



[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[NRC-2020-0033]

RIN 3150-AK46

Non-Substantive Amendments to Adjudicatory Proceeding Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to revise and clarify the agency's rules of practice and procedure to reflect current Atomic Safety and Licensing Board Panel practice, Commission case law, and a decision of the Supreme Court of the United States and to enhance consistency within the NRC's regulations.

DATES: This final rule is effective **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, unless significant adverse comments are received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. If the direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the *Federal Register*. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Comments received on this direct final rule will also be considered to be comments on a

companion proposed rule published in the Proposed Rules section of this issue of the *Federal Register*.

ADDRESSES: You may submit comments by any of the following methods:

- **Federal Rulemaking Web Site:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0033. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407; e-mail: Dawn.Forder@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **E-mail comments to:** Rulemaking.Comments@nrc.gov. If you do not receive an automatic e-mail reply confirming receipt, then contact us at 301-415-1677.

- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Ian Irvin, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; telephone: 301-287-9193; e-mail: 2020_Part_2_Rulemaking@usnrc.onmicrosoft.com.

SUPPLEMENTARY INFORMATION:

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC-2020-0033 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 <https://www.regulations.gov> and search for Docket ID NRC-2020-0033.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's PDR reference staff at 1-800-397-4209, at 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 this document.
- **Attention:** The Public Document Room (PDR), where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via e-mail at PDR.Resource@nrc.gov or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking Web Site (<https://www.regulations.gov>). Please include Docket ID NRC-2020-0033 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is using the “direct final rule procedure” for this rule. This amendment to the rule will become effective on **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. However, if the NRC receives significant adverse comments on this direct final rule by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rules section of

this issue of the *Federal Register*. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

3) The comment causes the NRC to make a change (other than editorial) to the rule.

For detailed instructions on filing comments, please see the ADDRESSES section of this document.

III. Background

The NRC's regulations governing the conduct of adjudicatory proceedings before the agency are contained in part 2 of title 10 of the *Code of Federal Regulations* (10 CFR), "Agency Rules of Practice and Procedure." Periodically, the NRC has amended these rules, including adopting changes in 2004 to enhance efficiency; in 2012 to promote fairness, efficiency, and openness; and in 2016 to reflect technological advances and current agency practice. Since the last update to the agency's rules of practice and procedure, the NRC has identified additional provisions that should be updated to reflect technological advances and current agency practice. This direct final rule makes those updates and clarifies that any administrative law judge designated to preside over an NRC adjudication must be appointed by the Commission consistent with the Supreme Court decision in *Lucia v. Securities and Exchange Commission* (138 S. Ct. 2044 (2018)).

IV. Discussion

Appointment of Administrative Law Judges

This direct final rule revises § 2.313(a) to clarify that any Administrative Law Judge (ALJ) designated to preside in a 10 CFR part 2 proceeding must be appointed by the Commission, consistent with the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*. Part 2 permits the use of an ALJ as presiding officer in an NRC adjudication, although the agency does not currently employ any ALJs (members of the Atomic Safety and Licensing Board Panel are not ALJs but are administrative judges whose appointments are already approved by the Commission). In addition, this direct final rule updates the definition of "administrative law judge" in § 2.4, which cites an

outdated section of the Administrative Procedure Act, by citing to the correct statutory authority for the appointment of ALJs.

Timely Renewal

This direct final rule revises § 2.109 by adding new paragraph (e), which provides that if an Independent Spent Fuel Storage Installation licensee submits a renewal application at least 2 years before the license expires, the existing license will continue in effect until a final decision is reached on the application. New paragraph (e) provides consistency between §§ 2.109 and 72.42(c) of the NRC's regulations. Conforming changes are made to § 2.109(a) to reflect the addition of new paragraph (e).

Orders

This direct final rule revises § 2.202 by redesignating paragraph (a)(3) as paragraph (a)(3)(i) and adding a new paragraph (a)(3)(ii), which clarifies that a person other than the recipient of an order under that section who may be adversely affected by the order must meet the requirements of § 2.309 when requesting a hearing. Section 2.202(a)(3)(i) is revised to clarify that the recipient of an order has the right to demand a hearing on all or part of the order within 20 days of the date of the order.

Motions

This direct final rule revises § 2.323 to clarify that the deadlines for general motions do not apply to motions for summary disposition.

Evidentiary Exhibit Submission Requirements

This direct final rule updates the evidentiary exhibit submission requirements to reflect the current practices of using the E-Filing system to submit exhibits unless the

Commission or presiding officer grants an exemption permitting an alternative filing method or unless the filing falls within the scope of § 2.302(g)(1). This direct final rule revises §§ 2.337(d) and 2.711(h) to require that information referenced through hyperlinks must be submitted in its entirety, either in the exhibit or in a separate exhibit, if a party wants that information included in the evidentiary record.

Separation of Functions

This direct final rule revises the separation of functions provision to include employees in the Office of Commission Appellate Adjudication in § 2.348(b)(2). The rule generally prohibits communications between NRC officers or employees engaged in investigative or litigating functions in the proceeding or in a factually related proceeding with respect to a disputed issue in that proceeding. The rule also sets forth various types of communications that are permissible. The direct final rule adds employees in the Office of Commission Appellate Adjudication to the list of Commission adjudicatory employees covered by the exception in paragraph (b)(2) to the general prohibition set forth in paragraph (a).

Deposition Transcripts in Subpart G Proceedings

This direct final rule revises § 2.706(a)(5) for forwarding deposition transcripts to the Commission consistent with the agency's E-filing rules. This revision requires the party that took the deposition to promptly transmit an electronic copy of the deposition to the Secretary of the Commission for entry into the electronic docket.

Part 2 Subpart L Model Milestones

This direct final rule makes a conforming change to the Subpart L Model Milestones in appendix B to 10 CFR part 2 to replace "late-filed contentions" with "new or

amended contentions filed after the deadline.” The NRC issued a final rule in 2012, titled “Amendments to Adjudicatory Process Rules and Related Requirements” (77 FR 46562), to discontinue using the terms “late-filed” or “nontimely” with regard to such contentions and instead use “new or amended contentions filed after the deadline.” The current Subpart L Model Milestones refer to “late-filed contentions” in three places. This direct final rule updates this language to “new or amended contentions filed after the deadline” consistent with the 2012 final rule.

This direct final rule also revises the Subpart L Model Milestones in appendix B to 10 CFR part 2 to separate the model milestone for filing proposed new or amended contentions filed after the deadline and the model milestone for filing motions for summary disposition on previously admitted contentions. This change is made for clarity. New or amended contentions filed after the deadline would continue to be due within 30 days after issuance. Motions for summary disposition on previously admitted contentions would continue to be due within 30 days of the issuance of the SER and any necessary NEPA document.

V. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, “Plain Language in Government Writing,” published June 10, 1998 (63 FR 31883).

VI. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor environmental assessment has been prepared for this final rule.

VII. Paperwork Reduction Act

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

Public Protection Notification

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

VIII. Congressional Review Act

This direct final rule is a rule as defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information, Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants

and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, 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 part 2:

PART 2 – AGENCY RULES OF PRACTICE AND PROCEDURE

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

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note.

Section 2.205(j) also issued under 28 U.S.C. 2461 note.

2. In § 2.4, revise the definition of “*Administrative Law Judge*” to read as follows:

§ 2.4 Definitions.

* * * * *

Administrative Law Judge means an individual appointed by the Commission pursuant to 5 U.S.C. 3105 to conduct proceedings subject to this part.

* * * * *

3. In § 2.109, revise paragraph (a) and add paragraph (e) to read as follows:

§ 2.109 Effect of timely renewal application.

(a) Except for the renewal of licenses identified in paragraphs (b) through (e) of this section, if at least 30 days before the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

* * * * *

(e) If the licensee of an Independent Spent Fuel Storage Installation (ISFSI) licensed under subpart C of part 72 of this chapter files a sufficient application for renewal under § 72.42 of this chapter at least 2 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

4. In § 2.202, redesignate paragraph (a)(3) as paragraph (a)(3)(i) and revise the newly redesignated paragraph, and add paragraph (a)(3)(ii) to read as follows:

§ 2.202 Orders.

(a) * * *

(3)(i) Inform the licensee or any other person to whom the order was issued of their right, within twenty (20) days of the date of the order, or within such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person to whom the order was issued has consented in writing to the order;

(3)(ii) State that a request for a hearing by any other person who may be adversely affected by the order must be made within twenty (20) days of the date of the order, or within such other time as may be specified in the order, and must meet the requirements of § 2.309;

* * * * *

5. In § 2.313, revise paragraph (a)(1) to read as follow:

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

(a) * * *

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

* * * * *

6. In § 2.323, revise paragraphs (a)(2) and (c) to read as follows:

§ 2.323 Motions.

(a) * * *

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

* * * * *

(c) *Answers to motions.* For all written motions, other than motions for summary disposition, within ten (10) days after service of the motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by

affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

* * * * *

7. In § 2.337, revise paragraph (d) to read as follows:

§ 2.337 Evidence at a hearing.

* * * * *

(d) *Exhibits.* Exhibits must be filed through the agency’s E-Filing system, unless the presiding officer grants an exemption permitting an alternative filing method under § 2.302(g)(2) or (g)(3) or unless the filing falls within the scope of § 2.302(g)(1) as not being subject to electronic transmission. When an exhibit is not filed through the E-Filing system, the presiding officer may permit a party to replace with a true copy an original document admitted into evidence. Information that a party references through hyperlinks in an exhibit must be submitted by that party, in its entirety, either as part of the exhibit or as a separate exhibit, for that information to be included in the evidentiary record.

* * * * *

8. In § 2.348, revise paragraph (b)(2) introductory text to read as follows:

§ 2.348 Separation of functions.

* * * * *

(b) * * *

(2) Communications to or from Commissioners, members of their personal staffs, employees of the Office of Commission Appellate Adjudication, Commission

adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding—

* * * * *

9. In § 2.706, revise paragraph (a)(5) to read as follows:

§ 2.706 Depositions upon oral examination and written interrogatories; interrogatories to parties.

(a) * * *

(5) When the testimony is fully transcribed, the deposition must be submitted to the deponent for examination and signature unless he or she is ill, cannot be found, or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign. The deposing party shall promptly transmit an electronic copy of the deposition to the Secretary of the Commission for entry into the electronic docket.

* * * * *

10. In § 2.711, revise paragraph (h) to read as follows:

§ 2.711 Evidence.

* * * * *

(h) *Exhibits.* Exhibits must be filed through the agency's E-Filing system, unless the presiding officer grants an exemption permitting an alternative filing method under § 2.302(g)(2) or (g)(3) or unless the filing falls within the scope of § 2.302(g)(1) as not being subject to electronic submission. When an exhibit is not filed through the E-Filing system, the presiding officer may permit a party to replace with a true copy an original document admitted into evidence. Information that a party references through hyperlinks

in an exhibit must be submitted by that party, in its entirety, either as part of the exhibit or as a separate exhibit, for that information to be included in the evidentiary record.

* * * * *

11. In appendix B to part 2, under section II, revise the table “Model Milestones [10 CFR Part 2, Subpart L]” to read as follows:

Appendix B to 10 CFR Part 2—Model Milestones To Be Used By a Presiding Officer as a Guideline in Developing a Hearing Schedule for the Conduct of an Adjudicatory Proceeding in Accordance With 10 CFR 2.332.

* * * * *

II. * * *

Model Milestones

[10 CFR Part 2, Subpart L]

• Within 140 days of publication of notice in Federal Register:	Presiding officer decision on intervention petitions and admission of contentions.
• Within 55 days of presiding officer decision granting intervention and admitting contentions:	Presiding officer to set initial schedule for proceeding, based on staff schedule for issuing draft and final SERs and any necessary NEPA document.
• Within 30 days of issuance of SER and any necessary NEPA document:	Proposed new or amended contentions filed after the deadline on SER and necessary NEPA documents due.
• Within 30 days of issuance of SER and any necessary NEPA document:	Motions for summary disposition on previously admitted contentions due.
• Within 85 days of issuance of SER and-NEPA document:	Presiding officer decision on admission of proposed new or amended contentions filed after the deadline and motions for summary disposition; presiding officer sets schedule for remainder of proceeding.

<ul style="list-style-type: none"> • Within 14 days after presiding officer decision on new or amended contentions filed after the deadline: 	All parties complete updates of mandatory disclosures.
<ul style="list-style-type: none"> • Within 115 days of issuance of SER and NEPA document: 	Motions for summary disposition due.
<ul style="list-style-type: none"> • Within 155 days of issuance of SER and NEPA document: 	Written direct testimony filed.
<ul style="list-style-type: none"> • Within 175 days of issuance of SER and NEPA document: 	Evidentiary hearing begins.
<ul style="list-style-type: none"> • Within 90 days of end of evidentiary hearing and closing of record: 	Presiding officer issues initial decision.

* * * * *

Dated October 21, 2020.

For the Nuclear Regulatory Commission.

Margaret M. Doane,
Executive Director for Operations.

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