

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM-2-14]

State of Nevada;
Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; Notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking filed by the State of Nevada (petitioner). The petition has been docketed by the NRC and has been assigned Docket No. PRM-2-14. The petitioner asserts that NRC will conduct a “mandatory” formal hearing if NRC docketed a Department of Energy (DOE) application for a construction authorization for the proposed Yucca Mountain repository and requests that the NRC amend its regulations governing rules of practice in hearings by specifying the issues to be heard in this “mandatory” hearing. The petitioner believes an amendment is necessary because NRC’s rules of practice currently only specify issues to be heard in mandatory hearings on nuclear reactor construction permits.

DATE: Submit comments by (75 days following publication in the *Federal Register*).

Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number PRM-2-14 in the subject line of your comments. Comments on petitions submitted in writing or in electronic form will be made available to the public in their entirety on the NRC rulemaking website. Personal information such as name, address, phone, e-mail address, etc., will not be removed from your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC

20555. Attention: Rulemaking and Adjudications staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via the NRC's rulemaking website at <http://ruleforum.llnl.gov>. Address comments about our rulemaking website to Carol Gallagher, (301) 415-5905; (e-mail cag@nrc.gov). Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

Publicly available documents related to this petition may be viewed electronically on the public computers located at the NRC Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking website at <http://ruleforum.llnl.gov>.

Publicly available documents created or received at the NRC after November 1, 1999 are also available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading--rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

For a copy of the petition, write to Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Office of Administration, U.S.

Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-415-7163 or Toll-Free: 1-800-368-5642 or E-mail: MTL@NRC.Gov.

SUPPLEMENTARY INFORMATION:

Background

The NRC has received a petition for rulemaking dated June 19, 2007, submitted by the State of Nevada (petitioner) entitled, "Petition by the State of Nevada for Rulemaking to Specify Issues for the Yucca Mountain Mandatory Hearing." The petitioner requests that the NRC amend 10 CFR Part 2, which governs rules of practice for licensing proceedings. The petitioner notes that section 189a.(1)(A) of the Atomic Energy Act of 1954, as amended (AEA), requires a mandatory hearing for nuclear power reactor construction permits and that issues for these proceedings are specified by regulation. The petitioner asserts that in 1981 the Commission decided that there would be a "mandatory" formal adjudicatory hearing on any application for a construction authorization for the proposed Yucca Mountain repository but that the issues for that "mandatory" hearing are not specified by regulation. The petitioner states that it would be inappropriate for the Commission to delegate to the NRC staff the function of determining the issues in this hearing because the petitioner asserts the NRC staff will be an adversary party in the proceeding. The NRC has determined that the petition meets the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802. The petition has been docketed as PRM-2-14. The NRC is soliciting public comment on the petition for rulemaking.

Discussion of the Petition

The petitioner asserts that under section 161c. of the AEA, the NRC reserves the power to require a mandatory hearing even when the AEA does not require such a proceeding. The petitioner states that 10 CFR 2.104(a) provides for issuance of a notice of hearing when required by the AEA or the Commission's regulations, and when the NRC "finds that a hearing is required in the public interest." The petitioner notes that the NRC developed procedures for

licensing of a high-level waste (HLW) repository during the early 1980s and published these procedures on February 25, 1981 (46 FR 13971). The petitioner asserts that these procedures include a requirement for a “mandatory hearing” at the repository construction authorization stage. The petitioner also asserts that, in 2004, when NRC revised its rules of practice, it reaffirmed the decision to hold a “mandatory,” formal hearing for an HLW repository. (See, 69 FR 2182, 2204; January 14, 2004.)

The petitioner states that although 10 CFR 2.101(e)(8) requires that the notice of a “mandatory” hearing on a repository construction authorization “shall recite the matters specified in § 2.104(a) of this part,” § 2.104(a) does not specify the matters of fact or law to be considered. The petitioner contrasts this provision with the notices of mandatory hearings for nuclear power reactors under § 2.104(b) that require the presiding officer to consider the evidence and make all safety and environmental findings required for issuance of the license, and to determine if the NRC staff’s review of the application was adequate. The petitioner asserts this has resulted in a “regulatory gap” in the NRC’s rules of practice.

The petitioner is concerned that the scope of issues to be considered must extend beyond admitted contentions “because otherwise the decision to hold a mandatory hearing would be nothing more than an empty gesture.” The petitioner states that its proposed amendment is patterned after § 2.104(b) but notes that this provision currently applies only to nuclear power reactor proceedings. The petitioner believes that the recent notices of hearing for uranium enrichment facilities such as in the *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 NRC 426 (2004) proceeding offer an easier template to follow for a hearing. The petitioner also states that because there is no reason to distinguish the “mandatory” hearing for Yucca Mountain from the “mandatory” hearing for other HLW repositories subject to 10 CFR Part 60, its suggested amendments would apply to repository facilities subject to either Part 60 or Part 63.

The Petitioner's Proposed Amendment

The petitioner requests that 10 CFR 2.101(e)(8) be amended by deleting the reference to §2.104(a) and replacing it with a reference to §2.104(f). The petitioner also requests that §2.104 be amended by adding a new paragraph (f) to read as follows:

(f)(1) In the case of an application for a construction authorization for a high-level waste repository under parts 60 or 63 of this chapter, the notice of hearing will state that the matters of fact and law to be considered are whether the application complies with the Nuclear Waste Policy Act of 1982, as amended, and the standards set forth in 10 CFR 60.10, 60.21, and 60.24(a), or 10 CFR 63.10, 63.21, and 63.24(a), as applicable, and whether the requirements of 10 CFR 60.31 or 10 CFR 63.31, as applicable, have been met.

(2) Regardless of whether the proceeding is contested or uncontested, the Atomic Safety and Licensing Board will determine the following, without conducting a *de novo* review of the application:

(i) Whether the application and record of the proceeding contain sufficient information, and whether the NRC staff's review of the application has been adequate, to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards with respect to the matters set forth in paragraph (f)(1) of this section; and

(ii) Whether the review conducted by the NRC Staff under 10 CFR part 51 has been adequate.

(3) Regardless of whether the proceeding is contested or uncontested, the Atomic Safety and Licensing Board will, in its initial decision, under Subpart A of 10 CFR part 51, and the Nuclear Waste Policy Act of 1982, as amended:

(i) Determine whether the requirements of section 102(2)(A), (C), and (D)

of NEPA, section 114(f) of the Nuclear Waste Policy Act of 1982, as amended, and subpart A of 10 CFR part 51 have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the authorization should be issued, denied, or further conditioned to protect the environment.

(4) If the proceeding becomes a contested proceeding, the Board shall also make findings of fact and conclusions of law on admitted contentions within the scope of paragraphs (f)(1), (2), and (3) of this section. With respect to matters set forth in paragraph (f)(1) of this section but not covered by admitted contentions, the Atomic Safety and Licensing Board will make the determinations set forth in paragraph (f)(2) of this section without conducting a *de novo* evaluation of the application.

Lastly, the petitioner requests that 10 CFR 2.700 be amended by deleting “2.101(f)(8)” and replacing it with “2.104(f).”

The petitioner states that its proposed § 2.104(f)(2) would apply to both contested and uncontested proceedings. The petitioner explains that the safety findings required by this proposed amendment focus on the adequacy of the record of the proceeding, the license application, and the NRC staff’s review. The petitioner states that limiting these findings to uncontested cases, as it believes was the NRC’s prior practice, implies that these findings are irrelevant in litigating contested issues. However, the petitioner states that litigation and findings on contested issues necessarily include findings on the adequacy of the record, the application, and the NRC staff’s review, insofar as these are relevant to contested issues.

The petitioner also explains that proposed §§ 2.104(f)(1) and (3) reference the Nuclear

Waste Policy Act of 1982, as amended (NWPA), “for completeness” and because of the National Environmental Policy Act provision in section 114(f) of the NWPA. Lastly, the petitioner explains that proposed § 2.104(f)(4) includes a specific reference to paragraphs (f)(1)-(f)(3) of that section for clarity because these provisions define the scope of material issues that may be litigated. The petitioner requests that the NRC act expeditiously on these proposed amendments to 10 CFR Part 2 as detailed in this petition for rulemaking because the DOE intends to file a construction authorization license application for the Yucca Mountain facility with the NRC no later than June 30, 2008.

Dated at Rockville, Maryland, this 23rd day of August 2007.

For the Nuclear Regulatory Commission.

/RA/

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