



U.S. NUCLEAR REGULATORY COMMISSION
NUREGS
RESPONSE TO FREEDOM OF
INFORMATION ACT (FOIA) REQUEST

NRC FOIA REQUEST NUMBER(S)
FOIA — 89-546

RESPONSE TYPE

☒ FINAL

☐ PARTIAL

DATE

APR 11 1990

DOCKET NUMBER(S) (if applicable)

REQUESTER

Joseph M. Felton

PART I - AGENCY RECORDS RELEASED OR NOT LOCATED (See checked boxes)

☐ No agency records subject to the request have been located.

☐ No additional agency records subject to the request have been located.

☐ Requested records are available through another public distribution program. See Comments Section.

☐ Agency records subject to the request that are identified on Appendixes _____ are already available for public inspection and copying in the NRC Public Document Room, 2120 L Street, N.W., Washington, DC 20555.

☒ Agency records subject to the request that are identified on Appendixes _____ are being made available for public inspection and copying in the NRC Public Document Room, 2120 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.

☐ The nonproprietary version of the proposal(s) that you agreed to accept in a telephone conversation with a member of my staff is now being made available for public inspection and copying at the NRC Public Document Room 2120 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.

☐ Agency records subject to the request that are identified on Appendixes _____ may be inspected and copied at the NRC Local Public Document Room identified in the Comments Section.

☐ Enclosed is information on how you may obtain access to and the charges for copying records placed in the NRC Public Document Room, 2120 L Street, N.W., Washington, DC.

☐ Agency records subject to the request are enclosed.

☐ Records subject to the request have been referred to another Federal agency(ies) for review and direct response to you.

☐ You will be billed by the NRC for fees totaling \$ _____.

☐ In view of NRC's response to this request, no further action is being taken on appeal letter dated _____, No _____.

PART II - INFORMATION WITHHELD FROM PUBLIC DISCLOSURE

☒ Certain information in the requested records is being withheld from public disclosure pursuant to the exemptions described in and for the reasons stated in Part II sections B, C, and D. Any released portions of the documents for which only part of the record is being withheld are being made available for public inspection and copying in the NRC Public Document Room, 2120 L Street, N.W., Washington, DC, in a folder under this FOIA number and requester name.

COMMENTS

SIGNATURE, DIRECTOR, DIVISION OF FREEDOM OF INFORMATION AND PUBLICATIONS SERVICES

David H. Burley

9006050330 900411
PDR FOIA
FELTON89-546 PDR

PART II. B -- APPLICABLE EXEMPTIONS

Records subject to the request that are described on the enclosed Appendixes) Q are being withheld in their entirety or in part under the Exemptions and for the reasons set forth below pursuant to 5 U.S.C. 552(b) and 10 CFR Part 2.2(a) of NRC Regulations.

1. The withheld information is properly classified pursuant to Executive Order (EXEMPTION 1)

2. The withheld information relates solely to the internal personnel rules and procedures of NRC. (EXEMPTION 2)

3. The withheld information is specifically exempted from public disclosure by statute indicated: (EXEMPTION 3)

Sections 141-145 of the Atomic Energy Act which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165)

Section 147 of the Atomic Energy Act which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167)

4. The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated: (EXEMPTION 4)

The information is considered to be confidential business (proprietary) information.

The information is considered to be proprietary information pursuant to 10 CFR 2.790(d)(1).

The information was submitted and received in confidence pursuant to 10 CFR 2.790(d)(2).

X 5. The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. (EXEMPTION 5): Applicable Privilege:

X Deliberative Process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.

Attorney work-product privilege: (Documents prepared by an attorney in contemplation of litigation.)

Attorney-client privilege: (Confidential communications between an attorney and his/her client.)

6. The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy. (EXEMPTION 6)

7. The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated: (EXEMPTION 7)

Disclosure could reasonably be expected to interfere with an enforcement proceeding because it could reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow them to take action to shield potential wrongdoing or a violation of NRC requirements from investigators (EXEMPTION 7 (A)).

Disclosure would constitute an unwarranted invasion of personal privacy (EXEMPTION 7 (C)).

The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources (EXEMPTION 7 (D)).

Other

PART II. C -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(b) and/or 9.25 (c) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The persons responsible for the denial are those officials identified below as denying officials and the Director, Division of Information and Publications Services, Office of Administration and Resources Management, for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL	
			SECRETARY	EDO
John C. Hoyle	Assistant Secretary of the Commission	Appendix Q	X	

PART II. D -- APPEAL RIGHTS

The denial by each denying official identified in Part II.C may be appealed to the Appellate Official identified in that section. Any such appeal must be in writing and must be made within 30 days of receipt of this response. Appeals must be addressed as appropriate to the Executive Director for Operations or to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

APPENDIX P
DOCUMENT BEING PLACED IN THE PDR

NUMBER	DATE	DESCRIPTION
1.	10/18/89	SECY-89-321, entitled: "Revisions to Procedures To Issue Orders - 10 C.F.R. Part 2." (27 pages)

APPENDIX Q
DOCUMENT BEING WITHHELD IN ITS ENTIRETY

NUMBER	DATE	DESCRIPTION
1.	8/3/87	Memo from William C. Parler to Commissioner Bernthal, subject: OI Comments on SECY-87-152. (7 pages) Withheld pursuant to Exemption 5.

NUCLEAR LICENSING REPORTS

Executive Offices:

200-A Monroe Street, Suite 225
Rockville, Maryland 20850
(301) 424-4132

Mail Order Address:

P.O. Box 10866
Rockville, Maryland 20850

December 15, 1989

Mr. Donnie H. Grimsley, Director
Division of Freedom of Information
and Publication Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-89-546
Rec'd 12-20-89

Dear Mr. Grimsley:

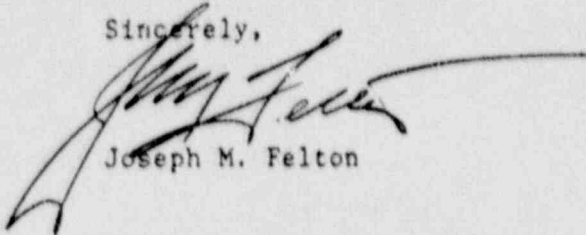
Pursuant to the Freedom of Information Act, Nuclear Licensing Reports requests copies of the records listed below.

Nuclear Licensing Reports is a monthly newsletter designed to inform NRC and Agreement State licensees about new and proposed changes in NRC and state regulations and policies in order that licensees may be better able to carry out their operations in a safe and cost effective manner. Included among its subscribers are NRC and Agreement State licensees, Federal and state regulatory agencies, Congressional committees, and members of the public.

Pursuant to the FOIA and NRC regulations, Nuclear Licensing Reports requests a waiver of search and processing costs, and the first 100 pages of copying costs, as a news media organization.

Please send the records directly to me at the Monroe Street address listed above. Should the number of pages exceed 100, please send the first 100 pages to me, and the remaining pages to the PDR reproduction contractor for copying and charge to my FMI account.

Sincerely,



Joseph M. Felton

Records Requested:

Records relating to the background and purpose of a rule being prepared by the Office of Enforcement on "Holding Unlicensed Persons Accountable for Willful Misconduct".

The memo to the EDO requesting approval of the rule.

The status of the rule.

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*Copy for each
for
note well
copy to save
in paper*

October 18, 1989

RULEMAKING ISSUE SECY-89-321
(Notation Vote)

FOR: The Commissioners

FROM: William C. Parler
General Counsel

SUBJECT: REVISIONS TO PROCEDURES TO ISSUE ORDERS - 10 C.F.R. PART 2

PURPOSE: To obtain approval to initiate a rulemaking to revise the Commission's procedures in 10 C.F.R. Part 2, Subpart B, for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. The proposed amendments would more fully reflect the Commission's existing statutory authority to issue orders than is presently the case. The proposed amendments also would clarify the types of Commission orders to which hearing rights attach.

BACKGROUND: The proposed rulemaking recommended for Commission approval proposes procedural changes to 10 C.F.R. Part 2, Subpart B, regarding the issuance of orders and orders to show cause to persons (corporate and individuals) not licensed by the Commission but who engage in activities subject to the Commission's jurisdiction. These changes will make the Commission's Rules of Practice more consistent with our existing statutory authority.

The proposed rules are procedural in nature. They do not establish the substantive standards or conditions under which the NRC would issue an order to a licensed or unlicensed person. The staff has been directed to submit to the Commission, in a separate rulemaking, a substantive addition to its regulations in order to put unlicensed persons on notice that they may be held accountable for willful misconduct which undermines, or calls into

CONTACT:

Jack R. Goldberg
x21681
Mary E. Wagner
x21683

OK to release if approved by Comm.

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question, adequate protection of the public health and safety. The intended scope of the substantive rule will be set forth in that rulemaking.

The proposed change to § 2.202 establishes the procedural mechanism to issue orders to unlicensed persons. The procedural mechanism for issuing orders to show cause to licensees and other persons would be set forth in a separate section (revised § 2.204) in order to make it clear that the right to a hearing does not attach at the time of issuance of a show cause order which requires only that information be provided in order to determine whether an order to modify, suspend or revoke a license or for other appropriate action should be issued. Further, the EDO's authority to issue such orders would not be limited to emergencies, as in the current regulations. To conform to the changes to §§ 2.202 and 2.204, conforming changes are also proposed to §§ 2.1 (scope) and 2.700 (scope of subpart).

Portions of this proposed rulemaking to revise the procedures to issue orders to include persons not licensed also are responsive in part to a memorandum dated June 29, 1989 from Samuel J. Chilk to Victor Stello, Jr., "SECY-89-151 -- Identifying and Informing Others of Wrongdoers and Initiating Rulemaking to Permit the Issuance of Orders to Non-Licensees." As mentioned above, the staff intends to submit, in accordance with SECY-89-151, Option 1, and Secretary Chilk's June 29, 1989 memorandum, a proposed rulemaking containing a substantive addition to the regulations in order to put unlicensed individuals on notice that they may be held accountable for willful misconduct which causes a licensee to violate an NRC requirement or which places in question reasonable assurance of adequate protection of the public health and safety. However, the changes to 10 C.F.R. Part 2 proposed here have a utility independent of the staff's need to track wrongdoers, as discussed below.

Moreover, the establishment of the procedural mechanism to issue orders to individuals also should resolve a concern raised some time ago in response to the Commission's proposed adoption of regulations on Completeness and Accuracy of information. In those comments, the United States Department of Justice expressed concern that in its civil enforcement program the Commission does not impose civil penalties against individuals, but only against licensees, resulting in a particular problem in a marginal criminal case where a civil penalty against the individual

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could be the preferred resolution. See letter dated December 18, 1986 from Victoria Toensing, U.S. Department of Justice, to William C. Parler, U.S. Nuclear Regulatory Commission.

DISCUSSION:

The current provisions in the Commission's Rules of Practice for issuing show cause orders only address licensees. However, the Commission's statutory authority to issue orders, which is found in Section 161 of the Atomic Energy Act of 1954, as amended, is not so limited. In fact, the Commission's Atomic Energy Act authority to issue orders is extremely broad, extending to any person (defined in Section 11s to include, for example, any individual, corporation, federal, state and local agency) who engages in conduct within the Commission's subject-matter jurisdiction. The few court cases which deal with the scope of the general authority Congress has granted the Commission usually do so in a general discussion or in passing and conclude that Section 161 confers uniquely broad and flexible authority on the Commission. See Power Reactor Dev. Co. v. International Union of Elec. Radio and Mach. Workers, AFL-CIO, 367 U.S. 396 (1961); Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 527, n. 3 (D.C. Cir. 1982); New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170, 173-74 (1st Cir. 1969); Siegel v. Atomic Energy Comm'n, 400 F.2d 779, 783 (D.C. Cir. 1968); but cf. Reynolds v. United States, 286 F.2d 433 (9th Cir. 1960) (interpreting Section 161i in detail and holding in the context of the AEC's bomb testing activities, that Section 161i(3) authorized the AEC to take action to govern the activities of private licensees and not the activities of the Commission itself; the court's use of the word "licensee" is dictum with regard to the term in the context of this paper).

Section 161i provides broad authority to issue orders as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue orders to establish such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material, as may be necessary or desirable to provide for the common defense and security and protect the public health and safety. As relevant here, Section 161o authorizes the Commission to order reports as may be necessary to effectuate the purposes of the Act.

Given this broad authority, it is appropriate to amend 10 C.F.R. § 2.202 to have the procedural mechanism in place to issue orders, as necessary, to unlicensed persons, both corporate and individual, when such persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is necessary or desirable to protect public health and safety or to minimize danger to life or property or to protect the common defense and security. This amendment would revise § 2.202 to establish that mechanism both as to a licensee, as the current § 2.202 provides, and to any person subject to the jurisdiction of the Commission. Such a person includes, but is not limited to, a person who held a license or who was otherwise engaged in licensed activities at the time of the conduct in question, but who no longer holds a license or is so engaged, and to vendors, contractors, and certificate holders.

In addition, the procedural mechanism for issuing orders to show cause to licensees and other persons would be set forth in a separate section (revised § 2.204) in order to make it clear that the right to a hearing does not attach at the time of issuance of a show cause order. Orders, including orders to show cause, currently are issued under Section 161 of the Atomic Energy Act of 1954, as amended, which are implemented by §§ 2.202 (order to show cause) and 2.204 (order for modification license). In addition, civil penalty orders are issued under Section 234, implemented by § 2.205 (civil penalties). NRC practice commonly has been to issue a single order, an order to show cause, which requires that certain information be provided to demonstrate why either a proposed or immediately effective action modifying, suspending, or revoking a license or a proposed order for such other action as may be appropriate, should not be taken. The order affords a hearing with regard to these actions. While Section 189 of the Atomic Energy Act provides for the granting of a hearing in connection with proceedings to modify, suspend, or revoke a license and certain other enumerated actions, neither the Act nor the Administrative Procedure Act would require a hearing in connection with an order to show cause which requires only the submission of information, but does not by its terms modify, suspend or revoke a license.

The Atomic Energy Act does not explicitly set out the form or requirements for an order to show cause. The Atomic Energy Act does, however, authorize the Commission to collect information pursuant to Sections 161c and d and the Commission may issue show cause orders to implement this

authority. Section 182 of the Act authorizes the Commission to request information from licensees and the Commission has implemented this authority by promulgating regulations such as 10 C.F.R. § 50.54(f). Licensees subject to Commission requests under 10 C.F.R. § 50.54(f), or its equivalent in other parts of the NRC's regulations, have no hearing rights under the Act regarding these information requests.

Separation of the Commission's order to show cause authority from the Commission's general ordering authority, contained in revised § 2.202, will clarify that hearing rights do not attach to the former. The provisions concerning orders to show cause are set forth in a revised § 2.204. Under the proposed rule changes, an order to show cause will be issued only to require the submission of information. If an order to show cause is issued as part of an order requiring action, hearing rights will be offered but only with respect to the provisions of the order requiring action. The order will provide that the answer, if not consenting to the required action, may explain why the order should not have been issued.

In order to avoid unnecessary duplication in the regulations, it is proposed that the current language of § 2.204, "Order for modification of license," be deleted from Part 2, since procedures for modification of a license have been included in revised § 2.202. Revised § 2.202(f) provides that if the action ordered by the Commission constitutes a backfit of a Part 50 licensee, the procedures described in 10 C.F.R. § 50.109 must be followed, unless the action is consented to. This provision currently appears in the last sentence of § 2.204.

Section 2.202 is also revised to provide that if the licensee or other person to whom an order is issued consents to its issuance, or the order confirms actions agreed to by the licensee or such other person, such consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing and any associated rights. Such orders will be immediately effective. This is not a departure from current Commission practice, but merely conforms the Commission's regulations to such practice. See, e.g., Minnesota Mining and Manufacturing Co., 3M Center 220-2E-02, Confirmatory Order Modifying License, Effective Immediately, December 21, 1988, 53 Fed. Reg. 52534 (1988). Section 2.202(d) also provides that the licensee's or other person's agreement to an order must be in writing. The addition of this

provision is intended to minimize the possibility of issuance of a confirmatory order which does not accurately reflect the agreement reached by the parties. Whether or not the licensee or other person consents to any order, a person adversely affected by an order issued under § 2.202 to modify, suspend or revoke a license will be offered an opportunity for a hearing pursuant to Section 189 of the Atomic Energy Act, consistent with current practice and the authority of the Commission to define the scope of the proceeding. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

The existing § 2.202 vests authority to issue orders in the Executive Director for Operations (EDO) and various staff office directors. The existing rule limits the EDO's authority to issue orders only during an emergency. Existing § 2.204 vests authority to issue orders in the Commission. The revised rules consistently vest such authority in the Commission, leaving it to the Commission's internal delegation authority to delegate such authority to others. This change will avoid the need to amend the regulation each time the title of one of the currently enumerated officials is changed, and will also remove the unnecessary limitation on the EDO's authority. However, the Commission's existing delegations should undergo a review to assure that they are clear, complete, and current.

Finally, to conform to the changes to §§ 2.202 and 2.204, § 2.1 is amended to specify that the scope of Part 2 includes the issuance of orders and orders to show cause to unlicensed persons, and § 2.700 is amended to specify that Subpart G (Rules of General Applicability) applies to all adjudications initiated by an order rather than just an order to show cause.

RECOMMENDATION:

That the Commission:

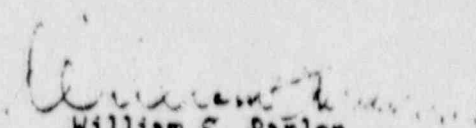
1. Approve publication in the Federal Register of the notice of proposed rulemaking in Enclosure A;
2. Direct the staff to undertake a review of the Commission's existing delegations to assure they are clear, complete, and current, and promptly revised when necessary;

EX. 5

3. Note:

- a. The notice of proposed rulemaking in Enclosure A will be published in the Federal Register allowing 60 days for public comment.
- b. The Commission may wish to consider publishing this notice of proposed rulemaking in conjunction with publication of the proposed rulemaking containing the substantive changes imposing requirements on unlicensed persons.
- c. The issue of procedural changes to the regulations to clarify the Commission's authority to issue orders to persons who do not hold licenses was discussed before the House Subcommittee on Environment, Energy and Natural Resources during its decommissioning hearings on August 3, 1989.
- d. Since this proposed rule qualifies as a categorical exclusion under 10 C.F.R. 51.22(c), neither an environmental impact statement nor an assessment has been prepared.
- e. The Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Subcommittee on Energy and the Environment of the House Interior and Insular Affairs Committee, the Subcommittee on Energy Conservation and Power of the House Energy and Commerce Committee, and the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations will be informed of the rulemaking by letter such as Enclosure B.
- f. The Federal Register notice of proposed rulemaking will be distributed to affected licensees.
- g. A public announcement will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register.
- h. Since the proposed rule is administrative in nature, and therefore does not result in the "modification of or addition to systems, structure, components, or design of a facility

... or the procedures or organization required to design, construct, or operate a facility, the staff believes that the backfit rule, 10 C.F.R. 50.109, does not apply to the proposed rule.


William C. Parler
General Counsel

Enclosures:

- A. Draft Federal Register Notice
- B. Draft Congressional Letter

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Friday, November 3, 1989.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, October 27, 1989, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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NUCLEAR REGULATORY COMMISSION

10 C.F.R. Part 2

Revisions to Procedures to Issue Orders

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to revise the Commission's procedures for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. The proposed revisions would more accurately reflect the Commission's existing statutory authority to issue orders than is presently the case. The revisions also clarify the types of Commission orders to which hearing rights attach.

DATES: The comment period expires on (60 days after publication in the Federal Register). Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Send written comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Comments may also be delivered to the Office of the Secretary, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. weekdays.

Copies of any comments received may be examined and copied for a fee at the HRC Public Document Room, 2120 L Street, NW, Washington, DC between the hours of 7:45 a.m. and 4:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Mary E. Wagner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: 301-492-1683.

SUPPLEMENTARY INFORMATION:

Background

The procedures to be followed by the Commission to initiate formal enforcement action are found in the Commission's Rules of Practice set forth in 10 C.F.R. Part 2, Subpart B. These actions include notices of violation, described in § 2.201, show cause orders, described in § 2.202, orders to modify licenses, described in § 2.204, and civil penalties, described in § 2.205.

Until 1983, with the exception of the civil penalty procedures in § 2.205, the language in these procedures referred solely to licensees. At that time, it was recognized that the Commission's regulations did not provide a procedural mechanism to issue a formal notice of violation to an unlicensed person (corporate or individual) who had violated Commission requirements. For example, by referring only to licensees, the procedures in § 2.201 did not address issuing a notice of violation to a person who possessed radioactive material without a license in violation of Commission requirements or an unlicensed person who violated provisions of 10 C.F.R. Part 21, which

implements Section 206 of the Energy Reorganization Act of 1974. Consequently, the Commission amended its regulations to permit the issuance of notices of violations to unlicensed persons who violated Commission requirements. Charges were published in the Federal Register on September 28, 1983 (48 FR 44170) to amend § 2.200 (Scope of subpart) and § 2.201 (Notice of violation) to add the phrase "or other person subject to the jurisdiction of the Commission."

As stated above, the provisions for issuing show cause orders only address licensees. However, the Commission's statutory authority to issue orders, which is found in Section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201, is not so limited. In fact, the Commission's Atomic Energy Act authority to issue orders is extremely broad, extending to any person (defined in Section 11s to include, e.g., any individual, corporation, federal, state and local agency) who engages in conduct within the Commission's subject matter jurisdiction. The few court cases which deal with the scope of the general authority Congress has granted the Commission usually do so in a general discussion or in passing and conclude that Section 161 confers uniquely broad and flexible authority on the Commission. See Power Reactor Dev. Co. v. International Union of Elec. Radio and Mach. Workers, AFL-CIO, 367 U.S. 396 (1961); Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 527, n. 3 (D.C. Cir. 1982); New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170, 173-74 (1st Cir. 1969); Siegel v. Atomic Energy Comm'n, 400 F.2d 773, 783 (D.C. Cir. 1968); but cf. Reynolds v. United States, 286 F.2d 433 (9th Cir. 1960) (interpreting Section 161i in detail and holding, in the context of the AEC's bomb testing

activities, that Section 161i(3) authorized the AEC to take action to govern the activities of private licensees and not the activities of the Commission itself; the court's use of the word "licensee" is dictum with regard to the term in the context of this notice).

Cases analyzing the Federal Communications Commission's (FCC) enabling statute, which, in many ways, is analogous to the 1954 Act, also support the principle that the Commission's authority is broad in scope. The Federal Communications Act of 1934 (the 1934 Act) broadly authorizes the FCC to "make such rules and regulations, and issue such orders, not inconsistent with [the 1934 Act], as may be necessary in the execution of its functions", 47 U.S.C. § 154i (1982). This provision is similar to Section 161i(3) of the Atomic Energy Act of 1954, which authorizes the Commission to "prescribe such rules, regulations, and orders as it may deem necessary to govern any activity authorized pursuant to the [Atomic Energy Act of 1954] . . . in order to protect health and to minimize danger to life or property" 42 U.S.C. § 2201(i) (3) (1982). A number of cases have analyzed Section 154i in detail and determined that the FCC's ordering authority is necessarily broad. See Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 at 793 (1978); United States v. Storer Broadcasting Co., 351 U.S. 192 at 203 (1955); National Broadcasting Co. v. United States, 319 U.S. 190 at 196 (1943); Lincoln Telephone and Telegraph Co. v. Federal Communications Commission, 659 F.2d 1092 (D.C. Cir. 1981); American Telephone and Telegraph v. Federal Communications Commission, 487 F.2d 865 (2d Cir. 1973); GTE Service Corp. v. Federal Communications Commission, 474 F.2d 724 (2d Cir. 1973); and Western Union Telegraph Co. v. United States, 267 F.2d

715, 722 (2nd Cir. 1959). It has been held that the FCC has authority to issue orders under Section 154i to persons whether licensed or not. United States v. Southwestern Cable, 392 U.S. 157 at 180-81 (1968).

Section 161i provides broad authority to issue orders as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue orders to establish standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material. As relevant here, Section 161o authorizes the Commission to order reports as may be necessary to effectuate the purposes of the Act.

Given this broad statutory authority, it is appropriate to amend 10 C.F.R. § 2.202 to have the procedural mechanism in place to issue orders, as necessary, to unlicensed persons when such persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is deemed to be necessary or desirable to protect public health and safety or to minimize danger to life or property or to protect the common defense and security. This amendment would revise § 2.202 to establish that mechanism both as to a licensee, as the current § 2.202 provides, and to any person subject to the jurisdiction of the Commission. Such a person includes, but is not limited to, a person who held a license or who was otherwise engaged in licensed activities at the time of the conduct in question, but who no longer holds a license or is so engaged.

In addition, the procedural mechanism for issuing orders to show cause to licensees and other persons would be set forth in a separate section in order

to make it clear that the right to a hearing does not attach at the time of issuance of a show cause order. Orders, including orders to show cause, currently are issued under § 161 of the Atomic Energy Act of 1954, as amended, which are implemented by §§ 2.202 (order to show cause), and 2.204 (order for modification of license). In addition, civil penalty orders are issued under Section 234, implemented by § 2.205 (civil penalties). NRC practice commonly has been to issue a single order, an order to show cause, which requires that certain information be provided to demonstrate why either a proposed or immediately effective action modifying, suspending, or revoking a license should not be taken. The order affords a hearing with regard to these actions. While § 189 of the Atomic Energy Act provides for the granting of a hearing in connection with proceedings to modify, suspend, or revoke a license, neither the Act nor the Administrative Procedure Act would require a hearing in connection with an order to show cause which requires only the submission of information, but does not by its terms modify, suspend or revoke a license.

The Act does not explicitly set out the form or requirements for an order to show cause. The Act does, however, authorize the Commission to collect information pursuant to §§ 161c and d and the Commission may issue show cause orders to implement this authority. Section 182 of the Act authorizes the Commission to request information from licensees and the Commission has implemented this authority by promulgating regulations such as 10 C.F.R. § 50.54(f). Licensees subject to Commission requests under 10 C.F.R. § 50.54(f) or its equivalent in other parts of the NRC's regulations have no hearing rights under the Act regarding these information requests.

Accordingly, to clarify that hearing rights do not attach to show cause orders, the Commission proposes to separate its order to show cause authority from the Commission's general ordering authority contained in § 2.202. The provisions concerning orders to show cause are set forth in a new § 2.204. Under the proposed rule changes, an order to show cause will be issued only to require the submission of information. If an order to show cause is issued as part of an order requiring action, hearing rights will be offered but only with respect to the provisions of the order requiring action.

In order to avoid unnecessary duplication in the regulations, it is proposed that the current § 2.204, "Order for modification of license," be deleted from Part 2, since procedures for modification of a license are included in proposed § 2.202. Proposed § 2.202(f) provides that if the action ordered by the Commission constitutes a backfit of a Part 50 licensee, the procedures described in 10 C.F.R. § 50.109 must be followed. This provision currently appears in the last sentence of § 2.204.

Section 2.202 is also revised to provide that if the licensee or other person to whom an order is issued consents to its issuance, or the order confirms actions agreed to by the licensee or such other person, such consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing and any associated rights. Such orders will be immediately effective. This is not a departure from current Commission practice, but merely conforms the Commission's regulations to such practice. Section 2.202(d) also provides that the licensee's or other person's agreement to an order must be in writing. The addition of this provision is intended to minimize the possibility of issuance of a confirmatory order which does not

accurately reflect the agreement reached by the parties. Whether or not the licensee or other person consents to any order, a person adversely affected by an order issued under § 2.202 to modify, suspend or revoke a license will be offered an opportunity for a hearing pursuant to § 189 of the Atomic Energy Act, consistent with current practice and the authority of the Commission to define the scope of the proceeding. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

The existing § 2.202 vests authority to issue orders in the Executive Director for Operations (EDO), and various staff office directors. Currently, the rule limits the EDO's authority to issue orders to emergency situations. Existing § 2.204 vests authority to issue orders in the Commission. The revised rules consistently vest such authority in the Commission, leaving it to the Commission's internal delegation authority to delegate such authority to others. This change will avoid the need to amend the regulations each time the title of one of the currently enumerated officials is changed, and it will also remove the unnecessary limitation on the EDO's authority.

The Commission is retaining, in new § 2.202(e), a provision that, upon a finding that the public health, safety or interest so requires or that the violation is willful, the proposed action may be immediately effective. A similar provision appears in current §§ 2.202(f) and 2.204. A finding, in an order, of the need for immediate effectiveness is final and not subject to

administrative challenge. ^{1/} Relief from the requirements of an immediately effective order, on the other hand, may be sought under the relaxation provisions contained in that order, or by motion for a stay to the presiding officer if a hearing has been requested.

The proposed rule also continues, in § 2.202(f), the backfitting requirements of § 50.109, including the provision therein that when immediately effective action is required, the documented evaluation may follow, rather than precede, the regulatory action.

Finally, consistent with the changes to §§ 2.202 and 2.204, § 2.1 is amended to specify that the scope of Part 2 includes the issuance of orders and orders to show cause to unlicensed persons, and § 2.700 is amended to specify that Subpart G (Rules of General Applicability) applies to all adjudications initiated by an order, rather than just an order to show cause.

The proposed amendments are procedural in nature. They do not establish the substantive standards or conditions under which the NRC would issue an order to a licensed or an unlicensed person. The Commission intends to propose, in a separate rulemaking, a substantive addition to its regulations in order to put unlicensed persons on notice that they may be held accountable for willful misconduct which undermines, or calls into question, adequate protection of the public health and safety. Once the proposed rules are in effect, consistent with the Commission's statutory authority, there will be

^{1/} Of course, the Commission has the inherent power to review, sua sponte, orders issued by those to whom it has delegated authority.

procedural rules governing the issuance of an order or show cause order not only to a licensee, as currently provided, but also to an unlicensed person who willfully causes a licensee to be in violation of Commission requirements or whose willful misconduct undermines, or calls into question, the adequate protection of the public health and safety in connection with activities regulated by the NRC under the Atomic Energy Act of 1954, as amended.

An example of a situation in which it might be appropriate to issue an order to an unlicensed person is where an employee of a corporate licensee might willfully cause that licensee to be in violation of Commission requirements such that the Commission does not have reasonable assurance that requirements to protect the public health and safety will be followed if that person continues to engage in activities licensed by the Commission. Another example would be an unlicensed person who willfully provides the Commission with materially false information; this would not, of course, include such persons who, in good faith, bring information or make allegations to the NRC concerning safety matters which, after review, are found to be unsubstantiated. Depending on the circumstances in these two cases, it might be appropriate to issue an order to such a person to either prohibit the person from being involved in activities licensed by the Commission or require the person to provide prior notice to the Commission before engaging in licensed activities. These types of conditions have been used by the Commission in settlement of litigation in accordance with 10 C.F.R. 2.203. Edward Hines, Jr. Medical Center, 27 NRC 477, ALJ-88-2 (October 7, 1988), and Finlay Testing Laboratories, Inc., LBP-88-17, 27 NRC 586 (1988).

This rulemaking establishes the procedures to be used in issuing orders to licensed and unlicensed persons. The procedures establish the mechanism to provide notice of the issuance of an order and to resolve, through adjudication, whether a particular order is appropriate under the circumstances.

Environmental Impact: Categorical Exclusion

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

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The existing regulations in 10 C.F.R. 2.202 authorize the NRC, through its designated officials, to institute a proceeding to modify, suspend, or revoke a license by service of an order to show cause on a licensee. The regulations, as currently written, do not provide procedures for the NRC to take direct action against unlicensed persons whose willful misconduct causes a licensee to violate Commission requirements or places in question reasonable assurance of adequate protection of the public health and safety, although such action is authorized by the Atomic Energy Act of 1954, as amended. The

amendments will make the Commission's Rules of Practice more consistent with the Commission's existing statutory authority and provide the appropriate procedural framework to take action, in appropriate cases, in order to protect the public health and safety. The amendments also will make clear that hearing rights do not attach to orders to show cause, consistent with § 189 of the Atomic Energy Act of 1954, as amended, and the Administrative Procedure Act.

The proposed rule constitutes the preferred course of action and the cost involved in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule establishes the procedural mechanism to issue orders to show cause to unlicensed persons in addition to licensed persons, who were previously covered. The proposed rule, by itself, does not impose any obligations on entities including any regulated entities that may fall within the definition of "small entities" as set forth in § 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in § 3 of the Small Business Act, 15 U.S.C. § 632, or within the Small Business Size Standards found in 13 C.F.R. Part 121. Such obligations would not be created until an

order is issued, at which time the person subject to the order would have a right to a hearing in accordance with the regulations.

Backfit Analysis

This proposed rule does not involve any new provisions which would impose backfits as defined in 10 C.F.R. 50.109(a)(1). Accordingly no backfit analysis pursuant to 10 C.F.R. 50.109(c) is required for this proposed rule.

List of Subjects in 10 C.F.R. Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

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 proposing to adopt the following amendments to 10 C.F.R. Part 2.

Part 2 -- Rules of Practice for Domestic Licensing Proceedings

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-015, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Sec. 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092,

2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.710 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C are also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 139, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. § 2.1 is revised to read as follows:

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in Part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for: (a) granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license; (b) issuing orders and orders to show cause to persons subject to the Commission's jurisdiction, including licensees and persons not licensed by the Commission; (c) imposing civil penalties under section 234 of the Act; and (d) public rulemaking.

3. § 2.202 is revised to read as follows:

§ 2.202 Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or other person of his right, within twenty (20) days of the date of the order, or such other time as may be specified in the

order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented to the order;

(4) Specify the issues; and

(5) State the effective date of the order.

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in (d) below, the answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) When the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective.

(f) If the order involves the modification of a Part 50 license and is a backfit, the requirements of § 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

4. § 2.204 is revised to read as follows:

§ 2.204 Order to show cause.

(a) The Commission may issue to a licensee or other person subject to the jurisdiction of the Commission an order to show cause why such actions as may be proper should not be taken, which will:

(1) Allege the violations with which the licensee or other person is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed; and

(2) Provide that the licensee or other person must file a written answer to the order to show cause under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order to show cause.

(b) A licensee or other person to whom the Commission has issued an order to show cause under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order to show cause, and shall

set forth the matters of fact and law on which the licensee or other person relies.

(c) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order to show cause.

(d) Upon review of the answer filed pursuant to paragraph (a)(2) of this section, or if no answer is filed, the Commission may institute a proceeding pursuant to 10 C.F.R. 2.202 to take the action proposed in the order to show cause or such other action as may be proper.

5. § 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order pursuant to § 2.202, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3).

Dated at Rockville, Maryland,
this day of 1989.

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk
Secretary of the Commission

DRAFT CONGRESSIONAL LETTER

Dear Mr. Chairman:

Enclosed for your information are copies of a proposed rule to be published in the Federal Register.

The Commission is proposing to initiate a rulemaking to revise the Commission's procedures in 10 C.F.R. Part 2, Subpart B, for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. The proposed amendments would more fully reflect the Commission's existing statutory authority to issue orders than is presently the case, and will also clarify the types of Commission orders to which hearing rights attach.

Sincerely,

William C. Parler
General Counsel

Enclosure: As stated