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OFFICE OF SECRETARY
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STATE OF NEW YORK
DEPARTMENT OF LABOR
Division of Safety & Health
Radiological Health Unit
Governor W. Averell Harriman State Office Building Campus
Building 12, Room 169
Albany, New York 12240

March 25, 2005

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: RIN 3150-AH57

Dear Mr. Secretary:

I would like to comment on the proposed rule for the Protection of Safeguards Information, published in the Federal Register on February 11, 2005 (70 FR 7196-7217).

Section 147 of the Atomic Energy Act of 1954, as amended (the Act) directs the Commission to "... prescribe such regulations ... or issue orders, as necessary to prohibit the unauthorized disclosure of safeguards information which specifically identifies *a licensee's or applicant's* detailed ... [security measures]" (emphasis added). Nowhere in the Act is "safeguards information" (SGI) explicitly defined, however the statutory language does clearly state that it is information about the security measures taken by a *licensee* or an *applicant* for a license. In other words, in order to be considered SGI, the subject of the information in question must be the security measures taken by a person who has been issued a licensee or who is applying for a license. The Act does not say what kind of a license or by what agency such a license is issued. This is crucial, since if only information about a Commission licensee's (or applicant's) security measures are SGI, then section 147 does not apply to the security measures of Agreement State licensees.

The most natural interpretation of the term "license" as used in a federal statute relating to a specific federal agency, would be to assume it referred to a license issued by that federal agency. If congress had intended some other meaning here, such as a license issued by another federal agency or by a State agency, it could easily have expressed its intent by appropriate language. That it did not do so is strong evidence that congress had no such intention, and that the natural meaning should be accepted. To assume, as the Commission does, that section 147 of the Act applies to both Commission licensees and licensees of the Agreement States is not justified by the plain language of the statute. Indeed, nowhere in section 147 are the Agreement

Telephone (518) 457-1202 Fax (518) 485-7406

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States or their licensees even mentioned. This total absence of an express statement of intent by congress should suffice for the rejection the Commission's construction.

If the term licensee were inclusive of State and Commission licensees, there would be no need for congress to specify as it does that the security measures to be safeguarded are those of a licensee or applicant. Any person employing security measures for the physical protection of by-product source or special nuclear material must be either a licensee of a State or of the Commission. By specifying security measures of a licensee or applicant, congress is expressing its intent that this section shall apply only to the security measures taken by persons under the Commission's licensing jurisdiction. The Commission's construction would render this language of the statute meaningless and for that reason should be rejected.

The conflation of State and Commission licensees violates long standing precedent. Heretofore, wherever the Commission has referred to licenses in its own regulations (as for example in 10 CFR Parts 20 though 199), the term is always taken to mean licenses issued by the Commission, unless otherwise specified (see e.g. 10 CFR 20.1003). Wherever the Commission refers to licenses issued by other agencies, such as the Agreement States, they are specifically identified as such. The Commission's current inclusive construction appears to be an *ad hoc* attempt to read new meanings into existing statute to suit the exigencies of the moment.

Under the Agreements entered into pursuant to subsection 274 b., the Commission discontinues (with certain specific exceptions) its regulatory authority under chapters 6, 7, and 8, and section 161 of the Act. The Commission's authority to issue licenses for by-product, source and special nuclear material derives from the three chapters enumerated. The specific exception to the Commission's relinquishment of authority which is relevant here is its authority to issue rules, regulation or orders to protect the common defense and security. This authority is reserved to the Commission under subsection 274 m.

> *m. No agreement entered into under subsection b., and no exemption granted pursuant to subsection f., shall affect the authority of the Commission under subsection 161 b. or i. to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. **For purposes of subsection 161 i., activities covered by exemptions granted pursuant to subsection f. shall be deemed to constitute activities authorized pursuant to this Act; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 53.*** (Emphasis added.)

The first sentence of subsection 274 m. reserves to the Commission the authority, granted to it under 161 b., to protect the common defense and security. It is under this reserved authority that the Commission has already issued orders to Agreement State licensees. (Subsection 161 i. relates solely to the protection of restricted data and special nuclear material.) The second sentence states that activities covered by exemptions issued under subsection f., that is to say activities licensed by Agreement States, are deemed to be authorized by the Act, but only for the purposes of subsection 161 i. By the well known canon of statutory construction *expressio unius*

exclusio alterius est, State licensed activities are not to be deemed as activities authorized by the Act for the purposes of subsection 161 b. (common defense and security) or for any other purpose. Had congress held as a default assumption that State licensed activities would be construed as activities authorized pursuant to the Act, it would have had no need to spell out that they should be so construed for the purposes of 161 i. By making this express statement, congress has made an exception to the general rule that State licensed activities are not to be construed as authorized by the Act. This being the case, the reference to licensees and applicants in section 147 cannot be construed as inclusive of State licensees or applicants.

In conclusion, the Commission lacks the statutory authority to impose regulations for the protection of SGI pertaining to the security measures of State licensees. The licensees (or applicants) referred to in section 147 of the Atomic Energy Act are clearly those of the Commission only, not of the States. Although the Commission has authority under section 161 b. to issue rules, regulations or orders to State licensees for the protection of the common defense and security, it cannot by rule, regulation or order amend section 147 of the statute to bring State licensees within its ambit. The proposed rule must either be withdrawn or revised to make clear that its applicability is limited to the protection of the Commission's licensees' security measures. Specifically the proposed definition of Safeguards Information under section 73.2 should be revised to conform to the narrower definition under section 147 of the Act. In addition, those portions of orders already issued to Agreement State licensees imposing requirements for the protection of safeguards information exceed the Commission's authority and should be vacated.

Thank you for this opportunity to comment.

Sincerely,

Clayton J. Bradt, CHP
Principal Radiophysicist
New York State Department of Labor

From: "Bradt, Clayton" <Clayton.Bradt@Labor.State.Ny.Us>
To: "'secy@nrc.gov'" <secy@nrc.gov>
Date: Fri, Mar 25, 2005 3:30 PM
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The attached are comments on the proposed rule "Protection of Safeguards Information". RIN: 3150-AH57

Clayton J. Bradt, CHP

Principal Radiophysicist

NYS Dept. of Labor

phone: (518) 457 1202

fax: (518) 485 7406

e-mail: clayton.bradt@labor.state.ny.us

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