

**From:** Carolyn Evans *R2*  
**To:** Charles R. Ogle *R2*  
**Date:** 5/20/02 11:15AM  
**Subject:** Re: BACKGROUND INFORMATION

Attached are the documents you requested. Please note that statements of considerations/supplementary information merely explain to the regulated community the agency's basis for drafting the rule; they are not binding or controlling as law. Also, with respect to the Deliberate Misconduct Rule (10 CFR 50.5), be advised that when the rule was first published, it was intended to apply to non-licensed individuals for willful violations based on careless disregard. That quickly changed and the rule only applies to **deliberate** violations of regulatory requirements (the formula for deliberate = knowledge of a controlling rule, regulation, order, license condition, etc coupled with conduct in contravention of the known standard). I've probably given you more info than you needed. If I did, my apologies.

>>> Charles R. Ogle 05/20/02 09:55AM >>>

As part of the DPV review process would it be possible for me to get the statements of consideration for 10 CFR 50.70 and 10 CFR 50.5? Electronic would be best. Thanks.

*B/26*

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Send to: EVANS, CAROLYN  
- NUCLEAR REGULATORY COMMISSION/REGION 2  
PO BOX 2257  
ATLANTA, GEORGIA 30301-2257

LEXSEE 55 FR 12374

NUCLEAR REGULATORY COMMISSION

AGENCY: Nuclear Regulatory Commission.

10 CFR Parts 30, 40, 50, 60, 61, 70, 72, 110 and 150

RIN 3150-AD38

Willful Misconduct by Unlicensed Persons

55 FR 12374

April 3, 1990

**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 June 18, 1990. Comments received after this date will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

**ADDRESSES:** Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch. Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:45 am and 4:15 pm Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** James Lieberman, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-0741.

**TEXT: SUPPLEMENTARY INFORMATION:** Over the years, the Commission has in most cases issued licenses to organizations rather than individuals. Likewise, the Commission's enforcement program holds the licensees responsible for not only the conduct of operations, but also for the conduct of their employees, consultants, or contractors. Until now, enforcement actions concerning persons who have willfully caused violations of Commission requirements or otherwise have engaged in willful misconduct in connection with licensed activities consisted of actions against licensees, including Notices of Violations, civil penalties, and orders

modifying the license to direct removal of the individual from licensed activities at the licensed facility where the violation occurred, or orders confirming that the licensee has removed an individual from licensed activities. These actions only indirectly reach an individual.

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.<sup>1 n</sup>

<sup>1 n</sup> 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.

Accordingly, the Commission is proposing to amend its regulations to put on notice all those who are engaged in any manner in activities subject to the Commission's jurisdiction that they may be subject to enforcement action for willful misconduct that causes "a licensee to be in violation of any rule, regulation, or order issued by the Commission, or any term, condition, or limitation, of any license issued by the Commission." The proposed change makes any person who violates this requirement subject to enforcement action in accordance with the procedures of 10 CFR part 2, subpart B. That subpart provides for issuance of Notices of Violation, civil penalties, and orders.

These changes will allow the Commission to utilize the full range of enforcement sanctions, where warranted, against any person willfully violating or causing a violation of Commission requirements. This would include licensee employees, vendors, contractors, and consultants, and their employees, and other agents of licensees. The Commission emphasizes that, by taking action against these persons, it does not intend to diminish the responsibility of a licensee for the conduct of its employees and therefore, as appropriate, the Commission also will be taking action against the licensee directly.

The proposed regulations focus on willful misconduct. A violation is willful if an individual either knew that the conduct was prohibited or showed a careless disregard for whether the conduct was prohibited. Careless disregard has been

described as a showing of disregard for a governing statute or an indifference to its requirements. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *U.S. v. Illinois Central Railroad Co.* 303 U.S. 239 (1938). In the Commission's statement of considerations for the final rule on Completeness and Accuracy of Information (52 FR 49362-65; December 31, 1987) the Commission noted that willful conduct includes "careless disregard" in that it "connotes a reckless regard or callous \* \* \* indifference toward one's responsibilities or the consequences of one's actions." The NRC's Enforcement Policy, 10 CFR part 2, appendix C, General Statement of Policy and Procedure for NRC Enforcement Actions, states that "willfulness \* \* \* embraces a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements." A finding of careless disregard indicates that the person acted with reckless indifference to the requirement, or with disregard (or utter unconcern) of the consequences or whether there was compliance. This recklessness involves, at a minimum, an unconcern as to whether a requirement was or will be violated, or a situation in which an individual blinds himself or herself to the realities of whether a violation has occurred or will occur. This contrasts with violations caused by simple error, misjudgment, miscalculation, ignorance, or confusion on the part of the individual.

In most cases, taking action directly against the licensee should be sufficient for conduct that does not involve wrongdoing, that is, conduct that does not rise at least to the level of careless disregard. However, this focus on willful misconduct in the proposed regulations should not be construed to condone negligent conduct by a person that causes a violation. In cases involving negligent conduct, action against the individual is more appropriately handled within the licensee's remedial program.

Cases addressed in this rulemaking where orders are issued are significant matters in which (1) the staff concludes that the person's involvement in licensed activities would cause the staff to lose its confidence that there is a reasonable assurance that licensed activities will be conducted in accordance with the Commission's requirements, and (2) the NRC believes that it has sufficient evidence to prove by a preponderance of the evidence that wrongdoing occurred.

A situation in which it might be appropriate to issue an order to an unlicensed individual is the case of an employee of a licensee willfully causing that licensee to be in violation of Commission requirements. As a result of that individual's action, the Commission might no longer have reasonable assurance that requirements necessary to protect the public health and safety would be followed if that individual were to continue to engage in activities within the Commission's jurisdiction. Another example where an order to an individual might be appropriate is the case of an unlicensed individual who willfully provides an inspector, investigator, or other NRC employee with inaccurate or incomplete information on a matter material to the Commission's regulatory responsibilities. Additional examples include a supervisor who discharges an employee for raising safety concerns, a company officer who directs employees to provide false information to the NRC, an employee who falsifies records of required information, or an employee who willfully defeats alarms that have safety significance.

Depending on the circumstances of these types of cases, it might be appropriate to issue an order to the individual either prohibiting the individual from being involved in NRC licensed activities, conditioning the individual's involvement in those activities, or requiring the individual to provide prior notice to the

Commission before engaging in licensed activities in the future. The provision for prior notice would permit the Commission to evaluate whether it needs to issue an additional order to prohibit or condition the individual's involvement in licensed activities or to determine whether increased inspection effort is needed. In addition, the order might require the individual to inform future employers licensed by the Commission of the existence of the order. This would provide some assurance that, should the individual be employed to perform licensed activities in the future, the new employer would be aware of the individual's past conduct and ensure that appropriate oversight is in place. Some of these conditions have been used by the Commission in settlement of litigation in accordance with 10 CFR 2.203. *Edward Hines, Jr. Medical Center, ALJ-88-2, 28 NRC 477 (1988)*, and *Finlay Testing Laboratories, Inc., LBP-88-17, 27 NRC 586 (1988)*.

As a supplement to an order to an individual, the Commission might also order the facility licensee to remove the individual from licensed activities. This would provide additional assurance that the individual is actually removed. If the licensee has already removed the wrongdoer, the NRC could issue an order to the licensee confirming the removal and requiring the licensee to notify the NRC if the licensee desires to use the individual in licensed activities in the future, and to provide the basis for doing so. These orders could also direct the licensee to advise any prospective employer conducting licensed activities, who inquires about the past employment of the wrongdoer, of the issuance and publication of the removing or confirming order. These latter requirements may be appropriate because, while the NRC has preferred not to be involved in licensees' employment decisions, it has become apparent that licensees need more complete background information about prospective employees to make better employment decisions. In some instances, checking previous employment can be thwarted because employers are often reluctant to divulge to prospective employers any derogatory information about former employees, due to state laws and fear of tort liability. Similar restrictions have been adopted in a final rule of the Federal Railroad Administration, 54 FR 42894 (October 18, 1989).

Additional examples of potential application of the proposed rule include companies that provide testing services and whose employees willfully supply false data to a licensee in an effort to prevent the licensee from being in violation of 10 CFR part 50, appendix B; vendors whose willful false certification causes a licensee to acquire components that do not meet license requirements, such as the ASME code, where required; and companies that 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 to 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 licensed 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 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 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 revision to 10 CFR 2.202 and 2.204.

n2 The term "enforcement order" refers to an order directed to a person but which does not impose a civil penalty.

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. These orders will be subject to the procedures and hearing rights of 10 CFR part 2.3 n

n3 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 because those demands require only a written response.

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.

In a separate rulemaking published simultaneously with this rulemaking, the Commission is proposing 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 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 individual(s), 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.

n4. 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.

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 that when the NRC proposes to take escalated enforcement action against an unlicensed person, an enforcement conference will normally be held with that person. The Policy does not now provide for the amount of civil penalty that may be assessed vendors, contractors, or individuals who are subject to civil penalties. Therefore, Table 1A of the Policy will be modified to include vendors and contractors with "Industrial users of material," and "other individuals subject to NRC jurisdiction" will be included with "Other material licensees." The Commission also intends to include in the Policy examples of when enforcement action might be taken against individuals, similar to the examples set out in this Statement of Considerations. The Policy will also reflect that a person subject to an enforcement order will be given a right to a hearing and, as stated above, consultation with or prior notice to the Commission will be required.

This rulemaking implements the Commission's authority under the Atomic Energy Act of 1954, as amended, to issue regulations and orders to any person (defined in section 11s to include, e.g., an individual, corporation, firm or a Federal, State or local agency) who engages in conduct affecting activities within the Commission's subject-matter jurisdiction. The few court cases that deal with the scope of the general authority Congress has granted the Commission usually do so in the general discussion or in passing and conclude that section 161 confers uniquely broad and flexible authority on the Commission. See *Power Reactor Dev. Co. v. International Union of Elec. Radio and Mach. Workers, AFL-CIO*, 367 U.S. 396 (1961); *Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 527, n.3 (DC Cir. 1982); *New Hampshire v. Atomic Energy Comm'n*, 406 F.2d 170, 173-74 (1st Cir. 1969); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 779, 783 (DC Cir. 1968); but cf. *Reynolds v. United States*, 286 F.2d 433 (9th Cir. 1960) (interpreting section 161i in detail and holding, in the context of the AEC's bomb testing activities, that section 161i(3) authorized the AEC to take action to govern the activities of private licensees and not the activities of the Commission itself; the court's use of the word "licensee" is dictum with regard to the term in the context of this notice).

Cases analyzing the Federal Communications Commission's (FCC) enabling statute, which, in many ways, is analogous to the Atomic Energy Act, also support the principle that the Commission's authority is broad in scope. The Federal Communications Act of 1934 (the 1934 Act) broadly authorizes the FCC to "make such rules and regulations, and issue such orders, not inconsistent with [the 1934 Act], as may be necessary in the execution of its functions," 47 U.S.C. 154i (1982). This provision is similar to section 161i(3) of the Atomic Energy Act of 1954, which authorizes the Commission to "prescribe such rules, regulations, and orders as it may deem necessary to govern any activity authorized pursuant to the [Atomic Energy Act of 1954] \* \* \* in order to protect health and to minimize danger to life or property \* \* \* ." 42 U.S.C. 2201(i) (3) (1982). A number of cases have analyzed section 154i in detail and held that the FCC's ordering authority is necessarily broad. See *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 at 793 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 at 203 (1955); *National Broadcasting Co. v. United States*, 319 U.S. 190 at 196 (1943); *Lincoln Telephone and Telegraph Co. v. Federal Communications Commission*, 659 F.2d 1092 (DC Cir. 1981); *American Telephone and Telegraph v. Federal Communications Commission*, 487 F.2d 865 (2d Cir. 1973); *GTE Service Corp.*

v. *Federal Communications Commission*, 474 F.2d 724 (2d Cir. 1973); and *Western Union Telegraph Co. v. United States*, 267 F.2d 715, 722 (2nd Cir. 1959). It has been held that the FCC has authority to issue orders under section 154i to persons whether licensed or not. *United States v. Southwestern Cable*, 392 U.S. 157 at 180-81 (1968).

Section 161i provides broad authority to issue regulations as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue regulations to impose "standards and instructions" on persons to govern the possession and use of special nuclear material, source material, and byproduct material, as may be necessary or desirable to provide for the common defense and security and protect the public health and safety.

Section 234 of the Atomic Energy Act authorizes the NRC to impose civil penalties on unlicensed individuals, including those who conduct licensed activities as employees of licensees, for violation of the NRC's substantive requirements. Section 234 reads as follows:

a. Any person who (1) violates any licensing provision of section 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, or 109 or any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 186 [of the 1954 Act], shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed \$100,000 for each such violation \* \* \*

The licensing provisions listed in section 234a generally prohibit the possession, use, receipt, or transfer of nuclear materials or facilities unless authorized by a license. The specific prohibitions are as follows: Section 57, 63, and 81 prohibit persons from engaging in activities that may be licensed pursuant to sections 53, 63, 81, and 82 unless those persons or their principals hold licenses that permit those activities. Section 101 prohibits persons from engaging in activities regarding a production or utilization facility that the NRC licenses under sections 103 or 104 unless those persons hold licenses that allow those activities. Section 101 further requires that persons licensed under sections 103 or 104 conduct activities licensed pursuant to those sections in accordance with the licenses.

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.

*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 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, any number is unacceptable and the potential for injury is serious enough that the problem must be addressed.

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 NRC estimates that fewer than five cases per year will actually result in enforcement action being taken against unlicensed individuals. The cost of preparing and publishing a very few additional actions per year beyond the current workload of handling of more than a hundred escalated enforcement actions per year is not significant.

The proposed rule will be implemented by processing, in the same manner as other escalated enforcement actions, those cases of willful misconduct that come to the agency's attention. The Commission will be consulted on actions that involve orders or civil penalties against unlicensed individuals. The Office of Enforcement will also maintain a list of those enforcement orders applicable to individual wrongdoers and distribute, twice a year to all power reactor licensees, a copy of the list of currently effective orders that restrict individuals from licensed activities and copies of those orders. The same material will be available to others who request it. The cost of distributing this information is negligible.

In light of the benefits of enabling the NRC to use its statutory authority to address directly the willful misconduct of unlicensed persons, it is appropriate that the Commission adopt the proposed rule.

#### **Regulatory Flexibility Certification**

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule puts unlicensed persons on notice that they may be subject to enforcement action if they willfully cause a licensee to be in violation of Commission requirements or subject to an enforcement order if their willful misconduct 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. The proposed rule, by itself, does not impose any additional obligations on entities, including any regulated entities, that may fall within the definition of "small entities" as set forth in section 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the size standards adopted by the NRC (50 FR 50241, December 29, 1985). Obligations would not be created until an order is issued, at which time the person subject to the order would have a right to a hearing in accordance with the regulations.

#### **Backfit Analysis**

This proposed rule does not involve any new provisions that would impose backfits as defined in 10 CFR 50.109(a)(1). Accordingly, a backfit analysis pursuant to 10 CFR 50.109(c) is not required for this proposed rule. However, issuance of orders pursuant to this regulation may involve backfit considerations, which will be addressed on a case-by-case basis.

#### **List of Subjects**

Byproduct material, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Penalty, Radiation protection, Reporting and recordkeeping requirements.

5010 CFR Part 40

Government contracts, Hazardous material-transportation, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Source material, Uranium.

5010 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria. Reporting and recordkeeping requirements.

5010 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

5010 CFR Part 61

Low-level waste, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

5010 CFR Part 70

Hazardous materials - transportation, Material control and accounting, Nuclear materials, Packaging and containers, Penalty, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

5010 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

5010 CFR Part 110

Administrative practice and procedure, Classified information, Export, Import, Incorporation by reference, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements, Scientific equipment.

5010 CFR Part 150

Hazardous materials - transportation, Intergovernmental relations, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

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. 553, the NRC is proposing to adopt the following amendments to 10 CFR parts 30, 40, 50, 60, 61, 70, 72, 110 and 150.

PART 30 -- RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

1. The authority citation for part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232,

2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § § 30.3, 30.10, 30.34(b), (c) and (f), 30.41(a) and (c), and 30.53 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 30.10 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and § § 30.6, 30.9, 30.36, 30.51, 30.52, 30.55, and 30.56(b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. Section 30.1 is revised to read as follows:

§ 30.1 Scope.

This part prescribes rules applicable to all persons in the United States governing domestic licensing of byproduct material under the Atomic Energy Act of 1954, as amended (68 Stat. 919), and under Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242), and exemptions from the domestic licensing requirements permitted by section 81 of the Act. This part also gives notice, in § 30.10, 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.

3. Immediately following § 30.9, a new § 30.10 is added to read as follows:

§ 30.10 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 40 -- DOMESTIC LICENSING OF SOURCE MATERIAL

4. The authority citation for part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97-415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § 40.3, 40.10, 40.25(d)(1)-(3), 40.35(a)-(d) and (f), 40.41(b) and (c), 40.46, 40.51(a) and (c), and 40.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 40.10 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 40.5, 40.9, 40.25(c), (d)(3), and (4), 40.26(c)(2), 40.35(e), 40.42, 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

5. Section 40.2 is revised to read as follows:

§ 40.2 Scope.

Except as provided in §§ 40.11 to 40.14 of this part, inclusive, the regulations in this part apply to all persons in the United States. This part also gives notice, in § 40.10, 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.

6. Immediately following § 40.9, a new § 40.10 is added to read as follows:

§ 40.10 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 50 -- DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

7. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13 and 50.54(dd) also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections

50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 through 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § 50.5, 50.46(a) and (b), and 50.54(c) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 50.5, 50.7(a), 50.10(a)-(c), 50.34(a) and (e), 50.44(a)-(c), 50.46(a) and (b), 50.47(b), 50.48(a), (c), (d), and (e), 50.49(a), 50.54(a), (i), (i)(1), (l)-(n), (p), (q), (t), (v), and (y), 50.55(f), 50.55a(a), (c)-(e), (g); and (h), 50.59(c), 50.60(a), 50.62(c), 50.64(b), and 50.80(a) and (b) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and § 50.49(d), (h), and (j), 50.54(w), (z), (bb), (cc), and (dd), 50.55(e), 50.59(b), 50.61(b), 50.62(b), 50.70(a), 50.71(a)-(c) and (e), 50.72(a), 50.73(a) and (b), 50.74, 50.78, and 50.90 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

8. Section 50.1 is revised to read as follows:

§ 50.1 Basis, purpose, and procedures applicable.

The regulations in this part are promulgated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended (68 Stat. 919), and Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242), to provide for the licensing of production and utilization facilities. This part also gives notice, in § 50.5, 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 under other parts of this chapter, 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.

9. Immediately following § 50.4, a new § 50.5 is added to read as follows:

§ 50.5 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 60 -- DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

10. The authority citation for part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846);

secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228 as amended (42 U.S.C. 10134, 10141).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § 60.11 is issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 60.11 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

11. Section 60.1 is revised to read as follows:

§ 60.1 Purpose and scope.

This part prescribes rules governing the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982. This part does not apply to any activity licensed under another part of this chapter. This part also gives notice, in § 60.11, 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.

12. Immediately following § 60.10, a new § 60.11 is added to read as follows:

§ 60.11 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 61 -- LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

13. The authority citation for part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246, (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851).

For the purposes of Sec. 223, 68 Stat. 958, as amended, (42 U.S.C. 2273); Tables 1 and 2, §§ 61.3, 61.9b, 61.24, 61.25, 61.27(a), 61.41 through 61.43, 61.52, 61.53, 61.55, 61.56, and 61.61 through 61.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 61.9b is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); 61.9a, 61.10 through 61.16, 61.24, and 61.80 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

14. In § 61.1, paragraph (c) is added to read as follows:

§ 61.1 Purpose and scope.

\* \* \* \* \*

(c) This part also gives notice, in § 61.9b, 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.

15. Immediately following § 61.9a, a new § 61.9b is added to read as follows:

§ 61.9b 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 70 -- DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

16. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § § 70.3, 70.10, 70.19(c), 70.21(c), 70.22(a), (b), (d)-(k), 70.24(a) and (b), 70.32(a) (3), (5), (6), (d), and (i), 70.36, 70.39(b) and (c), 70.41(a), 70.42(a) and (c), 70.56, 70.57(b), (c), and (d), 70.58(a)-(g) (3), and (h)-(j) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § § 70.7, 70.10, 70.20a(a) and (d), 70.20b(c) and (e), 70.21(c), 70.24(b), 70.32(a) (6), (c), (d), (e), and (g), 70.36, 70.51(c)-(g), 70.56, 70.57(b) and (d), and 70.58 (a)-(g) (3) and (h)-(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and § § 70.5, 70.9, 70.20b(d) and (e), 70.38, 70.51(b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g) (4), (k), and (l), 70.59, and 70.60(b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

17. Section 70.2 is revised to read as follows:

§ 70.2 Scope.

Except as provided in §§ 70.11 to 70.13, inclusive, the regulations in this part apply to all persons in the United States. This part also gives notice, in § 70.10, 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.

18. Immediately following § 70.9, a new § 70.10 is added to read as follows:

§ 70.10 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 72 -- LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

19. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); Secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 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). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.12, 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72(b), (c), 72.74(a), (b), 72.76, 72.78, 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.148, 72.154, 72.156, 72.160, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.184, 72.186 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10(a), (e), 72.12, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.90(a)-(d), 72.92, 72.94, 72.98, 72.100,

72.102(c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154, 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.182, 72.184, 72.186, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and § § 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(b)(3), (c)(5), (d)(3), (e), (f), 72.48(b), (c), 72.50(b), 72.54(a), (b), (c), 72.56, 72.70, 72.72, 72.74(a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140(b), (c), (d), 72.144(a), 72.146, 72.148, 72.150, 72.152, 72.154(a), (b), 72.156, 72.160, 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

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 110 -- EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

22. The authority citation for part 110 is revised to read as follows:

Authority: Secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2071, 2073, 2074, 2077, 2092-2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154-2158, 2201, 2231-2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Section 110.1(b)(2) also issued under Pub. L. 96-92, 93 Stat. 710 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c and 57d., 88 Stat. 473, 475 (42 U.S.C. 2074). Section 110.27 also issued under sec. 309(a), Pub. L. 99-440. Section 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Section 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Sections 110.80-110.113 also issued under 5 U.S.C. 552, 554. Sections 110.30-110.35 also issued under 5 U.S.C. 553.

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § § 110.20-110.29, 110.50, and 110.120-110.129 also issued under secs. 161b and i, 68 Stat. 948, 949, as amended (42 U.S.C. 2201(b) and (i)); § 110.7b is issued under sec 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and § § 110.7a, 110.53 also issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

23. In § 110.1, paragraph (a) is revised to read as follows:

§ 110.1 Purpose and scope.

(a) The regulations in this part prescribe licensing, enforcement, and rulemaking procedures and criteria, under the Atomic Energy Act, for the export of nuclear equipment and material, as set out in § 110.8, and the import of nuclear equipment and material, as set out in § 110.9. This part also gives notice, in § 110.7b, 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.

\* \* \* \* \*

24. Immediately following § 110.7a, a new § 110.7b is added to read as follows:

§ 110.7b 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

25. The authority citation for part 150 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073). Section 150.15 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § § 150.20(b)(2)-(5) and 150.21 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § § 150.14 and 150.20(b)(5) are issued under sec. 161i, 68

Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 150.16-150.19 and 150.20(b) (1) are issued under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

26. Section 150.2 is revised to read as follows:

§ 150.2 Scope.

The regulations in this part apply to all States that have entered into agreements with the Commission or the Atomic Energy Commission pursuant to subsection 274b of the Act. This part also gives notice, in § 150.20b(5), 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.

27. In § 150.20, paragraph(b) (5) is added to read as follows:

§ 150.20 Recognition of Agreement State licensees.

\* \* \* \* \*

(b) \* \* \*

(5) 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.

Dated at Rockville, Maryland, this 28th day of March, 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 90-7470 Filed 4-2-90; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

AGENCY: Nuclear Regulatory Commission.

10 CFR Part 50

Licensee Announcements of Inspectors

53 FR 42939

October 25, 1988

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission is amending its regulations to ensure that the presence of NRC inspectors on nuclear power reactor sites is not widely communicated or broadcast to licensee and contractor personnel without the expressed request to do so by the inspector. This change will allow the NRC inspectors, badged at the facility, to observe ongoing activities as they are being performed without advanced notification of the inspection to licensee and contractor personnel. There is a need for this change because of the possible altering of attention and performance levels of a licensee and/or its contractors when the licensee is aware of NRC surveillance. Past occurrences where site and/or contractor personnel have been notified of NRC's presence on site have heightened concern in this area.

**EFFECTIVE DATE:** October 25, 1988.

**FOR FURTHER INFORMATION CONTACT:** George Barber, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-1234.

**TEXT: SUPPLEMENTARY INFORMATION:**

**I. Background**

By clarifying the meaning and intent of 10 CFR 50.70(b)(3), this final rule should ensure that NRC inspectors will be granted immediate and unannounced access to licensee facilities so as to provide the inspector with unfettered access equivalent to that provided a regular plant employee following proper identification and compliance with applicable access control procedures. This rule provides that no access control measures or other means may be employed by the licensee or its contractors to intentionally give notice to other persons of the arrival and presence of an NRC inspector at a facility, unless the licensee is specifically requested to do so by the NRC inspector. There have been instances in the past at several facilities that compromised the ability of properly badged NRC inspectors to inspect and access, on an unannounced basis, activities related to the license or construction permit when licensee employees or contractor employees informed others at the facility of the presence of the NRC inspectors. This change to 10 CFR 50.70 is to clarify that NRC inspectors, badged at the facility, have immediate, unescorted access to ongoing activities as these activities are being

performed without advanced notification of the inspection. This is especially important during non-normal business hours when operating personnel might assume NRC inspectors would not be on site.

## II. Summary of Comments

On March 18, 1988, the Commission published in the Federal Register (53 FR 8924) a notice of proposed rulemaking on "Licensee Announcement of Inspectors." The Commission invited the public to comment on the proposed rule and received six letters of comment by April 18, 1988 (the specified closing date for public comments). After April 18, 1988, 26 additional letters of comments were received. All 32 letters of comments were considered in NRC's review of this final rule. The comments are discussed below.

*Comment.* A majority of the commenters believed the rule was unnecessary and characterized it as being too broad and vague. They asserted that it: was redundant with current regulations; would lead to unfair and impractical enforcement; be impossible to implement; inhibit inspector assistance by plant personnel; limit the ability of facility management to perform their safety functions; promote lying among the facility staff; require formal training and recordkeeping; and indicates a distrust of licensees.

*NRC Response.* NRC does not agree with the comments, but to ensure that the intent of the rule is clear and focused, adds the following clarification of the rule. The intent of this rule is to prevent site and contractor personnel from widespread dissemination or broadcasting the presence of an NRC inspector. Broadcasting, as used here, is defined as unsolicited one-way communications. Implementing or enforcing this rule should be no more difficult than implementing or enforcing any rule that involves personnel performance.

Adopting this rule does not indicate a predisposition on the part of the NRC that licensees are not acting properly. It is human nature for an individual to be more conscious of his or her performance when the individual realizes he or she is being observed. The NRC inspection program evaluates licensee performance on the basis of a sampling of its activities. It is critical that the sampling portion of the licensee's activities that are relied upon for this evaluation be representative of its overall activities. Therefore, the rule is more prophylactic than proscriptive, although it does carry enforcement sanctions should it be violated. Recognizing the possibility of inadvertent communication of an inspector's presence, the NRC expects to reserve enforcement action for significant intentional violations of the rule. An honest response by an employee to an innocent inquiry that he/she just saw an NRC inspector is not within the proscriptive perimeter of the rule. Therefore, an employee would not be required to lie, in response to a question, about the presence of an NRC inspector. Based on this discussion, formalized training will not be necessary, and NRC Form 3 need not be modified to reflect this requirement.

The NRC does not agree that this rule will prevent management from performing its safety functions. It should be noted the rule does not affect software security systems which monitor the presence of persons in certain areas. Such systems should provide the licensee with needed information on space occupancy in the case of an emergency or evacuation. For those licensees who have these systems in place, or will put them in place, the rule does not affect such systems. If a licensee were, however, to design or modify these systems (or use them) for the purpose of monitoring the NRC inspector's movements in order to alert other plant personnel of the inspector's whereabouts, those actions would violate the rule.

In sum, the licensee is prohibited from taking affirmative action which would compromise the NRC inspector's mission of gaining unfettered access to the plant and its various areas of interest to the inspector.

*Comment.* Some commenters expressed a concern that the rule could raise Constitutional questions under the First and Fourth Amendments.

*NRC Response.* As discussed above, the purpose of the rule is to enhance the credibility of the inspection process. Inspections are specifically authorized under section 1610 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(o). The regulation is narrowly drawn to achieve a legitimate governmental interest (effective NRC inspections) without infringing on an individual's right to express ideas and opinions on any subject. Thus, the regulation does not impermissively intrude upon freedom of speech protected by the First Amendment to the Constitution.

The regulation does not raise any significant Fourth Amendment considerations. The Atomic Energy Act creates a pervasive regulatory scheme that puts licensees on clear notice that they will be subject to inspection, and the granting of a license is conditioned on consent to reasonable inspections. Thus, NRC inspections of licensees' premises, activities and records do not require a warrant under the Fourth Amendment. *United States Nuclear Regulatory Commission vs Radiation Technology, Inc.*, 519 F. Supp. 1266, 1288-91 (D.N.J. 1981); *Union Electric Co. (Callaway Plant, Units 1 & 2)*, ALAB-527, 9 NRC 126, 139-41 (1979). The new regulation is a reasonable exercise of the Commission's inspection authority. Inspectors will continue to identify themselves and comply with other reasonable access control measures and, as always, inspections will be conducted for purposes authorized under the Atomic Energy Act and the Energy Reorganization Act. The regulation does not run afoul of the Fourth Amendment to the Constitution.

*Comment.* A number of commenters suggested that the rule be implemented only by written request of the NRC inspector.

*NRC Response.* NRC rejects the suggestion. With this suggested modification, the rule would only apply to those individuals who had been given notice of the NRC inspector's presence on site. If implemented, this suggestion would defeat the intent of the rule.

#### Environmental Impact: Categorical Exclusion

The NRC has determined that this change is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

#### Paperwork Reduction Act Statement

The final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0011.

#### Regulatory Analysis

This final rule will have no significant impact on state and local governments and geographical regions. It may have a significant impact on health, safety, and the environment, but only in the sense of preventing adverse impacts on health, safety, and the environment through more effective inspections. The rule will make it clear that NRC inspectors are to have a realistic picture of the actual

conditions at a site during the inspection process and, therefore, be better able to identify potentially dangerous conditions and/or practices for corrective action and to ensure that licensees comply with laws, regulations, and orders administered by the NRC. This constitutes the regulatory analysis for this final rule.

#### Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that this final rule does not have a significant economic impact on a substantial number of small entities. The final rule applies only to licensees authorized to construct or operate nuclear power reactors, who are not small business entities within the meaning of the act or implementing regulations. Therefore, a regulatory flexibility analysis has not been prepared.

#### Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does apply to this final rule. The backfit analysis for announcement of inspectors rule in accordance with each of the factors specified in 10 CFR 50.109(a)(4)(ii)(c) is as follows:

(1) This rule provides that no means may be employed by the licensee or its contractors to intentionally give notice to other persons of the arrival and presence of a NRC inspector at a facility, unless the licensee is specifically requested to do so by the NRC inspector.

(2) The licensee will have to communicate the requirements of this rule to its personnel and to contractor personnel working at its site.

(3) The purpose of this rule is to enhance the credibility of the inspection process. By requiring that the presence of NRC inspectors (either resident or off site) is not announced, the NRC, public and licensees will have more confidence that the activities inspectors are witnessing are representative of licensee performance. Ensuring that NRC inspectors are witnessing representative licensee performance could substantially increase the likelihood that NRC inspectors will discover unsafe or potentially unsafe practices, bring about corrective actions and thereby lower the risk of accidents occurring which could lead to the accidental off-site release of radioactive material.

It is not possible, without before and after data, to quantitatively evaluate the benefits of implementing this rule. Still, a recent significant enforcement action concerning licensee employee's inattention to duty demonstrates the premise advanced in the above paragraph. In this enforcement action, over 30 licensee personnel, both management and staff were cited for inattention to duty. The primary concern was sleeping on watch. It is not difficult to envision accidents that could occur because of this type of licensee performance.

Coupling inattention to duty with equipment failure adds a new dimension to the risk of accidents occurring which could lead to the off-site release of radioactive material. In the enforcement action mentioned above, had the licensee announced the presence of the NRC inspector, the inattention to duty would have gone unnoticed. It should be noted that the licensee facility where this incident occurred did, on one past occasion, announce the presence of NRC inspectors.

(4) Not appropriate. There is no radiological exposure of facility employees resulting from the rule's implementation.

(5) Very minor costs are associated with the rule's implementation. There are no training requirements or record keeping requirements associated with this rule.

The only cost to the licensee would be communicating this rule to its employees and contractors.

(6) Not appropriate. There is no potential safety impact of changes in plant or operational complexity associated with this rule.

(7) Not appropriate. There is no resource burden on the NRC from the implementation of this rule.

(8) Not appropriate. There is no potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit.

(9) The proposed backfit is final.

#### Conclusion

Based on the above analysis, the Commission concludes that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from this backfit and that the direct and indirect costs of implementation for facilities are justified in view of this increased protection.

#### List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

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 NRC is to adopt the following amendment to 10 CFR Part 50.

#### PART 50 -- DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 8546).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Section 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a, and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161(b), 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10 (b) and (c), and 50.54 are issued under sec. 161(i), 68 Stat. 949, as amended (42 U.S.C.

2201(i)); and §§ 50.9, 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73 and 50.78 are issued under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 50.70, paragraph (b)(4) is added to read as follows:

§ 50.70 Inspections.

\* \* \* \* \*

(b) \* \* \*

(4) The licensee or construction permit holder (nuclear power reactor only) shall ensure that the arrival and presence of an NRC inspector, who has been properly authorized facility access as described in paragraph (b)(3) of this section, is not announced or otherwise communicated by its employees or contractors to other persons at the facility unless specifically requested by the NRC inspector.

Dated at Rockville, MD, this 13th day of October, 1988.

For the Nuclear Regulatory Commission.  
Victor Stello, Jr.,

Executive Director for Operations.  
[FR Doc. 88-24609 Filed 10-24-88; 8:45 am]

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