

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

February 20, 1990

MEMORANDUM FOR: James M. Taylor
Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-90-022 - PROPOSED RULE HOLDING
UNLICENSED PERSONS ACCOUNTABLE FOR
WILLFUL MISCONDUCT

This is to advise you that the Commission (with all Commissioners agreeing) has approved the proposed rule on willful misconduct by unlicensed persons, subject to the revisions noted on the attached pages from the draft notice. Some of these comments are intended to conform this proposal to the commission comments on the related rulemaking to change Part 2 procedures on issuing orders.

In approving publication of the proposed rule, the Commission notes that its adoption of this approach should not signal any departure from the fundamental premise that NRC licensees are responsible for the safety of their operations and are accountable for the acts of their employees and agents. The enforcement actions provided for by these proposed changes to our regulations should be exercised sparingly and with utmost caution. If this proposal is adopted, the staff should be cautious in applying sanctions to ensure that they are necessary to supplement the Commission's established enforcement scheme over licensees and over non-licensees that are subject to Part 21. The commission intends to carefully review the staff's use of the enforcement option discussed herein and in SECY-89-321 to be sure it is used to the benefit of public health and safety.

NOTE: THIS SRM AND THE SUBJECT SECY PAPER ARE CONSIDERED TO BE "FINAL COMMISSION ACTIONS" AND AS SUCH WILL BE RELEASED TO THE PUBLIC UPON PUBLICATION OF THE FEDERAL REGISTER NOTICE.

The Commission also questions whether the text of the rule provides strong support for the assertion that there is an increasing number of cases involving willful misconduct when the identified number of cases has been only about 5 per year over the last few years. Probably the same number of cases existed 10 years ago; only our approach to such cases has really changed. In any event, the rule need not rest upon such assertions.

The staff should evaluate whether its proposal here should also extend to Part 110, which governs import/export licensing, before the proposed rule is published for comment.

(EDO) (SECY SUSPENSE: 3/9/90)

The Federal Register notice should be revised as noted above and in the attached pages; reviewed by the Regulatory Publications Branch, ADM, for consistency with the Federal Register requirements; and returned for signature and publication. Publication of this rule should occur at the same time as publication of the proposed changes to Part 2 (SECY-89-321).

(EDO) (SECY SUSPENSE: 3/22/90)

cc: Chairman Carr
Commissioner Roberts
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
OGC
GPA

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Enclosure A

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 60, 61, 70, 72, and 150

RIN: 3150-AD38

Willful Misconduct by Unlicensed Persons

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to revise its regulations to put unlicensed persons on notice that they may be subject to enforcement action (1) for willfully causing a licensee to violate any of the Commission's requirements or (2) for other willful misconduct that (a) arises out of activities within the jurisdiction of the NRC and (b) places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety. The proposed rule would subject a person who engages in that conduct to enforcement action under existing regulations. This proposed rule will enable the Commission to better address willful misconduct that places in question the reasonable assurance that licensed activities will be conducted in a manner that will provide adequate protection of the public health and safety.

DATES: The comment period expires [INSERT DATE 75 DAYS FROM

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These instances of willful misconduct on the part of unlicensed individuals have caused NRC to have reduced confidence that all of these individuals would conduct licensed activities in a manner that adequately protects public health and safety. This conduct has included deliberate violations of NRC requirements, falsification of records, false statements to the NRC, and interfering with an NRC investigation, as well as other forms of wrongdoing. After becoming aware of such conduct, a licensee may dismiss the employee either by its own decision or because the NRC formally orders removal of the employee from licensed activity. However, the wrongdoer may seek other employment in the same field at another NRC or Agreement State-licensed facility, often without the knowledge of the NRC or knowledge by the new employer of the employee's prior conduct. The Commission has also noted that willful acts of licensees' contractors, vendors, or their employees have caused licensees to be in violation of Commission requirements. The Commission believes that additional enforcement options are needed to address directly persons who are not themselves licensees, but are or have been engaged in licensed activities and whose willful misconduct, directly or indirectly, causes a licensee to be in violation of a Commission requirement or places in question the NRC's reasonable assurance of adequate protection of the public health and safety. "Licensed activities," as used in this rule, includes those actions that enable a licensee to carry out its license. 1/

1/ Licensed activity as used in this context is a broad term, coextensive with the Commission's jurisdiction, that encompasses all of those activities that a licensee or its contractors, employees, or other agents perform to permit the licensee to carry out activities licensed by the Commission in accordance with Commission requirements, whether performed on or off site.

supply components or other items knowing that they do not comply with their certificates of compliance. In these cases, depending on the circumstances, an order might be issued the contractor or vendor, prohibiting use of a service, product, or component in licensed activities, or to the employee who had willfully committed the misconduct, prohibiting that employee's involvement in licensed activities.

The Commission also recognizes that certain misconduct may not be a violation of a Commission requirement. However, when that misconduct occurs in connection with licensed activities or reasonably reflects on the ability of the individual to safely undertake license activities within the Commission's jurisdiction and raises a serious question as to whether there is reasonable assurance of adequate protection of the public health and safety if the person continues to be involved in licensed activities, NRC should have the ability to issue an order to the person involved in the misconduct. Therefore, the Commission is including in the proposed rule a provision that states: "In addition, the Commission may issue an enforcement order 21 pursuant to 10 CFR Part 2, Subpart B, to address willful misconduct of persons that arises out of activities within the jurisdiction of the NRC and places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to health and safety of the public. " This provision is intended to address cases in which the willful misconduct does not in itself constitute or create a violation of Commission requirements, either because of the wording of the particular requirement applicable to the activity or because NRC has not yet acted in an area, i.e., drug use by employees of a materials licensee while engaged in licensed activity. This willful misconduct

2/ The term "enforcement order" refers to an order directed to a person but which does not impose a civil penalty.

nevertheless may raise concerns that cause the NRC to question whether there is reasonable assurance that NRC-licensed activities, with that person present, will be conducted in a manner that provides adequate protection to the health and safety of the public. In these cases, where there is a reasonable basis for a regulatory concern, issuance of orders or demands to show cause might be appropriate pursuant to the proposed revisions to 10 CFR 2.202 and 2.204.

In deciding when to issue an enforcement order, the NRC recognizes that judgments will have to be made on a case by case basis. However, in making these decisions, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The safety consequences of the willful misconduct.

3. The benefit to the wrongdoer, e.g., personal or corporate gain.
4. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
5. The employer's response, e.g., disciplinary action taken.
6. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
7. The degree of management responsibility or culpability.
8. Who identified the willful misconduct.
The orders described above would be issued only for willful misconduct that bears on the person's ability to carry out health or safety-related responsibilities. In most cases, the order would require the person to divulge the existence of the order to a prospective employer or customer involved in licensed activities. Ordinarily, the Commission would expect to provide a specific time limit for the provisions of the order, and a process for relaxation of the order.

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These orders will be subject to the procedures and hearing rights of 10 CFR Part 2. 3/

Issuance of the orders described above would have the benefit of making the NRC aware of the person's future involvement in licensed activities for the time specified in the order, so that the NRC may monitor that involvement as necessary. It will also provide future employers involved in licensed activity the opportunity to make informed employment decisions, provided that the person complies with the terms of the order and informs the NRC and new employer, as required. If the person does not comply with the terms of the order, the failure to do so, when identified, could subject the offender to a civil penalty or could be referred to the Department of Justice for criminal prosecution.

A separate rulemaking under consideration by the Commission would make the necessary revisions to the Commission's procedures in 10 CFR Part 2, Subpart B, to expressly provide for issuance of orders to persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. Following promulgation of this rulemaking and the Part 2 rulemaking, there will be substantive and procedural rules governing the issuance of an order or a show cause demand not only to a licensee, as currently provided, but also to an unlicensed person whose willful misconduct causes a licensee to be in violation of Commission requirements or places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner adequate to protect the public health and safety. In addition, notices of Violation with

civil penalties will be authorized for willful misconduct that causes a licensee

3/ As indicated in the text, a separate rulemaking is Underway addressing procedures for issuing orders. Under that proposal, a hearing will not be provided for a show cause demand order because those demands require only a written response.

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to be in violation of Commission requirements. While civil penalties will not be available for willful misconduct that does not cause a licensee to be in violation, civil penalties are available for violations of all orders issued under the rule.

In sum, orders to unlicensed persons may include requirements such as:

1. A prohibition against any involvement in NRC-licensed activities, generally for a specified period of time.
2. A prohibition against any involvement in NRC-licensed activities until certain conditions are satisfied, e.g., completing specified training or meeting certain qualifications.
3. A requirement to notify the NRC before resuming work in licensed activities
4. A requirement to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

Orders to licensees who are employers or former employers of individuals subject to orders may include requirements such as:

1. Removal of an individual from licensed activity.
2. A requirement for retraining certain individuals, as a condition of allowing the person to continue in licensed activities.
3. A requirement to advise any prospective employer who inquires about an individual of the existence of any order issued to the individual.
4. A requirement to notify the NRC if the employer rehires or restores the individual to licensed activity, and to state the basis for so doing.
5. A requirement for additional oversight or independent verification of activities performed by the person, if the person is to continue to be involved in licensed activities.

Ordinarily, requirements such as those listed above will be imposed for a specified period of time. A person subject to an order may, at any time, request the NRC to relax the order for good cause in accordance with the provisions of the order.

Orders, including orders imposing civil penalties, are published in the Federal Register and NUREG-0940, (Enforcement Actions: Significant Actions Resolved), and are also the subject of a press release. In addition, the Commission intends to establish a system of records that will include a list of all persons currently subject to an order that affects their participation in licensed activities. A list and copies of all currently effective orders will be sent to all power reactor licensees twice a year. The list, with copies of orders, will be made available to other licensees and members of the public on request.

The Commission believes that these actions will provide greater assurance that licensees will be aware of persons who have been the subject of an NRC enforcement order. These actions should provide better accountability for employees, consultants, contractors, and vendors in the nuclear industry and increase their responsibility and thus improve the quality of performance, and therefore, the protection of the public health and safety. Use of these orders should also serve as an effective deterrent to wrongdoers and inadvertent employment of wrongdoers throughout the regulated industry. Adoption of these proposed regulations will not alter the NRC's procedures for referring certain alleged or suspected criminal violations of the Atomic Energy Act to the Department of Justice for appropriate action.

It would be an erroneous reading of the proposed regulations to conclude that conscientious people may be subject to personal liability for mistakes. The Commission realizes that people may make mistakes while acting in

good faith, and enforcement actions directly against individuals are not to be used for activities caused by merely negligent conduct. These persons should have no fear of individual liability under this regulation, as the rule requires that there be willful misconduct before the rule's sanctions may be imposed. The Commission recognizes, as stated in Section E, "Enforcement Actions Involving Individuals," of the NRC Policy and Procedure for Enforcement Actions; Policy Statement, 10 CFR Part 2, Appendix C (1989), that enforcement actions involving individuals are significant actions that need to be closely controlled and judiciously applied. The Policy also states that action will not be taken against an individual if the improper conduct was caused by management failures.

The NRC Enforcement Policy currently requires that all enforcement actions

involving unlicensed individuals, and licensed individuals pursuant to 10 CFR Part 55, be approved by the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support. The staff will consult with the Commission before taking action directly against unlicensed individuals by order or civil penalty or issuing a civil penalty in the case of a licensed reactor operator pursuant to 10 CFR Part 55. 4/ Prior notice will be given to the Commission on Notices of Violation without civil penalties that are issued to unlicensed individuals and actions taken against other unlicensed persons, such as corporations or partnerships. Enforcement actions against unlicensed persons, as with other NRC enforcement actions, require the exercise of discretion and will be taken dependent on the circumstances of the case.

4/ Consultation with the Commission does not preclude the staff from taking immediately effective action under existing regulatory provisions where necessary to protect health and safety, e.g., suspending a license and ordering radioactive sources to be removed.

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At the time of final rulemaking on these matters, the Commission also intends to modify its Enforcement Policy, 10 CFR Part 2, Appendix C, to address enforcement actions against unlicensed persons. The Policy will be clarified to provide

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The proposed changes are made under the authority of 161b and i and the above-identified licensing provisions. The proposed changes will prohibit willful misconduct that causes a licensee to be in violation of Commission requirements. By imposing a direct prohibition on unlicensed persons, the Commission will then be able to exercise its Section 234 authority to impose civil penalties on unlicensed individuals who willfully cause a licensee to be in violation of requirements because they are persons who violate the licensing provisions enumerated in section 234. In cases where the Commission issues an order (other than an order imposing a civil penalty) to a person based on willful misconduct that causes a licensee to be in violation of a Commission requirement or to a person whose willful misconduct, in the absence of a violation, places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the health and safety of the public, the order would be issued, in part, pursuant to a regulation (e.g. proposed 50.5) that was promulgated under a licensing provision of the Atomic Energy Act, and a civil penalty would be available for violations of such an order. In addition, criminal sanctions under Section 223 are available for willful violations of orders and regulations under Section 161b and i. Injunctions are also available under Section 232 for violations of Commission orders.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule relates to enforcement matters and, therefore, falls within the scope of 10 CFR 51.10(d). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

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Paperwork Reduction Act Statement

This proposed 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 Nuclear Regulatory Commission has statutory authority to issue enforcement actions against unlicensed persons whose Willful misconduct causes a licensee to be in violation of the Commission's requirements or causes the NRC to question its reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to public health and safety. As presently written, the Commission's regulations do not specifically provide for implement that statutory authority and issuance of these orders. In the past, the Commission has issued orders to holders of licenses directing removal of wrongdoers from licensed activities. However, this approach does not satisfy concerns about wrongdoers who may be hired by others in the industry, without knowledge of the prior wrongdoing, or who are rehired by the former employer, in those instances where no order was issued.

The Commission is concerned about a number of incidents of willful wrongdoing in recent years in which it has been limited in its ability to address the problem directly or to have some control over the activities of the wrongdoer in the near term. While the number of cases of willful misconduct of which the NRC is aware is not large (less than five cases per year for the past three years), that number is unacceptable and the potential for injury is serious enough that the problem must be addressed.

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The objective of the rule is to put everyone subject to the Commission's jurisdiction on notice that enforcement action, including civil penalties, might be taken against them for willful misconduct in relation to NRC licensed activities. Under section 234 of the Atomic Energy Act, the Commission may impose civil penalties on employees of licensees and others who willfully cause a violation of a requirement. The Commission also may impose a civil penalty on a

person who violates an order issued to that person for willful misconduct, absent a violation, that placed in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety, because the order would be issued, in part, pursuant to a regulation that was promulgated under a licensing provision of the Atomic Energy Act. The enforcement actions that are taken, including orders limiting activities of wrongdoers in the future and civil penalties, will serve as a deterrent to others throughout the industry.

The alternatives available to the Commission are to propose a rule, as is done herein, or do nothing. Given the frequency of these incidents, and the potential harm to the public as well as individuals working in NRC licensed activities, the alternative of doing nothing was rejected. The benefits of taking enforcement action are similar to those of taking action against licensed entities, in that a civil penalty and attendant adverse publicity encourage future compliance, the Notice of Violation calls for precise response as to corrective action taken, and, an enforcement order, if obeyed, may directly control the involvement of an individual in licensed activity. The effect of having these options available in the enforcement program should reduce the probability of repetitive violations by wrongdoers.

The NRC does not anticipate that additional investigations will be necessary to implement the rule because it focuses on the results of investigations. The

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20. In § 72.2, paragraph (f) is added to read as follows:

§ 72.2 Scope.

* * * * *

(f) This part also gives notice, in §72.12, to all persons whose actions enable a licensee to carry out activities licensed by the Commission, including individuals, corporations, and other entities, whether or not licensed by the NRC, that they may be individually subject to NRC enforcement action for willful misconduct that causes a licensee to be in violation of an NRC requirement or that places in question reasonable assurance of adequate protection of the public health and safety.

21. Immediately following # 72.11 a new # 72.12 is added to read as follows:

§ 72.12 Willful misconduct.

A person may not willfully cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission. A person who violates this provision may be subject

to enforcement action in accordance with the procedures in 10 CFR Part 2, Subpart B. In addition, the Commission may issue an enforcement order pursuant to 10 CFR Part 2, Subpart B, to address willful misconduct of persons that arises out of activities within the jurisdiction of the NRC and places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the health and safety of the public.

PART 150 - EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

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Enclosure B

DRAFT CONGRESSIONAL LETTER

Dear Mr. Chairman:

Enclosed for your information are copies of a proposed rule to be published in the Federal Register.

The Commission is proposing to revise its regulations to put unlicensed persons on notice that they may be subject to enforcement action for willfully causing a licensee to violate any of the Commission's requirements or for other willful misconduct that arises out of activities within the jurisdiction of the NRC and places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety. The proposed rule would subject a person who violates this prohibition to enforcement action under existing regulations.

This proposed rule will enable the Commission to better address willful misconduct that places in question the reasonable assurance that licensed activities will be conducted in a manner that will provide adequate protection to the public health and safety.

Sincerely,

James M. Taylor
Executive Director for Operations

Enclosure: As Stated