



POLICY ISSUE

(Notation Vote)

July 20, 2020

SECY-20-0065

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: RULEMAKING PLAN—CATEGORICAL EXCLUSIONS FROM
ENVIRONMENTAL REVIEW

PURPOSE:

The purpose of this paper is to request Commission approval to initiate a rulemaking to amend the categorical exclusions in Part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Environmental protection regulations for domestic licensing and related regulatory functions." This rulemaking would establish new, and amend existing, categorical exclusions for (1) licensing, regulatory, and administrative actions which do not individually or cumulatively have a significant effect on the human environment and (2) to address inconsistencies in the application of categorical exclusions across licensing and regulatory programs.

SUMMARY:

This paper provides the U.S. Nuclear Regulatory Commission (NRC) staff's recommendation to initiate a rulemaking for establishing new and amend existing, categories of actions that are excluded from the requirement to prepare an environmental review. The recommended rulemaking would continue to protect people and the environment by evaluating the individual and cumulative effects for certain activities through the rulemaking process. It will strengthen the execution of the NRC's environmental mission by ensuring resources are directed to activities that have the potential to significantly affect the environment. It will provide for more streamlined

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and effective regulatory decision making and reduce regulatory burden for any applications subject to the new categorical exclusion by decreasing environmental information requirements for applicants and the need for staff review of this information.

BACKGROUND:

In the staff requirements memorandum for SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated February 3, 2016 (Agencywide Documents Access and Management System (ADAMS) Accession No. [ML16034A441](#)), the Commission directed the staff to provide a streamlined rulemaking plan in the form of a SECY paper that would request Commission approval to initiate all rulemakings not already explicitly delegated to the staff. Accordingly, the NRC staff requests approval to initiate a rulemaking to amend the NRC listed categorical exclusions in 10 CFR 51.22.

Part 51 of 10 CFR contains NRC's regulations implementing the National Environmental Policy Act of 1969 (NEPA), as amended for domestic licensing and related regulatory functions. For every major Federal action, NEPA requires an environmental assessment (EA) or environmental impact statement (EIS) be completed unless a categorical exclusion applies. An EA documents an agency's assessment of whether a proposed action would significantly affect the quality of the human environment. If the EA supports a finding of no significant impact, the environmental review process is complete. If the proposed action would significantly affect the quality of the human environment, then an EIS must be prepared to describe the reasonably foreseeable environmental impacts of the proposed action.

NEPA also established the Council on Environmental Quality (CEQ) to, among other things, provide guidance on NEPA implementation. CEQ defines a categorical exclusion as a:

... category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency ... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required (40 CFR 1508.4).

In the December 6, 2010, *Federal Register* ([75 FR 75628](#)), as a best practice, the CEQ issued its final guidance on categorical exclusions and recommended that agencies periodically review categorical exclusions to assure their continued appropriate use and usefulness. The review should help determine if the existing categorical exclusions are still relevant or if there are additional eligible actions. Further, the CEQ recommended that agencies develop a process and timeline to periodically review their categorical exclusions (and extraordinary circumstances) to ensure that their categorical exclusions remain current and appropriate, and that those reviews should be conducted at least every seven years. The staff last evaluated and updated the agency's list of categorical exclusions in 2010 ([75 FR 20248](#)). This rulemaking plan is consistent with the CEQ's recommendations for periodic review and updates of categorical exclusions.

Categorical exclusions are addressed at 10 CFR 51.22, "Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review." Categorical exclusions established by the NRC are listed in 10 CFR 51.22(c). Except in special circumstances, an EA or EIS is not required for any action within a category included in 10 CFR 51.22(c).

Recently, the Office of Nuclear Material Safety and Safeguards (NMSS) reviewed its environmental programs and organization to identify potential opportunities to continue to meet our NEPA obligations in different ways to save time in the process, reduce resources, and look for enhancements. One of the opportunities identified was evaluating the possibility of creating new or revised categorical exclusions. This rulemaking plan is a direct result of that review. By identifying those actions that do not meet the threshold for an EA or EIS, the staff will ensure that it is focused on those actions with possibly new or significant environmental impacts. Further, the review for categorical exclusions ensures the program is more aligned with CEQ's "best practices."

In addition to revisions to 10 CFR 51.22, the staff has identified potential revisions to other sections of 10 CFR Part 51 to identify those actions that do not meet the threshold for an EA or EIS. These include consideration of the use of an EA for site-specific operating reactor and research test reactor license renewals instead of requiring an EIS. The staff determined that these potential additional revisions to the other sections of Part 51 would be more appropriately addressed in a separate rulemaking request.

DISCUSSION:

Title

"Categorical Exclusions from Environmental Review"

Regulation

10 CFR Section 51.22

Regulatory Issue

The staff identified additional recurring actions that may be eligible for categorical exclusion, for example, termination of licenses where no construction has been done. These types of actions would not result in environmental impacts. Other potential candidates for categorical exclusions include those where, after completing numerous EAs, staff has always concluded there are no findings of significant impacts, such as for spent fuel storage cask certificate of compliance renewals and amendments.

In addition, the staff believes that activities with the same environmental impacts, regardless of the regulatory process, should be eligible for the same categorical exclusions. For example, categorical exclusions explicitly list license amendments, exceptions, or amendments to regulations. However, if a licensing action such as an exemption is not specifically listed in the regulation, the action is not eligible for that categorical exclusion regardless of whether it has similar environmental impacts to another action for which a categorical exclusion already exists.

Further, the staff identified a number of times when different staff or program offices have cited different, potentially overlapping, categorical exclusions for similar or even identical actions (e.g., 10 CFR 51.22(c)(9) versus (c)(25)). In other cases, application of some criteria in a categorical exclusion can create unnecessary work, for example, having to apply the "no significant hazards considerations" criteria in non-reactor exemption actions (10 CFR 51.22(c)(25)(i)) even though they only apply to reactors.

Revisions to the categorical exclusions would: (1) would reduce regulatory burden by decreasing environmental information needed from applicants and by reducing the number of unnecessary EAs and (2) increase consistency by providing the same level of environmental review across regulatory programs.

Existing Regulatory Framework

As discussed above, NRC regulations for categorical exclusions are contained in 10 CFR 51.22 and NRC's established categorical exclusions are listed in 10 CFR 51.22(c).

NRC Offices have internal instructions or procedures on how to implement provisions of regulations. Some of these would need to be reviewed to identify any conforming changes needed based on the final scope of categorical exclusions added or amended, if rulemaking is approved. Examples of instructions and procedures that may need to be revised include, but are not limited to:

1. Office of Nuclear Reactor Regulation Office Instruction
 - a. LIC-101, "License Amendment Review Procedures"
 - b. LIC-102, "Relief Request Reviews"
 - c. LIC-103, "Exemption from NRC Regulations"
 - d. LIC-203, "Procedural Guidance for Preparing Categorical Exclusions, Environmental Assessments, and Considering Environmental Issues"
2. Office of Nuclear Material Safety and Safeguards
 - a. Policy and Procedures 5-1, "Reactor Decommissioning Program Procedures for Interfacing with the Office of Nuclear Reactor Regulation"
 - b. NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs"

Explanation of Why Rulemaking is the Preferred Solution

To address the staff's identification of potential new categorical exclusions, clarifications, and inconsistencies between existing excluded categories, the staff considered three options: status quo (no rulemaking and no guidance changes), enhance guidance (no rulemaking), and rulemaking.

Option 1: Status Quo (No Rulemaking and No Guidance Changes): Continue to apply the existing NRC approved list of categorical exclusions in 10 CFR 51.22 and corresponding guidance.

Pros:

- The staff would not expend resources on rulemaking, instruction, or procedure development activities.

Cons:

- The staff would continue to expend resources on EAs that do not have the potential to significantly affect the environment.
- The staff may continue to cite different, potentially overlapping, categorical exclusions for similar or even identical actions (e.g., 10 CFR 51.22(c)(9) versus (c)(25)). This leads to inconsistent and confusing application of our regulations and does not meet our

regulatory principle of clarity, which calls for agency positions to be “readily understood and easily applied.”

- The staff would not meet the CEQ recommendation that agencies periodically review their categorical exclusions to ensure that their categorical exclusions remain current and appropriate.

Option 2: Enhance Guidance (No Rulemaking): Continue to apply the existing NRC approved list of categorical exclusions in 10 CFR 51.22 and develop enhanced guidance

Pros:

- The staff would develop new instructions or procedures to provide clarity to reduce inconsistencies in staff’s implementation of existing categorical exclusions.
- The staff would expend minimal resources on new instructions or procedures development.

Cons:

- The staff would continue to expend resources on EAs even though the actions would not have the type of impacts that would call for this type of environmental review.
- The staff would continue to expend resources addressing the lack of clarity in existing categorical exclusions, for example performing EAs for activities that have the similar environmental impacts but are not specifically listed in the categorical exclusion.
- While improving guidance could provide some efficiencies, the NRC cannot, through guidance, either add new categorical exclusions or amend existing categorical exclusions.
- The staff would only minimally meet the CEQ recommendation that agencies periodically review their categorical exclusions to ensure that their categorical exclusions remain current and appropriate but would not update the categorically exclusions.

Option 3: Rulemaking

Pros:

- The staff would establish new, and amend existing, categories of actions identified as having no significant effect on the human environment, and strengthen the execution of the NRC’s environmental mission by ensuring resources are directed to activities that have the potential to significantly affect the environment.
- The staff would clarify some categories of actions to address inconsistencies in their application by various NRC programs and staff.
- The rulemaking process would allow for transparency and external input to identify opportunities for additions, modifications, and clarifications, specifically through an advance notice of proposed rulemaking (ANPR) seeking public comment. The staff would provide clarity, on a generic basis, as to why there is no significant impact to the environment for the new categorical exclusions.
- The staff would implement the CEQ recommendation that agencies periodically review their categorical exclusions to ensure that their categorical exclusions remain current and appropriate.

Cons:

- The staff would need to expend resources for rulemaking.

Description of Rulemaking: Scope

As described above, the purpose of this rulemaking is to expand the categories of actions that are excluded from the requirement to prepare an EA or EIS and to improve the clarity and utility of existing categorical exclusions. The staff identified several potential new categorical exclusions and modifications to current categorical exclusions including, but not limited to:

- certain license termination actions that are administrative in nature,
- issuance of amended, revised, and renewed certificates of compliance for spent fuel storage casks,
- amendments to permits or licenses that change emergency plans,
- amendments for reactor cybersecurity plans, and
- alternate waste disposal procedures for application to both reactor and materials licenses.

Revisions to the categorical exclusions would increase efficiency and consistency by reducing the number of EAs and by providing the same level of environmental review across regulatory programs.

The staff is aware that there may be other opportunities to expand and clarify the NRC approved list of categorical exclusions in 10 CFR 51.22. Therefore, to reach a broad audience the staff is proposing to use an ANPR to gather early stakeholder input to development of the proposed rule. The ANPR would allow staff to gather early stakeholder views on additional new categories as well as other ways to improve existing categorical exclusions. This step should result in a higher quality, more informed proposed rule that directly considers stakeholder input.

Description of Rulemaking: Preliminary Backfitting and Issue Finality Analysis

Increasing the actions that qualify for categorical exclusion from the requirement to prepare an EA or EIS would not impose new requirements on any licensee or applicant. Therefore, neither the NRC's backfitting provisions in 10 CFR Parts 50, 70, 72, and 76 nor the issue finality provisions in 10 CFR Part 52 apply to this rulemaking.

Description of Rulemaking: Estimated Schedule

Publish ANPR—6 months after Commission decision is issued, if rulemaking is approved.

Publish proposed rule—12 months after completion of the ANPR.

Publish final rule—12 months after proposed rule comment period closes.

The staff will look for opportunities to improve upon these schedules as the work proceeds.

The staff would publish an ANPR to solicit early stakeholder input to inform development of the proposed rule in lieu of a regulatory basis, as the technical and regulatory issues for categorical exclusions are well established. The issues to be developed during the rulemaking are: (1) actions that may be eligible for categorical exclusion; and, (2) clarifications to existing categorical exclusions that may be appropriate. These issues would benefit from early public involvement and would be straightforward to address through development of the proposed rule once identified. While the proposed and final rule would come to the Commission for approval, the staff recommends that the Commission delegate signature authority for the ANPR to the Executive Director for Operations.

Description of Rulemaking: Preliminary Recommendation on Priority

Based on the Common Prioritization of Rulemaking methodology, updated September 2018 (ADAMS Accession No. ML18263A070), the preliminary priority for the Option 3 rulemaking is medium. The staff determined that the rulemaking will be a:

- (1) Moderate contributor toward the Safety Goal (ensure the safe use of radioactive materials) by implementing the following two Safety Goal strategies:
 - a. Enhance NRC's regulatory programs, using information gained from lessons learned and NEPA experience, to remove the need to prepare EAs or EISs for licensing, regulatory, and administrative actions which do not individually or cumulatively have a significant effect on the human environment.
 - b. Ensure the efficiency of licensing and certification activities by allowing agency resources to be directed to activities that have the potential to significantly affect the environment.
- (2) Moderate contributor toward two Principles of Good Regulation:
 - a. Improve efficiency by reducing the need for EAs.
 - b. Improve clarity by clarifying which licensee or applicant requests are categorically excluded.
- (3) Moderate contributor toward one or more considerations relating to NRC mission; Congressional mandate, priority, or schedule; Commission direction or priority; conformance with external regulations; significant regulatory gap; or NRC licensing initiative and future regulatory benefit:
 - a. Ensure conformance with external regulations (NEPA) by reducing the potential for inconsistent application of categorical exclusions.
 - b. Provide NRC future licensing and regulatory benefit by ensuring resources are directed to activities that have the potential to significantly affect the environment.
- (4) Moderate contributor to regulatory burden reduction:
 - a. Reduce the environmental information needed to be provided by licensees and applicants.
 - b. Reduce the number of requests for additional information issued by the NRC and responses submitted by licensees and applicants.

Description of Rulemaking: Estimate of Resources

Option 3, Rulemaking, is estimated to achieve savings (averted costs) through reducing the number of EAs to be performed by the staff. This would include costs savings for NRC staff review and for licensee or applicant development and submittal of information as part of their applications. The savings to be realized would be based on the final rule language.

The proposed action is estimated to involve a low magnitude of costs at an estimate of 2.3 full-time equivalents (FTE) per year for the development of the ANPR, the proposed rule, and the final rule. A more detailed breakdown of the estimated resources is provided in the Enclosure, "Resources for Categorical Exclusions from Environmental Review."

The potential savings (averted costs) to the agency would be based on the number of EAs that could be avoided by establishing new, and amending existing, categorical exclusions.

Assuming the staff expends approximately 25 to 100 hours per EA and can reduce the number of EAs by 35 per year based on this rulemaking, the potential savings (averted costs) could be estimated to be approximately 875 to 3,500 hours per year or 0.6 to 2.3 FTE per year. The cost savings to licensees and applicants would be realized through the reductions of information required in their applications and from staff issued requests for additional information. Therefore, based on these early estimates, option 3, Rulemaking, would be cost-justified.

The proposed action is expected to reduce inefficiencies and inconsistencies in the implementation of the NRC's regulatory program by clarifying the applicability of existing categorical exclusions, and by eliminating the preparation of EAs for actions identified by the NRC as having no significant effect on the human environment and clarifying the application of existing categorical exclusions. The proposed action would also take into account the ten years of licensing experience since the last update to 10 CFR 51.22(c). By adding new, and amending existing, categorical exclusions, the NRC will continue to meet NEPA objectives and requirements of incorporating environmental considerations in federal agency's planning and decision-making process while improving efficiencies in the NRC's regulatory program. The use of categorical exclusions is a way of streamlining the NEPA required environmental review process and, therefore, saves time, effort, and resources for licensees, applicants and the NRC. The exact range of expected savings will depend on the specific new categories and opportunities to improve the existing categories that are identified for the proposed rule.

Cumulative Effects of Regulation

The categorical exclusion rule applies to the staff and not to licensees, applicants, or State and Tribal governments. Under NEPA, agencies can categorically exclude certain activities from environmental review where the agency has determined that the activities do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an EA nor an EIS is required. The use of categorical exclusions reduces the regulatory burden on licensees and applicants for having to prepare and submit unnecessary environmental reports.

There would be a potentially modest impact on stakeholders, including licensees and applicants, during the rulemaking process, as staff will be requesting public inputs during the development process.

Agreement State Considerations

NEPA applies only to Federal agencies. As such, the regulations in 10 CFR Part 51 are not required for purposes of compatibility for the Agreement States, and they will not need to make conforming changes to their regulations. Therefore, no consideration of impacts to Agreements States is needed.

Guidance

The staff does not believe that new instructions or procedures would need to be developed along with this rulemaking. As mentioned earlier, internal procedures may be revised depending on the scope of the final rule, if rulemaking is conducted (Option 3). As discussed in Option 2, while improving guidance could provide some efficiencies, the NRC cannot, through guidance, either add new categorical exclusions or amend existing categorical exclusions.

Advisory Committee on Reactor Safeguards Review

Because this rulemaking would not involve reactor safety, staff recommends that the Advisory Committee on Reactor Safeguards (ACRS) review not be conducted.

Committee to Review Generic Requirements Review

Because the rulemaking would not have any backfitting implications, staff recommends that the Committee to Review Generic Requirements (CRGR) review not be conducted.

Advisory Committee on the Medical Use of Isotopes Review

Because this rulemaking would not have any impact on the medical uses of isotopes, staff recommends that the Advisory Committee on the Medical Use of Isotopes (ACMUI) review not be conducted.

Analysis of Legal Matters

The Office of the General Counsel (OGC) has reviewed this rulemaking plan and has not identified any issues necessitating a separate legal analysis at this time.

COMMITMENTS:

If the Commission approves initiation of the rulemaking, in accordance with SECY-16-0042, "Recommended Improvements for Rulemaking Tracking and Reporting," dated April 4, 2016 (ADAMS Accession No. [ML16075A066](#)), the staff will add the rulemaking activity to the agency's list of funded rules at the next appropriate budget cycle.

In addition, the staff would evaluate and develop a recommended long-term approach and timeline for conducting periodic review of the agency's categorical exclusions to identify if any changes are needed to ensure they remain current and appropriate, to meet the CEQ recommendation. Staff would use the stakeholder input from the ANPR and proposed rule to inform development of the recommended approach and provide it in the Commission paper submitting the draft final rule.

RECOMMENDATION:

For the reasons provided above, the staff recommends that the Commission approve initiation of a rulemaking to add new NRC approved categorical exclusions and amend existing NRC approved categorical exclusions in 10 CFR 51.22 (Option 3).

The staff also recommends that the Commission approve its recommendations on not conducting ACRS, CRGR, and ACMUI reviews.

Further, the staff recommends that the Commission delegate authority to issue the ANPR to the Executive Director for Operations.

RESOURCES:

The enclosure includes an estimate of the resources needed to complete this rulemaking.

COORDINATION:

OGC has no legal objection to this action. The Office of the Chief Financial Officer has reviewed this paper and has no concerns with the estimated resources in the enclosure.

Margaret M. Doane

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Margaret M. Doane
Executive Director
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Enclosure:
Resources for Categorical Exclusions
from Environmental Review (not publicly available)

SUBJECT: RULEMAKING PLAN–CATEGORICAL EXCLUSIONS FROM
ENVIRONMENTAL REVIEW DATED: July 20, 2020

ADAMS Accession No: ML20021A158 (Pkg), ML20021A160 (RMPlan), ML20021A159
(Enclosure) *Concurred by e-mail

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