[7590-01-P]

UNITED STATES

NUCLEAR REGULATORY COMMISSION

In the Matter of

BABCOCK AND WILCOX NUCLEAR ENERGY	)	EA-2010-208
AND ALL OTHER PERSONS	)	Project No. 0776
WHO SEEK OR OBTAIN ACCESS TO	)	
SAFEGUARDS INFORMATION	)	
DESCRIBED HEREIN	)	

ORDER IMPOSING SAFEGUARDS INFORMATION
PROTECTION REQUIREMENTS FOR ACCESS
TO SAFEGUARDS INFORMATION
(EFFECTIVE IMMEDIATELY)

[NRC-2010-0207]

I

Babcock and Wilcox Nuclear Energy (B&W) has submitted a letter of intent to the U.S. Nuclear Regulatory Commission (NRC) for a design certification application in 2012.

In June 2009, the Commission published a rulemaking in the *Federal Register* (74 FR 28112) requiring applicants for a variety of licensing activities, including nuclear power plant designers, to perform a design-specific assessment of the effects of the impact of a large, commercial aircraft and to incorporate design features and functional capabilities into the nuclear power plant design to provide additional inherent protection with reduced use of operator actions. A discussion of the specific requirements for applicants for new nuclear power reactors can be found in Section V of the *Federal Register* notice. To assist designers in completing this assessment, the Commission has decided to provide the detailed aircraft impact characteristics that should be used as reasonable inputs for reactor vendors and architect/engineers who have the need to know and who meet the NRC's requirements for the.

disclosure of such information to use in the required aircraft impact assessments.

The NRC derived these characteristics from agency analyses performed on operating reactors to support, in part, the development of a broadly effective set of mitigation strategies to combat fires and explosions from a spectrum of hypothetical aircraft impacts. Although these detailed characteristics were not selected as a basis for designing new reactors, the staff is suggesting them as a starting point for aircraft impact assessments. On July 10, 2009, the NRC issued a draft regulatory guide, DG–1176, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts." The agency did not receive any comments on the document. The staff is currently working to finalize the regulatory guide and intends to include these aircraft impact characteristics in the safeguards information (SGI) version of the final regulatory guide. In addition, the staff recognizes that no national or international consensus has been reached on the selection of appropriate characteristics for such analyses. Therefore, the information contained in DG-1176 should be considered preliminary and subject to authorized stakeholder comment. The detailed aircraft characteristics that are the subject of this Order are hereby designated as SGI,[1] in accordance with Section 147 of the Atomic Energy Act of 1954, as amended (AEA).

On October 24, 2008, the NRC revised 10 CFR 73.21, "Protection of Safeguards Information: Performance Requirements," to include applicants in the list of entities required to protect SGI. (73 FR 63546). The NRC is issuing this Order to B&W to impose requirements for the protection of SGI, in addition to the requirements set forth in 10 CFR 73.21. These additional requirements include nomination of a reviewing official, restrictions on storage of SGI, and access to SGI by certain individuals.

[1]SGI is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under Section 147 of the AEA.

To implement this Order, B&W must nominate an individual who will review the results of the Federal Bureau of Investigation (FBI) criminal history records check to make SGI access determinations. This individual, referred to as the "reviewing official," must be someone who seeks access to SGI. Based on the results of the FBI criminal history records check, the NRC staff will determine whether this individual may have access to SGI. If the NRC determines that the individual may not be granted access to SGI, this Order prohibits that individual from obtaining access to any SGI. Once the NRC approves a reviewing official, that reviewing official, and only that reviewing official, can make SGI access determinations for other individuals who have been identified by B&W as having a need to know SGI, and who have been fingerprinted, have had a criminal history records check and a background check, in accordance with this Order. The reviewing official can only make SGI access determinations for other individuals, but cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if B&W wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in that capacity.

II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of SGI. Section 147 of the AEA grants the Commission explicit authority to issue such orders, as necessary, to prohibit the unauthorized disclosure of SGI. To provide assurance that B&W is continuing to implement appropriate measures to ensure a consistent level of protection to prohibit unauthorized disclosure of SGI, and to comply with the fingerprinting, criminal history records check, and background check requirements for access to SGI, B&W shall implement the requirements for the protection of SGI as set forth in 10 CFR 73.21, 10 CFR 73.22, and this Order.

Certain categories of individuals are relieved by rule from the fingerprinting requirements under 10 CFR 73.59, “Relief from Fingerprinting, Identification and Criminal History Records Checks and Other Elements of Background Checks for Designated Categories of Individuals.” Those individuals include Federal, State, and local law enforcement personnel; Agreement State inspectors who conduct security inspections on behalf of the NRC; members of Congress; certain employees of members of Congress or congressional committees who have undergone fingerprinting for a prior U.S. Government criminal history check; and representatives of the International Atomic Energy Agency or certain foreign government organizations. In addition, individuals who have had a favorably-decided U.S. Government criminal history check within the last 5 years, or individuals who have active Federal security clearances (provided in either case that they make available the appropriate documentation), have already been subjected to fingerprinting and criminal history checks and, thus, have satisfied the fingerprinting requirement.

In addition, pursuant to 10 CFR 2.202, “Orders,” I find that in light of the matters identified above, which warrant the issuance of this Order, the public health, safety, and interest require that this Order be effective immediately.

III

Accordingly, pursuant to Sections 147, 149, 161b, 161i, 161o, 182, and 186 of the AEA, and the Commission's regulations in 10 CFR 2.202 and10 CFR Part 73, “Physical Protection of Plants and Materials,” IT IS HEREBY ORDERED, **EFFECTIVE IMMEDIATELY**, THAT B&W AND ALL OTHER PERSONS WHO SEEK OR OBTAIN ACCESS TO SAFEGUARDS INFORMATION AS DESCRIBED HEREIN SHALL COMPLY WITH THE REQUIREMENTS SET FORTH IN 10 CFR 73.21, 10 CFR 73.22, AND THIS ORDER.

A. 1. No person may have access to any SGI if the NRC, when making an SGI access

determination for a nominated reviewing official, has determined, based on fingerprinting and an FBI identification and criminal history records check, that the person nominated may not have access to SGI.

2. B&W shall store SGI designated by this Order only in the facility or facilities specifically approved, in writing, by the NRC for storage of SGI designated by this Order. B&W may request, in writing, NRC approval of additional facilities for the storage of the SGI designated by this Order that the NRC will consider on a case-by-case basis.
3. B&W may provide SGI designated by this Order to individuals (such as foreign nationals, U.S. citizens living in foreign countries, or individuals under the age of 18) for whom fingerprinting and an FBI criminal history records check is not reasonably expected to yield sufficient criminal history information to form the basis of an informed decision on granting access to SGI, provided that the individual satisfies the requirements of this Order, and that B&W has implemented measures, in addition to those set forth in this Order, to ensure that the individual is suitable for access to the SGI designated by this Order. Such additional measures must include, but are not limited to, equivalent criminal history records checks conducted by a local, State, or foreign governmental agency, and/or enhanced background checks including employment and credit history. The NRC must review these additional measures and approve them in writing.

B. No person may provide SGI to any other person except in accordance with Section III.A. above. Before providing SGI to any person, a copy of this Order shall be provided to that person.

C. B&W shall comply with the following requirements:

1. B&W shall, within 20 days of the date of this Order, submit the fingerprints of one individual whom (a) B&W nominates as the "reviewing official" for determining access to SGI by other individuals and (b) has an established need to know the information. The NRC will determine whether this individual (or any subsequent reviewing official) may have access to SGI and, therefore, will be permitted to serve as B&W's reviewing official.[2] B&W may, at the same time or later, submit the fingerprints of other individuals to whom B&W seeks to grant access to SGI. Fingerprints shall be submitted and reviewed in accordance with the procedures described in the attachment to this Order.
2. B&W shall, in writing, within 20 days of the date of this Order, notify the Commission: (a) if it is unable to comply with any of the requirements described in the Order, including the attachment; or (b) if compliance with any of the requirements is unnecessary in its specific circumstances.

The notification shall provide B&W's justification for seeking relief from, or variation of, any specific requirement.

B&W shall submit responses to Section III.C.1. and Section III.C.2 above to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555. In addition, B&W shall mark its responses as "Security-Related Information - Withhold Under 10 CFR 2.390."

Except for the requirements for fingerprinting, the Director, Office of New Reactors, may,

[2]The NRC's determination of this individual's access to SGI in accordance with the process described in Enclosure 3 to the transmittal letter of this order is an administrative determination that is outside the scope of this order.

in writing, relax or rescind any of the above conditions upon demonstration of good cause by B&W.

IV

In accordance with 10 CFR 2.202, B&W must, and any other person adversely affected by this Order may, submit an answer to this Order and may request a hearing with regard to this Order, within 20 days of its publication in the *Federal Register*. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law by which B&W or other entities adversely affected rely, and the reasons as to why the NRC should not have issued this Order. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies shall also be sent to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, and to B&W, if the answer or hearing request is by an entity other than B&W. Because of possible delays in delivery of mail to U.S. Government offices, the agency asks that answers and requests for a hearing be transmitted to the Secretary of the Commission, either by means of facsimile transmission to (301) 415-1101 or via e-mail to hearingdocket@nrc.gov, and also to the Office of the General Counsel either through facsimile transmission to (301) 415-3725 or via e-mail to OGCMailCenter@nrc.gov. If an entity other than B&W requests a hearing, that entity shall set forth, with particularity, the manner in which this Order adversely affects its interest and

shall address the criteria set forth in 10 CFR 2.309, “Hearing Requests, Petitions to Intervene, Requirements for Standing, and Contentions.”

If B&W, or a person whose interest is adversely affected, requests a hearing, the Commission will issue an order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), B&W may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order on the grounds that the order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified above in Section III shall be final 20 days from the date of this Order without, further order or proceedings.

If the agency approves an extension of time for requesting a hearing, the provisions, as specified above in Section III, shall be final when the extension expires, if a hearing request has not been received.

AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

Dated at Rockville, Maryland, this 22nd day of December 2010.

For The Nuclear Regulatory Commission,

/RA/

Michael R. Johnson, Director
Office of New Reactors

Guidance for Evaluation of Access to Safeguards Information With the Inclusion of Criminal History Records (Fingerprint) Checks

When a licensee or other person[3] submits fingerprints to the Nuclear Regulatory Commission (NRC) pursuant to an NRC Order, it will receive a criminal history summary of information, provided in federal records, since the individual's eighteenth birthday. Individuals retain the right to correct and complete information and to initiate challenge procedures described in Enclosure 3. The licensee will receive the information from the criminal history records check for those individuals requiring access to Safeguards Information (SGI), and the reviewing official will evaluate that information using the guidance below. Furthermore, the requirements of all Orders, which apply to the information and material to which access is being granted, must be met.

The licensee's reviewing official is required to evaluate all pertinent and available information in making a determination of access to SGI, including the criminal history information pertaining to the individual as required by the NRC Order. The criminal history records check is used when determining whether an individual has a record of criminal activity that indicates that the individual should not have access to SGI. Each determination of access to SGI, which includes a review of criminal history information, must be documented to include the basis for the decision that is made.

(i) If negative information is discovered that was not provided by the individual, or which is different in any material respect from the information provided by the individual, this information should be considered, and decisions made based on these findings, must be documented.

[3]As used herein, "licensee" means any licensee or other person who is required to conduct fingerprinting.

(ii) Any record containing a pattern of behaviors which indicates that the behaviors could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have access to SGI, should be carefully evaluated prior to any authorization of access to SGI.

It is necessary for a licensee to resubmit fingerprints only under two conditions:

1) the FBI has determined that the fingerprints cannot be classified due to poor quality in the mechanics of taking the initial impressions; or

2) the initial submission has been lost.

If the FBI advises that six sets of fingerprints are unclassifiable based on conditions other than poor quality, the licensee may submit a request to the NRC for alternatives. When those search results are received from the FBI, no further search is necessary.

Process to Challenge NRC Denials or Revocations of Access to Safeguards Information

1. Policy.

This policy establishes a process for individuals whom the Nuclear Regulatory Commission (NRC) licensees or other person[4] nominate as reviewing officials to challenge and appeal NRC denials or revocations of access to Safeguards Information (SGI). Any individual nominated as a licensee reviewing official whom the NRC has determined may not have access to SGI shall, to the extent provided below, be afforded an opportunity to challenge and appeal the NRC's determination. This policy shall not be construed to require the disclosure of SGI to

[4]As used herein, "licensee" means any licensee or other person who is required to conduct fingerprinting.

any person, nor shall it be construed to create a liberty or property interest of any kind in the access of any individual to SGI.

2. Applicability.

This policy applies solely to those employees of licensees who are nominated as a reviewing official, and who are thus considered, by the NRC, for initial or continued access to SGI in that position.

3. SGI Access Determination Criteria.

Determinations for granting a nominated reviewing official access to SGI will be made by the NRC staff. Access to SGI shall be denied or revoked whenever it is determined that an individual does not meet the applicable standards. Any doubt about an individual's eligibility for initial or continued access to SGI shall be resolved in favor of the national security and access will be denied or revoked.

4. Procedures to Challenge the Contents of Records Obtained from the FBI.

a. Prior to a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall:

(i) Be provided the contents of records obtained from the FBI for the purpose of assuring correct and complete information. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge

procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537-9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI will forward the challenge to the agency that submitted the data and request that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any necessary changes in accordance with the information supplied by that agency.

(ii) Be afforded ten (10) days to initiate an action challenging the results of an FBI criminal history records check (described in (i), above) after the record is made available for the individual's review. If such a challenge is initiated, the NRC Facilities Security Branch Chief may make a determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record.

5. Procedures to Provide Additional Information.

a. Prior to a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall:

(i) Be afforded an opportunity to submit information relevant to the individual's trustworthiness and reliability. The NRC Facilities Security Branch Chief shall, in writing, notify the individual of this opportunity, and any deadlines for submitting this information. The NRC Facilities Security Branch Chief may make a determination of access to SGI only upon receipt of

the additional information submitted by the individual, or, if no such information is submitted, when the deadline to submit such information has passed.

6. Procedures to Notify an Individual of the NRC Facilities Security Branch Chief Determination to Deny or Revoke Access to SGI.

a. Upon a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall be provided a written explanation of the basis for this determination.

7. Procedures to Appeal an NRC Determination to Deny or Revoke Access to SGI.

a. Upon a determination by the NRC Facilities Security Branch Chief that an individual nominated as a reviewing official is denied or revoked access to SGI, the individual shall be afforded an opportunity to appeal this determination to the Director, Division of Facilities and Security. The determination must be appealed within twenty (20) days of receipt of the written notice of the determination by the Facilities Security Branch Chief, and may either be in writing or in person. Any appeal made in person shall take place at the NRC's headquarters, and shall be at the individual's own expense. The determination by the Director, Division of Facilities and Security, shall be rendered within sixty (60) days after receipt of the appeal.

8. Procedures to Notify an Individual of the Determination by the Director, Division of Facilities and Security, Upon an Appeal.

a. A determination by the Director, Division of Facilities and Security, shall be provided to the individual in writing, and include an explanation of the basis for this determination. A determination by the Director, Division of Facilities and Security, to affirm the Facilities Branch Chief's determination to deny or revoke an individual's access to SGI is final and not subject to further administrative appeals.

General Requirements

Licensees and other persons who are required to conduct fingerprinting shall comply with the requirements of this enclosure.[5]

A. The licensee shall notify the U.S. Nuclear Regulatory Commission (NRC) of any desired change in reviewing officials, in compliance with C.1 of the subject Order. The NRC will determine whether the individual nominated as the new reviewing official may have access to safeguards information (SGI) based on a previously-obtained or new criminal history check and, therefore, will be permitted to serve as the licensee's reviewing official.

Procedures for Processing Fingerprint Checks

For the purpose of complying with this order, licensees shall, using an appropriate method listed in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, Section 4, submit to the NRC's Division of Facilities and Security, Mail Stop T-6E46, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ) or, where practicable, other

[5] As used herein, "licensee" means any licensee or other person who is required to conduct fingerprinting in accordance with these requirements.

fingerprint records for each individual seeking access to SGI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling (301) 415-5877, or by e-mail to forms@nrc.gov. Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

The NRC will review submitted fingerprint cards for completeness. Any Form FD-258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the Federal Bureau of Investigations (FBI) because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

Fees for processing fingerprint checks are due upon application. Licensees shall submit payment with the application for processing fingerprints by corporate check, certified check, cashier's check, money order, or electronic payment, made payable to “U.S. NRC.” [For guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415-7404]. Combined payment for multiple applications is acceptable. The application fee (currently $26) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

Right to Correct and Complete Information

Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation, Identification Division, Washington, DC 20537-9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of an FBI criminal history records check after the record is made available for his/her review. The licensee may make a final SGI

access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to SGI, the licensee shall provide the individual its documented basis for denial. Access to SGI shall not be granted to an individual during the review process.

Protection of Information

1. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history record check may be transferred to another licensee if the licensee holding the criminal history record check receives the individual's written request to re-disseminate the information contained in his/her file, and the current licensee verifies information such as the individual’s name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

4. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the

regulations and laws.

5. The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, for three (3) years after termination of employment or determination of access to SGI (whether access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.