PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as final rules, without change, the interim rules amending 7 CFR 301.64 *et seq.* that were published at 55 FR 42698–42699 on October 23, 1990, and at 55 FR 47737–47738 on November 15, 1990.

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

Done in Washington, DC, this 20th day of February 1991.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 91–4434 Filed 2–25–91; 8:45 am]

BILLING CODE 3410-34-M

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7 CFR Part 301

[Docket No. 91–018]

Black Stem Rust; Addition of Rust-Resistant Variety of Berberis Thunbergii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the black stem rust quarantine and regulations to add *Berberis thunbergii* "Bonanza Gold" to the list of rust-resistant *Berberis* species. This change allows this newly developed variety to be moved without unnecessary restrictions.

EFFECTIVE DATE: February 26, 1991.

FOR FURTHER INFORMATION CONTACT: Stephen Poe, Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, USDA, room 645, Federal Building, 6505 Belcrest Road, Hyattsville, Maryland 20782, 301–436–8247.

SUPPLEMENTARY INFORMATION:

Background

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis, Mahoberberis,* and *Mahonia.* The fungus is spread from host to host by wind-borne spores.

The black stem rust quarantine and regulations in 7 CFR 301.38 *et seq.* (referred to below as the regulations) quarantine the conterminous 48 States and the District of Columbia, and govern the interstate movement of certain plants of the genera *Berberis, Mahoberberis,* and *Mahonia,* also known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust; rust-susceptible plants do pose such a risk.

Section 301.38–2 of the regulations includes a listing of regulated articles, and indicates which species of the genera *Berberis, Mahoberberis,* and *Mahonia* are rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through otherwise protected areas if accompanied by a certificate.

In a document published in the **Federal Register** on January 11, 1991 (56 FR 1121–1122, Docket Number 90–234), we proposed adding *Berberis thunbergii* "Bonanza Gold" to the list of rust-resistant *Berberis* species in § 301.38–2(b) of the regulations. Based on testing, USDA has determined that *Berberis thunbergii* "Bonanza Gold" is rust-resistant.

Comments on the proposed rule were required to be received on or before January 28, 1991. We received one comment, from a nursery in Ohio, which simply favored the rule as proposed. Based on the rationale set forth in the proposal and in this document, we are adopting the provisions of the proposal as a final rule without change.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register.** Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. Immediate implementation of this rule will allow interested nurseries to ship *Berberis thunbergii* "Bonanza Gold" to protected areas during the next shipping season, and will provide consumers in protected areas with the opportunity to acquire *Berberis thunbergii* "Bonanza Gold."

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule allows the interstate movement of *Berberis thunbergii* "Bonanza Gold" into and through States or parts of States designated as protected areas. Based on the information available to us, only one commercial nursery is currently producing *Berberis thunbergii* "Bonanza Gold." It is impossible to determine how many nurseries will propagate this new variety. However, with this change, *Berberis thunbergii* "Bonanza Gold" becomes just one of 85 varieties listed in § 301.38–2 as being rust-resistant.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR 3015, subpart V.)

List of Subjects in 7 CFR Part 301

Agricultural commodities, Black stem rust, Plant diseases, Plant pests, Plants (Agriculture), Quarantine, Transportation.

Accordingly, 7 CFR part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.17, 2.51, and 371.2(c).

§ 301.38–2 [Amended]

2. In § 301.38–2(b), "*B. thunbergii* "Bonanza Gold"" is added to the list of rust-resistant *Berberis* species immediately after "*B. thunbergii* "Bagatelle" ".

Done in Washington, DC, this 20th day of February 1991.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 91-4435 Filed 2-25-91; 8:45 am]

BILLING CODE 3410-34-M

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9 CFR Part 77

[Docket No. 91-011]

Tuberculosis in Cattle and Bison; State Designations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

SUMMARY: We are affirming without change an interim rule that amended the regulations concerning the interstate movement of cattle and bison because of tuberculosis by lowering the designation of Kansas and Oklahoma from accredited-free States to modified accredited States.

EFFECTIVE DATE: March 28, 1991.

FOR FURTHER INFORMATION CONTACT: Dr. Mitchell A. Essey, Senior Staff Veterinarian, Cattle Diseases and Surveillance Staff, VS, APHIS, USDA, room 729, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8715.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule published in the Federal Register and effective November 13, 1990 (55 FR 47303-47304, Docket Number 90-183), we amended the tuberculosis regulations contained in 9 CFR part 77 by lowering the designation of Kansas and Oklahoma from accredited-free States to modified accredited States.

Comments on the interim rule were required to be received on or before January 14, 1991. We did not receive any comments. The facts presented in the interim rule still provide a basis for the rule.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived the review process required by Executive Order 12291.

Cattle and bison moved interstate are moved for slaughter, for use as breeding stock, or for feeding. Changing the status of Kansas and Oklahoma may affect the marketability of cattle and bison from those States, since some prospective cattle and bison buyers prefer to buy cattle and bison from accredited-free States. However, it has been our experience that lowering a State's designation from accredited-free to modified accredited status does not significantly affect interstate sales of cattle and bison. Consequently, we have determined that this action will not have a significant effect on marketing patterns in Kansas and Oklahoma, and will therefore not have a significant economic impact on those persons affected by this action.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under Number 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Transportation, Tuberculosis.

PART 77—TUBERCULOSIS

Accordingly, we are adopting as a final rule, without change, the interim rule amending 9 CFR 77.1 that was published at 55 FR 47303-47304 on November 13, 1990.

Authority: 21 U.S.C. 111, 114, 114a, 115-117, 120, 121, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, DC, this 20th day of February 1991.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 91-4436 Filed 2-25-91; 8:45 am]

BILLING CODE 3410-34-M

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9 CFR Part 114

[Docket No. 90-236]

Viruses, Serums, Toxins, and Analogous Products; Shipment of Products Produced Under an Extended Exemption

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are adopting as a final rule, with one change, an interim rule that amended the rule pertaining to the preparation of veterinary biological products for intrastate distribution or export, under an extension of the exemption from the requirement that such products be prepared under a USDA license. The interim rule established procedures for manufacturers to obtain authorization for the shipment of finished products until June 30, 1991.

EFFECTIVE DATE: March 28, 1991.

FOR FURTHER INFORMATION CONTACT: Dr. David A. Espeseth, Deputy Director, Biotechnology, Biologics, and Environmental Protection, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 838, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, telephone number (301) 436-8245.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule that was effective on the date of publication, November 2, 1990 (55 FR 46188-46190, Docket No. 90-171), we amended the regulations in 9 CFR part 114 regarding authorization to ship, after December 31, 1990, certain veterinary biological products that were produced under an extended exemption. The interim rule established procedures for manufacturers to obtain authorization for the shipment, intrastate or for export, of finished products until June 30, 1991.

Comments on the interim rule were required to be received on or before December 3, 1990. We received seven comments prior to this closing date. The commenters included a biologics consultant, a professional association, and five producers of veterinary biological products.

Two of the comments supported the rule as written, four comments supported the rule but requested minor changes to it, another requested that the exemption period be extended, and a final comment requested that authorization to ship be extended as long as necessary to achieve licensure. The comments that requested changes to the rule are discussed below.

Two comments were in favor of extending the period to ship authorized products produced during the extended exemption for one year rather than six months. These commenters further requested that products not authorized for shipment be allowed to be distributed through routine distribution channels for either six months or until such products had cleared distribution channels. In this way, products that were not authorized for shipment would be spared destruction and invested capital would not be lost. Another comment requested that the exemption period for certain biological products deemed by APHIS to be in the advanced stages of licensing be extended for up to 12 months.

No change in the rule has been made based on these comments. The statutorily-authorized exemption for the preparation of unlicensed veterinary biological products ended December 31, 1990. APHIS has no statutory authority to extend this exemption beyond that date. Consistent with the intent of the 1985 amendments, the interim rule provided that manufacturers on the verge of completing licensure could submit data demonstrating significant progress toward licensure in support of a request to allow shipment of finished product until June 30, 1991. APHIS believes that a six month period for the shipment of finished product is reasonable, given the fact that producers have known for some time that production of unlicensed product would have to cease on December 31, 1990.

With respect to those products not authorized for shipment that have been produced in accordance with the regulations and for which an outline of production has been filed, such products may be retained at the licensed establishment after December 31, 1990, and be presented for release once full licensure is attained at a later date. Products not authorized for shipment cannot be shipped from either a manufacturer's or distributor's facility. Another commenter requested that the authorization for shipment be made applicable to unlabeled completed product in final containers. The commenter's rationale was that producers have specialized markets and that it may not be possible to anticipate labeling in advance. APHIS agrees with this request. APHIS recognizes that certain firms have specialized markets and that it may not be possible to anticipate final labeling in advance. In order to reduce financial hardship on these firms, APHIS is amending the interim rule so that authorization to ship until June 30, 1991, applies to completed product in final container as well as finished product (see 9 CFR 101.3 (c) and (d)).

Another comment requested that the exemption to produce unlicensed biological products be continued as long as necessary to achieve licensure provided that a good faith effort be made to meet requirements and delays are determined not to be the fault of the applicant. No change in the regulations has been made in response to this request. This request is contrary to the statutory requirement that the exemption period end on December 31, 1990. APHIS believes that authorization to ship finished product for an additional six months would enable a manufacturer to sell products for which licensure will occur in the next six months.

One comment requested that additional time be allowed for preparation of authorized products after December 31, 1990. The commenter cited the fact that products not granted an extension of the exemption could be shipped until December 31, 1990. APHIS believes that adequate notice of its policy was given and no change has been made to the regulations in response to this request. APHIS has previously granted a one-year extension for the production of products based on the rationale that the producer, through good faith effort; would complete licensure by December 31, 1990. To allow additional time to prepare unlicensed product after December 31, 1990, would run counter to the rationale that products granted an extension complete licensure by that date. Furthermore, there is no authority in the Virus-Serum-Toxin Act to allow production beyond December 31, 1990. The comment further suggested that adequate notice had not been provided that authorization to ship would be allowed products that had been produced during the extended exemption and that had initiated efficacy studies. APHIS believes that adequate notice of its policy was given and no change has been made to the regulations in response to this request. APHIS held a public meeting on August 22, 1990, which addressed this policy (see 55 FR 29077, July 17, 1990). Moreover, an interim rule was published on November 2, 1990 (see 55 FR 46188), allowing firms to submit data to support authorization to ship finished product after December 31, 1990.

Based on the rationale set forth in the interim rule and in this document, we are issuing this final rule.

The interim rule that was published on November 2, 1990, incorrectly gave the last date for shipment of authorized products as June 30, 1990 (see 55 FR 46190, col. 2). This typographical error has been changed to June 30, 1991, in the final rule.

Executive Order 12291 and Regulatory Flexibility Act

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The 1985 amendments to the Virus-Serum-Toxin Act provided for the 4-year period of exemption during which time manufacturers of exempted, unlicensed veterinary biological products could continue to produce such products solely for intrastate distribution or export while attaining USDA licensure for the extended products. The statutorily-authorized extension period ended December 31, 1990. Based on applications received on December 1, 1990, APHIS has granted nine firms authorization to ship a total of forty-eight products.

It is anticipated that granting a six-month authorization to nine firms to ship some forty-eight products will have minimal impact on the remainder of the industry.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic effect on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, (44 U.S.C. 3501 *et seq.*) the information collection provisions that are included in this rule were submitted for approval to the Office of Management and Budget (OMB) and were approved by OMB and assigned control number 0579-0013.

Executive Order 12372

This program/activity is listed in the Catalog of Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires governmental consultation with State and local officials. (See 7 CFR 3015, subpart V.)

List of Subjects in 9 CFR Part 114

Animal biologics.

PART 114—PRODUCTION REQUIREMENTS FOR BIOLOGICAL PRODUCTS

1. The authority citation for 9 CFR Part 114 continues to read as follows:

Authority: 21 U.S.C. 151–159; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 114.2, paragraphs (d)(6) (i) and (ii) are revised to read as follows:

§ 114.2 Products not prepared under license.

* * * * *

(d) * * *

(6) * * *

(i) Either completed product in final container or finished product, prepared under an exemption granted pursuant to § 114.2 (d)(3) of this subchapter and meeting the requirements of § 101.3 (c) and (d), may be shipped intrastate or exported after December 31, 1990, and until June 30, 1991, if authorized by the Administrator. Applications must be made, on or before December 1, 1990, to the Deputy Director, Veterinary Biologics, Biotechnology, Biologics, and Environmental Protection, APHIS, USDA, room 838, 6505 Belcrest Road, Hyattsville, MD 20782, and must address all of the following criteria:

(A) The progress which has been made in completing the work defined in the protocol of research filed in support of the request for extension of the exemption including dates efficacy studies were initiated (test animals vaccinated);

(B) What remains to be done to complete licensure; and

(C) Any other information requested by the Administrator that is determined to be relevant to the consideration of an authorization for shipment.

(ii) Approval will be granted based upon a determination that there is a reasonable expectation that licensure will be completed by June 30, 1991.

Done in Washington, DC, this 20th day of February 1991.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 91-4337 Filed 2-25-91; 8:45 am]

BILLING CODE 3410-34-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150-AD27

Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations concerning the Rules of Practice for the licensing of high-level radioactive waste at a geologic repository (HLW proceeding). The revised rules enhance the Commission's ability to comply with the schedule for the Commission's decision on the construction authorization for the repository contained in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, (NWPA), while providing for the thorough technical review of the license application and the equitable treatment of the parties to the hearing. The revised rules for the HLW proceeding establish a new standard for the admission of initial contentions, define "late contentions" as any contention proposed after the initial contentions are submitted, establish a compulsory hearing schedule, and specify that there will be no *sua sponte* review by the Commission's adjudicatory boards. The revised rules also clarify that the LSS Administrator's written report and periodic evaluations of the Department of Energy's (DOE) compliance with the LSS requirements will be circulated to potential parties who must timely file any objections they may have to the Administrator's evaluations or report or risk waiving their objections. In addition, the rules clarify the Commission's authority to designate a Pre-License Application Presiding Officer to resolve disputes during the period prior to the receipt of the formal application for the construction of the high-level waste repository. The revised rules indicate that the Commission will specify the jurisdiction of the pre-License Application Presiding Officer in designating the officer pursuant to these amendments.

EFFECTIVE DATE: March 28, 1991.

FOR FURTHER INFORMATION CONTACT: Kathryn L. Winsberg, Senior Attorney, or Stuart A. Treby, Assistant General Counsel, Rulemaking and Fuel Cycle Division, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone (301) 492-1636.

SUPPLEMENTARY INFORMATION:

Background

In adopting the final rule on the Licensing Support System (LSS) promulgated on April 14, 1989 (54 FR 14925), the Commission added a new subpart J to 10 CFR part 2 which established the basic procedures for the HLW licensing proceeding including the use of the LSS in the proceeding. The new subpart was primarily the result of a negotiated rulemaking proceeding conducted with the participation of DOE and other parties potentially affected by the HLW licensing proceeding. However, when the Commission promulgated these rules, the Commission stated that it might be necessary to make further changes to these rules in order to streamline the licensing process. As the Commission noted in the Supplementary Information section of the April 18, 1989, final rule—

* * * the Commission is committed to do everything it can to streamline its licensing process and at the same time conduct a thorough safety review of the Department of Energy's application to construct a high-level waste repository. The negotiators to this rulemaking have made a number of improvements to our existing procedures. However, more improvements may be necessary if the Commission is to meet the tight licensing deadline established by the Nuclear Waste Policy Act of 1982, as amended. By publishing this rule, the Commission is not ruling out further changes to the rules contained in the negotiated rulemaking. 54 FR 14925, 14930.

After further study, the Commission published a notice of proposed rulemaking presenting amendments to its Rules of Practice for the HLW licensing proceeding and inviting public comment (September 26, 1989; 54 FR 39387). The specific revisions proposed involved a new standard for initial contentions, a new definition of "late contentions", a requirement of direct testimony on contentions, a compulsory hearing schedule, elimination of *sua sponte* review by adjudicatory boards, the potential parties' rights to receive and file timely comment upon the LSS Administrator's evaluations and written report on DOE's compliance with the

LSS requirements, and the Commission's ability to appoint and specify the jurisdiction of the Pre-License Application Presiding Officer. The Commission also proposed some issues for inclusion in the Notice of Hearing. The comment period for the proposed rule expired November 27, 1989. The Commission received six comments including comments from Florida Power & Light Company (FPL), the National Congress of American Indians (NCAI), Malachy Murphy for the State of Nevada (Nevada), the Department of Energy (DOE), the Edison Electric Institute/Utility Nuclear Waste and Transportation Program (EEI/UWASTE), and jointly from the Environmental Defense Fund, Friends of the Earth, and the National Audubon Society (environmental groups).

Summary of Comments

A. General

Although the proposed revisions were generally supported by DOE, EEI/UWASTE, and FPL, the three other commenters raised strong general objections to the Commission's consideration of revisions to subpart J which require some discussion. Nevada, NCAI, and the environmental groups protest the initiation of this rulemaking proceeding to adopt revisions to the procedural rules agreed to by the LSS Negotiating Committee less than six months after their adoption. These commenters assert that their participation in the give and take of the negotiations was based upon a good faith effort to achieve consensus and that the Commission's attempted revision of the recently adopted rules reflects bad faith in the negotiating process. The commenters state that the future integrity of the negotiated rulemaking process and their own trust and future willingness to participate are threatened by the Commission's actions.

In announcing the possible formation of an advisory committee for negotiated rulemaking (51 FR 45338; December 18, 1986), and at every subsequent stage of the negotiated rulemaking process,[1] the Commission has clearly stated that it retains the responsibility for formulating the final rules for the HLW licensing proceeding. The Commission has the ultimate responsibility to draft regulations to implement statutory provisions in its purview. Because of the novelty and technical complexity of the issues involved in the HLW licensing proceeding, as well as the strict time deadlines imposed in section 114(d) of the NWPA, the Commission sought to formulate new, efficient, and streamlined procedures with the assistance of those parties which would probably be affected by the HLW licensing proceeding.

In the notice of establishment of the Negotiating Committee, the Commission announced that any consensus of the Negotiating Committee would only be the basis for the agency's issuance of a proposed rule for notice and comment. "The consensus is not the basis per se for the final rule which the agency will develop after traditional notice and comment procedures" (52 FR 29024; August 5, 1987).

According to the committee's protocol, "consensus" was defined as no dissenting vote by any committee member on a matter before the committee for approval. The Negotiating Committee did not ultimately reach consensus due to the dissenting vote of the industry coalition member. Although the industry coalition dissented in the final vote, it participated fully in the drafting of the substantive parts of the agreement and dissented in the end over the broader question of whether the LSS was a cost-effective method to achieve the goal of streamlining the licensing process. Therefore, in spite of the lack of consensus, the Commission published a notice of proposed rulemaking inviting public comment, based on the product of the Negotiating Committee's efforts (53 FR 44411; November 3, 1988). The Commission received comments and duly adopted a final rule (54 FR 14925; April 14, 1989).

Thus the intensive work of the Negotiating Committee resulted in the enactment of part 2 subpart J regulations to facilitate the creation of the LSS. These regulations reflect significant new efficiency in the procedures applicable to the HLW licensing proceeding. However, the Commission is obligated to fulfill its ultimate responsibility to insure that its procedural rules will facilitate compliance with its statutory responsibilities under the NWPA.

In the time subsequent to the adoption of the final rules for subpart J, two events intervened. First, revisions to the Rules of Practice for domestic licensing proceedings, part 2, subpart G, were adopted on August 11, 1989 (54 FR 33168, *aff'd, Union of Concerned Scientists* v. *NRC*, No. 89–1617 (D.C. Cir., November 30, 1990)). Second, an internal review was conducted to consider possible improvements to the procedural rules in subpart J. In the Statement of Considerations to the subpart J rules, the Commission had explicitly stated the intention to evaluate further the subpart J rules in general (54 FR 14925; April 14, 1989), and specifically to revisit the issue of the threshold for initial contentions in light of the later resolution of the then pending consideration of changes to subpart G regulations (*id.* at 14931). The amendments that are the subject of this rulemaking proceeding were either proposed to bring the subpart J regulations into conformity with subpart G regulations, which apply in other licensing proceedings, or were proposed to enhance further the Commission's ability to meet deadlines and conduct a fair and effective HLW licensing proceeding.

The mechanism of public rulemaking with notice and comment pursuant to the Administrative Procedure Act, is a necessary element of the Commission's powers. In addition to the negotiated rulemaking which allowed advisory input by potentially affected parties, this rulemaking procedure is contributing substantially to the Commission's ability to fulfill effectively and efficiently its responsibilities in the contemplated novel and technically complex HLW licensing proceeding.

B. Comments on Specific Proposals with Responses

The sections which follow contain a description of the amendments, a summary of the comments received and an NRC response.

1. Standards for Initial Contentions (§ 2.1014)

The amendments to § 2.1014 incorporate a similar standard for admission of initial contentions to that now incorporated in subpart G, § 2.714, adopted in the final rule on regulatory reform (54 FR 33168; August 11, 1989). These amendments raise the threshold for the admission of contentions to require the proponent of the contention to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact. The contention must be supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware, which will be relied upon to establish the facts or expert opinion. Absent a showing that there is a genuine dispute on a material issue of fact or law, the contention will not be admitted. Admission of a contention may also be refused if it appears that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the

[1] See Notice of Proposed Rulemaking, November 3, 1988 (53 FR 44411), regarding the opportunity for other participants to comment and respond to any criticism or potential revision of the text after the Commission considered comments in the preceding.

petitioner to relief. Finally, the amendments would provide that a contention raising only an issue of law will not be admitted for resolution in an evidentiary hearing but must be decided on the basis of briefs and any oral argument that may be held.

While EEI/UWASTE (FPL also supports the specific comments of EEI/UWASTE) supports the Commission's discretion to conform the requirements for initial contentions to the requirements in subpart G, the commenter states that the availability of the information in the LSS data base and of certain types of discovery during the pre-license application phase warrant a more substantial threshold for contentions. EEI/UWASTE suggests that, at a minimum, the Commission should require a proffer in affidavit or other evidentiary form to demonstrate that a genuine dispute exists concerning a material fact or law issue.

The Commission disagrees that a higher threshold is warranted for the admission of initial contentions. An intervenor should not be required to prove its case at the stage of the initial submission of contentions. This rule's requirement that sufficient information be presented to establish the existence of a genuine dispute with the applicant on a material issue of fact or law allows the scope of the proceeding to be defined and advanced without prematurely eliminating legitimate contentions.

EEI/UWASTE suggests that the language in § 2.1014(a)(2)(iii)(D) should be improved. As proposed, the section states that in determining whether a genuine dispute exists, the Commission or the Presiding Officer "shall consider" whether the contention, if proven, would be of no consequence because it would not entitle the petitioner to relief. The commenter believes the language should mandate rejection of the contention.

The Commission considers that the clear implication of the language stating that the Commission or the Presiding Officer "shall" consider the factor of whether a petitioner would be entitled to relief is that this factor will be dispositive in deciding whether a genuine dispute exists. Therefore, the Commission does not believe that a revision is necessary. However, to clarify that this is a factor which the Presiding Officer shall consider, a new § 2.1014(c)(5) has been added. Slightly revised language in § 2.1014(a)(2)(iii)(D) remains to advise the parties that this is a dispositive factor.

EEI/UWASTE also suggests minor change in § 2.1014(a)(3) where the currently effective language refers to a failure of a petitioner to comply with "paragraphs (a)(2) (ii), (iii) and (iv) of this section". The amended version of this paragraph refers only to paragraph (a)(2)(iii) of this section, although no changes are proposed to § 2.1014(a)(2)(ii) and (iv). The commenter suggests that there does not appear to be any reason to delete the reference to these two paragraphs and that the reference should be reinstated.

The Commission agrees and is adopting a minor revision to the amended rule to restore the reference to paragraph (a)(2)(ii). However, in connection with the amendments, several minor editorial changes are also necessary for clarity and parallel construction which slightly modify paragraph (a)(2)(ii) and redesignate paragraph (a)(2)(iv). The proposed rule (no changes were proposed for paragraphs (a)(2)(i), (ii), and (iv)) reads as follows:

[§ 2.1014(a)] (2) The petition shall set forth with particularity—

(i) The interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (c) of this section;

(ii) A list of the contentions that petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity;

(iii) With respect to each contention:

(A) A specific statement of the issue of law or fact, to be raised or controverted.

(B) A brief explanation of the bases of the contention.

(C) A concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(D) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to specific documentary material that provides a basis for the contention, or if the petitioner believes that any documentary material fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. In determining whether a genuine dispute exists on a material issue of law or fact, the Commission or the presiding officer shall consider whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

(iv) As to each contention, the specific regulatory or statutory requirement to which the contention is relevant.

In the final rule, the words "and the bases for each contention set forth with reasonable specificity" have been eliminated from paragraph (a)(2)(ii), as this subject is now covered in paragraph (a)(2)(iii)(B). The words "As to each contention" have been eliminated from paragraph (a)(2)(iv) and the remainder of this provision has been redesignated paragraph 2.1014(a)(2)(iii)(E) to maintain parallel construction in this section.

NCAI objects that the amended standard for initial contentions (and the subpart G revisions with which it is consistent) is unwarranted and violative of the Atomic Energy Act, section 189(a) hearing right and due process. The commenter states that only a well financed intervenor will be able to get any contentions admitted because the high initial standard for admission of contentions assumes extensive access to the LSS which may not be possible for many parties on a limited budget. Therefore it may be impossible for a small tribe or organization to participate at all.

Nevada also comments that the requirements for initial contentions of intervenors are more rigorous than the requirements imposed upon the applicant, and that this criteria is too burdensome for members of the public or groups of citizens who may wish to intervene.

The Commission disagrees with the assertions that the proposed amendments are unduly burdensome and that it will be virtually impossible for persons who wish to participate to have any contentions admitted. Under these rules, an intervenor is not required to make its full case at this stage of the proceeding, however, the intervenor is required to read the license application and indicate that a specific genuine dispute exists as to a material issue of law or fact.

In addition, sections 116 and 118 of the NWPA provide for financial assistance to affected Indian tribes, to the State of Nevada, and to any affected unit of local government for participation in the HLW repository licensing process. The availability of these grants should mitigate the financial burden of participation for affected parties.

The Commission has addressed, rebutted, and prevailed on judicial challenge (*Union of Concerned Scientists* v. *NRC*, No. 89-1617 (D.C. Cir., November 30, 1990)) against the arguments that this higher threshold for contentions is inconsistent with the hearing right in section 189a of the Atomic Energy Act of 1954, as amended. See The Commission's more detailed discussion regarding the adoption of the same higher threshold for contentions in other domestic licensing proceedings in subpart G, § 2.714 adopted at 54 FR 33168; August 11, 1989, and the Court's affirmance referenced above.

2. Late-filed Contentions (§ 2.1014)

The rule revises § 2.1014 to require that any contentions proposed after the initial contentions have been filed must satisfy the higher standards for admission that is now set forth in § 2.1014(a)(4) of subpart J. In addition to the criteria for initial contentions set forth at § 2.1014(a)(1), a proponent of a late-filed contention has to demonstrate that the contention raises a material issue related to the performance evaluation required by 10 CFR 60.112 and 60.113. The standard for late contentions remains the same as the existing rule; however, the amended rule applies that standard to any contention filed after the initial contentions are submitted.

In evaluating whether the contention raises "significant" or "material" issues, factors such as whether a materially different result in the proceeding might be likely if the contention were to be admitted, or whether a modification in facility design or construction that substantially enhances the protection of public health and safety would result if the contention were to be admitted, should be considered.

EEI/UWASTE supports this change which applies the late-filed contentions standard to all contentions that are filed after initial contentions, including contentions based on information contained in the Staff Safety Evaluation Report (SER). The commenter maintains that the adequacy of the application is the issue, to the adequacy of the SER, therefore the issuance of the SER should not automatically constitute good cause for late contentions. The commenter suggests further modification to require that a late-filed contention must address a "new" and "significant" issue. The commenter asserts the admission late in the process of contentions that raise insignificant issues or those that are not new will imperil the schedule set by the Commission.

The Commission responds that the criterion of significance is already included in this section in the requirement that a "significant safety or environmental issue is involved." The other criterion involved is a "material issue related to the performance evaluation anticipated by §§ 60.112 and 60.113." The Commission believes that the adjectives "significant" and "material" adequately restrict the admissibility of late-filed contentions and encourage the early identification of issues in controversy.

EE/UWASTE also suggests that § 2.1014(a)(4) does not appear to incorporate the requirements of § 2.1014(a)(2)(ii)–(iv), although the commenter postulates that this must have been the intention of the Commission.

The commenter is correct that those sections are intended to be referenced but the amended § 2.1014(a)(4) does in fact incorporate the cited sections by reference to the "balancing of the factors specified in paragraph (a)(1) of this section." Paragraph (a)(1) requires "satisfying those [factors] set out in paragraphs (a)(2) and (c) of this section."

Nevada strongly objects that this amendment removes an element that was specifically agreed to by the Negotiating Committee, i.e., the forty day period immediately following the publication of the SER when contentions might still be filed without being subjected to the higher standard for late-filed contentions. The commenter points out that this amendment will deprive the parties and the intervenors of the right to incorporate new issues raised by the SER.

The Commission responds that the extensive interaction in the pre-license application phase between NRC, DOE, and affected parties such as the State of Nevada, as well as the early availability of relevant documents through the LSS, should aid in the formulation of initial contentions. The need for late-filed contentions should be substantially reduced, yet, as described in the rule, significant and/or material issues will be admitted as late-filed contentions. The later in the processing that a contention is raised, the greater the burden will be to demonstrate its significance or materiality. The Commission is confident that the revision will contribute to an efficient hearing process.

3. Participation in the LSS (§ 2.1014)

New § 2.1014(c)(4) adds the failure of the petitioner to participate in the LSS as a factor to be considered by the Commission or the Presiding Officer in ruling on petitions to intervene. This amendment restores a form of a provision which the Negotiating Committee had proposed as a factor to be considered governing admission to the high level waste proceeding. The Commission removed the provision in the subpart J rulemaking so that participation would not be given weight as a factor in favor of intervention. However, the commission does not wish to remove entirely the provision's beneficial effect of encouraging participation in the LSS. The Commission has, therefore, added the failure to participate in the LSS as a factor to be considered.

Nevada supports this amendment and affirms that this reflects the original intent of the Negotiating committee.

4. Direct Testimony on Contentions (§ 2.1024); Summary Disposition (§ 2.1025)

The proposed rule added a new § 2.1024 requiring that a party who sponsors a contention must present direct expert testimony to support that contention. The party's evidence may not consist solely of cross-examination of the license applicant's or the NRC staff's witnesses.

The requirement for a direct case also would be applied to replies in opposition to motions for summary disposition under a new § 2.1025. Summary disposition motions that are supported by evidentiary material in the form of affidavits would require an opposition to the summary disposition motion likewise to be supported by affidavits.

Motions for summary disposition may be filed at any time, however the Commission anticipates that motions for summary disposition will be filed early. The Presiding Officer will have liberal discretion to summarily dismiss or hold in abeyance motions filed shortly before the hearing commences or during the hearing if considering the motion would divert substantial resources from the hearing.

Minor deletions of wording referring to discovery methods (patterned after § 2.749) contained in § 2.1025 (b) and (c) of the proposed rule have been made in the final rule to tailor this section to the HLW licensing proceeding. The availability of the LSS allows a different framework of discovery for this proceeding.

NCAI objects to the changes in §§ 2.1024 and 2.1025 on the ground that these provisions drastically raise the minimum costs of intervention by requiring intervenors to hire experts for both testimony and affidavits. NCAI asserts that intervenors who cannot afford to do more should continue to have the opportunity to make their case by cross-examination only. Nevada also objects that these provisions impose on intervenors additional expenses which might not be necessary if their presentation were based on cross-examination of applicant's or the NRC staff's witnesses, or argument from documents already in the record. Both NCAI and Nevada note that there appears to be no purpose for these requirements.

With regard to § 2.1024, which would require intervenors to present a direct case on contentions, the Commission has reconsidered the proposed rule with the benefit of public comments received and summarized above. The Commission agrees with commenters to the effect that those parties whose contentions have been admitted and who believe a full disclosure of the facts regarding those contentions could be established by cross-examination of the other parties or by reference to materials already in the record might be forced to go to the extra expense and unnecessary expansion of the record to present a direct case. On balance, the Commission does not find a pressing need for imposing this requirement at this time. Proposed § 2.1024 will not be adopted.

The Commission has already reconsidered the requirement in proposed new § 2.1025 that an affidavit be submitted in opposition to a motion for summary disposition when the motion for summary disposition is supported by an affidavit. The proponent of the motion for summary disposition has the option whether or not to submit an affidavit in support of its motion. It seems reasonable that the opponent of the motion should have the same option whether to support its answer with an affidavit, based on its evaluation of how best to prevail against the motion. In particular, the opponent should have the option of attacking the legal sufficiency of the proponent's motion and affidavits without submitting affidavits. This is consistent with the parallel provision in subpart G of part 2 which applies to other domestic licensing proceedings, § 2.749. The sentence requiring supporting affidavits has been removed and the clause, "with or without affidavits," has been restored to the preceding sentence to read: "Any party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion."

EEI/UWASTE supports the new § 2.1025 and further suggests additional changes to this section to require that answers supporting a motion for summary disposition also be accompanied by supporting affidavits.

Although it might be desirable for a party to submit an affidavit with an answer supporting a motion for summary disposition, the Commission does not view this as necessary.

5. Compulsory Hearing Schedule (§ 2.1026)

The amendment adds a new § 2.1026 and a new appendix D to subpart J which would incorporate a model hearing schedule substantially the same as that originally set forth in the Supplementary Information of the LSS rule (54 FR 14925; April 14, 1989) and make the schedule mandatory with some flexibility for the Presiding Officer to handle special circumstances.

The Presiding Officer may grant extensions of up to 15 days of any individual milestone for the parties' filings. Except for "exceptional and unforeseen" circumstances, requests for extensions in excess of 15 days must be filed 5 days in advance of the deadline for which an extension is sought, and must be referred by the Presiding Officer to the Commission. If the Commission does not act to disapprove the extension within 10 days, the extension is effective. The final rule contains the additional clarification that if the Commission disapproves the requested extension, the date which was the subject of the extension request will be set for 5 days after the date of the Commission's disapproval action.

For Presiding Officer issuances, the Presiding Officer may delay up to 30 days beyond the date of the milestone set in the hearing schedule. If the Presiding Officer anticipates that a milestone will be exceeded by more than 30 days, the Presiding Officer shall notify the Commission at least 10 days before the scheduled date of the milestone and provide a justification for the delay.

DOE suggests that the Commission should provide a few examples of the "exceptional and unforeseen circumstances" which would be permissible bases for an exception from the rule in § 2.1026(b)(1) requiring requests for extensions of more than 15 days to be submitted at least 5 days in advance of the required filing deadline.

The Commission believes that it would not be particularly useful to provide examples of situations that would meet these criteria. By definition, "exceptional" and "unforeseen" circumstances are difficult to predict in advance. It should be sufficient to note that the Commission expects that such exceptions would not be routine.

NCAI asserts that the adoption of a mandatory schedule at this point in time defies reality and belies the Commission's inability to anticipate what might occur during the licensing proceeding. Nevada finds it unreasonable for the Commission to commit to the three year time frame which the NRC's proposed Waste Confidence Decision "now finds to be unnecessary." Nevada asserts that this timetable may compromise the NRC's statutory obligation to protect the public health and safety against undue radiological risk and may also preclude effective public participation.

The Commission rejects the assertions that the schedule is unrealistic or inconsistent with its statutory obligations. This schedule was discussed by the Negotiating Committee with the participation of a full range of the parties that are likely to be affected by the HLW licensing proceeding. The schedule illustrates how the statutory deadline can be met. The Commission has reviewed the schedule and finds that it balances the need to comply with the statutory deadline with the need to insure effective public participation and a thorough technical review of the application. The Commission has determined that this schedule should be adhered to unless special circumstances dictate otherwise.

The Commission also rejects the assertion that the findings in the Commission's Waste Confidence Decision have any bearing on the NRC's existing statutory duty, imposed in section 114(d) of the NWPA, to make a decision on the issuance of a construction authorization for the repository within 3 years after the submission of the DOE license application. The original Waste Confidence Proceeding resulted in a decision issued August 31, 1984. The purpose of the proceeding was "to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or offsite storage will be available and to determine whether radioactive waste can be safely stored onsite past the expiration of existing facilities licenses until offsite disposal or storage is available" (49 FR 34658; August 31, 1984). The Commission reviewed the Waste Confidence Decision and proposed revisions to two of its five findings. (54 FR 39767; September 28, 1989). After considering the public comments, the Commission approved the revision of the Waste Confidence Decision (55 FR 38474; September 18, 1990). The revised Waste Confidence Decision takes into consideration the development since the time of the original decision in 1984. Due to these events, there have been significant delays in the anticipated timetable for the construction of a geologic repository. See Reassessment of the Civilian Radioactive Waste Management Program, Report to Congress by the Secretary of Energy, November 29, 1989. Therefore, there have been necessary changes in the Commission's estimate of the timing of the availability of the repository. None of these developments effectively mitigates the Commission's existing statutory obligation to comply with the deadlines set in the NWPA, once the application is filed.

EEI/UWASTE supports the hearing schedule provisions and finds that they represent an appropriate combination of firmness with flexibility. However, the commenter suggests that appendix D and/or § 2.1026 should be modified to reflect the possibility that some of the actions in the hearing schedule may be taken earlier than indicated on the schedule. This might be accomplished, for instance, if the Hearing Licensing Board conducted portions of the proceeding in parallel, rather than in the linear fashion.

The Commission believes that the suggested modification to the rule or to appendix D is not necessary because schedule provisions do not prevent some actions from being taken earlier. As indicated in the section concerning the Notice of Hearing, it is contemplated that subsidiary Boards may be appointed. Past licensing experience indicates that conducting parallel hearings before several Boards is an efficient way to meet a statutory deadline. This procedure may be used in the repository licensing proceeding.

The schedule is designed for realistic compliance with the 3 year deadline set for the NRC in section 114 of the NWPA. However, if at a later time in the HLW licensing proceeding it appears desirable or necessary to amend the schedule to accommodate a particular plan for the proceeding, the Commission could then consider amending the schedule.

Several small editorial changes to the schedule and related rules have been made to the proposed versions. The amendment to § 2.1022 has been limited to changing the timing of the second pre-hearing conference to not later than thirty days after the Safety Evaluation Report. Paragraph (a)(1) of § 2.1022, which was deleted in the proposed rule, has been restored. Although subject to the stricter standards in § 2.1014(a)(4), amended contentions, if any are submitted, are an appropriate topic for consideration at the second prehearing conference.

Also, in appendix D, the description of several milestones concerning "final motions for summary disposition" have been amended because they were based upon a prior version of § 2.1025. Section 2.1025 has been amended to allow motions for summary disposition to be filed at any time, therefore, the milestones formerly set at days 660, 680, 700, 710, and 750 have been amended to reflect that these are the "last practicable" dates for motions for summary disposition. This wording has been chosen to emphasize that although motions for summary disposition may be filed at any time, after these dates the Presiding Officer will have liberal discretion under § 2.1025 to summarily dismiss or hold in abeyance any motion for summary disposition if considering the motion would divert substantial resources from the hearing.

6. *Sua sponte* (§ 2.1027)

The new rule specifically prohibits the Presiding Officer [2] from raising issues that have not been placed in controversy by the parties to the proceeding.

EEI/UWASTE asserts that the Commission is justified in withdrawing the use of *sua sponte* authority in this particular proceeding. The commenter observes that four governmental entities will be scrutinizing the application (DOE, the State of Nevada, the NRC staff, and the Advisory Committee on Nuclear Waste) and that a fifth level of review is unnecessary.

Nevada objects that the new rule takes away a basic and essential attribute of judicial activity, the ability to recognize issues in a proceeding affecting public health and safety which are not raised by the litigating parties. NCAI and Nevada both assert that this amendment suggests that the Commission is elevating considerations of an efficient schedule over health and safety issues or scientific validity in the proceeding.

The Commission does not agree that the new rule takes away anything. The current regulations in 10 CFR part 2, subpart J, do not provide for *sua sponte* review by the Presiding Officer. The new provision merely clarifies that it is the Commission's specific intention not to grant this authority to the Presiding Officer in this proceeding.

The only existing provision which explicitly allows *sua sponte* review for specified matters, § 2.760a, applies only to initial decisions in contested proceedings for an operating license for a production or utilization facility. This provision was never incorporated by reference in subpart J and does not, by its terms, apply to the repository licensing proceeding. Therefore, new § 2.1027 simply removes any remaining uncertainty that *sua sponte* authority is not granted to the Presiding Officer.

The Commission also rejects the notion that the rule will have any effect upon the thorough consideration of health and safety issues in this proceeding. The parties to this proceeding will include entities which should be well prepared after the extended pre-license application period and the availability of licensing information in the LSS. The Commission believes that there is little likelihood that a significant issue will be overlooked. All parties will be focused upon a thorough identification of the issues for litigation.

7. Subpoenas (§ 2.1019)

Under proposed amended § 2.720(a), a party seeking to subpoena a hostile witness, other than NRC staff, would be required to demonstrate the general relevance of the testimony to the contention. Under proposed § 2.720(h)(2)(v), the Presiding Officer is directed not to issue a subpoena requiring the testimony of named NRC personnel unless a showing is made that the particular named NRC employee has direct knowledge relevant to the contention, and the testimony sought is not reasonably obtainable from another source.

The Commission has decided to reorganize the proposed provisions relating to subpoenas. The proposed change to § 2.720(a) will not be adopted because the current language already contains a requirement of general relevance. The proposed addition of § 2.720(h)(2)(v) will not be adopted and instead, the same purpose will be accomplished by the adoption of a revision to § 2.1019(j) adding the language "and that the testimony sought is not reasonably obtainable from another source by any party" to the last sentence.

8. Conforming Amendments

The amended rule requires several conforming amendments. Section 2.1000 has been revised to delete references to §§ 2.749 and 2.785. The amended rule adds a new § 2.1025 on summary disposition for the HLW proceeding. Therefore, the reference to the summary disposition provision in subpart G, § 2.749 no longer needs to be cross referenced in § 2.1000. Also, as discussed in footnote 2, the Commission has decided to abolish the Atomic Safety and Licensing Appeal Panel. The Commission itself will not review initial decisions. Therefore, the cross-reference in § 2.1000 to § 2.785, (entitled Functions

[2] The proposed version of this rule also applied to the Appeal Board, however, the Commission has subsequently decided to abolish the Atomic Safety and Licensing Appeal Board Panel. Appeals to initial decisions will now be heard by the Commission. See Proposed Rulemaking Notice, Options and Procedures for Direct Commission Review of Licensing Board Decisions (55 FR 42947; October 24, 1990).

of the Atomic Safety and Licensing Appeal Board) has been deleted. All references to the Appeal Board elsewhere in this subpart have been revised to refer to the Commission.

Revised § 2.4 clarifies that for purposes of § 2.1018, "NRC Personnel" includes NRC consultants.

Paragraph (b)(1) of § 2.1008 has been revised to include reference to two new paragraphs that have been added as criteria for considering petitions to intervene, §§ 2.1014(c) (4) and (5).

9. Clarifications to LSS Regulations

The amended rule contains a modification to § 2.1003(h) to clarify that both the periodic evaluations of, and the written report on, DOE's compliance with the LSS requirements pursuant to §§ 2.1003(h)(2) (i) and (ii) will be circulated to the potential parties for comments due within 30 days of the issuance of the evaluation or report.

DOE does not agree the interpretation of the Commission that the evaluation required by § 2.1003(h)(2)(i) and the written report of the evaluation required by § 2.1003(h)(2)(ii) are two separate written documents. As a participant in the Negotiating Committee, DOE understood that the first section requires that an evaluation be performed and the second section specifies the method of recording the evaluation, a written report. DOE does agree that potential parties should be required to submit comments or objections to the evaluation report within 30 days of the issuance of the report or the comments or objections are waived.

The Commission disagrees with DOE's interpretation. The evaluations required by § 2.1003(h)(2)(i) are scheduled every six months, beginning 6 months after the appointment of the LSS Administrator. There is only one written report required in § 2.1003(h)(2)(ii). Pursuant to § 2.1003(h)(1), this report must show DOE's substantial compliance with the § 2.1003 requirements and is due at least 6 months prior to the submission of the license application. In practice, one of the evaluations prepared pursuant to § 2.1003(h)(2)(i) could serve as the written report required by § 2.1003(h)(ii) if all the required information were included. However, the revision clarifies that both the periodic evaluations and the written report will be written documents and will be circulated to potential parties. These potential parties may submit comments or objections to either the periodic evaluations or the report within 30 days of issuance or else waive the right to comment or object. The schedule for initiating the compliance evaluation process will be set in the LSS Administrator's Compliance Evaluation Strategy to be submitted to the Commission in 1991.

Modifications to § 2.1010 clarify that the Commission may designate one or more members of the Commission or an atomic safety and licensing board or a named officer to serve as the Pre-License Application Presiding Officer. A new § 2.1010(f) clarifies that the Commission will specify the jurisdiction of the Pre-License Application Presiding Officer in designating the Officer.

Both FPL and EEI/UWASTE oppose the amendment allowing the appointment of a Pre-License Application Presiding Officer and favor retaining the use of a three member licensing board during the pre-license application phase. EEI/UWASTE favors this approach in the hope that members of the Pre-License Application Licensing Board might have the benefit of early exposure to the HLW licensing issues and that at least some of these members might eventually serve on the adjudicatory board (Presiding Officer).

The Commission did not intend to limit its options when it adopted § 2.1010. Although the Commission may actually decide to use a three member licensing board during the pre-license application phase of the HLW licensing proceeding, the Commission wishes to maintain the same options it would have in other NRC proceedings. The range of options that the Commission is specifying in this pre-license application phase of the proceeding is similar to that in § 2.704, which is applicable in other NRC proceedings and to this licensing proceeding as well, by specific reference in subpart J, § 2.1000.

FPL suggests adding a new § 2.1010(f) which would specify that the jurisdiction of the Pre-License Application Board would not extend to any substantive issue in the application to build all or part of a repository.

The Commission responds that § 2.1010(f) has been added to clarify that the Commission will specify the jurisdiction of the Pre-License Application Presiding Officer at the same time that it designates the Officer.

In the notice of proposed rulemaking, two clauses were inadvertently omitted from the text of amended § 2.1010(a)(1) which are in this paragraph as it currently reads. These clauses relating to the authority of the Pre-License Application Presiding Officer to resolve "disputes relating to relevance and privilege;" and "disputes relating to access to the Licensing Support System;" have been restored.

In addition, for clarity and consistency, definitions of "Pre-License Application Presiding Officer" and "Presiding Officer" have been added to § 2.1001. Minor conforming amendments have been added to correct old references to the "Pre-License Application Board" to refer to the "Pre-License Application Presiding Officer" and to substitute "Presiding Officer" for "Board" or "Hearing Licensing Board." These terms have been inserted throughout subpart J for consistency only and do not constitute any substantive change.

10. Notice of Hearing

In addition to the procedures set forth for the HLW licensing proceeding in subpart J, the Commission also proposed several issues related to the management of the hearing that would be set forth in the Commission's Notice of Hearing for the HLW proceeding. The Commission has proposed the following issues that it plans to include in the Notice of Hearing:

(1) The Commission itself will designate the Presiding Officer. If the Presiding Officer is a Hearing Licensing Board, the Commission will designate the members. This Hearing Licensing Board will have plenary authority and management responsibility for the HLW hearing, including the authority to discipline parties, to rule on procedural motions on issues before it, and to rule on party status and contentions. The Hearing Licensing Board may establish such other subsidiary boards as are necessary to hear and decide discrete issues identified by the Hearing Licensing Board for separate disposition.

(2) The Commission will select the technical members of the Hearing Licensing Board from a wide pool of external and internal candidates, including members of the Commission's Licensing Board Panel. This will ensure the greatest potential for identifying candidates with the requisite expertise. The Commission anticipates a three member Hearing Licensing Board consisting of a lawyer-chairman who is experienced with NRC procedures, and two technical members, one with engineering expertise, and one with geoscience expertise, and both with a background in performance assessment.

(3) The Commission will encourage the Presiding Officer to set time limits on cross-examination if necessary to meet the hearing schedule.

(4) The Commission will direct the Presiding Officer to institute the "lead intervener" concept for the proceeding.

(5) The Commission will direct the Presiding Officer to limit the scope of re-direct the re-cross examination to the issues raised on cross-examination and re-direct examination, respectively.

(6) The Commission will encourage the Presiding Officer and parties to reach agreement on the order of hearing issues so that related issues can be addressed at the same time, and to the extent practicable, in a logical sequence.

(7) The Commission will instruct the NRC staff to refrain from becoming involved in procedural disputes between other parties in which the staff does not have an interest, unless the Presiding Officer specifically requests the staff's views on the matter.

(8) The Commission will clearly define the precise scope of the hearing, outline the appropriate general issue areas to be considered in the proceeding and define the boundaries of the Presiding Officer's jurisdiction in the Notice of Hearing.

With reference to the selection of the technical members of the Hearing Licensing Board, DOE suggests that at least one of the technical members ought to have some experience in the NRC licensing process, and also that it might unnecessarily limit the pool of available candidates to require that both technical members have a background in performance assessment.

Nevada opposes the setting of time limits on cross examination. The commenter believes that sufficient authority currently exists in the licensing boards to control cross examination when necessary.

Nevada strongly opposes the "lead intervenor" concept and urges the Commission not to include this procedure in the Notice of Hearing. The commenter believes that Nevada's right to participate is clearly recognized and should not be subordinated in any way to a "lead intervenor."

EEI/UWASTE does not agree that the staff should be instructed to refrain from involvement in procedural disputes between the parties. The commenter asserts that procedural disputes might affect the timing, scope, or outcome of the hearing, or establish precedent with broad impact. Although in a narrow sense, the staff is not directly affected, the commenter feels that the views of the staff should be brought to the Hearing Licensing Board's attention without the requirement of a specific request.

The Commission will consider the comments that have been submitted in the future in formulating the Notice of Hearing.

Environmental Impact: Categorical Exclusion

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

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150–0136.

Regulatory Analysis

The Commission has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. No comments were received on the draft regulatory analysis. The analysis is available for inspection in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Kathryn L. Winsberg, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 492–1637.

Regulatory Flexibility Certification

This final rule will not have a significant economic impact upon a substantial number of small entities. The amendments modify the Commission's rules of practice and procedures. The license applicant for the HLW repository will be the Department of Energy, which would not fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, in the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121, or in the NRC's size standards published December 9, 1985 (50 FR 50241). Although a few of the intervenors in the HLW proceeding are likely to fall within the pertinent Small Business Act definition, the impact on intervenors or potential intervenors will not be significant. While intervenors or potential intervenors will have to meet a higher threshold to gain admission to NRC proceedings and thereby incur some additional costs in preparing for, and participating in, the proceeding, these costs will be minimized by the early availability of information through the LSS and the pre-license application consultation process. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this final rule will not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule, and therefore, that a backfit analysis is not required for this final rule, because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, 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 Nuclear Regulatory Commission is adopting the following amendments to 10 CFR part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

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

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154).

Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99–240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section 2.4 is amended by revising the definition of "NRC personnel" to read as follows:

§ 2.4 Definitions.

* * * * *

NRC personnel means:

(1) NRC employees;

(2) For the purpose of §§ 2.720, 2.740, and 2.1018 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and

(3) Members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings; and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

* * * * *

3. Section 2.1000 is revised to read as follows:

§ 2.1000 Scope of subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR part 2, subpart G, rules of general applicability, except for the following provisions: §§ 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.762, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.787, 2.788, and 2.790.

4. In § 2.1001 the definitions for "Party" and "Potential party" are revised and new definitions of "Pre-License Application Presiding Officer" and "Presiding Officer" are added to read as follows:

§ 2.1001 Definitions.

* * * * *

Party for the purpose of this subpart means the DOE, the NRC staff, the host State and any affected Indian Tribe in accordance with § 60.63(a) of this chapter, and a person admitted under § 2.1014 of this subpart to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter; provided that a host State or affected Indian Tribe shall file a list of contentions in accordance with the provisions of §§ 2.1014(a)(2) (ii) and (iii) of this subpart.

* * * * *

Potential party means any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d) of this subpart, is granted access to the Licensing Support System and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart.

* * * * *

Pre-License Application Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation.

* * * * *

Presiding Officer means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, designated in the notice of hearing to preside.

* * * * *

5. In § 2.1003 paragraph (h)(2)(iii) is revised to read as follows:

§ 2.1003 Submission of material to the LSS.

* * * * *

(h) * * *

(2) * * *

(iii) The LSS administrator shall circulate each evaluation prepared pursuant to paragraph (h)(2)(i) of this section, and the written report prepared pursuant to paragraph (h)(2)(ii) of this section, to potential parties to the high level waste proceeding. Potential parties may submit comments on or objections to the evaluations prepared pursuant to paragraph (h)(2)(i) of this section or the report prepared pursuant to paragraph (h)(2)(ii) of this section, to the LSS Administrator within 30 days of issuance of the evaluation or report. Comments or objections not filed within this time period are waived.

* * * * *

6. Section 2.1004 is amended by revising paragraph (d) to read as follows:

§ 2.1004 Amendments and additions.

* * * * *

(d) Any document that has been incorrectly excluded from the Licensing Support System must be submitted to the LSS Administrator by the potential party, interested governmental participant, or party responsible for the submission of the document within two days after its exclusion has been identified unless some other time is approved by the Pre-License Application Presiding Officer or the Presiding Officer designated for the high-level waste proceeding; provided, however, that the time for submittal under this paragraph will be stayed pending Officer action on a motion to extend the time for submittal.

7. Section 2.1006 is amended by revising paragraph (b) to read as follows:

§ 2.1006 Privilege.

* * * * *

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be submitted by the party, interested governmental participant, or potential party that asserted the claim to—

(1) The LSS Administrator for entry into the Licensing Support System into an open access file; or

(2) To the LSS Administrator or to the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under § 2.1010(b) or § 2.1018(c) of this subpart.

* * * * *

8. Section 2.1008 is amended by revising paragraphs (a), (b)(1), (c), and (d) to read as follows:

§ 2.1008 Potential parties.

(a) A person may petition the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart for access to the Licensing Support System.

(b) * * *

(1) The factors set out in § 2.1014(c) (1), (2), and (3) of this subpart as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide; or

* * * * *

(c) The Pre-License Application Presiding Officer shall, in ruling on a petition for access, consider the factors set forth in paragraph (b) of this section.

(d) Any person whose petition for access is approved pursuant to paragraph (c) of this section shall comply with the regulations set forth in this subpart, including § 2.1003 and agree to comply with the orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart.

9. Section 2.1010 is amended by revising the heading, paragraph (a), the introductory text of paragraph (b), paragraphs (b)(6), and (e), and by adding a new paragraph (f) to read as follows:

§ 2.1010 Pre-License Application Presiding Officer.

(a)(1) The Commission may designate one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority on the matter (Pre-License Application Presiding Officer) to rule on all petitions for access to the Licensing Support System submitted under § 2.1008; disputes over the entry of documents during the pre-license application phase, including disputes relating to relevance and privilege; disputes relating to the LSS Administrator's decision on substantial compliance pursuant to § 2.1003(h); discovery disputes; disputes relating to access to the Licensing Support System; disputes relating to the design and development of the Licensing Support System by DOE or the operation of the Licensing Support System by the LSS Administrator under § 2.1011, including disputes relating to the implementation of the recommendations of the LSS Advisory Review Panel established under § 2.1011(e).

(2) The Pre-License Application Presiding Officer shall be designated six months before access to the Licensing Support System is scheduled to be available.

(b) The Pre-License Application Presiding Officer shall rule on any claim of document withholding to determine—

* * * * *

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a potential party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The Pre-License Application Presiding Officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Pre-License Application Presiding Officer for violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

* * * * *

(e) The Pre-License Application Presiding Officer shall possess all the general powers specified in §§ 2.721(d) and 2.718.

(f) The Commission, in designating the Pre-License Application Presiding Officer in accordance with paragraphs (a) (1) and (2) of this section, shall specify the jurisdiction of the Officer.

10. Section 2.1012 is amended by revising paragraphs (c) and (d) to read as follows:

§ 2.1012 Compliance.

* * * * *

(c) The Presiding Officer shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any person who is not in compliance with all applicable orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

(d) Access to the Licensing Support System may be suspended or terminated by the Pre-License Application Presiding Officer or the Presiding Officer for any potential party, interested governmental participant or party who is in noncompliance with any applicable order of the Pre-License Application Presiding Officer or the Presiding Officer or the requirements of this subpart.

§ 2.1013 [Amended]

11. In § 2.1013, paragraph (c)(1) is amended by replacing the word "board(s)" with "Presiding Officer"; paragraph (c)(6) is amended by replacing the word "Board" with "Presiding Officer"; and paragraph (d) is amended by replacing the word "Board" with "Presiding Officer" and the word "board(s)" with "Presiding Officer".

12. In § 2.1014, paragraph (a)(1) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; and paragraph (c) is amended by replacing the word "Hearing Licensing Board" with "Presiding Officer" and replacing "Board" with "Presiding Officer"; the introductory text of paragraph (d) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (e) is amended by replacing "Hearing Licensing Board" with "Presiding Officer". Paragraph (a)(2)(iv) is removed and paragraphs (a)(2) (ii), (iii), (a)(3), and (a)(4) are revised and paragraphs (c)(4), (c)(5), and (h) are added to read as follows:

§ 2.1014 Intervention.

(a) * * *

(2) * * *

(ii) A list of the contentions that petitioner seeks to have litigated in the matter;

(iii) With respect to each contention:

(A) A specific statement of the issue of law or fact to be raised or controverted.

(B) A brief explanation of the basis of the contention.

(C) A concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(D) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include reference to the specific documentary material that provides a basis for the contention, or if the petitioner believes that any documentary material fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. In determining whether a genuine dispute exists on a material issue of law or fact, a dispositive factor shall be whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

(E) The specific regulatory or statutory requirement to which the contention is relevant.

(3) Any petitioner who fails to satisfy paragraphs (a)(2) (ii) and (iii) of this section with respect to at least one contention shall not be permitted to participate as a party.

(4) Any party may amend its contentions specified in paragraph (a)(2)(ii) of this section. The Presiding Officer shall rule on any petition to amend such contentions based on the balancing of the factors specified in paragraph (a)(1) of this section, and a showing that a significant safety or environmental issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by §§ 60.112 and 60.113 of this chapter.

* * * * *

(c) * * *

(4) The failure of the petitioner to participate as a potential party in the Licensing Support System.

(5) In determining whether a genuine dispute exists on a material issue of law or fact, whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

* * * * *

(h) If the Commission or the Presiding Officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the Commission or the Presiding Officer.

13. Section 2.1015 is revised to read as follows:

§ 2.1015 Appeals.

(a) No appeals from any Pre-License Application Presiding Officer or Presiding Officer order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), and (d) of this section.

(b) A notice of appeal from (1) a Pre-License Application Presiding Officer order issued pursuant to § 2.1010, (2) a Presiding Officer First or Second Prehearing Conference Order issued pursuant to § 2.1021 or § 2.1022, (3) a Presiding Officer order granting or denying a motion for summary disposition issued in accordance with § 2.1025 of this part, or (4) a Presiding Officer order granting or denying a petition to amend one or more contentions pursuant to § 2.1014(a)(4), must be filed with the Commission no later than (10) days after service of the order. A supporting brief must accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten days after service of the appeal.

(c) Appeals from a Presiding Officer initial decision or partial initial decision must be filed and briefed before the Commission in accordance with the requirements of § 2.762 of this part.

(d) When, in the judgment of a Pre-License Application Presiding Officer or Presiding Officer, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Pre-License Application Presiding Officer or Presiding Officer may refer the ruling promptly to the Commission, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Pre-License Application Presiding Officer or Presiding Officer certify, pursuant to § 2.718(i) of this part, rulings not immediately appealable under paragraph (b) of this section.

(e) Unless otherwise ordered, the filing of an appeal, petition for review, referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

§ 2.1016 [Amended]

14. In § 2.1016, paragraphs (a), (c), (d), and (e), remove the word "Board," and add in its place "Presiding Officer."

15. In § 2.1018, paragraphs (a)(2), (b)(2), introductory language in paragraph (c), paragraphs (c)(5), (c)(7), (d), (f)(1), (f)(2) and (g), remove the words "Hearing Licensing Board," and add in their place "Presiding Officer ," and revise paragraph (e)(3) to read as follows:

§ 2.1018 Discovery.

* * * * *

(e) * * *

(3) A duty to supplement responses may be imposed by order of the Presiding Officer or agreement of the parties, potential parties, and interested governmental participants.

* * * * *

16. In § 2.1019, paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" both times it appears and paragraph (j) is revised to read as follows:

§ 2.1019 Depositions.

* * * * *

(j) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the Presiding Officer, by subpoena or otherwise: *Provided,* That the Presiding Officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations and the testimony sought is not reasonably obtainable from another source by any party, require the attendance and testimony of named NRC personnel.

§ 2.1020 [Amended]

17. In § 2.1020, paragraph (b) is amended by replacing "Board" with "Presiding Officer".

§ 2.1021 [Amended]

18. In § 2.1021, the introductory text of paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" both times it appears; paragraph (a)(3) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (b) is amended by replacing "Board" with "Presiding Officer"; and paragraph (d) is amended by replacing "Board" with "Presiding Officer".

19. In § 2.1022, paragraph (c) is amended by replacing "Board" with "Presiding Officers" and paragraph (a) is revised to read as follows:

§ 2.1022 Second prehearing conference.

(a) The Commission or the Presiding Officer in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than thirty days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

* * * * *

§ 2.1023 [Amended]

20. In § 2.1023, paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; the introductory language in paragraph (b) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (c)(1), is amended by replacing "Hearing Licensing Board" with "Presiding Officer" both times it appears; paragraph (c)(2) is amended by

replacing "Hearing Licensing Board" with "Presiding Officer"; and paragraph (c)(3) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" once in the first sentence and twice in the third sentence.

21. Section 2.1025 is added to subpart J to read as follows:

§ 2.1025 Authority of the Presiding Officer to dispose of certain issues on the pleadings.

(a) Any party may move, with or without supporting affidavits, for a decision by the Presiding Officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise, statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement to be filed by the moving party will be deemed to be admitted unless controverted by the statement required to be filed by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The Presiding Officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the Presiding Officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

(b) Affidavits must set forth those facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. The Presiding Officer may permit affidavits to be supplemented or opposed by further affidavits. When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, must be rendered.

(c) The Presiding Officer shall render the decision sought if the filings in the proceeding show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.

22. Section 2.1026 is added to subpart J to read as follows:

§ 2.1026 Schedule.

(a) Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in appendix D of this part.

(b)(1) Pursuant to § 2.711, the Presiding Officer may approve extensions of no more than 15 days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforseen circumstances, requests for extensions of more than 15 days must be filed no later than 5 days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

(2) Extensions beyond 15 days must be referred to the Commission. If the Commission does not disapprove the extension within 10 days of receiving the request, the extension will be effective. If the Commission disapproves the extension, the date which was the subject of the extension request will be set for 5 days after the Commission's disapproval action.

(c)(1) The Presiding Officer may delay the issuance of an order up to thirty days beyond the time set forth for the issuance in appendix D.

(2) If the Presiding Officer anticipates that the issuance of an order will not occur until after the thirty day extension specified in paragraph (c)(1) of this section, the Presiding Officer shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

23. Section 2.1027 is added to subpart J to read as follows:

§ 2.1027 Sua Sponte.

In any initial decision in a proceeding on an application to receive and possess waste at a geologic repository operations area, the Presiding Officer, other than the Commission, shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties and determined to be litigable issues in the proceeding.

24. Appendix D is added to 10 CFR part 2 to read as follows:

Appendix D to Part 2—Schedule for the Proceeding on Application for a License To Receive and Possess High-Level Radioactive Waste at a Geologic Repository Operations Area

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2,105(a)(5)	**Federal Register** Notice of Hearing.
30	2.1014(a)(1)	Petition to intervene/request for hearing, w/contentions.
	2.715(c)	Petition for status as interested government participant & interested government participant petitions.
50	2.1014(b)	Answers to intervention & interested government participant petitions.
70	2.1021	1st Prehearing Conference.
100		1st Prehearing Conference Order; identifies participants in proceeding, admits contentions, and sets discovery and other schedules.
	2.1018(b)(1), 2.1019	Deposition discovery begins.
110	2.1015(b)	Appeals from 1st Prehearing Conference Order, w/briefs.
120	2.1015(b)	Briefs in opposition to appeals.
150		Commission order ruling on appeals from 1st Prehearing Conference Order.
548		NRC staff issues SER.
578	2.1022	2nd Prehearing Conference.
608		2nd Prehearing Conference Order; finalizes issues for hearing and sets schedule for pre-filed testimony and hearing.
618	2.1015(b)	Appeasl from 2nd Prehearing Conference Order, w/briefs.
628	2.1015(b)	Briefs in opposition to appeals.
658		Commission order ruling on appeals from 2nd Prehearing Conference Order.
660		Last practicable date for motions for summary disposition.

Day	Regulation (10 CFR)	Action
680		Replies to last practicable motions for summary disposition.
690	Supp. info	Discovery complete.
700		Presiding Officer order on last practicable motions for summary disposition.
710	2.1015(b)	Appeals from last practicable summary disposition order w/briefs.
720		Evidentiary hearing begins.
	2.1015(b)	Briefs in opposition to appeals from last practicable summary disposition orders.
810		Evidentiary hearing ends.
840	2.754(a)(1)	Applicant's proposed findings.
850	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings.
860	2.754(a)(2)	NRC staff's proposed findings.
865	2.754(a)(3)	Applicant's reply to proposed findings.
955	2.760	Initial Decision.
965	2.788(a), 2.762(a), 2.1015(c)	Stay motions to Commission Notices of Appeals.
975	2.788(d)	Replies to stay motions.
995		Commission ruling on stay motion.
	2.762(b)	Appellant's briefs.
1005	2.788(a)	Stay motions to Commission.
1015	2.788(d)	Replies to stay motions.
1025	2.762(c)	Appellee's brief.
1035	2.762(c)	NRC staff brief.
1055	2.1023 Supp. Info	Completion of NMSS and Commission supervisory review; Commission ruling on any stay motions; issuance of construction authorization; NWPA 3-year period tolled.
1065	2.763	Oral argument on appeals.
1125		Commission decision.

Dated at Rockville, Maryland, this 20th day of February 1991.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 91–4483 Filed 2–25–91; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R-0717]

RIN 7100-AB01

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is adopting in final form, with minor technical changes, its interim rule amending Regulation CC to conform to recent amendments to the Expedited Funds Availability Act (see the Cranston-Gonzales National Affordable Housing Act, Public Law 101–625, section 1001). The amendments extend the availability schedules for deposits at nonproprietary automated teller machines for a period of two years. The amendments to the Expedited Funds Availability Act were signed into law on November 28, 1990, with a retroactive effective date of September 1, 1990.

EFFECTIVE DATE: September 1, 1990.

FOR FURTHER INFORMATION CONTACT: Louise L. Roseman, Assistant Director (202/452–3874), or Kathleen M. Connor, Senior Financial Services Analyst (202/452–3917), Division of Reserve Bank Operations and Payment Systems; Oliver Ireland, Associate General Counsel (202/452–3625), or Stephanie Martin, Attorney (202/452–3198), Legal Division. For information regarding modifications to disclosures or appendix C, contact Thomas J. Noto, Staff Attorney (202/452–3667), or Jane E. Ahrens, Staff Attorney (202/452–3667), Division of Consumer and Community Affairs. For the hearing impaired only: Telecommunications Device for the Deaf, Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION: The Expedited Funds Availability Act ("Act") specifies the time periods within which funds deposited at ATMs must be made available for withdrawal. Under the temporary schedule (which was effective from September 1, 1988, to August 31, 1990), the rules that applied to deposits at nonproprietary ATMs [1] were different from those that applied to deposits at proprietary ATMs because of operational differences in the way these deposits are processed. During consideration of the Act, banks reported to Congress on the processing limitations associated with accepting deposits at nonproprietary ATMs. They indicated that the account-holding bank does not have the information necessary to place holds on nonproprietary ATM deposits because the deposits are removed and processed by the ATM operator rather than the account-holding bank. Given these limitations, the Act allowed the account-holding bank to treat such deposits as though they were composed of nonlocal checks under the temporary schedule. At that time, Congress anticipated that the processing limitations that necessitated the special availability rule for nonproprietary ATM deposits under the temporary schedule would be addressed by the time the permanent schedule became effective in September 1990. Therefore, under the permanent schedule, deposits at nonproprietary ATMs generally had to be made available for withdrawal within the same time periods as deposits made at staffed teller facilities.

During the past two years, ATM networks, banks, and the Board have investigated a number of potential alternatives both to address the processing limitations and to facilitate compliance with the permanent schedule. A viable operational solution to address the processing limitations has not been identified. All of the identified solutions are costly and would likely result in increased fees for customers who make deposits at nonproprietary ATMs. The possible operational solutions would degrade the efficiency of shared ATM networks and may slow the collection of checks, which would be contrary to the intent of the Act.

In addition, banks and ATM operators have expressed concern that the potential for fraud will increase if banks must comply with the permanent availability schedule for nonproprietary ATMs. Under the permanent availability schedule, second-business-day availability is required for local checks. Thus, an account-holding bank that could not ascertain the composition of deposits at nonproprietary ATMs would

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[1] A *nonproprietary ATM* is defined in the Act as one that is not proprietary. In the Act, *proprietary ATM* means an automated teller machine that is (1) located at or adjacent to a branch of the receiving institution or in close proximity, as defined by the Board, or (2) owned by, operated exclusively for, or operated by the receiving institution.