

COMMISSION INVOLVEMENT IN THE EARLY STAGES OF RULEMAKING

**A Report for the House and Senate
Committees on Appropriations**

By the U.S. Nuclear Regulatory Commission

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I. INTRODUCTION

This report describes the U.S. Nuclear Regulatory Commission's (NRC's) plan to increase Commission involvement in the early stages of rulemaking. This report was developed as requested by the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2016 (Public Law 114-113).

II. BACKGROUND

A. NRC Commission Direction and Staff Response

In August 2015, the Commission directed the staff to provide a proposed plan for increasing the Commission's involvement in the rulemaking process, with the objective of ensuring early Commission engagement before significant resources are expended.¹ In October 2015, the staff provided to the Commission a proposed plan to facilitate early Commission involvement in rulemaking.² In February 2016, the Commission issued a staff requirements memorandum (SRM) indicating its approval of certain aspects of the staff's proposed plan and directing some modifications to the plan consistent with the Joint Explanatory Statement.³

B. Fiscal Year 2016 Appropriations Legislation and Associated Joint Explanatory Statement

In December 2015, Congress passed and the President signed into law the Consolidated Appropriations Act for Fiscal Year 2016 (Public Law 114-113).⁴ This legislation was accompanied by a Joint Explanatory Statement.⁵ The Joint Explanatory Statement requested that the NRC, by March 1, 2016, submit to the House and Senate Appropriations Committees a plan for making changes to the agency's rulemaking process consistent with the approach described in the Joint Explanatory Statement. The Joint Explanatory Statement stipulated that a rulemaking plan be prepared for each rulemaking, except those that are exempted by the Commission and described the minimum content of a rulemaking plan. The Joint Explanatory Statement also requested that the plan to be provided to the committees include (1) a discussion of the roles of the Advisory Committee on Reactor Safeguards (ACRS) and the Committee To Review Generic Requirements (CRGR) in the rulemaking process, (2) a description of how the Commission will determine which rules will be exempt from the requirement to develop a rulemaking plan, and (3) a description of how the Commission will annually review the prioritization of all rulemaking as part of its budget process.

¹ COMSGB-15-0003, "Commission Involvement in Early Stages of Rulemaking," dated August 14, 2015.

² SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated October 19, 2015.

³ SRM for SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated February 3, 2016.

⁴ "Consolidated Appropriations Act, 2016" (Public Law 114-113).

⁵ 161 CONG. REC. H9693, H10124 (daily ed. December 17, 2015) (Joint Explanatory Statement).

III. STREAMLINED RULEMAKING PLANS

A. Purpose

In 1995, the NRC began using rulemaking plans as part of its effort to shorten rulemaking schedules, improve coordination among offices on rulemaking development, and use resources more efficiently. Those rulemaking plans documented the staff's definition of the regulatory issue, identified why NRC rulemaking action is necessary, outlined alternatives to rulemaking, provided the results of early stakeholder engagement, and estimated resource requirements. At that time, rulemaking plans were reviewed and approved by the Commission.

B. Changes in 2006—2007

In the early 2000s, an internal NRC report found that the development of a rulemaking plan added time to the overall rulemaking process and did not shorten the time needed to develop a proposed rule. In subsequent years, the NRC employed enhancements to the rulemaking process that diminished the importance of rulemaking plans. In 2006 and 2007, the Commission delegated authority to allow specific Office Directors, in consultation with the General Counsel, the discretion to waive the requirement to develop rulemaking plans.⁶

C. Changes in 2016

In its February 2016 SRM, the Commission rescinded the 2006 and 2007 delegations of authority to waive rulemaking plans and directed the staff to submit streamlined rulemaking plans (in the form of a template-based, brief notation vote paper) for Commission approval for all rulemakings, except those that have already been explicitly delegated to the staff. The template for the streamlined rulemaking plans is Attachment A.

To ensure that the Commission has an opportunity to assess whether additional involvement is warranted, the staff will provide draft and final regulatory bases to the Commission for all rulemaking that is not already explicitly delegated to the staff. Such draft and final regulatory bases will be sent to the Commission via Commissioner's Assistants Notes no less than 10 business days before publication. Any Commissioner who believes that the Commission's involvement is warranted based on the information provided via the note can convert the issue to a Commission voting matter. The staff must obtain prior Commission approval if it wishes to prepare a regulatory basis document before the Commission has approved a rulemaking plan.

In February 2016, the Commission also directed the staff to update internal guidance so that it explicitly instructs the staff to raise potential policy issues to the Commission as early as practicable in the rulemaking process, especially in those instances where leadership is not able to resolve significant differences in approach. Accordingly, in March 2016, the staff will issue an internal announcement to reflect Commission direction in the SRM dated February 3, 2016. By September 2016, the staff will also

⁶ SRM for COMMJD-06-0004/COMEXM-06-0006, "Streamlining the NRR Rulemaking Process," dated May 31, 2006, and SRM for SECY-07-0134, "Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan," dated October 25, 2007.

update Management Directive 6.3, "The Rulemaking Process," to reflect this Commission direction.

D. Components of the New Streamlined Rulemaking Plans

The streamlined rulemaking plans will contain the components described below.

1. Description of Rule, Existing Regulatory Framework, and Regulatory Options

The streamlined rulemaking plans will describe the regulatory issue, the scope of the proposed rule, and the existing regulatory framework. The staff will also identify the regulatory options and alternatives to rulemaking and discuss why rulemaking is preferable to these other options. The rulemaking plan will include a discussion of how the proposed rule relates to the safety and security goals found in the NRC's Strategic Plan⁷ and describe the impact that the rule will have on regulatory efficiency.

2. Preliminary Evaluation of the Cumulative Effects of Regulation (CER)

CER describes the challenges that licensees or other impacted entities face while implementing new regulatory positions, programs, or requirements. Such challenges may result from a licensee or impacted entity implementing a number of complex regulatory positions, programs, or requirements within a limited implementation period and with available resources (which may include limited available expertise to address a specific issue). The streamlined rulemaking plans will have a section devoted to CER. In that section, the staff will provide a preliminary assessment of CER, to the extent known, including a description of any early stakeholder engagement upon which the assessment is based. In addition, that section may address topics such as: the availability of critical skills (within the NRC and impacted entities), whether there are ongoing NRC regulatory activities that would impact the implementation of the proposed change, and preliminary plans for interaction with stakeholders.

3. Preliminary Analysis of Costs and Benefits

In the streamlined rulemaking plan, the staff will perform a high-level estimate of costs and benefits of the proposed changes. This estimate will contain descriptions such as "high," "medium," or "low" as well as the basis for costs, and postulated pros/cons for the discussion of benefits. Following Commission approval of the rulemaking plan, the staff would develop estimates of costs and benefits that contain greater detail.

4. Preliminary Analysis of Backfitting and Issue Finality

The NRC's regulations governing nuclear power reactors and certain nuclear materials licenses contain provisions that restrict the NRC's ability to impose new requirements on licensees or, in certain applications related to power reactors, to take a different position from a previous NRC position. These are denoted as backfitting and issue finality restrictions. The streamlined rulemaking plans will describe whether the staff expects that the proposed change will constitute a backfit

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The NRC's Strategic Plan can be found on the agency's public Web site at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/>.

or a matter of issue finality. The staff will also discuss whether one or more of the exceptions to preparing a backfit analysis are likely to apply and be relied upon by the staff. Otherwise, the staff will identify the potential safety or security significance of the action and the nature of the cost of the possible backfitting, to the extent that they are known.

5. Preliminary Recommendation on Priority

The NRC has developed the Common Prioritization of Rulemaking methodology in order to prioritize its rules, assigning each rulemaking a high, medium, or low priority designation. In the streamlined rulemaking plan, the staff will indicate the priority designation of the rule and provide a brief discussion regarding the basis for that preliminary priority designation.

6. Estimated Schedule

In the streamlined rulemaking plan, the staff will indicate the estimated month and year that the following would be completed: initiation of regulatory basis, completion of regulatory basis, publication of proposed rule, and publication of final rule.

7. Estimated Resources

The staff will estimate the resources required for the rulemaking and attach this estimate as an enclosure to the streamlined rulemaking plan. If the Commission approves the rulemaking, the staff will add the rule to the Common Prioritization of Rulemaking during the next budget formulation cycle.

IV. RULEMAKINGS THAT ARE EXEMPT FROM RULEMAKING PLAN REQUIREMENT

The new rulemaking plan requirement applies to all rulemakings, except those already explicitly delegated to the staff. Delegated rulemakings include (1) the annual Revision of Fee Schedules rulemaking that is delegated to the Chief Financial Officer, (2) certificates of compliance for spent fuel storage casks rulemakings that are delegated to the Executive Director for Operations, (3) recurring 10 CFR 50.55a, "Codes and Standards," rulemakings (for incorporation by reference of certain standards, such as American Society of Mechanical Engineers standards) that are delegated to the Director of the Office of Nuclear Reactor Regulation, and (4) administrative rulemakings (for administrative changes such as updating addresses and telephone numbers and correcting typographical errors) that are delegated to the Executive Director for Operations and redelegated to the Director of the Office of Administration (ADM) and the Chief of the Rules, Announcements, and Directives Branch within ADM.

V. ROLE OF THE ADVISORY COMMITTEE ON REACTOR SAFEGUARDS (ACRS)

A. Statutory Responsibilities of the ACRS

The statutory responsibilities of the ACRS described in the Atomic Energy Act of 1954, as amended, include advising the Commission with regard to the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards, as well as performing such other duties as the Commission may request. The ACRS also

advises the Commission on certain issues associated with nuclear materials and waste management.

B. ACRS Review of Proposed Rules

1. Currently, rules in the earliest stage of development come to the ACRS under three circumstances: (1) ACRS review is required by law (e.g., reactor design certification rules); (2) the Commission directs the review; or (3) the ACRS uses its own discretion to direct the review. The ACRS receives a monthly list of items coming to the Commission and is well informed to determine which rules it should review. The ACRS also reviews final rules before submittal for Commission review and approval.
2. In February 2016, the Commission directed the staff to include in rulemaking plans an explicit question to the Commission, and recommendation if desired, on whether ACRS review of the proposed rule is warranted.

VI. ROLE OF THE COMMITTEE TO REVIEW GENERIC REQUIREMENTS (CRGR)

A. Purpose of the CRGR

The CRGR reviews selected staff guidance and regulatory requirements that could impose a generic backfit. The purpose of the CRGR review is to ensure that any generic backfits that are proposed for NRC-licensed power reactors, new reactors, and nuclear materials facilities are appropriately justified on the bases of the backfit provisions of the applicable NRC regulations, the NRC's regulatory analysis guidelines, and the Commission's backfit policy. The current CRGR charter allows the NRC office responsible for a particular rulemaking or the NRC Executive Director for Operations to request a CRGR review. It does not require CRGR review of all NRC rulemakings.

B. Forthcoming Guidance on When CRGR Review Is Appropriate

The CRGR recently identified a need to develop and provide guidance to the offices about when CRGR review of a rulemaking would be appropriate. In February 2016, the Commission directed the staff to provide to the Commission the criteria and guidance it develops for triggering a CRGR review of a proposed rule. By June 2016, the staff expects to complete the development of the new criteria and guidance.

VII. COMMISSION'S ANNUAL REVIEW OF RULEMAKING PRIORITIZATION AS PART OF THE BUDGET PROCESS

The Commission will continue to review annually the prioritization of all rulemaking as part of its budget process. In May/June of each year, to coincide with its review of the agency budget, the Commission will receive a rulemaking report that will include all rulemaking prioritization information. The Commission will consider this information in its assignment of resources to rulemaking activities outlined in the budget for that year. This also provides the Commission with an opportunity to question the NRC staff about how a given rule or rules were prioritized.

Attachment:
As stated