing.

\* \* \* \* \*

31. In § 2.710, paragraph (a) is revised to read as follows:

**§ 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 20 days after the close of discovery. The moving party shall attach to the motion a 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 20 days after service of the motion. The party shall attach to any answer opposing the motion a 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 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 to the motion will be entertained.

\* \* \* \* \*

32. In § 2.802, paragraph (d) is revised to read as follows:

**§ 2.802 Petition for rulemaking.**

\* \* \* \* \*

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant pending disposition of the petition for rulemaking.

\* \* \* \* \*

33. In § 2.811, paragraph (c) is revised to read as follows:

**§ 2.811 Filing of standard design certification application; required copies.**

\* \* \* \* \*

(c) *Capability to provide additional copies.* The applicant shall maintain the capability to generate additional copies of the general information and the safety analysis report, or part thereof or amendment thereto, for subsequent distribution in accordance with the written instructions of the Director, Office of New Reactors, the Director, Office of Nuclear Reactor Regulation, the Director, Office of Federal and State Materials and Environmental Management Programs, or the Director, Office of Nuclear Material Safety and Safeguards, as appropriate.

\* \* \* \* \*

**Subpart L—Simplified Hearing Procedures for NRC Adjudications**

34. The title of subpart L is revised to read as set forth above:

35. In § 2.1202, the introductory text of paragraph (a) is revised to read as follows:

**§ 2.1202 Authority and role of NRC staff.**



(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which is the subject of the hearing and as authorized by law, the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the underlying regulatory matter for which a hearing was provided. When the NRC staff takes its action, it must notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter before the presiding officer. The NRC staff's action on the matter is effective upon issuance by the staff, except in matters involving:

\* \* \* \* \*

36. In § 2.1205, paragraph (a) is revised to read as follows:

**§ 2.1205 Summary disposition.**

(a) Unless the presiding officer or the Commission directs otherwise, motions for summary disposition may be submitted to the presiding officer by any party no later than 45 days before the commencement of hearing. The motions must be in writing and must include a written explanation of the basis of the motion. The moving party must attach a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard. Motions for summary disposition must be served on the parties and the Secretary at the same time that they are submitted to the presiding officer.

\* \* \* \* \*

37. Section 2.1209 is revised to read as follows:

**§ 2.1209 Findings of fact and conclusions of law.**

Each party shall file written post-hearing proposed findings of fact and conclusions of law on the contentions addressed in an oral hearing under § 2.1207 or a written hearing under § 2.1208 within 30 days of the close of the hearing or at such other time as the presiding officer directs. Proposed findings of fact and conclusions of law must conform to the format requirements in § 2.712(c).

38. In § 2.1210, paragraph (d) is revised to read as follows:

**§ 2.1210 Initial decision and its effect.**

\* \* \* \* \*

(d) Pending review and final decision by the Commission, an initial decision resolving all issues before the presiding officer is immediately effective upon issuance except as otherwise provided by this part (e.g., § 2.340) or by the Commission in special circumstances.

39. In § 2.1213, paragraph (f) is added to read as follows:

**§ 2.1213 Application for a stay.**

\* \* \* \* \*

(f) Stays are not available on matters limited to whether a no significant hazards consideration determination was proper in proceedings on power reactor license amendments.

40. Section 2.1300 is revised to read as follows:

**§ 2.1300 Scope of subpart M.**

The provisions of this subpart, together with the generally applicable intervention provisions in subpart C of this part, govern all adjudicatory proceedings on an application 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 statutes, or pursuant to a license condition. This subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

**§ 2.1304 [Removed]**

41. Section 2.1304 is removed.

42. In § 2.1316, paragraph (c) is revised to read as follows:

**§ 2.1316 Authority and role of NRC staff.**

\* \* \* \* \*

(c)(1) Within 15 days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff must notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If the NRC staff desires to be a party thereafter, the NRC staff must notify the presiding officer and the parties, and identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (b)(5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

(2) Once the NRC staff chooses to participate as a party, it will 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.

43. In § 2.1321, paragraph (b) is revised to read as follows:

**§ 2.1321 Participation and schedule for submission in a hearing consisting of written**

**comments.**

\* \* \* \* \*

(b) Written responses, rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants, and proposed written questions for the Presiding Officer to consider for submittal to persons sponsoring testimony submitted under paragraph (a) of this section. These materials shall be filed within 20 days of the filing of the materials submitted under paragraph (a) of this section, unless the Commission or Presiding Officer directs otherwise. Proposed written questions directed to rebuttal testimony for the Presiding Officer to consider for submittal to persons offering such testimony shall be filed within 7 days of the filing of the rebuttal testimony.

\* \* \* \* \*

44. In § 2.1403, the introductory text of paragraph (a) is revised to read as follows:

**§ 2.1403 Authority and role of the NRC staff.**

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter that is the subject of the hearing and as authorized by law, the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the matter that is the subject of the hearing. When the NRC staff takes its action, it must notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter before the presiding officer. The NRC staff's action on the matter is effective upon issuance, except in matters involving:

\* \* \* \* \*

45. In § 2.1407, paragraphs (a)(1) and (a)(3) are revised to read as follows:

**§ 2.1407 Appeal and Commission review of initial decision.**

(a)(1) Within 25 days after service of a written initial decision, a party may file a written appeal seeking the Commission's review on the grounds specified in paragraph (b) of this section. Unless otherwise authorized by law, a party must file an appeal with the Commission before seeking judicial review.

\* \* \* \* \*

(3) Any other party to the proceeding may, within 25 days after service of the appeal, file an answer supporting or opposing the appeal. The answer may not be longer than 20 pages and should concisely address the matters specified in paragraph (a)(2) of this section. The appellant does not have a right to reply. Unless it directs additional filings or oral arguments, the Commission will decide the appeal on the basis of the filings permitted by this paragraph.

\* \* \* \* \*

**PART 12—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS**

46. The authority citation for Part 12 continues to read as follows:

**Authority:** Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504 (c)(1)); Pub. L. 99-80, 99 Stat. 183.

47. In § 12.308, paragraph (a) is revised to read as follows:

**§ 12.308—Agency Review.**

(a) Either the applicant or the NRC counsel may seek review of the initial decision on the fee

application, or the Commission may decide to review the decision on its own initiative, in accordance with the Commission's review procedures set out in 10 CFR 2.341. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. If neither the applicant nor NRC counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the NRC 120 days after it is issued.

(b)\* \* \*

- (1) The expiration of the 120 day period provided in paragraph (a) of this section; or
- (2) If within the 120 day period provided in paragraph (a) of this section the Commission elects to review the decision, the Commission's issuance of a final decision on review of the initial decision.

\* \* \* \* \*

## **PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS**

48. The authority citation for Part 51 continues to read as follows:

**Authority:** Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041; and sec. 193, Pub. L. 101-575, 104 Stat. 2835 (42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 51.80. and 51.97 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241, and sec. 148,

Pub. L. 100-203, 101 Stat. 1330-223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

49. In § 51.4, the definition of *NRC staff* is revised to read as follows:

**§ 51.4 Definitions.**

\* \* \* \* \*

*NRC staff* means any NRC officer or employee or his/her authorized representative, except a Commissioner, a member of a Commissioner's immediate staff, an Atomic Safety and Licensing Board, a presiding officer, an administrative judge, an administrative law judge, or any other officer or employee of the Commission who performs adjudicatory functions.

\* \* \* \* \*

50. In § 51.34, paragraph(b) is revised to read as follows:

**§ 51.34 Preparation of finding of no significant impact.**

\* \* \* \* \*

(b) When a hearing is held on the proposed action under the regulations in part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the appropriate NRC staff director will prepare a proposed finding of no significant impact, which may be subject to modification as a result of review and decision as appropriate to the nature and scope of the proceeding. In such cases, the presiding officer, or the Commission acting as a collegial body, as appropriate, will issue the final finding of no significant impact.

51. In § 51.102, paragraph (c) is revised to read as follows:

**§ 51.102 Requirement to provide a record of decision; preparation.**

\* \* \* \* \*

(c) When a hearing is held on the proposed action under the regulations in part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the initial decision of the presiding officer or the final decision of the Commissioners acting as a collegial body will constitute the record of decision. An initial or final decision constituting the record of decision will be distributed as provided in § 51.93.

52. In § 51.109, paragraph (f) is revised to read as follows:

**§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.**

\* \* \* \* \*

(f) In making the determinations described in paragraph (e) of this section, the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in § 51.26(c). If the Commission reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

\* \* \* \* \*



53. Section 51.125 is revised to read as follows:

**§ 51.125 Responsible official.**

The Executive Director for Operations shall be responsible for overall review of NRC NEPA compliance, except for matters under the jurisdiction of a presiding officer, administrative judge, administrative law judge, Atomic Safety and Licensing Board, or the Commission acting as a collegial body.

**PART 54—REQUIREMENTS FOR RENEWAL OF OPERATING LICENSES FOR NUCLEAR POWER PLANTS**

54. The authority citation for Part 54 continues to read as follows:

**Authority:** Secs. 102, 103, 104, 161, 181, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, as amended (42 U.S.C. 5841, 5842). Section 54.17 also issued under E.O.12829, 3 CFR, 1993 Comp., p.570; E.O. 12958, as amended, 3 CFR, 1993 Comp., p. 333; E.O. 12968, 3 CFR, 1995 Comp., p.391.

55. Section 54.27 is revised to read as follows:

**§ 54.27 Hearings.**

A notice of an opportunity for a hearing will be published in the *Federal Register* in accordance with 10 CFR §§ 2.105 and 2.309. In the absence of a request for a hearing filed within 60 days by a person whose interest may be affected, the Commission may issue a renewed operating license or renewed combined license without a hearing upon a 30-day notice and publication in the *Federal Register* of its intent to do so.

**PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE**

56. The authority citation for Part 61 continues to read as follows:

**Authority:** Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, 95, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and 102, sec 2902, 106 Stat. 3123, (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Sec. 651(e), Pub. L. 109-58, 119 Stat. 806-810 (42 U.S.C. 2014, 2021, 2021b, 2111).

57. In § 61.25, paragraph (c) is revised to read as follows:

**§ 61.25 Changes.**

\* \* \* \* \*

(c) The Commission shall provide a copy of the notices for opportunity for hearing provided in paragraph (a)(1) of this section to State and local officials or tribal governing bodies specified in § 2.104(c) of part 2 of this chapter.

Dated at Rockville, Maryland this XX day of MONTH 2012.

For the Nuclear Regulatory Commission.

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Annette L. Vietti-Cook  
Secretary of the Commission.

