



Samuel Lawrence Foundation Comment and Formal Petition

Categorical Exclusion for Advanced Nuclear Reactors

Docket No. DOE-HQ-2025-0405 | 91 Fed. Reg. [2026-02071] (Feb. 2, 2026)

Submitted via www.regulations.gov

The Honorable Chris Wright

Secretary of Energy

U.S. Department of Energy

1000 Independence Avenue, S.W.

Washington, D.C. 20585

Re: Formal Administrative Comment and Process Objection — Violation of the Administrative Procedure Act, 5 U.S.C. § 553

The Samuel Lawrence Foundation (“SLF”) respectfully submits this formal comment in response to the Department of Energy’s (“DOE”) Federal Register notice of February 2, 2026, announcing the adoption of Categorical Exclusion (“CX”) B5.26 for Advanced Nuclear Reactors. We submit these comments pursuant to the invitation for comment stated in the notice and look forward to working with the DOE to ensure that any nuclear safety guidelines are efficient, effective, and safe.

In addition to responding to the aims of the comment, the SLF respectfully submits that DOE failed to follow the procedural requirements of the Administrative Procedure Act (“APA”) in adopting CX B5.26 and requests that DOE: (1) immediately suspend the effectiveness of CX B5.26; (2) treat this comment period as the public comment period on a Notice of Proposed Rulemaking; and (3) re-issue B5.26 as a properly noticed proposed rule under 5 U.S.C. § 553 with a genuine opportunity for prior public participation before the CX takes binding legal effect.

I. Summary Of Objections

1. DOE made CX B5.26 immediately effective without prior notice-and-comment, in direct violation of 5 U.S.C. §§ 553(b)–(c);
2. DOE published no Notice of Proposed Rulemaking before adopting CX B5.26;

3. DOE failed to invoke or satisfy the 'good cause' exception under 5 U.S.C. § 553(b)(B), the only APA mechanism that could have authorized immediate effectiveness;
4. DOE improperly placed CX B5.26 outside the CFR in an effort to avoid the formal rulemaking process DOE has historically used and is legally required to use for CX establishment; and
5. DOE's departure from its own established rulemaking practice — without reasoned explanation — is arbitrary and capricious under 5 U.S.C. § 706(2)(A).

II. Legal Argument

A. The APA Required Prior Notice and Comment Before CX B5.26 Took Effect

The APA's informal rulemaking provision, 5 U.S.C. § 553, requires that before adopting a binding rule, an agency must: (1) publish a notice of proposed rulemaking including the rule's substance and legal authority; (2) give interested persons a meaningful opportunity to comment before adoption; (3) consider those submissions; and (4) publish the final rule at least 30 days before its effective date. 5 U.S.C. §§ 553(b)–(d). The purpose is to ensure that public participation occurs prior to the ultimate decision. *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982).

DOE violated every element of this sequence. CX B5.26 became effective February 2, 2026 — simultaneously with publication — with no prior NPRM, no prior comment period, and no consideration of any public input. The post-publication comment period cannot serve the APA's purpose. An agency “cannot cure its failure to provide meaningful notice and comment by allowing post hoc submissions.” *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1134 (D.C. Cir. 2007).

B. CEQ Regulation Rescission Does Not Relieve DOE of Its APA Obligations

DOE's footnote 4 implies that because CEQ's NEPA implementing regulations have been rescinded, prior public comment on CXs is no longer applicable. This reasoning is fundamentally flawed. The notice-and-comment requirement arises from the APA — a federal statute enacted by Congress in 1946 — not from any CEQ regulation. CEQ's rescission of its own regulations (90 FR 10610, Feb. 25, 2025) eliminated one procedural layer; it had no effect on DOE's independent statutory obligations under the APA. Congress has not amended the APA, and no Executive Order can override a congressional statute. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

C. DOE Failed to Invoke or Satisfy the Good Cause Exception

The APA provides one narrow path for bypassing prior notice-and-comment: the “good cause” exception. 5 U.S.C. § 553(b)(B). This provision requires the agency to: (a) make an affirmative finding of good cause; and (b) incorporate that finding and a brief statement of reasons into the rule itself. *Id.* DOE made no such finding. The notice never references § 553(b)(B). Courts narrowly construe this exception and only reluctantly countenance departures from notice-and-comment. *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). The motivating Executive Orders were issued eight months before this notice, undermining any urgency argument, and DOE's voluntary solicitation of comment implicitly concedes that comment was neither impracticable nor unnecessary.

D. Non-CFR Placement Does Not Exempt CX B5.26 from § 553

APA notice-and-comment requirements apply based on an action's substantive legal effect, not its label or location. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997). CX B5.26 has binding legal effect regardless of where it is housed: when invoked, it forecloses all NEPA environmental review for advanced nuclear reactor projects. Agencies “cannot escape the notice-and-comment requirements by the choice of instrument.” *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999).

E. DOE's Unexplained Departure from Prior Practice Is Arbitrary and Capricious

As recently as November 2023 (88 FR 79157), DOE published a formal NPRM for CX additions with a full prior public comment period. DOE has followed this practice throughout its regulatory history. The APA requires an agency to cogently explain why it has exercised its discretion in a given manner and, when changing course, to display awareness that it is changing position. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 57 (1983). DOE's notice provides no such explanation, rendering CX B5.26 independently arbitrary and capricious under 5 U.S.C. § 706(2)(A).

III. Petition to Align with APA Procedures

1. We request DOE immediately suspend the effectiveness of CX B5.26 pending completion of a lawful notice-and-comment rulemaking process;
2. Treat this comment period as a public comment period on a Notice of Proposed Rulemaking;

3. Rescind or alternatively re-issue B5.26 with 90 days for full public consideration in line with the gravity of the exception sought. After the comment period DOE at a minimum should issue a final rule only after fully considering all public comments and publishing a reasoned statement of basis and purpose consistent with 5 U.S.C. § 553(c);
4. Only then codify the final rule in 10 C.F.R. Part 1021, consistent with DOE's established practice; and
5. Refrain from applying CX B5.26 to any specific project until a procedurally compliant rule is in place.

The SLF reserves all rights to seek judicial review of CX B5.26 pursuant to 5 U.S.C. §§ 702 and 706 should DOE fail to correct these procedural deficiencies.

IV. Merits of the Categorical Exclusion

Even if this CX were promulgated in accordance with the APA, Categorical Exclusions are meant only for projects that do not have a “significant effect on the human environment.” We have decades of data on the safety of nuclear reactors of many kinds, but we have precious little on the 127+ possible permutations of next generation reactors that have virtually no testing. We have no reliable data on the waste they will generate, how it will be stored, or how it could potentially interact with local soil, bedrock, and groundwater.

The advanced reactor types covered here (Generation IV, small modular reactors, microreactors) have never been built at commercial scale and are drastically less efficient than large scale systems. That lower efficiency means that these reactors will produce more radioactive waste per unit of electricity than current reactor designs, for which the U.S. still has no permanent solution. It bears repeating. The U.S. lacks a permanent disposal pathway for existing nuclear waste. Adding novel, uncharacterized waste streams on top of that unresolved problem, with no site-specific review required, is not streamlining -- it is shifting a multigenerational liability onto the public.

We need energy to meet the rising demand of data centers, to reduce costs for ratepayers, to increase domestic manufacturing, and, if renewable, to help abate the worst effects of climate change. There can be a role for nuclear energy to play, but not at the expense of human safety, not rushed or rubber stamped or set in the hands of dozens of



companies that could pack up and go home when their investor dollars dry up. CXs were created for routine events that agencies knew, through experience and expertise, posed little risk to the environment and human health. This is not that. This is throwing dice in the dark, and gambling with the health and wellbeing of millions of American lives.

Respectfully submitted,

Dr. Bart Ziegler
Samuel Lawrence Foundation
P.O. Box F
Del Mar, California 92014
858-481-1673

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