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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1210

[WRPA Docket No. 1; FV-91-253]

Watermelon Research and Promotion Plan; Amendments to Rules and Regulations

AGENCY: Agricultural Marketing Service (USDA).

ACTION: Interim final rule.

SUMMARY: This interim final rule amends rules and regulations issued under the Watermelon Research and Promotion Plan to clarify when the 90-day refund period begins for assessments paid by producers and handlers and specifies that, when requesting a refund, handlers must submit copies of a specified report, and producers must submit receipts or copies of receipts received from handlers on the date the producer's watermelons were handled.

DATES: Effective June 27, 1991. Comments which are received by July 29, 1991 will be considered prior to the issuance of any final rule.

ADDRESSES: Interested persons may submit written comments concerning this interim final rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525, South Building, P.O. Box 96456, Washington, DC 20090-6456. Comments should reference docket number FV-91-253 and the date and page number of this issue of the **Federal Register**. A copy of comments received will be made available for public inspection in the office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Richard H. Mathews, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525-South, P.O. Box 96456, Washington, DC 20090-6456; telephone (202) 447-4140.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under the Watermelon Research and Promotion Plan (Plan) (7 CFR part 1210). The Plan is effective under the Watermelon Research and Promotion Act (7 U.S.C. 4901-4916), hereinafter referred to as the Act.

This rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation No. 1512-1 and the criteria contained in Executive Order 12291 and has been detemined to be a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

The Act and Plan provide that all producers (not including persons engaged in the growing of less than five acres of watermelons) and handlers of watermelons are subject to regulation under the Plan for watermelons produced in the contiguous 48 States. The Act and Plan provide that watermelon producers and handlers pay equal assessments for operating the program. The Act and Plan further provide that handlers are responsible for collecting and submitting both producer and handler assessments to the National Watermelon Promotion Board (Board), reporting their handling of watermelons, and for maintaining records necessary to verify their reportings.

There are approximately 750 watermelon handlers and 5,000 watermelon producers subject to regulation under the Plan. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $3,500,000 and small agricultural producers are defined as those having annual receipts of less than $500,000. The majority of watermelon handlers and producers may be classified as small entities.

This action would not have a significant economic impact on small handlers or producers. This action would benefit both producers and handlers by clarifying when the refund period starts and what documentation is acceptable for proving payment of assessments.

Section 1647(b)(2) of the Act (7 U.S.C. 4906(b)(2)) and § 1210.327(b) (7 CFR 1210.327(b)) of the Plan authorize the Board to recommend to the Secretary such rules and regulations as are necessary to effectuate the terms and conditions of the Plan. Section 1210.520 of the current regulations (7 CFR 1210.520) specifies the procedures for requesting refunds of assessments.

Based on the exeperience of its first year of operation, the Board believes that the wording in § 1210.520 is confusing and open to misinterpretation by watermelon producers and handlers. The Board believes that replacement of the word "payable" with the word "due" in the first sentence of § 1210.520 will clarify that the section is referring to the end for the month the watermelons were actually handled. The industry considers the payable date as being the thirtieth day following the month the watermelons were handled, which is the date by which handlers must remit their assessments to the Board.

Also, the Board recommended revision of § 1210.520(b) to clarify when the 90-day period begins for the submission of a refund application, by both producers and handlers. The Board believes that the current provision could be interpreted as meaning that the 90-day period begins on the actual day of handling; on the last day of the month of handling; on the handler's due date for paying assessments, following the month of handling; or on some other date. The Board wants to clarify the provision establishing when the refund period begins by specifying that the refund period begins for both producers and handlers on the last day of the month of handling.

While no refunds, in part or total, have been denied because of a misunderstanding regarding the beginning of the 90-day refund period, the Board believes this revision should eliminate the potential for refunds being denied because of misunderstandings of when the refund period begins. This revision is consistent with the requirements of the Act which provide that both producers and handlers be given not less than 90 days to request a refund of assessments paid.

Also, the Board recommends that § 1210.520 be revised to specify what documents must be submitted by producers and handlers as evidence of payment of assessments when requesting a refund. As revised, this provision specifies that producers must submit a receipt, or copy thereof, received from the handler on the date the watermelons were handled. It further specifies that handlers must submit a copy of the handler's report which they submitted to the Board when they paid the assessments.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. chapter 35) and section 3504(h) of the PRA, the information collection requirements and refund application forms used under the provisions of § 1210.520 have been previously approved by the OMB under OMB No. 0581–0158. This action places no new recordkeeping or reporting requirements on producers or handlers.

Based on available information, the Administrator of the AMS has determined that the issuance of this rule will not have a significant economic impact on a substantial number of small entities.

Upon the basis of the evidence provided by the Board, it is found that this action, and all of its terms and conditions as set forth, will tend to effectuate the declared policy of the Act.

Pursuant to the provisions in 5 U.S.C. 553, it is found and determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action clarifies the provisions of § 1210.520 by specifying when the 90-day refund period begins; (2) specifying what documents need to accompany refund applications as evidence of the payment of the assessments; and (3) the 1991 crop year began in early April 1991 and any amended rules and regulations should be in place as soon as possible. All written comments received in response to this publication by the date specified herein will be considered prior to any finalization of this interim final rule.

List of Subjects in 7 CFR Part 1210

Agricultural promotion, Agricultural research, Market development, Reporting and recordkeeping requirements, Watermelons.

For the reasons set forth in the preamble, chapter XI of title 7 is amended as follows:

PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN

1. The authority citation for 7 CFR part 1210 continues to read as follows:

Authority: 7 U.S.C. 4901–4916.

2. Section 1210.520 is amended by revising the introductory text, paragraph (b) introductory text, and paragraph (c) to read as follows:

§ 1210.520 Refunds.

Each watermelon producer or handler against whose watermelons an assessment became due and was paid pursuant to this subpart may obtain a refund of the assessment amount paid for any calendar month by following the procedures prescribed in this section.

* * * * *

(b) *Submission of refund application to the Board.* A handler or producer may request a refund of their assessments paid by submitting a refund application within a 90 day period beginning the last day of the month the watermelons were actually handled. The refund application shall show the following:

* * * * *

(c) *Proof of payment of assessment.* Evidence of payment of assessments satisfactory to the Board shall accompany the producer's or handler's refund application. Producers must submit a receipt, or a copy thereof, received from a handler on the date the watermelons were handled. Handlers must submit a copy of the handler's report filed when the handler paid the assessments. Evidence submitted with refund applications shall not be returned to the applicant.

* * * * *

Dated: June 21, 1991.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91–15189 Filed 6–26–91; 8:45 am]

BILLING CODE 3410–02–M

Farmers Home Administration

7 CFR Parts 1951 and 1955

Certain Leaseback/Buyback and Disposal of Farm Inventory Property Provisions of the Food, Agriculture, Conservation, and Trade Act of 1990

AGENCY: Farmers Home Administration, USDA.

ACTION: Interim rule with a request for comments.

SUMMARY: The Food, Agriculture, Conservation, and Trade Act of 1990 (Pub. L. 101–624), hereinafter referred to as the "1990 Farm Bill," amends provisions of the Agricultural Credit Act of 1987 and therefore removes and revises certain provisions of the leaseback/buyback program as well as the procedure by which FmHA manages and disposes of suitable farm inventory property. The FmHA amends its regulations to conform to certain provisions of section 1813, "Disposition of Suitable Property," of the 1990 Farm Bill.

The intended effect is to facilitate keeping borrowers on their farm and ranch property, enhance the Agency's efforts to sell suitable farm property to family size farm operators, provide more guidance to the FmHA field staff, and implement the provisions of the 1990 Farm Bill.

DATES: Interim rule effective June 27, 1991. Comments must be submitted on or before July 29, 1991.

ADDRESSES: Submit written comments, in duplicate, to the Office of the Chief, Regulations Analysis Control Branch, Farmers Home Administration, USDA, room 6348, South Agriculture Building, 14th and Independence Avenue SW., Washington, DC 20250. All written comments will be available for public inspection during regular working hours at the above address.

FOR FURTHER INFORMATION CONTACT: Roger Witt, Branch Chief, Farmers Programs, Farmers Home Administration, USDA, room 5446, Washington, DC 20250, telephone (202) 382–1948.

SUPPLEMENTARY INFORMATION:

Classification

This action has been reviewed under USDA procedures established in Departmental Regulation 1512–1, which implements Executive Order 12291, and has been determined to be nonmajor because it will not result in an annual effect on the economy of 100 million dollars or more.

Programs Affected

These changes affect the following FmHA programs as listed in the catalog of Federal Domestic Assistance:

10.404—Emergency Loans.
10.406—Farm Operating Loans.
10.407—Farm Ownership.
10.407—Low Income Housing Loans.
(Section 502 Rural Housing Loans)
10.416—Soil and Water Loans.

Intergovernmental Consultation

1. For the reasons set forth in the final rule related to notice 7 CFR 3015, subpart V (48 FR 29115, June 24, 1983) and FmHA Instruction 1940–J, "Intergovernmental Review of Farmers Home Administration Programs and Activities," (December 23, 1983), Emergency Loans, Farm Operating Loans, and Farm Ownership Loans are excluded with the exception of the nonfarm enterprise activity from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

2. The Soil and Water Loans Program is subject to the provisions of Executive Order 12372 and FmHA Instruction 1940–J

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." It is the determination of FmHA that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969 (Pub. L. 91–190), An Environmental Impact Statement is not required.

Background

This document amends the interim rule published in the **Federal Register** (53 FR 35638–35798) on September 14, 1988, which implemented certain provisions of the Agricultural Credit Act of 1987. The 1990 Farm Bill amends the Agricultural Credit Act of 1987 and related statutes as it pertains to the leaseback/buyback program and the manner by which the Agency disposes of suitable farm inventory property. In accordance with the provisions of section 1813, "Disposition of Suitable Inventory Property," of the 1990 Farm Bill, the Agency is amending its regulations to be in compliance with the 1990 Farm Bill. Several of the changes required by section 1813 are as follows:

1. Paragraph (b), "Random Selection Among Equally Qualified Applicants." This provision provides that the County Committee will randomly select the purchaser of suitable farm property when there are two or more applicants that meet the loan eligibility criteria and deletes the requirement that the selection will be based on majority vote.

2. Paragraph (c), "Property Subject to Borrower Purchase or Lease Option." The Agricultural Credit Act of 1987 provided that the leaseback/buyback property consisted of all real property. The 1990 Farm Bill limits the leaseback/buyback property to that of real farm and ranch property, including the principal residence of the borrower.

3. Paragraph (g), "Offering Price." This provision deletes the conflicting provisions of the Food Security Act of 1985 that required farmland be sold at its capitalization value while the Agricultural Credit Act of 1987 required suitable farm property be sold at its market value. To resolve these conflicting provisions, the Agency offered farm property for sale at the lower of its capitalization value or market value. The 1990 Farm Bill deletes the capitalization value price. This provision removes the conflict in the statute and provides that suitable farm property will be offered for a value not greater than that which reflects the appraised market value of such farmland.

In the interim rule date September 14, 1988, FmHA implemented the leaseback/buyback provisions of the Agriculture Credit Act of 1987 by providing that the former owner had the first priority to purchase the real property that FmHA acquired from the former owner. In the event the former borrower was not the same individual as the former owner, FmHA would give a priority to the former owner to purchase the property, not the former borrower. If the borrower was the operator of the farm, the operator would have a priority to purchase the farm, if the former owner or the former owner's spouse and children did not exercise their leaseback/buyback rights. To implement the provisions of paragraph (c) of the 1990 Farm Bill and to ensure that the farm or ranch property will continue to have a residence for the operator of farm or ranch property, we have amended the definition of leaseback/buyback property to provide that the leaseback/buyback property consists of real farm and ranch property of the former owner, including any principal residence of the operator of the farm or ranch. This definition in the 1990 Farm Bill limits the scope of the property that the former owner will have a priority right to acquire from FmHA. In the event that the former owner's residence is acquired by FmHA, such residence is not a part of the farm or ranch property, and the former owner was not the operator of the farm, the former owner's residence would not be a part of the leaseback/buyback property. Likewise, if the former borrower's residence is acquired by FmHA; such residence is not part of the farm and ranch property, and the former borrower was not the operator of the farm or ranch property, the former borrower's residence would not be a part of the leaseback/buyback property. The leaseback/buyback property, however, would consist of any principal residence of the operator, if owned by the same individual that owned the real farm and ranch property. In most situations, the former owner is the former borrower as well as the operator of the farm. However, in the event the former owner, former borrower, and the operator are different individuals, and each reside in a separate residence which are all owned by the same owner, and no residence is considered a part of the farm or ranch property, only the principal residence of the operator would be considered as leaseback/buyback property. With this definition of leaseback/buyback property, it needs to be recognized that there may be a small number of cases where the former owner's residence is located on a nonfarm tract, is not considered a part of the farm or ranch property, and such owner is not the operator of the farm or ranch property. In such case, the former owner will not have a priority to purchase the property under FmHA's leaseback/buyback program; however, in the event the former owner is also the former borrower, such individual would have an opportunity, under FmHA's homestead protection program, to lease with an option to purchase the former borrower's residence and up to ten acres.

The Agency has temporarily suspended the lease and sale of certain real farm and ranch inventory property pending implementation of the 1990 Farm Bill. This document is being published as an interim rule with a 30-day comment period in order that the Agency can resume leaseback/buyback transactions where wetlands are not involved. Many of the farm properties in FmHA inventory will be leased or sold to the former owner and the former owner's family members. In order that the Agency can assist the former owner and the former owner's family members to remain on the farm and continue with their farming operations, for the 1991 crop year and beyond, it is important that FmHA has rules and regulations in place to expedite the lease or sale, in accordance with the provisions of the 1990 Farm Bill.

There are other provisions of section 1813 of the 1990 Farm Bill that require revisions to FmHA regulations but will be addressed in separate issuances of the regulations.

List of Subjects

7 CFR Part 1951

Account servicing, Credit, Loan programs—Agriculture, Loan programs—Housing and Community development, Low and Moderate income housing loans—Servicing, Debt restructuring.

7 CFR Part 1955

Foreclosure, Government acquired property, Government property management, Sale of government acquired property, Surplus government property.

Accordingly, chapter XVIII, title 7, Code of Federal Regulations is amended as follows:

PART 1951—SERVICING AND COLLECTIONS

1. The authority citation for part 1951 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70

Subpart S—Farmer Programs Account Servicing Policies

2. Section 1951.906 is amended by removing the definition of "inventory property" and adding, in alphabetical order, the definition of "Leaseback/Buyback Property" to read as follows:

§ 1951.906 Definitions.

* * * * *

Leaseback/Buyback Property. Real farm and ranch property and any off the farm principal residence(s) of the operator(s) which secured a Farmer Programs loan. Any off farm principal residence(s) of the former borrower(s) and/or owner(s), who are not the operator(s) of the farm or ranch property, are not considered leaseback/buyback property.

* * * * *

3. Section 1951.911 is amended by removing the first two sentences and adding three new sentences to the beginning of the introductory text of paragraph (a), removing the first two sentences and adding two new sentences to the beginning of paragraph (a)(1)(ii) and revising paragraph (a)(2)(ii) to read as follows:

§ 1951.911 Preservation loan service programs.

(a) *Leaseback/Buyback.* This section contains the policies and procedures pertaining to the Farmer Programs Leaseback/Buyback Program. The Farmer Programs Leaseback/Buyback Program will permit the previous owner of real farm and ranch property, including any off the farm principal residence of the former operator, which was security for a Farmer Programs loan(s), to have the first opportunity to lease or purchase the leaseback/buyback property from FmHA. Any off the farm residence(s) of the former borrower(s) and/or owner(s), who are not the operator(s) of the farm or ranch property are not considered leaseback/buyback property, unless such residence(s) are a part of the farm or ranch property. * * *

(1) * * *

(ii) When FmHA acquires real farm and ranch property, including the principal residence of the former operator, which collateralized a Farmer Programs loan, the former owner will be sent exhibit O of this subpart within 30 days. The former owner has 180 days from the date FmHA acquired the real farm and ranch property, including any off the farm principal residence of the former operator, to apply for leaseback/buyback, unless State laws provide for a longer period. * * *

* * * * *

(2) * * *

(ii) Within each of the foregoing priorities, if there is more than one individual eligible for leaseback/buyback in any category who has indicated an intention, in writing, to the County Supervisor to participate in the leaseback/buyback program (e.g., one individual wants to purchase and the other individual wants to rent), priority within the category will be given to an individual who wants to purchase the leaseback/buyback property, either for cash or by credit sale. There is no preference for a cash sale over a credit sale. If there are two or more individuals in the same priority category who are eligible for leaseback/buyback who both want to purchase (or to lease if no one wants to purchase), the County Committee will make the selection of the lessee and/or purchaser by lot by placing the names in a receptacle and drawing names sequentially. Drawn offers will be numbered and those drawn after the first drawn offer will be held as back-up offers pending sale to the successful offeror. The random selection of the County Committee is not an appealable item for those individuals that are not the successful lessee and/or purchaser.

* * * * *

PART 1955—PROPERTY MANAGEMENT

4. The authority citation for part 1955 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 7 CFR 2.70.

Subpart A—Liquidation of Loans Secured by Real Estate and Acquisition of Real and Chattel Property

5. Section 1955.3 is amended by revising the definition of "Leaseback/Buyback Property" to read as follows:

§ 1955.3 Definitions.

* * * * *

Leaseback/Buyback Property. Real farm and ranch property and any off the farm principal residence(s) of the operator(s) which secured a Farmer Programs loan. Any off farm principal residence(s) of the former borrower(s) and/or owner(s), who are not the operator(s) of the farm or ranch property, are not considered leaseback/buyback property.

* * * * *

6. Section 1955.18 is amended by revising paragraph (i) to read as follows:

§ 1955.18 Actions required after acquisition of property.

* * * * *

(i) *Leaseback/buyback.* The County Supervisor will notify the immediate previous owner of leaseback/buyback rights by sending exhibit O of subpart S of 1951 of this chapter, to the immediate previous owner, certified mail, return receipt requested, immediately after FmHA acquires real farm and ranch property, including any off the farm principal residence of the former operator, that secured an FP loan. The County Supervisor will notify the immediate previous operator of leaseback/buyback rights in accordance with § 1951.911(a)(1)(iii) of subpart S of part 1951 of this chapter by sending exhibit P of subpart S of part 1951 of this chapter to the immediate previous operator, certified mail, return receipt requested, immediately after FmHA acquires real farm and ranch property, including the principal residence of the former operator, that secured an FP loan.

* * * * *

Subpart B—Management of Property

7. Section 1955.53 is amended by adding, in alphabetical order, a new definition of "Leaseback/Buyback Property" to read as follows:

§ 1955.53 Definitions.

* * * * *

Leaseback/Buyback Property. Real farm and ranch property and any off the farm principal residence(s) of the operator(s) which secured a Farmer Programs loan. Any off farm principal residence(s) of the former borrower(s) and/or owner(s), who are not the operator(s) of the farm or ranch property, are not considered leaseback/buyback property.

* * * * *

8. Section 1955.66 is amended by revising paragraph (h) to read as follows:

§ 1955.66 Lease of real property.

* * * * *

(h) *Lease of farm property with option to purchase.* Except for property that was pledged to secure a loan to an organization (as defined in § 1955.53 of this subpart), a lessee may be given the option to purchase farm property.

Terms of the option will be set forth as part of the lease as a special stipulation in accordance with the FMI for form FmHA 1955–20.

(1) The lease payments will not be applied toward the purchase price.

(2) The purchase price (option price) will be the appraised market value of the property. For farm property, the purchase price (option price) will be the market value of the property, as of the date the option is exercised, as set forth in subpart A of part 1809 of this chapter (FmHA Instruction 422.1).

(3) A lease with option to purchase to individuals with leaseback/buyback rights will be for a term not to exceed 5 years. For Preservation Loan Service Programs, refer to subpart S of part 1951 of this chapter. For those individuals that do not have leaseback/buyback rights, a lease with option to purchase farm property will normally not exceed 1 year but may be, in justifiable cases, for a period not longer than 3 years.

(4) If there is more than one prospective lessee that wishes to lease the property with an option to purchase, the County Committee will select the lessee/purchaser in accordance with § 1955.107 of subpart C of part 1955 of this chapter.

(5) Indian tribes or tribal corporations which utilize the Indian Land Acquisition Program will be allowed to purchase the property for its market value less the contributory value of the buildings, in accordance with subpart N of part 1823 of this chapter (FmHA Instruction 442.11).

(6) Denials of applications for or disputes over terms and conditions of a lease are appealable, pursuant to subpart B of part 1900 of this chapter.

* * * * *

Subpart C—Disposal of Inventory Property

9. Section 1955.103 is amended by adding, in alphabetical order, a definition for "Leaseback/Buyback Property" to read as follows:

§ 1955.103 Definitions.

* * * * *

Leaseback/Buyback Property. Real farm and ranch property and any off the farm principal residence(s) of the operator(s) which secured a Farmer Programs loan. Any off farm principal residence(s) of the former borrower(s) and/or owner(s), who are not the operator(s) of the farm or ranch property, are not considered leaseback/buyback property.

* * * * *

10. Section 1955.107 is amended by revising paragraph (c) to read as follows:

§ 1955.107 Sale of suitable property (CONACT).

* * * * *

(c) *Price.* Property will be offered or listed for its appraised market value based on the condition of the property at the time it is made available for sale. For farm property, the market value will be determined by an appraisal made in accordance with subpart A of part 1809 of this chapter (FmHA Instruction 422.1).

* * * * *

Dated: April 16, 1991.

La Verne Ausman,

Administrator, Farmers Home Administration.

[FR Doc. 91–15281 Filed 6–26–91; 8:45 am]

BILLING CODE 3410–07–M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 0, 1 and 2

RIN 3150–AD73

Procedures for Direct Commission Review of Decisions of Presiding Officers

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its rules of procedure to establish a new system for agency appellate review of decisions and actions of presiding officers in all formal and informal agency adjudications.[1] The Commission's prior decision to abolish the Atomic Safety and Licensing Appeal Panel which had provided mandatory administrative appellate review of initial decisions of presiding officers in agency adjudications necessitates the establishment of a new system. The new system provides for discretionary review by the Commissioners of the NRC of most partial and final initial decisions, referred rulings and certifications of questions.

EFFECTIVE DATE: July 29, 1991.

FOR FURTHER INFORMATION CONTACT: E. Neil Jensen, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone (301) 492–1634.

SUPPLEMENTARY INFORMATION: This final rule (1) sets forth procedures for petitioning for Commission review of decisions and actions for which review is permitted; (2) establishes a standard which the Commission will employ in determining whether to take review; (3) codifies the existing case law standard for interlocutory review in revised § 2.786(g) and provides that this standard must be met for interlocutory appeals under §§ 2.718(i) and 2.730(f); (4) retains the Commission's current immediate effectiveness review procedure whereby designated licensing board decisions do not become effective until the Commission so determines; (5) makes clear that for all orders subject to judicial review a petition for Commission review is an available remedy for a disappointed party; and (6) incorporates the provisions of present § 2.762 into § 2.1015(c) (relating to licensing of a high level waste repository) which is otherwise unaltered by this rulemaking. In addition, this final rule deletes reference to the Appeal Panel or to appeal boards from NRC regulations. Finally, the NRC's regulations describing internal agency organization are amended to reflect the creation of a new Office of Commission Appellate Adjudication whose function is to assist the Commission in exercising its adjudicatory responsibilities.

This rule includes an additional amendment to 10 CFR part 2. This amendment adds a new § 2.8 entitled, "Information collection requirements: OMB approval." This section provides the OMB clearance approval authority for the existing information collection requirements in 10 CFR part 2, appendix B. The new § 2.8 is included in 10 CFR part 2 solely to correct a technical oversight in the regulations.

[1] For simplicity, these initial decisions will be referred to as licensing board decisions; however, all initial adjudicatory decisions are covered by this final rulemaking.

Background

On October 24, 1990 (55 FR 42947), the Commission published a notice of proposed rulemaking announcing its proposal to establish a new system for providing agency appellate review of initial decisions in all formal and informal agency adjudications to replace the system of mandatory review of initial decisions by appeal boards followed by discretionary review of appeal board decisions by the Commission. The Commission's need to formulate a new system was created by its earlier decision to abolish the Appeal Panel. The Commission proposed to adopt a system providing for direct discretionary review of licensing board decisions by the Commission and further proposed to adopt a broad review standard like that which applied when the Atomic Safety and Licensing Board was established in 1962, rather than the more narrow standard that the Commission has applied in determining whether to take review of appeal board decisions.

The Commission invited public comment on its choices and on necessary or desirable procedural changes incident to either system as well as on whether the Commission should make use of an existing organization or establish a separate office to assist it in performing its adjudicatory function. The comment period expired December 10, 1990. Seven comments were received: four from electric utilities or their counsel, one from an industry organization (Nuclear Management and Resources Council (NUMARC)), one from a public interest group (Ohio Citizens for Responsible Energy (OCRE)) and one from the Department of Energy. Copies of all comments received are available for public inspection, and copying for a fee, at the NRC Public Document Room at 2120 L Street, NW. (lower level), Washington, DC.

Summary of Public Comments

A. General

All industry commenters and the Department of Energy supported the Commission's proposals to adopt a discretionary review system and a broad standard of review. These commenters noted that this system would give the Commission the flexibility to involve itself only in cases requiring special Commission attention, such as cases involving novel, complex, or precedent-setting issues. This would enhance the Commission's ability to determine how best to allocate its resources to carry out its public health and safety functions. One industry commenter, while supportive of discretionary review in most cases, urged that review be mandatory in those cases where a licensing board and the NRC Staff hold conflicting views with respect to the issuance of certain types of authorizations because an internal conflict, in the view of the commenter, requires resolution by the Commission. This commenter also suggested that the Commission's immediate effectiveness rule be supplanted with a different procedure which would provide a definite time limit to the automatic stay now provided for licensing board decisions affected by this rule to help streamline the licensing process. OCRE objected to the Commission's decision to abolish the Appeal Panel and, absent reconsideration of that decision, favored mandatory review by the Commission. In OCRE's view, a mandatory review system would be the best means of securing direct Commission involvement in agency adjudications and would also be more fair to potential appellants in that all parties dissatisfied with licensing board decisions would be assured an equal degree of agency appellate review.

B. Commission Responses to Specific Comments

1. Abolition of the Appeal Panel

OCRE objects to the Commission's decision to abolish the Appeal Panel and asserts that this decision should not have been made without advance notice and solicitation of public comments. In addition, OCRE notes that Congress, in transferring the functions of the Appeal Panel to the Commission at the time it enacted the Energy Reorganization Act of 1974, required the Commission to notify Congress in advance of any decision to abolish the Appeal Panel. OCRE believes that the Appeal Panel served an important "separation of powers" function because it did not have the potential conflict of interest inherent in the Commission's dual function of being both an adjudicatory body and the supervisor of the NRC Staff which is frequently a party in adjudications before the Commission. OCRE states that it prefers the system of review by appeal boards where opportunity for oral argument is available to the parties.

The Commission's decision to abolish the Appeal Panel was an internal management decision concerning which agency organization would conduct administrative appellate review. In adopting interim procedures for conducting appellate review itself, the Commission explicitly stated that it intended to follow existing procedures and thus the existing right of the parties to a merits review of an initial decision would not be affected. (October 24, 1990; 55 FR 42944). Given these facts, the Commission was under no legal duty to provide notice and opportunity for public comment with respect to its decision to abolish the Appeal Panel. See 5 U.S.C. 553(b)(A). In any event, we have considered OCRE's view and do not find it persuasive.

The present rulemaking proceeding, which substitutes a discretionary system of review for a mandatory system and changes certain procedures by which review is conducted, does affect the procedural rights of prospective appellants and, for this reason, has been made the subject of a notice and comment rulemaking proceeding. In response to OCRE's comments concerning NRC's obligations to Congress, we note that Congress was notified of the Commission's plan to abolish the Appeal Panel by letters dated July 3, 1990, from the Chairman of the Commission to the President of the Senate and the Speaker of the House. In response to OCRE's concern that the Commission will be subject to a conflict of interest in conducting appellate review, we note that OCRE's objection is applicable to all agencies with both adjudicatory and staff supervisory functions and is not ground for retaining the Appeal Panel. Moreover the Commission's rules governing ex parte communication and separation of functions (10 CFR 2.780 and 2.781) have long and successfully protected the integrity of adjudicatory proceedings from potential conflicts of the sort complained of here. There is no reason to suppose that these regulations will not continue to serve their function of assuring the impartiality of the Commission and its adjudicatory employees in agency adjudications. Finally, the availability of oral argument in agency appellate review has always been, and will continue to be, a matter of agency discretion. See 10 CFR 2.763.

2. Mandatory vs. Discretionary Review

As noted above, all commenters except OCRE supported adoption of a discretionary review system. Reasons given emphasized the administrative efficiency which will result from the Commission having the flexibility to involve itself only in appeals warranting Commission attention, such as cases involving particularly novel, complex, or precedent-setting issues or important legal, policy, or public health and safety questions. In the view of one industry commenter, a discretionary system, by giving the Commission the opportunity to focus its attention only on the truly significant cases, will provide more meaningful access to the Commission than would a mandatory system requiring that all cases, including the routine or insignificant, come before the Commission for review. OCRE, on the other hand, favors a mandatory review system. OCRE believes that a mandatory system will serve to increase the Commission's direct involvement in agency adjudications which was one of the reasons given for the decision to abolish the Appeal panel. Further, in OCRE's view, mandatory review will be more fair to all parties in NRC adjudicatory proceedings because all parties will be assured of a thorough agency review of licensing board decisions without the need to incur the expense and delay of judicial review. OCRE mentions the filing fee, the costs of printing and binding the briefs and appendix, and the need for legal counsel as expenses necessitated by a decision to seek judicial review of an initial decision.

The Commission believes that a discretionary review system will be administratively more efficient than a mandatory system for the reasons suggested by the commenters and will also achieve appropriate involvement of the Commission in agency adjudications. While OCRE is technically correct that a mandatory system would bring greater direct involvement of the Commission, the desirability of direct involvement must be balanced against a sensible use of the Commission's time and resources. Even in a discretionary system, the Commission will examine all licensing board decisions to determine whether to take review *sua sponte*. Where review is not taken, a discretionary system will have the benefit of expeditiously bringing the adjudication to an end and enabling a disappointed party to seek judicial review at an earlier point. The direct involvement of the Commission in those cases where review is taken will be more meaningful because the significance of the case will be highlighted by the very fact that the Commission has taken review.

The Commission does not agree with OCRE that is somehow inequitable to provide review of licensing board decisions in some cases but to deny review in others and thus leave some parties with the sole recourse of seeking an initial merits review in the courts. Many disappointed litigants may lose again on appeal. Thus such a party would be saddled with the expense and delay of an appeal before the Commission as well as an appeal in court. Moreover, the expenses of an appeal to the Commission and an appeal to a court would be much the same unless, as contemplated by OCRE, the appellants appear *pro se* before the Commission but retain counsel in court. Even in such an unusual case, however, it may be possible for the appellants to argue *pro se* in court as well. In short, a potential appellant of an initial decision is at least as likely to save on expenses by being able to go to court if a petition for Commission review is rejected as by having to incur the expenses of an appeal before the Commission before judicial review becomes available.

3. Mandatory Review of Licensing Board—NRC Staff Conflicts

One industry commenter, while agreeing that the discretionary review system is appropriate for most cases, suggested that the Commission provide for mandatory review in a proceeding where the licensing board disagrees with the staff's findings and recommendations as to issuance of a site permit, design approval, construction authorization, operating license, combined license, or license amendment. This is because such a situation would create an intra-agency conflict that the commenter believes would warrant mandatory Commission review.

The Commission agrees that the circumstance envisioned is one that might likely merit Commission review. However, to make review mandatory in such a situation might create the appearance that the staff is a party more equal than others in the adjudicatory proceeding before the licensing board and might tend to unduly focus the proceeding on the findings and recommendations of the staff as opposed to those of the applicant on whom the burden of proof has traditionally rested at least in initial licensing cases. Thus the Commission believes that an exception to the discretionary review system need not be carved out to deal with this potential circumstance.

4. Standard for Granting Review

All commenters addressing the issue supported the Commission's proposed adoption of a standard of review similar to that employed by the Commission at the time the Atomic Safety and Licensing Board was established in 1962. That standard states:

The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to such considerations as the following:

(1) A finding of a material fact is clearly erroneous;

(2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(3) A substantial and important question of law, policy or discretion has been raised;

(4) The conduct of the proceeding involved a prejudicial procedural error; or

(5) Any other consideration which the Commission may deem to be in the public interest. (January 13, 1962; 27 FR 377)

An industry commenter urged adoption of an additional factor:

A conflict in licensing board decisions on a controlling question of law or matter of fact necessary for decision.

Commission review of conflicting interpretations of law by different licensing boards and reconciliation of those interpretations, it is argued, would contribute to a more consistent body of NRC precedent. Similarly, the commenter contends that review where there are conflicts in material factual findings (such as the adequacy of a particular design used at different reactors) would enable the Commission to reconcile differences between licensing boards and would also carry over the policy embodied in present 10 CFR 2.786(b)(4)(ii), wherein the Commission may take review of an appeal board decision if it appears that the appeal board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to resolution of that same issue by the licensing board.

The Commission adopts this suggestion in part. The potential conflict between licensing boards as to issues of material fact is not explicitly comprised within the review standard but it is clearly a reason for the Commission to take review. Thus the Commission has incorporated this part of the commenter's suggestion into § 2.786(b)(4) of the final rule. On the other hand, a potential conflicting interpretation of law between licensing boards is already a matter comprised within the second or third factor of the January 13, 1962 (27 FR 377) rule. Thus the Commission believes that adding another factor to address this circumstance would be redundant.

The same commenter also suggested that the language of the Commission's present standard for taking review of appeal board decisions be added, perhaps as a footnote, to the standard of review to emphasize that issues presented for review must be significant and thus discourage frivolous appeals. That regulation states:

A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy.

10 CFR 2.786(b)(4)(i) (1990). The Commission does not agree that this additional language is necessary to discourage frivolous appeals. The standard already provides that the Commission, in determining whether to take review, will give due weight to the existence of a substantial question with respect to, among other things, a substantial and important question of law, policy or discretion. This language should be sufficient to warn potential appellants that issues presented for review must be significant. Moreover, coupling the more restrictive language of the standard the Commission has used to determine whether to take review of appeal board decisions with the more flexible language of the January 13, 1962 (27 FR 377) standard could lead to confusion as to what standard is really being applied. Thus the Commission has not adopted this suggestion.

5. Immediate Effectiveness Rule Amendment

The Commission's notice of proposed rulemaking noted one potential problem with adopting a discretionary review system: The possibility that a licensing board's decision might be appealed to a court without any petition for review having been submitted to the agency altering the agency to potential problems with the decision and giving the agency an opportunity to correct these problems. However, the Commission expressed the view that one way of avoiding this problem would be to continue the Commission's immediate effectiveness regulation (10 CFR 2.764) which provides an automatic stay of effectiveness of designated licensing board decisions until the Commission has reviewed the decision to determine whether it should be allowed to become effective pending any appellate review of the merits of the decision.

Two industry commenters addressed this matter. One favored continuation of the present immediate effectiveness rule; the other urged that the immediate effectiveness rule be replaced with an alternative procedure whereby the Commission would have a brief time limit (10 days was suggested) within which to decide whether to review a licensing board decision authorizing issuance of a construction permit or operating license for a nuclear power reactor. During the period, a party would be able to request a stay of the decision pending any merits review by the Commission. The stay motion would be governed by the factors specified in 10 CFR 2.788(e). If both a stay and review were granted, the licensing action authorized by the decision would not become effective and the decision would not become final agency action. If review were granted but a stay denied, the licensing action authorized by the decision would be effective but there would be no final agency action as to the merits of the licensing board decision. A court could review the Commission's stay decision, but not the merits of the licensing board decision. The advantage of this alternative procedure, in the commenter's view, is that it would help streamline the licensing process in that there would no longer be an automatic stay of indefinite length before the licensing board's decision is allowed to take effect.

The Commission does not believe that it would be feasible to set a regulatory time limit on its decision whether to take review of a licensing board decision of the brevity suggested by the commenter due to the wide variety of cases, including cases presenting multiple complex technical or legal issues where the record is voluminous, that come before the board. The time suggested is not adequate for petitions for review, and responses thereto, to be filed and considered. The Commission's present rule governing petitions for review of appeal board decisions (which will be retained and applied to licensing board decisions) provides a thirty-day period for a decision on whether to take review (10 CFR 2.786(b)(5)). The Commission is establishing a separate Office of Commission Appellate Adjudication with the function of assisting the Commission in the exercise of its appellate review functions. The Commission believes that it will be able to reach a decision on whether to take review in an expeditious fashion but that to impose a severe regulatory time limit for this decision could interfere with its duty to make sure that no public health or safety problems are unresolved before a decision is allowed to become final. Thus the Commission has not adopted this suggestion.

These amendments will take effect thirty days after publication in the **Federal Register**. The amendments apply to any licensing board decision or action issued on or after the effective date of these rules. Appeals presently pending before an appeal board in the Seabrook operating license proceeding, Advanced Medical Systems (Suspension Order) and Wrangler Laboratories enforcement proceedings, and the Turkey Point (OLA-4) and Turkey Point (OLA-5) license amendment proceedings will be governed by the rules in effect prior to October 24, 1990. Licensing board decisions or actions issued before the date these amendments become effective are governed by the rules in effect prior to October 24, 1990, except that the Commission will take the place of appeal boards under those rules and except that the Commission will not entertain a petition for review of its own decision.

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 regulation.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et. seq.).

Regulatory Analysis

The Commission's prior decision to abolish the Appeal Panel which had provided administrative appellate review of initial decisions of presiding officers in agency adjudications necessitates the establishment of a new system wherein the Commission itself will review initial decisions. On October 24, 1990 (55 FR 42944), the Commission put in place interim procedures for conducting this review. In this rulemaking, the Commission adopts a discretionary review system, including a standard whereby the Commission will exercise its discretion whether to take review of a licensing board decision. This system replaces the system of mandatory appellate review formerly provided by appeal boards. The cost of the new discretionary review system is likely to be less in all cases where review is not taken the Commission and the parties will not need to expend further time and resources before a final agency decision is reached. Thus the cost entailed in the promulgation and application of this final rule is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. Many applicants, licensees and intervenors fall within the definition of small businesses found in section 34 of the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121, or the NRC's size standards published December 9, 1985 (50 FR 50241). In a discretionary review system, the procedural requirements on licensees or intervenors may be reduced because they will not need to fully brief errors of fact or law that they may perceive in a presiding officer's decision prior to seeking judicial review unless the Commission first determines to take review of the decision. Licensees and intervenors will, however, need to file petitions for discretionary review with the Commission if they perceive errors in the presiding officer's decision and intend to seek judicial review.

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 improve backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 0

Conflict of interest, Criminal penalty.

10 CFR Part 1

Organization and functions (Government agencies).

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 parts 0, 1, and 2.

PART 0—CONDUCT OF EMPLOYEES

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964–1965 COMP., p. 306; 5 CFR 735.104.

Sections 0.735–21 and 0.735–29 also issued under 5 U.S.C. 552, 553. Section 0.735–26 also issued under secs. 501, 502, Pub. L. 95–521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96–28, 93 Stat. 76, 77, (18 U.S.C. 207).

2. In 10 CFR part 0, all references to "the Atomic Safety and Licensing Appeal Panel" or "ASLAP" are removed, and where the word "or" precedes either of these terms, it is moved to the appropriate location in the text.

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: Secs. 23, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2033, 2201); sec. 29, Pub. L. 85–256, 71 Stat. 579, Pub. L. 95–209, 91 Stat. 1483 (42 U.S.C. 2039); sec. 191, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); secs. 201, 203, 204, 205, 209, 88 Stat. 1242, 1244, 1245, 1246, 1248, as amended (42 U.S.C. 5841, 5843, 5844, 5845, 5849); 5 U.S.C. 552, 553; Reorganization Plan No. 1 of 1980, 45 FR 40561, June 16, 1980.

4. In § 1.11, paragraph (c) is revised to read as follows:

§ 1.11 The Commission.

* * * * *

(c) The following staff units and officials report directly to the Commission: Atomic Safety and Licensing Board Panel, Office of the General Counsel, Office of the Secretary, Office of Commission Appellate Adjudication, Office of the LSS Administrator, Office of Governmental and Public Affairs, and other committees and boards which are authorized or established specifically by the Act. The Advisory Committee on Reactor Safeguards also reports directly to the Commission.

* * * * *

§ 1.17 [Removed]

5. Part 1 is amended by removing § 1.17.

6. In § 1.23, paragraph (b) is revised to read as follows:

§ 1.23 Office of the General Counsel.

* * * * *

(b) Reviews and prepares appropriate draft Commission decisions on public petitions seeking direct Commission action and rulemaking proceedings involving hearings, monitors cases pending before presiding officers and reviews draft Commission decisions on Atomic Safety and Licensing Board decisions and rulings;

* * * * *

7. A new § 1.24 is added to read as follows:

§ 1.24 Office of Commission Appellate Adjudication.

The Office of Commission Appellate Adjudication—

(a) Monitors cases pending before presiding officers;

(b) Provides the Commission with an analysis of any adjudicatory matter requiring a Commission decision (e.g., petitions for review, certified questions, stay requests) including available options;

(c) Drafts any necessary decisions pursuant to the Commission's guidance after presentation of options; and

(d) Consults with the Office of the General Counsel in identifying the options to be presented to the Commission and in drafting the final decision to be presented to the Commission.

§ 1.1 [Amended]

8. In 10 CFR 1.1 the words "and the Atomic Safety and Licensing Appeal Panel" are removed.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

9. 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); secs. 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.).

10. In the definition of *Commission adjudicatory employee* in § 2.4, paragraph (2) is revised to read as follows:

§ 2.4 Definitions.

* * * * *

Commission adjudicatory employee means—

* * * * *

(2) The employees of the Office of Commission Appellate Adjudication;

* * * * *

11. A new § 2.8 is added preceding subpart A to read as follows:

§ 2.8 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) OMB has approved the information collection requirements contained in this part under control number 3150–0136.

(b) The approved information collection requirements contained in this part appear in appendix B.

12. In § 2.704, paragraph (d)(2) is revised to read as follows:

§ 2.704 Designation of presiding officer, disqualification, unavailability.

* * * * *

(d) * * *

(2) The Commission may direct that the record be certified to it for decision; or

* * * * *

13. Section 2.714a(a) is revised to read as follows:

§ 2.714a Petitions for review of certain rulings on petitions for leave to intervene and/or requests for hearing.

(a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal. No other appeals from rulings on petitions and/or requests for hearing shall be allowed.

* * * * *

§ 2.713 [Amended]

13A. In § 2.713(c)(4), the reference to "2.788(b) (1), (2) and (4)" is revised to read "§ 2.788(b) (1), (2), and (3)."

§ 2.715 [Amended]

13B. In § 2.715(d), the words "by the Appeal Board on appeal or sua sponte or" are removed.

§ 2.721 [Amended]

14. In § 2.721, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

15. In § 2.760, paragraphs (a), (b)(1), and (c)(4) are revised to read as follows:

§ 2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review sua sponte or the decision is subject to the provisions of § 2.764.

(b) * * *

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration pursuant to § 2.771; or

* * * * *

(c) * * *

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

16. In § 2.761, paragraphs (a)(1) and (c)(1) are revised to read as follows:

§ 2.761 Expedited decisional procedure.

(a) * * *

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

* * * * *

(c) * * *

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

* * * * *

§ 2.762 [Removed]

17. Part 2 is amended by removing § 2.762.

18. Section 2.763 is revised to read as follows:

§ 2.763 Oral argument.

In its discretion the Commission may allow oral argument upon the request of a party made in a petition for review or brief on review, or upon its own initiative.

§ 2.764 [Amended]

18a. In § 2.764, paragraph (e)(1)(i), the words "Appeal Board and" are removed, and the reference to "paragraphs (e)(2) and (e)(3)" is revised to read "paragraph (e)(2)".

19. In § 2.764, paragraph (e)(3) is removed and paragraphs (a), (b), (e)(2), (f)(2)(iv), and (g) are revised to read as follows:

§ 2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

(a) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to review thereof and further decision by the Commission upon petition for review filed by any party pursuant to § 2.786 or upon its own motion.

(b) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or granting of a petition for review, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

* * * * *

(e) * * *

(2) Commission. Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Commission will seek to issue a decision on any stay motions that are timely filed. Such motions shall be filed

as provided by 10 CFR 2.788. For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Commission action described herein. If no stay papers are filed, the Commission will, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and will seek to issue a decision on whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard. The initial decision will be considered stayed pending the Commission's decision. In deciding these stay questions, the Commission shall employ the procedures set out in 10 CFR 2.788.

(f) * * *

(2) * * *

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

(g) The Commission's effectiveness determination is entirely without prejudice to proceedings under § 2.786 or § 2.788.

20. In § 2.770, paragraph (a) is revised to read as follows:

§ 2.770 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

* * * * *

21. In § 2.771, paragraph (a) is revised to read as follows:

§ 2.771 Petition for reconsideration.

(a) A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision.

* * * * *

22. In § 2.780, paragraph (e)(2) is revised to read as follows:

§ 2.780 Ex parte communication.

* * * * *

(e) * * *

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

* * * * *

23. In § 2.781, paragraphs (d)(2) and (f) are revised to read as follows:

§ 2.781 Separation of functions.

* * * * *

(d) * * *

(2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

* * * * *

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

§ 2.785 [Removed]

24. Part 2 is amended by removing § 2.785.

25. Section 2.786 is revised to read as follows:

§ 2.786 Review of decisions and actions of a presiding officer.

(a) Within forty (40) days after the date of a decision or action by a presiding officer, or within thirty (30) days after a petition for review of the decision or action has been filed under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) A petition for review under this paragraph must be no longer than ten (10) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer must be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party shall have no right to reply, except as permitted by the Commission.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) If within thirty (30) days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto.

(d) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both.

(e) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided.

(f) Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission.

(g) Certified questions and referred rulings. A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either—

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

§ 2.787 [Removed]

26. Part 2 is amended by removing § 2.787.

27. Section 2.788 is revised to read as follows:

§ 2.788 Stays of decisions of presiding officers pending review.

(a) Within ten (10) days after service of a decision or action of a presiding officer any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay must be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g., telecopier message, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer must be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., telecopier message, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by telecopier message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

28. 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, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.788, and 2.790.

29. In § 2.1015, paragraph (c) is revised to read as follows:

§ 2.1015 Appeals.

* * * * *

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

(1) *Notice of appeal.* Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal. The notice shall specify:

(i) The party taking the appeal; and

(ii) The decision being appealed.

(2) *Filing appellant's brief.* Each appellant shall file a brief supporting its position on appeal within thirty (30) days (40 days if Commission staff is the appellant) after the filing of notice required by paragraph (a) of this section.

(3) *Filing responsive brief.* Any party who is not an appellant may file a brief in support of or in opposition to the appeal within thirty (30) days after the period has expired for the filing and service of the brief of all appellants. Commission staff may file a responsive brief within forty (40) days after the period has expired for the filing and service of the briefs of all appellants. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed.

(4) *Brief content.* A brief in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.

(i) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. An intervenor-appellant's brief must be confined to issues which the intervenor-appellant placed in controversy or sought to place in controversy in the proceeding. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

(ii) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.

(5) *Brief length.* A party shall not file a brief in excess of seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request an increase of this page limit for good cause. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement requested.

(6) *Certificate of service.* All documents filed under this section must be accompanied by a certificate reflecting service upon all other parties to the proceeding.

(7) *Failure to comply.* A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

* * * * *

30. In § 2.1209, paragraph (d) is revised to read as follows:

§ 2.1209 Power of presiding officer.

* * * * *

(d) Certify questions to the Commission for determination, either in the presiding officer's discretion or on direction of the Commission;

* * * * *

31. Section 2.1241 is revised to read as follows:

§ 2.1241 Settlement of proceedings.

The fair and reasonable settlement of proceedings subject to this subpart is encouraged. A settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding.

32. In § 2.1251, paragraphs (a), (c)(3) and (f) are revised to read as follows:

§ 2.1251 Initial decision and its effect.

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the presiding officer shall render an initial decision after completion of an informal hearing under this subpart. That initial decision constitutes the final action of the Commission thirty (30) days after the date of issuance, unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review of the decision sua sponte.

* * * * *

(c) * * *

(3) The time within which a petition for review may be filed, the time within which any answer to a petition for review may be filed, and the date when the decision becomes final in the absence of the Commission taking review of the decision.

* * * * *

(f) Following an initial decision resolving all issues in favor of the licensing action as specified in paragraph (e) of this section, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of a petition for review or pendency of any review taken by the Commission pursuant to § 2,786, shall take the appropriate licensing action upon making the appropriate licensing findings promptly, except as may be provided pursuant to paragraph (e)(1) or (2) of this section.

33. Section 2.1253 is revised to read as follows:

§ 2.1253 Petitions for review of initial decisions.

Parties and § 2.1211(b) participants may petition for review of an initial decision under this subpart in accordance with the procedures set out in § § 2.786 and 2.763 or the Commission may review the decision on its own motion. Commission review will be conducted in accordance with those procedures the Commission deems appropriate. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

§ 2.1255 [Removed]

34. Part 2 is amended by removing § 2.1255.

§ 2.1257 [Removed]

35. Part 2 is amended by removing § 2.1257.

36. In part 2, appendix A, section IX is removed and section I(b) is revised to read as follows:

Appendix A—Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing Is Required Under Section 189a of the Atomic Energy Act of 1954, as Amended

* * * * *

I. Preliminary Matters

* * * * *

(b) In fixing the time and place of any conference, including prehearing conferences, or of any adjourned session of the evidentiary hearing, due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as of the Board members, the nature of such conference or adjourned session, and the public interest. Adjourned sessions of hearings may be held in the Washington, DC area if all parties so stipulate. If the parties disagree, and any party considers that there are valid reasons for holding such session in the Washington, DC area, the matter should be referred to the Commission for resolution.

* * * * *

36A. In part 2, appendix a, section I(c)(1), the reference to "§§ 2.760 and 2.762" is revised to read "§ 2.760".

37. In 10 CFR part 2, all further references to the "Atomic Safety and Licensing Appeal Panel," "Atomic Safety and Licensing Appeal Board" and "Appeal Board" are removed and the following instructions apply:

A. In cases where there are two references, and the word "or" precedes or follows one of the listed terms, it is removed with the term.

B. In cases were there are two references and the words "as appropriate" appear in the same sentence with the listed term, they are also removed.

C. If the words "and" or "and/or" precede one of the terms listed, it is removed with the term.

D. The words "the", "a", or "an" preceding one of the listed terms is removed with the term if there are no other remaining terms to which the word applies.

Dated at Rockville, MD this 19th day of June , 1991.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 91-15092 Filed 6-26-91; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Part 261

[Docket No. R-0713]

Rules Regarding Availability Of Information; Freedom of Information Reform Act

AGENCY: Board of Governors of the Federal Reserve System

ACTION: Final Rule.

SUMMARY: The Board of Governors of the Federal Reserve System (the "Board") has adopted as a final rule, without change, the amendment to its Rules Regarding Availability of Information that was adopted by interim rule effective January 2, 1991 (55 FR 49876, December 3, 1990). The interim rule reflected changes in the direct costs to the Board to conduct searches, review documents, and copy documents in