

IN RESPONSE, PLEASE
REFER TO: M080317A

March 17, 2008

MEMORANDUM FOR: Karen D. Cyr
General Counsel

John F. Cordes, Jr., Director
Office of Commission Appellate Adjudication

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 12:55 P.M.,
MONDAY, MARCH 17, 2008, COMMISSIONERS' CONFERENCE
ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND
(OPEN TO PUBLIC ATTENDANCE)

I. SECY-07-0131 – Final Rule - 10 CFR Part 73 “Safeguards Information Protection Requirements” (RIN 3150 - AH57)

The Commission approved a final rule amending the Safeguards Information (SGI) protection requirements in 10 CFR Part 73 and making conforming changes to other provisions of the regulations. The rule utilizes the flexibility of Section 147 of the Atomic Energy Act of 1954, as amended, including the amendments in the Energy Policy Act of 2005, regarding the protection of SGI. In addition, the rule reflects the practices of the Commission in various orders and advisories issued since September 11, 2001. The Commission has approved the publication and implementation of this final rule, subject to the comments and changes noted in the attachment.

Following incorporation of these changes, the Federal Register notice should be reviewed by the Rulemaking, Directives, and Editing Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.

(EDO) (SECY Suspense: 4/18/08)

II. SECY-07-0219 – Pa’ina Hawaii, LLC (Materials License Application)

The Commission approved a Memorandum and Order addressing two questions that the Atomic Safety and Licensing Board certified to the Commission in the Pa’ina Hawaii, LLC Materials License Application proceeding. The Memorandum and Order addresses the Board's questions and rules that: (1) Contentions calling for an irradiator siting analysis are not barred as a matter of law, but must meet all contention admissibility standards, including having an adequately supported basis; and (2) there is no need at this phase of the proceeding to establish a "probability threshold" for irradiators.

(Subsequently, on March 17, 2008, the Secretary signed the Memorandum and Order.)

Attachment: Comments and Changes to the Final Rule in SECY-07-0131

cc: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
EDO
CFO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR

Comments and Changes to the Final Rule in SECY-07-0131

1. The rule language, and response to comments, should make it clear that if a proceeding has commenced, a different presiding officer will be appointed to review any adverse trustworthiness and reliability decisions.
2. Federal Register Notice, page 9: in item (3), delete “or SGI-M”.
3. Federal Register Notice, page 9: in item (4), delete “and SGI-M”.
4. Federal Register Notice, page 10, revise the first full paragraph as follows:

In the development of the rule, a A graded approach based on the risks and consequences of information disclosure ~~was~~ will be used ~~to determine~~ in determining which category of licensee or type of information would be subject to certain protection requirements. This graded approach ~~was~~ can be applied to issues such as the type of information to be protected, the classes of licensees subject to the rule, and the level of handling requirements necessary for the various licensees. For example, the graded approach ~~will allow~~s certain licensees to employ the modified-handling procedures introduced in recent orders and now set forth in the SGI-M provisions of this final rule.

5. Federal Register Notice, page 10, second full paragraph, revise the first sentence as follows: “The requirements set forth in this final rule are the minimum restrictions the Commission finds necessary to protect SGI ~~and SGI-M~~ against inadvertent release or unauthorized disclosure ...”
6. Federal Register Notice, page 10, second full paragraph, revise the second sentence as follows: “The final rule ~~would~~ covers those facilities and materials...”
7. Federal Register Notice, page 11, revise the first line from the top as follows: “...information constituting SGI ~~and SGI-M~~ relates to the types of facilities and the quantities off special nuclear material...”
8. Federal Register Notice, page 11, revise the sentence starting on line 8 from the top as follows: “Further, the Commission has determined, pursuant to Section 147a.(3)(B) of the AEA, that the unauthorized disclosure of SGI, ~~including SGI-M~~, could reasonably be expected to have a significant adverse effect on the health and safety of the public...”
9. Federal Register Notice, page 13, the comment response should provide an example of a circumstance to support the sentence: “This information, although not categorized as SGI, may be withheld from public disclosure if disclosure of the information could raise security concerns. For example, in some contexts information on actual quantities possessed in relation to possession limits could raise security concerns.”
10. Federal Register Notice, page 16-17, revise the paragraph starting at the bottom of page 16 and continuing on page 17 as follows: “The Commission does not accept the commenter’s suggestion to allow parties to mark pleadings as possibly containing SGI awaiting a determination by the Staff; the Commission thinks it fair that parties be responsible for determining whether the analyses they generate contain SGI. ~~A party that is litigating a security contention presumably possesses the requisite competence in security matters to make SGI determinations, and a party in possession of SGI must~~

~~have already been determined to possess competence in security matters to satisfy the “need to know” requirement. Also, The~~ the commenter’s suggestion, if implemented...”

11. Federal Register Notice, page 28, revise the sentence starting on line 10 from the top as follows: “~~This is especially the case because~~ A presiding officer review of adverse trustworthiness and reliability determinations **under an abuse of discretion standard** will not involve witness testimony or other procedures ...”
12. Federal Register Notice, page 33, revise line 6 from the top as follows: “...unnecessarily delay proceedings without **a** compensating benefit.”
13. Federal Register Notice, page 37, change the Response and revise §§ 2.336(f)(6), 2.705(c)(7), 2.709(f)(6) and 2.1010(b)(6)(vi), as necessary, to make the provisions applying to criminal penalties consistent with the provisions applying to civil penalties.
14. Federal Register Notice, page 42, revise line 6 of the first full paragraph as follows: “...enhance security at the Lead Cascade **Facility**.”
15. Federal Register Notice, pages 46-47, in the response to the comment regarding deleting the phrase “or other means approved by the Commission,” the staff should, in addition to the discussion of the Commission’s authority to relieve persons from criminal records requirements, provide a discussion that addresses the authority of the Commission to impose additional requirements to the extent that the phrase is considered to allow for more conservative protections.
16. Federal Register Notice, page 56, revise the second full paragraph as follows: “*Response:* In response to these comments, the Commission is clarifying the text in §§ 73.22(h) and 73.23(h) to state that the authority to determine that documents originally containing SGI ~~or SGI-M~~ must be removed from the SGI ~~or SGI-M~~ category may be exercised by the NRC, with the approval of the NRC, or in consultation with the individual or organization that made the original determination.
17. Federal Register Notice, page 58, revise the last full sentence as follows: “In addition, any agent, contractor, or consultant of those categories of individuals **is** ~~are~~ also exempt ~~if they have undergone~~ **provided** equivalent criminal history and background checks to those required by §§ 73.22(b) or 73.23(b) **have been performed**.”
18. Federal Register Notice, page 65, revise the sentence starting on line 4 from the top as follows: “The benefits of using NRC markings ~~surely~~ need not be quantified.”
19. Federal Register Notice, page 72, revise the sentence starting on line 8 from the top as follows: “Defining that term in part 30 will assist licensees, applicants, and other persons subject to part 30 in determining the applicability to their activities of the requirements for the protection of SGI ~~and SGI-M~~ in part 73.
20. Federal Register Notice, page 72, revise the last full sentence as follows: “This change correctly denotes the applicable sections of part 73 relating to a part 30 licensee’s or applicant’s protection against unauthorized disclosure of SGI ~~and/or SGI-M~~.”
21. Federal Register Notice, pages 141 and 152 addresses processing SGI on electronic systems. The requirements should make it clear that computer systems that have been used to process SGI, prior to being returned to nonexclusive use, must be free of

recoverable SGI in order to preclude any access to SGI. If it is not practical to do so at this stage, the Statement of Considerations should address the matter and note that the NRC will develop guidance on preventing such an occurrence.

22. Federal Register Notice, page 153, revise line 2 and 3 from the top as follows: "...as conforming to Federal Information Processing Standards (~~FIPS~~) [FIPS] 140-2 or later.