

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
OFFICE OF NEW REACTORS  
OFFICE OF NUCLEAR REACTOR REGULATION  
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS  
OFFICE OF FEDERAL AND STATE MATERIALS AND  
ENVIRONMENTAL MANAGEMENT PROGRAMS  
WASHINGTON, DC 20555-0001

May 13, 2008

**NRC REGULATORY ISSUE SUMMARY 2008-10  
NOTICE REGARDING FORTHCOMING  
FEDERAL FIREARMS BACKGROUND CHECKS**

**ADDRESSEES**

All U.S. Nuclear Regulatory Commission (Commission or NRC) licensees, certificate holders, and applicants for a license or certificate of compliance who use armed security personnel as part of their physical protection system and security organization. All Radiation Control Program Directors and State Liaison Officers.

**PURPOSE**

The NRC is issuing this Regulatory Issue Summary (RIS) first to provide time for advance planning by licensees, certificate holders, applicants, and their respective armed security personnel before the NRC issues new requirements on Federal firearms background checks. These firearms background checks will apply to the armed security personnel of NRC licensees and certificate holders who apply to the NRC for the new authority provided by section 161A of the Atomic Energy Act of 1954, as amended (AEA). The NRC is also providing time for such security personnel, in advance of their being subject to a future firearms background check, to consider applying under the Federal Bureau of Investigation's (FBI's) Voluntary Appeal File (VAF) program to verify that the FBI does not consider them disqualified from possessing firearms or ammunition.

Secondly, the NRC is recommending that licensees, certificate holders, and applicants with armed security personnel review their suitability evaluation program and suitability evaluation records for armed security personnel to specifically evaluate the disqualifying criteria currently stipulated under 18 U.S.C. § 922(d) and as discussed in this RIS. Although the NRC is not aware of any instances where security personnel at NRC-regulated facilities inappropriately possessed firearms or ammunition as part of their official duties, the NRC believes that it is good public policy to ensure that its licensees, certificate holders, and applicants who utilize armed security personnel are informed of applicable Federal laws. Additionally, the NRC recommends that licensees, certificate holders, and applicants discuss the contents of this RIS with their armed security personnel. Finally, for byproduct material licensees, there are no current or planned NRC requirements necessitating the use of armed security personnel.

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However, some byproduct material licensees may use armed security personnel to provide security for their overall facility rather than directly providing security for the radioactive byproduct material itself. Therefore, this RIS is issued to Radiation Control Program Directors and State Liaison Officers for information only. This RIS requires no specific action or written response by addressees.

## **BACKGROUND INFORMATION**

### **Current Statutory Requirements**

Under section 922 of Title 18 of the United States Code (18 U.S.C. § 922), individuals in any of the categories listed in subsections (g) and (n) are prohibited from shipping or transporting in interstate or foreign commerce, possessing in or affecting commerce, or receiving any firearm or ammunition shipped or transported in interstate or foreign commerce. Such individuals are under a “Federal firearms disability.” These statutory restrictions have been in place for many years and apply even in the case of an individual, who falls under such a prohibition, from taking possession of a firearm or ammunition without knowing that this specific prohibition exists. Furthermore, under 18 U.S.C. § 922(d), it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such a person falls within the categories of individuals who are prohibited from possessing or receiving a firearm or ammunition. In this context, the term “person” is very broad and includes any individual, corporation, company, association, firm partnership, society, or joint stock company.

The U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is responsible for regulating these statutory requirements. ATF’s regulations implementing 18 U.S.C. § 922(d), (g), and (n) are found under 27 CFR 478.32 “Prohibited shipment, transportation, possession, or receipt of firearms and ammunition by certain persons,” and a copy of these regulations are contained in Enclosure 1. See ATF’s Web site (Reference 1) for additional information.

### **Firearms Background Check Forthcoming Requirements**

The Energy Policy Act of 2005 amended the AEA and provided new authority to the NRC under new section 161A (see 42 U.S.C. § 2201a). Section 161A authorizes the Commission to enhance security at facilities owned or operated by an NRC licensee or certificate holder and for designated radioactive material or other property that is being transported to or from a facility owned by such a licensee or certificate holder. Specifically, section 161A permits licensees and certificate holders to apply to the NRC for approval to obtain enhanced weapons (e.g., machineguns) and obtain relief from restrictive State, local, and certain Federal firearms regulations, thereby increasing their defensive capabilities. Prior to the enactment of section 161A, with limited exceptions, only Federal, State or local law-enforcement agencies could lawfully possess machineguns.

The NRC published a proposed rule “Power Reactor Security Requirements,” on October 26, 2006, in the *Federal Register* (71 FR 62663) that would provide new requirements to implement section 161A in two new sections 10 CFR 73.18 and 73.19 (see pages 71 FR 62847 thru 62850). These proposed regulations would require that security personnel who have access to

any firearms and ammunition (at licensees and certificate holders who apply to the NRC for section 161A authority) must be subject to a firearms background check by the U.S. Attorney General (AG). Security personnel at licensees and certificate holders who do not apply to the NRC for section 161A authority are not subject to a firearms background check by the AG. In addition, licensees and certificate holders who do not apply to the NRC for section 161A authority are not eligible by statute to request a firearms background check by the AG of their armed security personnel.

Application for section 161A authority by NRC licensees and certificate holders is voluntary and such application cannot occur until after the Commission publishes in the *Federal Register* the firearms guidelines mandated by section 161A. Consequently, licensees and certificate holders cannot begin firearms background checks until after they have applied to the NRC for section 161A authority. A final rule implementing the firearms guidelines is under development by the NRC and will be published subsequent to the publication of the firearms guidelines.

## **SUMMARY OF ISSUE**

The NRC's current regulations in 10 CFR Part 73, Appendix B, Criteria I.A.1, "Employment suitability and qualification," requires licensees and certificate holders to accomplish a suitability evaluation of individuals prior to employment or assignment to the licensees', certificate holders', or applicants' security organization. Criteria I.A.1.b states:

*Felony convictions—Have no felony convictions involving the use of a weapon and no felony convictions that reflect on the individual's reliability.*

In contrast with the NRC's current requirements, U.S. law under 18 U.S.C. § 922(d) is both more restrictive (with regard to convictions) and includes additional disqualifying criteria. The statute states that it shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such a person—

1. *Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year,*
2. *Is a fugitive from justice,*
3. *Is an unlawful user of, or addicted to, any controlled substance,*
4. *Has been adjudicated as a mental defective or has been committed to a mental institution,*
5. *Being an alien, is illegally or unlawfully in the United States or has been admitted to the United States under a nonimmigrant visa (see 8 U.S.C. § 1101(a)(26)),*
6. *Has been discharged from the U.S. Armed Forces under dishonorable conditions,*
7. *Has renounced their U.S. citizenship,*
8. *Is subject to a court order that restrains the individual from harassing, stalking, or threatening an "intimate partner" of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, or*
9. *Has been convicted of a misdemeanor crime of domestic violence.*

ATF has indicated that the statutory prohibitions of 18 U.S.C. § 922(d) above apply to an NRC licensee, certificate holder, or applicant issuing firearms and ammunition to a security officer for the purposes of performing their official duty—including circumstances where the firearms and ammunition are returned to the licensee, certificate holder, or applicant at the end of a security officer's duty shift. See ATF's Web site (Reference 1) for additional information.

In general, these disqualifying criteria apply to all persons in all circumstances. However, ATF's regulations under 27 CFR 478.141, "General," also provide for limited exemptions. Some NRC licensees and certificate holders that are government agencies may meet the exemption criteria in this regulation. Such licensees and certificate holders should discuss this issue directly with ATF to verify whether they meet these exemptions (see technical contacts below). Additionally, ATF's regulations under 27 CFR 478.142, "Effect of pardons and expungement of convictions," addresses the removal of a Federal firearms disability following a pardon, an expungement, or the restoration of civil rights following a conviction.

#### *Security Officer Initiatives in Advance of Firearms Background Checks*

If the NRC publishes a final rule implementing its authority under section 161A, licensees and certificate holders who voluntarily apply for section 161A authority in the future would be required to satisfactorily complete a firearms background check for all armed security personnel. These licensees and certificate holders would submit to the NRC, for each armed security officer, a set of fingerprints and the personal descriptor information specified in proposed NRC Form 754. The NRC would then forward these fingerprint impressions and personal descriptor information to the FBI. The FBI would compare the name of the individual and other personal descriptors against the FBI's National Instant Criminal Background Check System (NICS) databases to identify whether the individual is prohibited from receiving or possessing firearms or ammunition. Licensees and certificate holders would not be authorized to request a firearms background check for their security personnel until the licensee or certificate holder applies to the NRC for section 161A authority.

Because NICS uses a name- and descriptor-based search process, rather than a fingerprint-based search process, an individual who has a common name, has been the victim of identity theft, or may have incomplete or inaccurate records in the NICS database (e.g., the expungement of a prior conviction or the receipt of a pardon may not have been recorded) could receive a "denied" response indicating she or he is under a Federal firearms disability. For a "denied" response, the NICS automatically refers the individual to the ATF for possible criminal investigation. The FBI will use the fingerprint impressions submitted by the security officer under a firearms background check to resolve questions of identity following the NICS search process, e.g., is hypothetical security officer "John Smith" (applying for a firearms background check) one of the 18 individuals named "John Smith" with a record in the NICS database indicating they are under a Federal firearms disability. Consequently, while the use of fingerprints as part of a firearms background check will reduce the potential for misidentification of an individual as being under a Federal firearms disability, it will not completely eliminate such potential events and subsequent referrals to the ATF.

Therefore, in advance of being subject to a future firearms background check pursuant to an NRC regulation, security personnel may wish to consider applying to the FBI under the FBI's

VAF program. Individuals applying for entry into the VAF program submit descriptive data and fingerprint impressions to the FBI which are then examined against the NICS databases to determine whether they are under a Federal firearms disability. If no prohibitive criteria exist, the application would be approved and the applicant would be placed in the VAF. These individuals are issued a unique personal identification number (UPIN). Security officers would be able to include their UPIN on the proposed NRC Form 754 they would submit if they are subject to a future firearms background check (under the regulations codifying the authority of section 161A) and thus would reduce the potential for misidentification and consequent delays in completing their firearms background check. VAF applicants whose entry into the VAF is rejected due to the presence of prohibitive criteria will not be automatically referred to ATF. Additional information on the FBI's VAF program can be found on the FBI's Web site (Reference 2). Further, an individual who believes they should not be in the NICS database can appeal to the FBI to correct any inaccurate or incomplete records or provide proof of their identity.

*Licensee, Certificate Holder, and Applicant Obligations on Security Officer Suitability*

The NRC's current regulations do not require licensees, certificate holders, or applicants who use armed security personnel as part of their physical protection system to confirm that their armed security personnel are not prohibited under 18 U.S.C. § 922(d) from receiving or possessing firearms or ammunition. However, the ATF has indicated that the statutory prohibitions of 18 U.S.C. § 922(d) apply to an NRC licensee, certificate holder, or applicant issuing firearms and ammunition to security personnel for the purposes of performing their official duty—including circumstances where the firearms and ammunition are returned to the licensee, certificate holder, or applicant at the end of a security officer's duty shift. Consequently, licensees, certificate holders, and applicants who utilize armed security personnel as part of their NRC-approved physical protection system are prohibited under 18 U.S.C. § 922(d) from issuing any firearms or ammunition to an individual if they know or have reasonable cause to believe the individual is prohibited from receiving the firearm or ammunition because a security officer meets one or more of the nine categories listed above.

Accordingly, the NRC recommends that licensees, certificate holders, and applicants with armed security personnel review their suitability evaluation program and suitability evaluation records for armed security personnel to specifically evaluate that information against the disqualifying criteria stipulated under 18 U.S.C. § 922(d). The NRC recommends that licensees, certificate holders, and applicants use existing background check information and criminal history records check information (obtained as part of an existing access authorization or background check program required under the NRC's regulations in 10 CFR Chapter I) in evaluating whether or not their security personnel could be under a Federal firearms disability. Additionally, the NRC notes that the only official determination of whether an individual is, or is not, under a Federal firearms disability is a check of the FBI's NICS, either under the forthcoming Federal firearms background check specified under section 161A of the AEA or via a current State law that mandates a State background check for private armed security personnel which includes as a component a check using the NICS system.

Finally, the NRC recommends that licensees, certificate holders, and applicants discuss the contents of this RIS with their armed security personnel.

## **BACKFIT DISCUSSION**

This RIS does not impose a regulatory staff position interpreting Commission rules that is either new or different from a previously applicable staff position, and, therefore, it is not a backfit as defined by 10 CFR 50.109, 70.76, 72.62, or 76.76. This RIS concerns licensee, certificate holder, and applicant compliance with statutory obligations under 18 U.S.C. § 922 and with security personnel's voluntary participation in the FBI's VAF program. This RIS requires no action or response. Consequently, for the reasons described above, the staff did not perform a backfit analysis.

## **FEDERAL REGISTER NOTIFICATION**

A notice of opportunity for public comment on this RIS was not published in the *Federal Register* because this RIS is informational. However, the NRC did hold a public meeting on March 14, 2008, at the NRC's headquarters in Rockville, Maryland, with the Nuclear Energy Institute to discuss the RIS. A draft of the RIS was available prior to and at the meeting for stakeholder review. Stakeholders provided both oral and subsequent written comments to the NRC staff on the draft RIS and the staff considered those comments in developing this RIS.

## **CONGRESSIONAL REVIEW ACT**

The NRC has determined that this action is not subject to the Congressional Review Act (5 U.S.C. §§ 801-808).

## **PAPERWORK REDUCTION ACT STATEMENT**

This RIS discusses existing information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. § 3501, *et seq.*). These information collection requirements were approved by the Office of Management and Budget (OMB) under control number 3150-0002. This RIS also discusses proposed information collection requirements that will be subject to the Paperwork Reduction Act of 1995. However, these information collection requirements (which are associated with the proposed firearms background checks required by section 161A and the proposed NRC Form 754) have not been approved by OMB as of the date of issuance of this RIS.

## **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.

## **REFERENCES**

1. ATF's Web site on Federal firearms disabilities — <http://www.atf.gov/firearms/faq/> under the link to Unlicensed Persons>Prohibited Persons.
2. FBI's Web site on NICS information — <http://www.fbi.gov/hq/cjisd/nics/index.htm> under the link to NICS Voluntary Appeal File Brochure.

## CONTACT

This RIS requires no specific action or written response. If you have any questions on this RIS, please contact one of the technical contacts listed below.

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Office of Nuclear Reactor Regulation

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#### Enclosures:

1. Federal Firearms Disability Regulations (27 CFR 478.32)
2. List of Issued NMSS/FSME Generic Communications (2007)

Note: A complete listing of recent NRC generic communications may be found on the NRC's public Web site <http://www.nrc.gov> under the link to: Electronic Reading Room>Document Collections.

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### DISTRIBUTION: (NSIR-07-0305)

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SUNSI Review performed by: P. Brochman

ADAMS Accession # ML073480158

\* See previous concurrence

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Coordination: The NRC has coordinated this RIS with the general counsel staffs at ATF headquarters and at the FBI's Criminal Justice Information Services division.



## Federal Firearms Disability Regulations

### Title 27: Alcohol, Tobacco and Firearms

#### PART 478—COMMERCE IN FIREARMS AND AMMUNITION

#### Subpart C—Administrative and Miscellaneous Provisions

### **§ 478.32 *Prohibited shipment, transportation, possession, or receipt of firearms and ammunition by certain persons.***

(a) No person may ship or transport any firearm or ammunition in interstate or foreign commerce, or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, or possess any firearm or ammunition in or affecting commerce, who:

- (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year,
- (2) Is a fugitive from justice,
- (3) Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802),
- (4) Has been adjudicated as a mental defective or has been committed to a mental institution,
- (5) Being an alien—
  - (i) Is illegally or unlawfully in the United States; or
  - (ii) Except as provided in paragraph (f) of this section, is a nonimmigrant alien: *Provided*, That the provisions of this paragraph (a)(5)(ii) do not apply to any nonimmigrant alien if that alien is-
    - (A) Admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;
    - (B) An official representative of a foreign government who is either accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States or is en route to or from another country to which that alien is accredited. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the representative's official capacity;
    - (C) An official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the official's or visitor's official capacity, except if the visitor is a private individual who does not have an official capacity; or
    - (D) A foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business,
- (6) Has been discharged from the Armed Forces under dishonorable conditions,
- (7) Having been a citizen of the United States, has renounced citizenship,
- (8) Is subject to a court order that—
  - (i) Was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

- (ii) Restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- (iii)(A) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
  - (B) By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or
- (9) Has been convicted of a misdemeanor crime of domestic violence.
- (b) No person who is under indictment for a crime punishable by imprisonment for a term exceeding one year may ship or transport any firearm or ammunition in interstate or foreign commerce or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
- (c) Any individual, who to that individual's knowledge and while being employed by any person described in paragraph (a) of this section, may not in the course of such employment receive, possess, or transport any firearm or ammunition in commerce or affecting commerce or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
- (d) No person may sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person:
  - (1) Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year,
  - (2) Is a fugitive from justice,
  - (3) Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802),
  - (4) Has been adjudicated as a mental defective or has been committed to a mental institution,
  - (5) Being an alien—
    - (i) Is illegally or unlawfully in the United States; or
    - (ii) Except as provided in paragraph (f) of this section, is a nonimmigrant alien: *Provided*, That the provisions of this paragraph (d)(5)(ii) do not apply to any nonimmigrant alien if that alien is-
      - (A) Admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;
      - (B) An official representative of a foreign government who is either accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States or en route to or from another country to which that alien is accredited. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the representative's official capacity;
      - (C) An official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the official's or visitor's official capacity, except if the visitor is a private individual who does not have an official capacity; or

- (D) A foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business,
- (6) Has been discharged from the Armed Forces under dishonorable conditions,
- (7) Having been a citizen of the United States, has renounced citizenship,
- (8) Is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child: *Provided*, That the provisions of this paragraph shall only apply to a court order that—
- (i) Was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and
- (ii)(A) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
- (B) By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or
- (9) Has been convicted of a misdemeanor crime of domestic violence.
- (e) The actual notice required by paragraphs (a)(8)(i) and (d)(8)(i) of this section is notice expressly and actually given, and brought home to the party directly, including service of process personally served on the party and service by mail. Actual notice also includes proof of facts and circumstances that raise the inference that the party received notice including, but not limited to, proof that notice was left at the party's dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or proof that the party signed a return receipt for a hearing notice which had been mailed to the party. It does not include notice published in a newspaper.
- (f) Pursuant to 18 U.S.C. 922(y)(3), any nonimmigrant alien may receive a waiver from the prohibition contained in paragraph (a)(5)(ii) of this section, if the Attorney General approves a petition for the waiver.

[T.D. ATF-270, 53 FR 10493, Mar. 31, 1988, as amended by T.D. ATF-363, 60 FR 17451, April 6, 1995; T.D. ATF-391, 62 FR 34639, June 27, 1997; T.D. ATF-401, 63 FR 35522, June 30, 1998; T.D. ATF-471, 67 FR 5425, Feb. 5, 2002]

List of Recently Issued FSME Generic Communications			
Date	GC No.	Subject	Addressees
10/04/07	RIS-2007-22	Status Update For Implementation Of NRC Regulatory Authority for Certain Naturally-Occurring and Accelerator-Produced Radioactive Material	All U.S. Nuclear Regulatory Commission materials licensees, radiation control program directors, State liaison officers, and the NRC's Advisory Committee on the Medical Uses of Isotopes.
10/04/07	RIS-2007-23	Date For Operation Of National Source Tracking System	All licensees authorized to possess Category 1 or Category 2 quantities of radioactive materials. All Radiation Control Program Directors and State Liaison Officers.
12/05/07	RIS-2007-27	Improving Public Understanding of the Risks Associated with Medical Events	All U.S. Nuclear Regulatory Commission medical use licensees. All Radiation Control Program Directors, and State Liaison Officers
12/07/07	RIS-2007-28	Security Requirements for Portable Gauges	U.S. Nuclear Regulatory Commission portable gauge licensees and Agreement State Radiation Control Program Directors and Liaison Officers
12/14/07	RIS-2007-38	Ensuring Complete and Accurate Information in the Documentation of Training and Experience for Individuals Seeking Approval as Medical Authorized Users	All U.S. Nuclear Regulatory Commission medical use licensees and NRC master materials licensees. All Agreement State Radiation Control Program Directors and State Liaison Officers
02/01/08	RIS 2008-02	Actions to Increase the Security of High Activity Radioactive Sources	All U.S. Nuclear Regulatory Commission Materials and Master Materials Licensees. All Agreement State Radiation Control Program Directors and State Liaison Officers.
<p>Note: This list contains the six most recently issued generic communications, issued by the Office of Federal and State Materials and Environmental Management Programs (FSME). A full listing of all NRC generic communications may be viewed at the NRC's public Web site at the following address:  <a href="http://www.nrc.gov/reading-rm/doc-collections/gen-comm/index.html">http://www.nrc.gov/reading-rm/doc-collections/gen-comm/index.html</a>.</p>			