

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 25 and 95

RIN 3150-AH52

Broadening Scope of Access Authorization and
Facility Security Clearance Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC or Commission) is amending its regulations to broaden the scope of the regulations applicable to persons who may require access to classified information, to include persons who may need access in connection with licensing and regulatory activities under the regulations that govern the disposal of high-level radioactive waste in geologic repositories, and persons who may need access in connection with other activities as the Commission may determine, such as vendors of advanced reactor designs. The Commission is also amending its regulations to broaden the scope of the regulations applicable to procedures for obtaining facility security clearances, to include persons who may need to use, process, store, reproduce, transmit, transport, or handle NRC classified information in connection with the above-identified activities. In addition, NRC is correcting the scope section of the regulations that govern access authorization for licensee personnel to include certificate holders and applicants for a certificate; clarifying the definition of "license" in the regulations that govern access authorization for licensee personnel and govern facility security clearance to include a reference to the regulations that govern combined licenses; correcting a typographical error in the definition of "security container" in its facility

security regulations; and updating the references to Executive Order 12958 which has been amended.

DATES: The final rule is effective on **(insert date 30 days after publication in the Federal Register)**.

FOR FURTHER INFORMATION CONTACT: Dr. Anthony N. Tse, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6233, e-mail ant@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

NRC's regulations at 10 CFR Parts 25 and 95 govern access to and protection of classified information by licensees or other persons who have a need for access to this information. Part 25 contains procedures for establishing initial and continuing eligibility for access authorizations for individuals who may require access to classified information. Part 95 contains procedures for obtaining a facility security clearance for licensees, certificate holders, or other persons who need to use, process, store, reproduce, transmit, transport, or handle certain types of NRC classified information at any location in connection with Commission-related activities. The purpose of this rulemaking is to amend Parts 25 and 95 to: (1) add references to 10 CFR Parts 60 and 63 in §§ 25.5, 25.17(a) and 95.5; (2) expand the scope of §§ 25.3 and 95.3 to include persons who may not be licensees or certificate holders or applicants for a license or certificate; (3) clarify the definition of "license" in §§ 25.5 and 95.5 to

include a reference to Part 52; (4) correct the omission of a reference to certificate holders in § 25.3; (5) correct a typographical error in the definition of “security container” in § 95.5; and (6) update references to Executive Order 12958 to reflect that this Executive Order has been amended and could be further amended in the future.

Direct Final Rule and Companion Proposed Rule

On December 15, 2004 (69 FR 74949), the NRC published in the *Federal Register* a direct final rule that would have amended NRC’s regulations to broaden the scope of the regulations in 10 CFR Parts 25 and 95. The direct final rule was to become effective on February 28, 2005. The NRC concurrently published a companion proposed rule on December 15, 2004 (69 FR 75007).

In the direct final rule, NRC stated that if any significant adverse comments were received, a notice of timely withdrawal of the direct final rule would be published in the *Federal Register*. As a result, the direct final rule would not take effect.

NRC received one public comment letter consisting of at least one significant adverse comment on the direct final rule; therefore, NRC withdrew the direct final rule on February 24, 2005 (70 FR 8921). NRC is addressing the comments received on the companion proposed rule in this final rule.

Discussion

Although 10 CFR 25.3 speaks broadly of the regulations that apply to “licensees and others who may require access to classified information related to a license or an application for a license,” in 10 CFR 25.5, “license” is defined to mean “a license issued pursuant to 10 CFR Parts 50, 70, or 72.” Similarly, 10 CFR 95.3 states that the regulations apply to licensees and

certificate holders and others regulated by the Commission who need access in connection with a license or certificate or an application for a license or certificate. However, at 10 CFR 95.5, “license” is defined to mean “a license issued pursuant to 10 CFR Parts 50, 70, or 72.” Absent from these provisions is any reference to the Commission’s regulations that govern the issuance of construction authorizations and licenses for disposal of high-level radioactive waste in geologic repositories (10 CFR Part 60) or in a potential geologic repository at Yucca Mountain, Nevada (10 CFR Part 63). Parts 25 and 95 were published on March 5, 1980; 45 FR 14476, before issuance of Part 60 (February 25, 1981; 46 FR 13971) or Part 63 (November 2, 2001; 66 FR 55732) and Parts 25 and 95 were not amended to include these regulations. The Commission currently anticipates receiving a license application from the U.S. Department of Energy under the provisions of Part 63. An adjudicatory proceeding on this license application could implicate the need for access authorizations and facility security clearances by persons who plan to participate in the proceeding. Accordingly, NRC is amending the definition of “license” in §§ 25.5 and 95.5 to include references to licenses issued under Parts 60 and 63. For the same reason, references to Parts 60 and 63 are added to § 25.17(a).

A second restriction that presently exists in 10 CFR 25.3 and 95.3 is that the requested access authorizations or facility security clearances must be related to a license or certificate, or an application for a license or certificate. However, there may be certain Commission-related activities undertaken by entities who are not licensees or certificate holders, or applicants for a license or certificate where an access authorization or facility security clearance may be needed. The NRC believes there is a need for access authorizations and facility security clearances for vendors who are involved in the design of advanced reactors. These vendors could need access to classified information which would enable them to consider potential

mitigative measures for operating reactors and design features for the various advanced reactor systems. Currently, a vendor who is not an NRC licensee or a contractor to an NRC licensee and does not have a facility clearance or access authorization provided by another government agency, is not eligible for an access authorization or a facility security clearance under Parts 25 and 95. NRC believes that most current vendors of advanced reactor designs are NRC licensees or contractors to NRC licensees or holders of clearances from other government agencies. However, to allow for the possibility that there could be vendors who would need to seek access authorizations and facility security clearances through the regulations at Parts 25 and 95, the NRC is adding language to the scope sections of these parts to allow the processing of requests for access authorization or facility security clearances with respect to “other activities as the Commission may determine.” This language could also be used to begin the processing of such requests, in advance of NRC’s receipt of a license application under Part 63, by potential parties in an adjudication on the application, or in circumstances when a need for access authorization might arise in the future.

Further, the NRC is clarifying the definition of “license” in §§ 25.5 and 95.5 to include a reference to Part 52 which contains provisions for combined licenses in Subpart C and for manufacturing licenses in Appendix M. Although NRC’s intent that access authorizations needed in connection with activities under Part 52 be included is evidenced by a reference to Part 52 in § 25.17(a), a similar reference to Part 52 does not appear in the definition of “license” in §§ 25.5 and 95.5. The Commission is correcting this oversight.

The NRC is also correcting the omission of a reference to certificate holders in § 25.3. Although § 25.5 includes a definition of “certificate holder” and § 25.17(a) includes activities under Part 76 that issue certificates to gaseous diffusion plants, § 25.3, unlike § 95.3, does not

include a reference to certificate holders or certificates. The NRC believes this is an oversight that is now being corrected.

In addition, the NRC is correcting a typographical error which appears in the definition of “security container” in § 95.5. In the description of a “safe” in paragraph (2), the phrase “at least ½ thick” should read “at least ½ inch thick.”

Finally, NRC is amending references to Executive Order 12958 where they appear in Parts 25 and 95 to include the phrase “as amended.” This reflects that Executive Order 12958 was amended on March 25, 2003 by Executive Order 13292 (68 FR 15315; March 28, 2003) and could be further amended in the future.

Response to Public Comments

The NRC received one public comment letter from a group of seven national environmental and public interest organizations. A summary of the comments contained in this letter and NRC’s responses are presented below.

Comment 1: The commenters expressed concern that the direct final rule did not make clear that public intervenors, such as environmental and public interest organizations that plan on taking part in the Yucca Mountain licensing proceeding, would be granted access authorizations and security clearances.

Response: An adjudicatory proceeding on DOE’s anticipated application for a license under the provisions of 10 CFR Part 63 may necessitate access authorizations and facility security clearances by persons who plan to participate in the proceeding. An access authorization is a necessary prerequisite for access to classified information as that term is defined in 10 CFR Part 25. The intent of this rulemaking is to broaden the scope of the regulations in Parts 25 and 95 so that potential intervenors, such as the environmental and

public interest organization commenters, can seek access authorizations and facility security clearances in accordance with the existing requirements in these parts.

Part 25 establishes the procedures for authorizing access to classified information. Prior to this rulemaking, 10 CFR 25.3 stated that Part 25 applies “to licensees and others who may require access to classified information related to a license or an application for a license.” However, the term “license” for the purposes of Part 25 was defined to mean “a license issued pursuant to 10 CFR Parts 50, 70, or 72.” See 10 CFR 25.5 (2004). Similarly, the former regulations provided that security clearances for access to classified information “must be requested for licensee employees or other persons (e.g., 10 CFR Part 2, Subpart I) who need access to classified information in connection with activities under 10 CFR Parts 50, 52, 54, 70, 72, or 76.” See 10 CFR 25.17(a) (2004). NRC would issue any license for the proposed repository at Yucca Mountain under the regulations at 10 CFR Part 63. Thus, the scope of the Part 25 and 95 regulations needed to be revised to include references to Part 63 to make it possible for those who plan to participate in the adjudicatory proceeding on DOE’s license application to seek access authorizations and facility security clearances. This is accomplished in this rulemaking.

Comment 2: The commenters sought clarification as to how broadly or narrowly NRC will apply “need-to-know” limitations upon potential intervenors in the proceeding, such as environmental and public interest organizations.

Response: A person with an access authorization must establish a “need-to-know” the particular information being sought before such information can be provided by the holder of the information. “Need-to-know” is defined in 10 CFR Part 25 to mean “a determination by an authorized holder of classified information that a prospective recipient requires access to a specific classified information to perform or assist in a lawful and authorized governmental

function under the cognizance of the Commission.” See 10 CFR 25.5. A “need-to-know” determination could be made by the holder of the information in the cognizant NRC office responsible for the specific information being sought or, once an adjudicatory proceeding using the special procedures of 10 CFR Part 2, Subpart I, is commenced, by the presiding officer or the Commission.

Comment 3: The commenters also expressed concern that any proposed rule changes, including the direct final rule, not be used by NRC or any other federal agencies involved in the Yucca Mountain licensing proceeding (such as DOE) to inappropriately restrict access to documents by improperly classifying documents vital to intervenors’ contentions against the proposed repository.

Response: This rulemaking does not affect how information is classified and does not expand the scope of information that can only be obtained by those with access authorizations. NRC cognizant information is classified under either the provisions of Executive Order 12958, as amended, for National Security Information, or the Atomic Energy Act of 1954, as amended, for Restricted Data. Section 1.7(a)(4) of Executive Order 12958, as amended, states: “In no case shall information be classified in order to: ... (4) prevent or delay the release of information that does not require protection in the interest of national security.”

Comment 4: The commenters sought clarification as to which categories of information, as well as specific documentation, NRC and other federal agencies involved in the Yucca Mountain licensing proceeding plan on declaring “classified.” Although NRC’s direct final rule refers only to “classified information,” they questioned if NRC intends to effectively also include “sensitive” and “safeguards” information. They urged that this point be clarified, and that comprehensive definitions for “sensitive” and “safeguards” be given.

Response: As stated in response to Comment 3, this rulemaking does not affect how information is classified. Questions concerning the classification of “sensitive” or “safeguards” information, or access to such information, are beyond the scope of this rulemaking.

After considering the public comments, NRC has determined to adopt the amendments contained in the proposed rule without change, as explained in the following section.

Discussion of Amendments by Section

Section 25.3 Scope.

This section currently limits the access to classified information to access “related to a license or an application for a license.” This scope is broadened to include persons who may need access in connection with such other activities as the Commission may determine, such as vendors of advanced reactor designs. Thus, the phrase “or other activities as the Commission may determine” is added to this section. The Commission is also correcting an oversight by including certificate holders in this section.

Section 25.5 Definitions.

References to Parts 52, 60 and 63 are added to the definition of “license.”

The phrase “Executive Order 12958” is replaced by “Executive Order 12958, as amended” under definitions of “classified national security information” and “national security information.”

Section 25.17 Approval for processing applicants for access authorizations.

References to Parts 60 and 63 are added to paragraph (a).

Section 25.37 Violations.

The phrase, "Executive Order 12958" is replaced by "Executive Order 12958, as amended" in paragraph (b).

Section 95.3 Scope.

This section currently applies to "licensees, certificate holders and others regulated by the Commission" who may require access to certain types of classified information "in connection with a license or certificate or an application for a license or certificate." The Commission is broadening the scope of the regulations applicable to procedures for obtaining facility security clearances, to include persons who may need to use, process, store, reproduce, transmit, transport, or handle NRC classified information in connection with other types of activities as the Commission may determine, such as vendors of advanced reactor designs. Thus, the phrase "regulated by the Commission" is deleted and the phrase "or other activities as the Commission may determine" is added.

Section 95.5 Definitions.

References to Parts 52, 60 and 63 are added under the definition of "license."

The phrase "E.O. 12958" is replaced by "E.O. 12958, as amended" under definitions of "classified national security information," "infraction," and "violation."

The phrase "at least ½ thick" is replaced by "at least ½ inch thick" under the definition of "Security container," paragraph (2).

Section 95.59 Inspections.

The phrase "E.O. 12958" is replaced by "E.O. 12958, as amended."

Agreement State Compatibility

Under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” approved by the Commission on June 30, 1997, and published in the Federal Register on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility Category “NRC.” Compatibility is not required for Category “NRC” regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended (AEA), or the provisions of Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State’s administrative procedure laws, but does not confer regulatory authority on the State.

Voluntary Consensus Standards

The National Technology Transfer Act of 1995 (Pub. L. 104-113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this final rule, the NRC broadens the scope of Parts 25 and 95 by adding references to Parts 60 and 63 and by including language in the scope sections which will enable NRC to consider access authorizations and facility security clearance for persons who are not licensees or certificate holders or applicants for a license or certificate. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, approval numbers 3150-0046 and 3150-0047.

The burden to the public for these information collections is estimated to average 1.4 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Send comments on any aspect of these information collections, including suggestions for reducing the burden, to the Records and FOIA/Privacy Services Branch (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to INFOCOLLECTS@NRC.GOV; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0046 and 3150-0047), Office of Management and Budget, Washington, DC 20503.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Regulatory Analysis

A regulatory analysis has not been prepared for this final rule because this rule is considered minor and not a substantial amendment; it has no economic impact on NRC licensees or the public.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule merely makes procedures available to individuals and entities for obtaining access authorizations and facility security clearances in connection with licensing activities under Parts 60 and 63 or with other activities as the Commission may determine, corrects the omission of a reference to Part 52 in the definition of “license” in Parts 25 and 95, corrects the omission of a reference to certificate holders in Part 25, updates references to Executive Order 12958, and clarifies a dimension used to describe a security container.

Backfit Analysis

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this final rule because this amendment does not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subject Terms

10 CFR Part 25

Classified information, Criminal penalties, Investigations, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 95

Classified information, Criminal penalties, Reporting and recordkeeping requirements, Security measures.

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 adopting the following amendments to 10 CFR Parts 25 and 95.

PART 25 — Access Authorization for Licensee Personnel

1. The authority citation for Part 25 is revised to read as follows:

AUTHORITY: Secs. 145, 161, 68 Stat. 942, 948, as amended (42 U.S.C. 2165, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); E.O. 10865, as amended, 3 CFR 1959-1963 Comp., p. 398 (50 U.S.C. 401, note); E.O. 12829, 3 CFR, 1993 Comp., p. 570; E.O. 12958, as amended, 3 CFR, 1995 Comp., p. 333, as amended by E.O. 13292, 3 CFR, 2004 Comp., p.196; E.O. 12968, 3 CFR, 1995 Comp, p. 396.

Appendix A also issued under 96 Stat. 1051 (31 U.S.C. 9701).

2. Section 25.3 is revised to read as follows:

§ 25.3 Scope.

The regulations in this part apply to licensees, certificate holders, and others who may require access to classified information related to a license, certificate, an application for a license or certificate, or other activities as the Commission may determine.

3. In § 25.5, the definitions of *Classified National Security Information*, *License*, and *National Security Information* are revised to read as follows:

§ 25.5 Definitions.

* * * * *

Classified National Security Information means information that has been determined pursuant to E.O. 12958, as amended, or any predecessor order to require protection against unauthorized disclosure and that is so designated.

* * * * *

License means a license issued pursuant to 10 CFR Parts 50, 52, 60, 63, 70, or 72.

* * * * *

National Security Information means information that has been determined pursuant to Executive Order 12958, as amended, or any predecessor order to require protection against unauthorized disclosure and that is so designated.

* * * * *

4. In § 25.17, paragraph (a) is revised to read as follows:

§ 25.17 Approval for processing applicants for access authorization.

(a) Access authorizations must be requested for licensee employees or other persons (e.g., 10 CFR part 2, subpart I) who need access to classified information in connection with activities under 10 CFR Parts 50, 52, 54, 60, 63, 70, 72, or 76.

* * * * *

5. In § 25.37, paragraph (b) is revised to read as follows:

§25.37 Violations.

* * * * *

(b) National Security Information is protected under the requirements and sanctions of Executive Order 12958, as amended.

PART 95 — Facility Security Clearance and Safeguarding of National Security Information and Restricted Data

6. The authority for Part 95 is revised to read as follows:

AUTHORITY: Secs. 145, 161, 193, 68 Stat. 942, 948, as amended (42 U.S.C. 2165, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); E.O. 10865, as amended, 3 CFR 1959-1963 Comp., p. 398 (50 U.S.C. 401, note); E.O. 12829, 3 CFR, 1993 Comp., p.570; E.O. 12958, as amended, 3 CFR, 1995 Comp., p. 333, as amended by E.O. 13292, 3 CFR, 2004 Comp., p.196; E.O. 12968, 3 CFR, 1995 Comp., p. 391.

7. Section 95.3 is revised to read as follows:

§ 95.3 Scope.

The regulations in this part apply to licensees, certificate holders and others who may require access to classified National Security Information and/or Restricted Data and/or Formerly Restricted Data (FRD) that is used, processed, stored, reproduced, transmitted, transported, or handled in connection with a license or certificate or an application for a license or certificate, or other activities as the Commission may determine.

8. In § 95.5, the definitions of *Classified National Security Information*, *infraction*, *License*, paragraph (2) of *Security container*, and *violation* are revised to read as follows:

§ 95.5 Definitions.

* * * * *

Classified National Security Information means information that has been determined pursuant to E.O. 12958, as amended, or any predecessor order to require protection against unauthorized disclosure and that is so designated.

* * * * *

Infraction means any knowing, willful, or negligent action contrary to the requirements of E.O. 12958, as amended, or its implementing directives, that does not comprise a “violation,” as defined in this section.

* * * * *

License means a license issued pursuant to 10 CFR Parts 50, 52, 60, 63, 70, or 72.

* * * * *

Security container includes any of the following repositories:

* * * * *

(2) A safe—burglar-resistive cabinet or chest which bears a label of the Underwriters' Laboratories, Inc., certifying the unit to be a TL-15, TL-30, or TRTL-30, and has a body fabricated of not less than 1 inch of steel and a door fabricated of not less than 1½ inches of steel exclusive of the combination lock and bolt work; or bears a Test Certification Label on the inside of the door, or is marked "General Services Administration Approved Security Container" and has a body of steel at least ½ inch thick, and a combination locked steel door at least 1 inch thick, exclusive of bolt work and locking devices; and an automatic unit locking mechanism.

* * * * *

Violation means any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information or any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of E.O. 12958, as amended, or its implementing directives.

9. Section 95.59 is revised to read as follows:

§ 95.59 Inspections.

The Commission shall make inspections and reviews of the premises, activities, records and procedures of any person subject to the regulations in this part as the Commission and CSA deem necessary to effect the purposes of the Act, E.O. 12958, as amended, and/or NRC rules.

Dated at Rockville, Maryland, this 19th day of May, 2005.

For the Nuclear Regulatory Commission.

/RA/
Luis A. Reyes,
Executive Director for Operations.

9. Section 95.59 is revised to read as follows:

§ 95.59 Inspections.

The Commission shall make inspections and reviews of the premises, activities, records and procedures of any person subject to the regulations in this part as the Commission and CSA deem necessary to effect the purposes of the Act, E.O. 12958, as amended, and/or NRC rules.

Dated at Rockville, Maryland, this 19th day of May, 2005.

For the Nuclear Regulatory Commission.

/RA/
 Luis A. Reyes,
 Executive Director for Operations.

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