UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

September 11, 2018

COMMISSION VOTING RECORD

DECISION ITEM: SECY-17-0103

TITLE: DENIAL OF PETITION FOR RULEMAKING ON AGENCY PROCEDURE FOR RESPONDING TO ADVERSE COURT DECISIONS AND ADDRESSING FUNDING SHORTFALLS (PRM-2-15; NRC-2015-0264)

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of September 11, 2018.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Svinicki
Commissioner Baran
Commissioner Burns
Commissioner Caputo
Commissioner Wright
OGC
EDO
PDR

VOTING SUMMARY – SECY-17-0103

RECORDED VOTES

	APPROVED	DISAPPROVED	ABSTAIN	NOT PARTICIPATING	COMMENTS	DATE
Chrm. Svinicki	X				X	09/05/18
Cmr. Baran	X				X	11/07/17
Cmr. Burns	X				X	12/20/17
Cmr. Caputo	X				X	09/05/18
Cmr. Wright	X				X	09/05/18

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN SVINICKI

SUBJECT: SECY-17-0103: Denial of Petition for Rulemaking on Agency Procedure for Responding to Adverse Court Decisions and Addressing Funding Shortfalls (PRM-2-15; NRC-2015-0264)

Approved __XX__ **Disapproved** ____ **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** __XX__ **Attached** __XX__ **None** ____

I approve publication of the *Federal Register* notice denying the petition for rulemaking, subject to the attached edits.

SIGNATURE

9/5/18
DATE

Entered on "STARS" **Yes** ✓ **No** ___

KLS EDITS [7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-15; NRC-2015-0264]

Agency Procedures for Responding to Adverse Court Decisions and Addressing Funding Shortfalls

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted on October 22, 2015, by Jeffrey M. Skov (the petitioner), and supplemented on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017. The petition was docketed by the NRC on November 10, 2015, and was assigned Docket No. PRM-2-15. The petitioner requests that the NRC amend its rules of practice to establish procedures for responding to adverse court decisions and to annually report to the public each instance where the NRC does not receive "sufficient funds reasonably necessary to implement in good faith its statutory mandates." The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.

DATES: The docket for the petition for rulemaking, PRM-2-15, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

losses ordinarily have involved a failure to explain the basis for a technical conclusion,[1] a request for further development of the administrative record,[2] or a court's determination that the legal position that the NRC has adopted on a point of law is incorrect.[3] In such circumstances, the NRC's response to judicial direction is transparent so that the public is able to see how the agency has addressed the concerns in the decision.[4] Indeed, after the *Aiken County* decision was rendered by the D.C. Circuit Court of Appeals, the Commission responded by soliciting the views of all participants involved and issuing an order detailing how the agency would continue with the licensing process. *See U.S. Department of Energy* (High-Level Waste Repository), CLI-13-08, 78 NRC 219 (2013). This included a direction to staff to complete and issue the Safety Evaluation Report associated with the construction authorization application and make associated documents available on the NRC's recordkeeping system.

~~Furthermore, the factual circumstances associated with *Aiken County* were unique and involved a writ of mandamus challenging a decision involving a highly controversial subject. These circumstances are unlikely to recur in any future judicial losses by the agency. This is particularly the case given that~~Moreover, the vast majority of licensing cases that result in federal court litigation have already been the subject of litigation before the Atomic Safety and Licensing Boards and the Commission, such that opportunities to identify deficiencies have been provided through the Commission's internal adjudicatory process. Further, the Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions and the need for any responsive action to ensure compliance with the holding. In addition, OGC will provide advice on the impact, if any, of that decision on

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[1] *See, e.g. Shieldalloy Metallurgical Corp. v. NRC*, 707 F.3d 371 (D.C. Cir. 2013); *Honeywell International, Inc. v. NRC*, 628 F.3d 568 (D.C. Cir. 2010).
[2] *See, e.g., Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013).
[3] *See, e.g., San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).
[4] *See, e.g. Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-06, 78 NRC 155 (2013); *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 NRC 1 (2013); Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, Draft Environmental Assessment and Finding of No Significant Impact, 78 FR 20144 (April 3, 2013); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007).

any current and future NRC decisionmaking. Given these facts, the additional processes in the proposed rule are not necessary.

In addition, the petitioner's proposed rule would require an independent evaluation of agency action in light of an adverse court decision. The NRC's Office of the Inspector General, however, already ~~serves that purpose~~has the authority to perform that function. ~~It is t~~The Inspector General~~'s~~ (IG~~'s~~) is authorized ~~responsibility~~ "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the agency in which the office is established. *See* 5 United States Code (U.S.C.) App 3, § 4(a)(1). This responsibility includes reporting "to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *See id.* § 4(d). The IG prepares a semiannual report to Congress which includes "a description of significant problems, abuses, and deficiencies relating to the administration of programs" and agency operations. *See id.* § 5(a)(1). Notably, this report includes "a description of the recommendations for corrective action made by the [Office of the Inspector General] during the reporting periods with respect to significant problems, abuses, or deficiencies." *See id.* § 5(a)(2).[5] The IG may initiate an investigation upon the request of an employee or member of the public. Although investigation by the IG is not necessarily precipitated by a specific event, the duties and abilities of the IG provide the authority and flexibility to investigate a wide range of agency action. Therefore, the proposed rule essentially requests the creation of a process of independent investigation that is duplicative of the one that already exists.[6]

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[5] Office of the Inspector General reports and associated corrective action recommendations for the NRC are available on the public website. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).

[6] In additional submissions to the NRC, the petitioner emphasized the same or similar arguments for the implementation of the proposed rules. His March 1, 2017 submission notes that the IG's Office did not prevent the statutory violation that led to the *Aiken County* proceeding. However, there is little explanation as to why the implementation of a process that essentially duplicates that of the independent investigative authority of the Office of the Inspector General would serve to effectively and efficiently eliminate the possibility of a violation in the future. Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on DOE's Yucca Mountain application and the *Aiken County* court was aware of the findings. *See In re Aiken Cty.*, 725 F.3d at 268 (Randolph, J., concurring) (citing U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA

The NRC is denying further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance. ~~The~~ OMB Circular A-11 directs agencies to withhold pre-decisional materials underlying budget deliberations. *See* OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, 22-1 (July 2016). ~~Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB.~~ Circular A-11 directs agencies "not [to] release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside of the Executive Branch" unless otherwise allowed under the Circular. Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions and the Executive Branch communications underlying those decisions. On the basis of our practice of compliance with OMB guidance, the NRC will not ~~consider~~ proceed with the petitioner's proposed rule ~~in the rulemaking process~~.

The arguments presented by the petitioner focus heavily on the outcome and safety consequences of the *Aiken County* decision, but they fail to justify the need for additional processes in the NRC's regulations. ~~The decision to engage in rulemaking on any issue is dependent on the safety, environmental, or security concerns that have been raised.~~ In light of the processes currently in place, the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns. ~~Given the small benefit to the agency's statutory mission, it is unlikely that, even if the rulemaking proposed were evaluated under the NRC process for determining rulemaking priorities, it would have sufficient priority to receive~~

~~resources to conduct such a rulemaking.~~ Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.[7]

With regard to the petitioner's concerns about agency inaction with respect to Yucca Mountain, the NRC has used virtually all of the remaining funds appropriated through fiscal year 2011 by Congress for the Yucca Mountain project to further review the application, consistent with the *Aiken County* decision and the Commission's Order in response to the case. Among other things, the NRC completed the Safety Evaluation Report and a Final Supplement to DOE's Environmental Impact Statement for the Yucca Mountain geologic repository. The NRC also placed millions of items of discovery material from the adjudicatory proceeding relating to the application in the public portion of the agency's online records collection. ~~Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.~~[8]

III. Conclusion

For the reasons ~~cited in this document~~discussed above, the NRC is denying PRM-2-15. The petition failed to identify a need for the proposed rules. Further, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with current agency policies and practice.

Dated at Rockville, Maryland, this xxth day of Xxxxx, 2017.

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[7] The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).

[8] ~~The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).~~

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Baran

SUBJECT: SECY-17-0103: Denial of Petition for Rulemaking on Agency Procedure for Responding to Adverse Court Decisions and Addressing Funding Shortfalls (PRM-2-15; NRC-2015-0264)

Approved X **Disapproved** ____ **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** X **Attached** X **None** ____

I approve publication of the *Federal Register* notice denying the petition for rulemaking, subject to the attached edits.

Entered in "STARS"
Yes X
No ____

SIGNATURE

11/7/17

DATE

JMB EDITS

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-15; NRC-2015-0264]

Agency Procedures for Responding to Adverse Court Decisions and Addressing Funding Shortfalls

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted on October 22, 2015, by Jeffrey M. Skov (the petitioner), and supplemented on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017. The petition was docketed by the NRC on November 10, 2015, and was assigned Docket No. PRM-2-15. The petitioner requests that the NRC amend its rules of practice to establish procedures for responding to adverse court decisions and to annually report to the public each instance where the NRC does not receive "sufficient funds reasonably necessary to implement in good faith its statutory mandates." The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.

DATES: The docket for the petition for rulemaking, PRM-2-15, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

of the agency as a 'trusted, independent, transparent, and effective nuclear regulator;' and (5) collateral fiscal impacts."

On February 17, 2016 (81 FR 8021), the NRC published a notice of docketing of PRM-2-15. The NRC elected not to request public comment on PRM-2-15 because the petition was sufficiently comprehensive for the NRC to address the issues contained therein. Accordingly, there were no public comments on this petition.

II. Reasons for Denial

In the original petition and subsequent submittals, the petitioner ~~focuses on the outcome of the *Aiken County* decision and perceived agency inaction with regard to the court's ruling.~~ raises concerns regarding NRC's response to adverse court decisions. As discussed further, the NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the proposed requirements. The NRC took into account the 10 CFR 2.803(h)(1) considerations for an agency determination on a petition for rulemaking with particular attention to § 2.803(h)(1)(vi), relevant agency policies and current practice.

The NRC is denying further consideration of the petitioner's first proposed rule because it does not present a practical process for agency accountability and the NRC already has the tools in place to provide for independent evaluation of agency actions. The petitioner's proposed rule presents the goal of requiring the agency to reflect upon the reasons for a loss it has sustained in court and to implement corrective actions in light of any lessons learned. However, for the reasons discussed below, the proposed rule is neither necessary nor appropriate for meeting this goal.

With regard to the trigger for the proposed rule—a finding by a court of competent jurisdiction that the NRC violated applicable law—adverse court decisions that relate to the

NRC's licensing responsibilities do not necessarily reflect misconduct. Rather, the NRC's losses ordinarily have involved a failure to explain the basis for a technical conclusion,[1] a request for further development of the administrative record,[2] or a court's determination that the legal position that the NRC has adopted on a point of law is incorrect.[3] In such circumstances, the NRC's response to judicial direction is transparent so that the public is able to see how the agency has addressed the concerns in the decision.[4] Indeed, after the *Aiken County* decision was rendered by the D.C. Circuit Court of Appeals, the Commission responded by soliciting the views of all participants involved and issuing an order detailing how the agency would continue with the licensing process. *See U.S. Department of Energy* (High-Level Waste Repository), CLI-13-08, 78 NRC 219 (2013). This included a direction to staff to complete and issue the Safety Evaluation Report associated with the construction authorization application and make associated documents available on the NRC's recordkeeping system.

~~Furthermore, the factual circumstances associated with *Aiken County* were unique and involved a writ of mandamus challenging a decision involving a highly controversial subject. These circumstances are unlikely to recur in any future judicial losses by the agency. This is particularly the case given that~~ Moreover, the vast majority of licensing cases that result in federal court litigation have already been the subject of litigation before the Atomic Safety and Licensing Boards and the Commission, such that opportunities to identify deficiencies have been provided through the Commission's internal adjudicatory process. Further, the Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions and the need for any responsive action to ensure compliance

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[1] *See, e.g. Shieldalloy Metallurgical Corp. v. NRC*, 707 F.3d 371 (D.C. Cir. 2013); *Honeywell International, Inc. v. NRC*, 628 F.3d 568 (D.C. Cir. 2010).
[2] *See, e.g., Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013).
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[4] *See, e.g. Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-06, 78 NRC 155 (2013); *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 NRC 1 (2013); Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, Draft Environmental Assessment and Finding of No Significant Impact, 78 FR 20144 (April 3, 2013); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007).

with the holding. In addition, OGC will provide advice on the impact, if any, of that decision on any current and future NRC decisionmaking. Given these facts, the additional processes in the proposed rule are not necessary.

In addition, the petitioner's proposed rule would require an independent evaluation of agency action in light of an adverse court decision. The NRC's Office of the Inspector General, however, already has the authority to perform that functionserves that purpose. It is tThe Inspector General's (IG's) is authorizedresponsibility "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the agency in which the office is established. *See* 5 United States Code (U.S.C.) App 3, § 4(a)(1). This responsibility includes reporting "to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *See id.* § 4(d). The IG prepares a semiannual report to Congress which includes "a description of significant problems, abuses, and deficiencies relating to the administration of programs" and agency operations. *See id.* § 5(a)(1). Notably, this report includes "a description of the recommendations for corrective action made by the [Office of the Inspector General] during the reporting periods with respect to significant problems, abuses, or deficiencies." *See id.* § 5(a)(2).[5] The IG may initiate an investigation upon the request of an employee or member of the public. Although investigation by the IG is not necessarily precipitated by a specific event, the duties and abilities of the IG provide the authority and flexibility to investigate a wide range of agency action. Therefore, the proposed rule essentially requests the creation of a process of independent investigation that is duplicative of the one that already exists.[6]

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[6] In additional submissions to the NRC, the petitioner emphasized the same or similar arguments for the implementation of the proposed rules. His March 1, 2017 submission notes that the IG's Office did not prevent the statutory violation that led to the *Aiken County* proceeding. However, there is little explanation as to why the implementation of a process that essentially duplicates that of the independent investigative authority of the Office of the Inspector General would serve to effectively and efficiently eliminate the possibility of a violation in the future. Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on

The NRC therefore denies further consideration of the petitioner's first proposed rule for the reasons stated.

The NRC is denying further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance. ~~The~~ OMB Circular A-11 directs agencies to withhold pre-decisional materials underlying budget deliberations. *See* OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, 22-1 (July 2016). ~~Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB.~~ Circular A-11 directs agencies "not [to] release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside of the Executive Branch" unless otherwise allowed under the Circular. Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions and the Executive Branch communications underlying those decisions. On the basis of our practice of compliance with OMB guidance, the NRC will not ~~consider~~ proceed with the petitioner's proposed rule ~~in the rulemaking process~~.

The arguments presented by the petitioner focus heavily on the outcome and safety consequences of the *Aiken County* decision, but they fail to justify the need for additional processes in the NRC's regulations. ~~The decision to engage in rulemaking on any issue is dependent on the safety, environmental, or security concerns that have been raised.~~ In light of the processes currently in place, the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns. ~~Given the small benefit to the agency's statutory mission, it is unlikely that, even if the rulemaking proposed were evaluated under the NRC process for determining rulemaking priorities, it would have sufficient priority to receive~~

~~resources to conduct such a rulemaking.~~ Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.[7]

With regard to the petitioner's concerns about agency inaction with respect to Yucca Mountain, the NRC has used virtually all of the remaining funds appropriated through fiscal year 2011 by Congress for the Yucca Mountain project to further review the application, consistent with the *Aiken County* decision and the Commission's Order in response to the case. Among other things, the NRC staff completed the Safety Evaluation Report and a Final Supplement to DOE's Environmental Impact Statement for the Yucca Mountain geologic repository. The NRC staff also placed millions of items of discovery material from the adjudicatory proceeding relating to the application in the public portion of the agency's online records collection. ~~Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.~~[8]

III. Conclusion

For the reasons ~~cited in this document~~discussed above, the NRC is denying PRM-2-15. The petition failed to identify a need for the proposed rules. Further, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with current agency policies and practice.

Dated at Rockville, Maryland, this xxth day of Xxxxx, 2017.

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[7] The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).

[8] ~~The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).~~

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Burns

SUBJECT: SECY-17-0103: Denial of Petition for Rulemaking on Agency Procedure for Responding to Adverse Court Decisions and Addressing Funding Shortfalls (PRM-2-15; NRC-2015-0264)

Approved X **Disapproved** ____ **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** X **Attached** X **None** ____

I approve the NRC staff's recommendation to deny PRM-2-15, subject to the edits indicated in the attached.

Signature

20 December 2017
Date

Entered in STARS
Yes X
No ____

[7590-01-P]

SGB Edits

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-15; NRC-2015-0264]

Agency Procedures for Responding to Adverse Court Decisions and Addressing Funding Shortfalls

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted on October 22, 2015, by Jeffrey M. Skov (the petitioner), and supplemented on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017. The petition was docketed by the NRC on November 10, 2015, and was assigned Docket No. PRM-2-15. The petitioner requests that the NRC amend its rules of practice to establish procedures for responding to adverse court decisions and to annually report to the public each instance where the NRC does not receive "sufficient funds reasonably necessary to implement in good faith its statutory mandates." The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.

DATES: The docket for the petition for rulemaking, PRM-2-15, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Please refer to Docket ID NRC-2015-0264 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2015-0264. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at http://www.nrc.gov/reading-rm/adams.html. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the SUPPLEMENTARY INFORMATION section. The petition is available in ADAMS under Accession No. ML15314A075.
- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Olivia Mikula, Office of the General Counsel, telephone: 301-287-9107; e-mail: Olivia.Mikula@nrc.gov, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001.

SUPPLEMENTARY INFORMATION:

I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking – requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. The NRC received a PRM from Mr. Jeffrey M. Skov on October 22, 2015, and supplemental information from the petitioner on December 7, 2015 (ADAMS Accession No. ML15342A005), March 1, 2016 (ADAMS Accession No. ML16063A026), March 21, 2016 (ADAMS Accession No. ML16082A020), and March 1, 2017 (ADAMS Accession Nos. ML17111A673 and ML17111A657). In the PRM and associated supplements, the petitioner requests that the NRC amend 10 CFR Part 2, "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates.

In his PRM, the Petitioner raises concerns about the NRC's independence, its mission-related functions, and its commitment to transparency in light of the adverse decision *In re Aiken County*. *See In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013). In that case, a group of individuals and government organizations filed a petition for writ of mandamus against the NRC in the United States Court of Appeals for the District of Columbia Circuit. The *Aiken County* petitioners challenged the NRC's decision to cease review and consideration of the license application filed by the U.S. Department of Energy (DOE) to construct a geologic repository at Yucca Mountain, Nevada, and claimed that this decision constituted agency action that was unlawfully withheld or unreasonably delayed. In August 2013, the court issued a decision granting the petition for writ of mandamus~~rejecting the agency's position~~ and concluding that the NRC was "defying a law enacted by Congress, and . . . doing so without any legal basis." *Id.*

The court directed the NRC to continue the proceeding and to make whatever progress it could with the remaining funds. According to Mr. Skov, the *Aiken County* decision raises concerns about the NRC's independence, its mission-related functions, and its commitment to transparency.

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II. Reasons for Denial

In the original petition and subsequent submittals, the petitioner focuses on the outcome of the *Aiken County* decision and perceived agency inaction with regard to the court's ruling. As discussed further, the NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the proposed requirements. The NRC took into account the 10 CFR 2.803(h)(1) considerations for an agency determination on a petition for rulemaking with particular attention to § 2.803(h)(1)(vi), relevant agency policies and current practice.

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losses ordinarily have involved a failure to explain the basis for a technical conclusion,[1] a request for further development of the administrative record,[2] or a court's determination that the legal position that the NRC has adopted on a point of law is incorrect.[3] In such circumstances, the NRC's response to judicial direction is transparent so that the public is able to see how the agency has addressed the concerns in the decision.[4] Indeed, after the *Aiken County* decision was rendered by the D.C. Circuit Court of Appeals, the Commission responded by soliciting the views of all participants involved and issuing an order detailing how the agency would continue with the licensing process. *See U.S. Department of Energy* (High-Level Waste Repository), CLI-13-08, 78 NRC 219 (2013). This included a direction to staff to complete and issue the Safety Evaluation Report associated with the construction authorization application and make associated documents available on the NRC's recordkeeping system.

Furthermore, the factual circumstances associated with *Aiken County* were unique and involved a writ of mandamus challenging a decision involving a highly controversial subject. These circumstances are unlikely to recur ~~in any future judicial losses by the agency~~. ~~This is particularly the case given that t~~The vast majority of NRC licensing cases that result in federal court litigation have already been the subject of litigation before the Atomic Safety and Licensing Boards and the Commission, such that opportunities to identify deficiencies have been provided through the Commission's internal adjudicatory process. Further, the Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions and the need for any responsive action to ensure compliance with the holding. In addition, OGC will provide advice on the impact, if any, of that decision on any current and

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[4] *See, e.g. Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-06, 78 NRC 155 (2013); *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 NRC 1 (2013); Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, Draft Environmental Assessment and Finding of No Significant Impact, 78 FR 20144 (April 3, 2013); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007).

future NRC decisionmaking. Given these facts, the additional processes in the proposed rule are not necessary.

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Commented [SGB1]: Please update the footnote reference prior to issuance, as necessary.

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[5] Office of the Inspector General reports and associated corrective action recommendations for the NRC are available on the public website. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated ~~May 3~~October 19, 2017).

[6] In additional submissions to the NRC, the petitioner emphasized the same or similar arguments for the implementation of the proposed rules. His March 1, 2017 submission notes that the IG's Office did not prevent the statutory violation that led to the *Aiken County* proceeding. However, there is little explanation as to why the implementation of a process that essentially duplicates that of the independent investigative authority of the Office of the Inspector General would serve to effectively and efficiently eliminate the possibility of a violation in the future. Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on DOE's Yucca Mountain application and the *Aiken County* court was aware of the findings. *See In re Aiken Cty.*, 725 F.3d at 268 (Randolph, J., concurring) (citing U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA

Similarly, the proposal to seek DOJ review of an adverse decision is not necessary because the DOJ is a party to, or has some involvement in, virtually all of the program-related cases in which the agency is named as a defendant. The Hobbs Act, which is the primary vehicle through which NRC decisions are challenged, requires that the United States be named as a respondent. *See* 28 U.S.C. § 2344. And although the Hobbs Act did not apply to, and the United States was not named as a respondent in, the *Aiken County* proceeding, the NRC consulted with the DOJ in its defense of the case. Moreover, the court specifically requested the views of the United States on several issues, and the United States filed its own brief in response to the court's request. Finally, to the extent the agency is sued directly in federal district court, it is represented by the DOJ both on programmatic matters as well as matters involving agency personnel or procurement. *See, e.g.*, *Brodsky v. NRC*, No. 09-Civ-10594 (LAP), 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015); *Khoury v. Meserve*, 268 F. Supp. 2d 600 (D. Md. 2003). Consequently, the DOJ was well aware of the NRC's filings in the *Aiken County* case specifically and is deeply involved in the NRC's litigation matters generally.

With respect to the codification of the need to make appeals and rehearing decisions in accordance with the Model Rules of Professional Conduct, each NRC attorney is already subject to the disciplinary rules of the bar in which he or she is admitted as well as the courts in which he or she appears. All decisions to seek further review of an adverse ruling are coordinated with the DOJ and, as necessary, the Solicitor General, who are likewise bound by applicable disciplinary rules. It is therefore not necessary to reference the ABA's Model Rules of Professional Conduct in the NRC's regulations.

The NRC therefore denies further consideration of the petitioner's first proposed rule for the reasons stated.

MOUNTAIN REPOSITORY LICENSE APPLICATION 7-10, 17, 44-46 (2011)).

The NRC is denying further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance, which. ~~The OMB Circular A-11~~ directs agencies to withhold pre-decisional materials underlying budget deliberations. *See* OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, 22-1 (July 2016). ~~Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB.~~ Circular A-11 directs agencies "not [to] release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside of the Executive Branch" unless otherwise allowed under the Circular. Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions and the Executive Branch communications underlying those decisions. On the basis of our practice of compliance with OMB guidance, the NRC will not proceed with~~consider~~ the petitioner's proposed rule ~~in the rulemaking process~~.

The arguments presented by the petitioner focus heavily on the outcome and safety consequences of the *Aiken County* decision, but they fail to justify the need for additional processes in the NRC's regulations. The decision to engage in rulemaking on any issue is dependent on the safety, environmental, or security concerns that have been raised. In light of the processes currently in place, the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns. ~~Given the small benefit to the agency's statutory mission, it is unlikely that, even if the rulemaking proposed were evaluated under the NRC process for determining rulemaking priorities, it would have sufficient priority to receive resources to conduct such a rulemaking.~~

With regard to the petitioner's concerns about agency inaction with respect to Yucca Mountain, the NRC has used virtually all of the remaining funds appropriated through fiscal year

2011 by Congress for the Yucca Mountain project to further review the application, consistent with the *Aiken County* decision and the Commission's Order in response to the case. Among other things, the NRC staff completed the Safety Evaluation Report and a Final Supplement to DOE's Environmental Impact Statement for the Yucca Mountain geologic repository. The NRC staffalso placed millions of items of discovery material from the adjudicatory proceeding relating to the application in the public portion of the agency's online records collection. ~~Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.[7]~~

III. Conclusion

For the reasons stated in Section II~~cited in this document~~, the NRC is denying PRM-2-15. The petition failed to identify a need for the proposed rules. Further, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with current agency policies and practice.

Dated at Rockville, Maryland, this xxth day of Xxxxx, 2017.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.

~~[7] The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016 (OIG-16-A-13). *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3October 19, 2017).~~

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SGB Edits

Mr. Jeffrey M. Skov
1321 Cavalier Lane
San Luis Obispo, California 93405

Dear Mr. Skov:

I am responding to your petition for rulemaking (PRM) that you submitted to the U.S. Nuclear Regulatory Commission (NRC) on October 22, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15314A075) and supplemented on December 7, 2015 (ADAMS Accession No. ML15342A005), March 1, 2016 (ADAMS Accession No. ML16063A026), March 21, 2016 (ADAMS Accession No. ML16082A020), and March 1, 2017 (ADAMS Accession Nos. ML17111A673 and ML17111A657). You requested that the NRC modify its regulations in Part 2 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates. The NRC docketed the PRM on November 10, 2015, under Docket No. PRM-2-15 and published a notice of docketing in the *Federal Register* on February 17, 2016 (81 FR 8021).

The NRC is denying your petition because the proposed rules would impose additional processes unnecessary in light of existing agency practices and it would require the NRC to disclose annually certain budget decisions and the underlying communications within the Executive Branch leading to those decisions, contrary to Office of Management and Budget guidance. The reasons for the denial are discussed in detail in the enclosed notice, which will be published in the *Federal Register*.

The docket for this petition is closed.

You may direct any questions regarding this matter to Olivia Mikula in the NRC's, Office of the General Counsel. Ms. Mikula may be reached by, telephone at: 301-287-9107 or by, email at: Olivia.Mikula@nrc.gov, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosure:
Federal Register notice

Enclosure:
Federal Register notice

ADAMS Accession Nos: PKG: ML17209A322; LTR to Petitioner: ML17209A345; FRN: ML17209A348
*Concurrence via email

OFFICE	OCA	OCFO	OCAA	OGC/GCLR/LC	OGC/GCLR/RMR
NAME	CWolf *	JJohnson *	EKrause *	MClark *	MSpencer *
DATE	08/01/17	08/07/17	08/08/17	08/30/17	08/16/17
OFFICE	OGC	OGC	ADM/DAS/RADB	OGC	
NAME	MZobler *	BJones *	CBladey *	MDoane	
DATE	09/13/17	09/19/17	09/15/17	10/13/17	

OFFICIAL RECORD COPY

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Caputo

SUBJECT: SECY-17-0103: Denial of Petition for Rulemaking on Agency Procedure for Responding to Adverse Court Decisions and Addressing Funding Shortfalls (PRM-2-15; NRC-2015-0264)

Approved X **Disapproved** ____ **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** X **Attached** X **None** ____

I approve publication of the *Federal Register* notice denying the petition for rulemaking, subject to the attached edits.

Entered in STARS
Yes X
No ____

Signature

9-5-18
Date

AC EDITS [7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-15; NRC-2015-0264]

Agency Procedures for Responding to Adverse Court Decisions and Addressing Funding Shortfalls

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted on October 22, 2015, by Jeffrey M. Skov (the petitioner), and supplemented on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017. The petition was docketed by the NRC on November 10, 2015, and was assigned Docket No. PRM-2-15. The petitioner requests that the NRC amend its rules of practice to establish procedures for responding to adverse court decisions and to annually report to the public each instance where the NRC does not receive "sufficient funds reasonably necessary to implement in good faith its statutory mandates." The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.

DATES: The docket for the petition for rulemaking, PRM-2-15, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Please refer to Docket ID NRC-2015-0264 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2015-0264. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at http://www.nrc.gov/reading-rm/adams.html. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the SUPPLEMENTARY INFORMATION section. The petition is available in ADAMS under Accession No. ML15314A075.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Olivia Mikula, Office of the General Counsel, telephone: 301-287-9107; e-mail: Olivia.Mikula@nrc.gov, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001.

SUPPLEMENTARY INFORMATION:

I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking – requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. The NRC received a PRM from Mr. Jeffrey M. Skov on October 22, 2015, and supplemental information from the petitioner on December 7, 2015 (ADAMS Accession No. ML15342A005), March 1, 2016 (ADAMS Accession No. ML16063A026), March 21, 2016 (ADAMS Accession No. ML16082A020), and March 1, 2017 (ADAMS Accession No. ML17111A673). In the PRM and associated supplements, the petitioner requests that the NRC amend 10 CFR Part 2, "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates.

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[6] In additional submissions to the NRC, the petitioner emphasized the same or similar arguments for the implementation of the proposed rules. His March 1, 2017 submission notes that the IG's Office did not prevent the statutory violation that led to the *Aiken County* proceeding. However, there is little explanation as to why the implementation of a process that essentially duplicates that of the independent investigative authority of the Office of the Inspector General would serve to effectively and efficiently eliminate the possibility of a violation in the future. Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on DOE's Yucca Mountain application and the *Aiken County* court was aware of the findings. *See In re Aiken Cty.*, 725 F.3d at 268 (Randolph, J., concurring) (citing U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA

Similarly, the proposal to seek DOJ review of an adverse decision is not necessary because the DOJ is a party to, or has some involvement in, virtually all of the program-related cases in which the agency is named as a defendant. The Hobbs Act, which is the primary vehicle through which NRC decisions are challenged, requires that the United States be named as a respondent. *See* 28 U.S.C. § 2344. And although the Hobbs Act did not apply to, and the United States was not named as a respondent in, the *Aiken County* proceeding, the NRC consulted with the DOJ in its defense of the case. Moreover, the court specifically requested the views of the United States on several issues, and the United States filed its own brief in response to the court's request. Finally, to the extent the agency is sued directly in federal district court, it is represented by the DOJ both on programmatic matters as well as matters involving agency personnel or procurement. *See, e.g.*, *Brodsky v. NRC*, No. 09-Civ-10594 (LAP), 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015); *Khoury v. Meserve*, 268 F. Supp. 2d 600 (D. Md. 2003). Consequently, the DOJ was well aware of the NRC's filings in the *Aiken County* case specifically and is deeply involved in the NRC's litigation matters generally.

With respect to the codification of the need to make appeals and rehearing decisions in accordance with the Model Rules of Professional Conduct, each NRC attorney is already subject to the disciplinary rules of the bar in which he or she is admitted as well as the courts in which he or she appears. All decisions to seek further review of an adverse ruling are coordinated with the DOJ and, as necessary, the Solicitor General, who are likewise bound by applicable disciplinary rules. It is therefore not necessary to reference the ABA's Model Rules of Professional Conduct in the NRC's regulations.

The NRC therefore denies further consideration of the petitioner's first proposed rule for the reasons stated.

MOUNTAIN REPOSITORY LICENSE APPLICATION 7-10, 17, 44-46 (2011)).

The NRC is denying further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance. ~~The~~ OMB Circular A-11 directs agencies to withhold pre-decisional materials underlying budget deliberations. *See* OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, 22-1 (July 2016). ~~Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB.~~ Circular A-11 directs agencies "not [to] release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside of the Executive Branch" unless otherwise allowed under the Circular. Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions and the Executive Branch communications underlying those decisions. On the basis of our practice of compliance with OMB guidance, the NRC will not ~~consider~~ proceed with the petitioner's proposed rule ~~in the rulemaking process~~.

The arguments presented by the petitioner focus heavily on the outcome and safety consequences of the *Aiken County* decision, but they fail to justify the need for additional processes in the NRC's regulations. ~~The decision to engage in rulemaking on any issue is dependent on the safety, environmental, or security concerns that have been raised.~~ In light of the processes currently in place, the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns. ~~Given the small benefit to the agency's statutory mission, it is unlikely that, even if the rulemaking proposed were evaluated under the NRC process for determining rulemaking priorities, it would have sufficient priority to receive resources to conduct such a rulemaking.~~

With regard to the petitioner's concerns about agency inaction with respect to Yucca Mountain, the NRC has used virtually all of the remaining funds appropriated through fiscal year

2011 by Congress for the Yucca Mountain project to further review the application, consistent with the *Aiken County* decision and the Commission's Order in response to the case. Among other things, the NRC completed the Safety Evaluation Report and a Final Supplement to DOE's Environmental Impact Statement for the Yucca Mountain geologic repository. The NRC also placed millions of items of discovery material from the adjudicatory proceeding relating to the application in the public portion of the agency's online records collection. ~~Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.~~[7]

III. Conclusion

For the reasons ~~cited in this document~~discussed above, the NRC is denying PRM-2-15. The petition failed to identify a need for the proposed rules. Further, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with current agency policies and practice.

Dated at Rockville, Maryland, this xxth day of Xxxxx, 2017.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.

~~[7] The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).~~

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Wright

SUBJECT: SECY-17-0103: Denial of Petition for Rulemaking on Agency Procedure for Responding to Adverse Court Decisions and Addressing Funding Shortfalls (PRM-2-15; NRC-2015-0264)

Approved X **Disapproved** ____ **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** X **Attached** X **None** ____

I approve the staff's recommendation to deny PRM-2-15, subject to the attached edits.

Entered in STARS
Yes ✓
No ____

Signature

9/5/18
Date

DAW Edits [7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-15; NRC-2015-0264]

Agency Procedures for Responding to Adverse Court Decisions and Addressing Funding Shortfalls

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted on October 22, 2015, by Jeffrey M. Skov (the petitioner), and supplemented on December 7, 2015, March 1, 2016, March 21, 2016, and March 1, 2017. The petition was docketed by the NRC on November 10, 2015, and was assigned Docket No. PRM-2-15. The petitioner requests that the NRC amend its rules of practice to establish procedures for responding to adverse court decisions and to annually report to the public each instance where the NRC does not receive "sufficient funds reasonably necessary to implement in good faith its statutory mandates." The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.

DATES: The docket for the petition for rulemaking, PRM-2-15, is closed on **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

SUPPLEMENTARY INFORMATION:

I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking – requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. The NRC received a PRM from Mr. Jeffrey M. Skov on October 22, 2015, and supplemental information from the petitioner on December 7, 2015 (ADAMS Accession No. ML15342A005), March 1, 2016 (ADAMS Accession No. ML16063A026), March 21, 2016 (ADAMS Accession No. ML16082A020), and March 1, 2017 (ADAMS Accession Nos. ML17111A673 and ML17111A657). In the PRM and associated supplements, the petitioner requests that the NRC amend 10 CFR Part 2, "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates.

In his PRM, the Petitioner raises concerns about the NRC's independence, its mission-related functions, and its commitment to transparency in light of the adverse decision *In re Aiken County*. *See In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013). In that case, a group of individuals and government organizations filed a petition for writ of mandamus against the NRC in the United States Court of Appeals for the District of Columbia Circuit. The *Aiken County* petitioners challenged the NRC's decision to cease review and consideration of the license application filed by the U.S. Department of Energy (DOE) to construct a geologic repository at Yucca Mountain, Nevada, and claimed that this decision constituted agency action that was unlawfully withheld or unreasonably delayed. In August 2013, the court issued a decision ~~rejecting the agency's position~~granting the petition for writ of mandamus and concluding that the NRC was "defying a law enacted by Congress, and . . . doing so without any legal basis." *Id.*

of the agency as a 'trusted, independent, transparent, and effective nuclear regulator;' and (5) collateral fiscal impacts."

On February 17, 2016 (81 FR 8021), the NRC published a notice of docketing of PRM-2-15. The NRC elected not to request public comment on PRM-2-15 because the petition was sufficiently comprehensive for the NRC to address the issues contained therein. Accordingly, there were no public comments on this petition.

II. Reasons for Denial

In the original petition and subsequent submittals, the petitioner focuses on the outcome of the *Aiken County* decision and perceived agency inaction with regard to the court's ruling. As discussed further, the NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the proposed requirements. The NRC took into account the 10 CFR 2.803(h)(1) considerations for an agency determination on a petition for rulemaking with particular attention to § 2.803(h)(1)(vi), relevant agency policies and current practice.

The NRC is denying further consideration of the petitioner's first proposed rule because it does not present a practical process for agency accountability and because the NRC already has the tools in place to provide for independent evaluation of agency actions. The petitioner's proposed rule presents the goal of requiring the agency to reflect upon the reasons for a loss it has sustained in court and to implement corrective actions in light of any lessons learned. However, for the reasons discussed below, the proposed rule is neither necessary nor appropriate for meeting this goal.

With regard to the trigger for the proposed rule—a finding by a court of competent jurisdiction that the NRC violated applicable law—adverse court decisions that relate to the NRC's licensing responsibilities do not necessarily reflect misconduct. Rather, the NRC's

losses ordinarily have involved a failure to explain the basis for a technical conclusion,[1] a request for further development of the administrative record,[2] or a court's determination that the legal position that the NRC has adopted on a point of law is incorrect.[3] In such circumstances, the NRC's response to judicial direction is transparent so that the public is able to see how the agency has addressed the concerns in the decision.[4] Indeed, after the *Aiken County* decision was rendered by the D.C. Circuit Court of Appeals, the Commission responded by soliciting the views of all participants involved and issuing an order detailing how the agency would continue with the licensing process. *See U.S. Department of Energy* (High-Level Waste Repository), CLI-13-08, 78 NRC 219 (2013). This included a direction to staff to complete and issue the Safety Evaluation Report associated with the construction authorization application and make associated documents available on the NRC's recordkeeping system.

Furthermore, the factual circumstances associated with *Aiken County* were unique and involved a writ of mandamus challenging a decision involving a highly controversial subject. These circumstances are unlikely to recur ~~in any future judicial losses by the agency~~. ~~This is particularly the case given that t~~The vast majority of NRC licensing cases that result in federal court litigation have already been the subject of litigation before the Atomic Safety and Licensing Boards and the Commission, such that opportunities to identify deficiencies have been provided through the Commission's internal adjudicatory process. Further, the Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions and the need for any responsive action to ensure compliance with the holding. In addition, OGC will provide advice on the impact, if any, of that decision on any current and

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[1] *See, e.g. Shieldalloy Metallurgical Corp. v. NRC*, 707 F.3d 371 (D.C. Cir. 2013); *Honeywell International, Inc. v. NRC*, 628 F.3d 568 (D.C. Cir. 2010).
[2] *See, e.g., Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013).
[3] *See, e.g., San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).
[4] *See, e.g. Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-06, 78 NRC 155 (2013); *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 NRC 1 (2013); Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, Draft Environmental Assessment and Finding of No Significant Impact, 78 FR 20144 (April 3, 2013); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007).

future NRC decisionmaking. Given these facts, the additional processes in the proposed rule are not necessary.

In addition, the petitioner's proposed rule would require an independent evaluation of agency action in light of an adverse court decision. The NRC's Office of the Inspector General, however, already has the authority to perform that function~~serves that purpose~~. ~~It is t~~The Inspector General~~'s~~ (IG~~'s~~) ~~responsibility~~ is authorized "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the agency in which the office is established. *See* 5 United States Code (U.S.C.) App 3, § 4(a)(1). This responsibility includes reporting "to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *See id.* § 4(d). The IG prepares a semiannual report to Congress which includes "a description of significant problems, abuses, and deficiencies relating to the administration of programs" and agency operations. *See id.* § 5(a)(1). Notably, this report includes "a description of the recommendations for corrective action made by the [Office of the Inspector General] during the reporting periods with respect to significant problems, abuses, or deficiencies." *See id.* § 5(a)(2).[5] The IG may initiate an investigation upon the request of an employee or member of the public. Although investigation by the IG is not necessarily precipitated by a specific event, the duties and abilities of the IG provide the authority and flexibility to investigate a wide range of agency action. Therefore, the proposed rule essentially requests the creation of a process of independent investigation that is duplicative of the one that already exists.[6]

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[5] Office of the Inspector General reports and associated corrective action recommendations for the NRC are available on the public website. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).

[6] In additional submissions to the NRC, the petitioner emphasized the same or similar arguments for the implementation of the proposed rules. His March 1, 2017 submission notes that the IG's Office did not prevent the statutory violation that led to the *Aiken County* proceeding. However, there is little explanation as to why the implementation of a process that essentially duplicates that of the independent investigative authority of the Office of the Inspector General would serve to effectively and efficiently eliminate the possibility of a violation in the future. Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on DOE's Yucca Mountain application and the *Aiken County* court was aware of the findings. *See In re Aiken Cty.*, 725 F.3d at 268 (Randolph, J., concurring) (citing U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA

The NRC is denying further consideration of the petitioner's second proposed rule because it is the NRC's practice to refrain from disclosing pre-decisional budgetary information, consistent with Office of Management and Budget (OMB) guidance. ~~The~~ OMB Circular A-11 directs agencies to withhold pre-decisional materials underlying budget deliberations. *See* OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, 22-1 (July 2016). ~~Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB.~~ Circular A-11 directs agencies "not [to] release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside of the Executive Branch" unless otherwise allowed under the Circular. Communications within the Executive Branch that ultimately lead to the President's budgetary decisions are not disclosed either by the NRC or by OMB. The petitioner's proposed rule would require the NRC to disclose annually certain budget decisions and the Executive Branch communications underlying those decisions. On the basis of our practice of compliance with OMB guidance, the NRC will not ~~consider~~ proceed with the petitioner's proposed rule ~~in the rulemaking process~~.

The arguments presented by the petitioner focus heavily on the outcome and safety consequences of the *Aiken County* decision, but they fail to justify the need for additional processes in the NRC's regulations. The decision to engage in rulemaking on any issue is dependent on the safety, environmental, or security concerns that have been raised. In light of the processes currently in place, the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns. ~~Given the small benefit to the agency's statutory mission, it is unlikely that, even if the rulemaking proposed were evaluated under the NRC process for determining rulemaking priorities, it would have sufficient priority to receive~~

~~resources to conduct such a rulemaking.~~ Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.[7]

With regard to the petitioner's concerns about agency inaction with respect to Yucca Mountain, the NRC has used virtually all of the remaining funds appropriated through fiscal year 2011 by Congress for the Yucca Mountain project to further review the application, consistent with the *Aiken County* decision and the Commission's Order in response to the case. Among other things, the NRC staff completed the Safety Evaluation Report and a Final Supplement to DOE's Environmental Impact Statement for the Yucca Mountain geologic repository. The NRC staff also placed millions of items of discovery material from the adjudicatory proceeding relating to the application in the public portion of the agency's online records collection. ~~Further, the NRC continues to be committed to its safety mission and to promoting a positive safety culture.~~[8]

III. Conclusion

For the reasons discussed above~~cited in this document~~, the NRC is denying PRM-2-15. The petition failed to identify a need for the proposed rules. Further, the NRC evaluated the petition in light of the considerations described in § 2.803(h)(1) and found the petition inconsistent with current agency policies and practice.

Dated at Rockville, Maryland, this xxth day of Xxxxx, 2018~~7~~.

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[7] The NRC has processes to self-assess and promote the safety culture of the agency. In conjunction with the IG's Office, the NRC participates in a safety culture climate survey to evaluate the comfort of the agency's workforce to raise safety concerns through these processes. The IG's Office appraises the outcome of these surveys in reports and provides corrective action recommendations, where appropriate. The most recent IG report on this topic was released on April 15, 2016. *See* U.S. NRC, *OIG Reports*, available at https://www.nrc.gov/reading-rm/doc-collections/insp-gen/ (last updated May 3, 2017).

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

DAW Edits

Mr. Jeffrey M. Skov
1321 Cavalier Lane
San Luis Obispo, California 93405

Dear Mr. Skov:

I am responding to your petition for rulemaking (PRM) that you submitted to the U.S. Nuclear Regulatory Commission (NRC) on October 22, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15314A075) and supplemented on December 7, 2015 (ADAMS Accession No. ML15342A005), March 1, 2016 (ADAMS Accession No. ML16063A026), March 21, 2016 (ADAMS Accession No. ML16082A020), and March 1, 2017 (ADAMS Accession Nos. ML17111A673 and ML14111A657). You requested that the NRC modify its regulations in Part 2 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Agency rules of practice and procedure," to establish procedures for (1) responding to adverse court decisions, and (2) annually reporting to the public each instance where the NRC does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates. The NRC docketed the PRM on November 10, 2015, under Docket No. PRM-2-15 and published a notice of docketing in the *Federal Register* on February 17, 2016 (81 FR 8021).

The NRC is denying your petition because the proposed rules would impose additional processes unnecessary in light of existing agency practices and it would require the NRC to disclose annually certain budget decisions and the underlying communications within the Executive Branch leading to those decisions, contrary to Office of Management and Budget guidance. The reasons for the denial are discussed in detail in the enclosed notice, which will be published in the *Federal Register*.

The docket for this petition is closed.

You may direct any questions regarding this matter to Olivia Mikula, Office of the General Counsel, telephone: 301-287-9107, email: Olivia.Mikula@nrc.gov, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosure:
Federal Register notice

Enclosure:
Federal Register notice

ADAMS Accession Nos: PKG: ML17209A322; LTR to Petitioner: ML17209A345; FRN: ML17209A348
*Concurrence via email

OFFICE	OCA	OCFO	OCAA	OGC/GCLR/LC	OGC/GCLR/RMR
NAME	CWolf *	JJohnson *	EKrause *	MClark *	MSpencer *
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OFFICE	OGC	OGC	ADM/DAS/RADB	OGC	
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DATE	09/13/17	09/19/17	09/15/17	10/13/17	

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