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PROPOSED RULE **PR 2**

(55 FR 27645)

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NUCLEAR REGULATORY COMMISSION

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10 CFR Part 2

RIN 3150-AD60

Revisions to Procedures to Issue Orders: Challenges  
to Orders that are made Immediately Effective

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to revise its regulations governing orders to provide for the expeditious consideration of challenges to orders that are made immediately effective. The proposed amendments specifically allow challenges to the immediate effectiveness of an order to be made at the outset of a proceeding and provide procedures for the expedited consideration and disposition of such challenges. The proposed amendments also require that challenges to the merits of an immediately effective order be heard expeditiously, except where good cause exists for delay.

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.

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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 7:45 am and 4:15 pm Federal Workdays. Copies of any comments received may be examined and copied for a fee at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC between the hours of 7:45 am and 4:15 pm Federal Workdays.

FOR FURTHER INFORMATION CONTACT: John Cho, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Telephone: 301-492-1585.

#### SUPPLEMENTARY INFORMATION:

##### Background

On April 3, 1990 (55 FR 12370), the Commission published in the Federal Register proposed changes to 10 CFR Part 2, Subpart B. The proposed changes, if adopted, would make clear that the provisions governing the issuance of orders include within their scope all persons subject to the jurisdiction of the Commission, licensees as well as non-licensees. As it exists now, except for orders imposing civil penalties, subpart B addresses issuance of orders only to licensees. Other changes were also proposed to clarify that hearing rights attach only to orders, in contrast to demands to

show cause; e.g., demands for explanation or other information. Upon further consideration, the Commission has decided that additional changes should be made to subpart B. These additional changes pertain to orders that are made immediately effective.

Under current subpart B, as well as under the amendments proposed on April 3, orders can be made immediately effective when required to protect the public health, safety, or interest or when there has been willful misconduct. There are no provisions, however, under the existing rule or under the proposed changes, that specifically require that challenges to such orders, including challenges to the immediate effectiveness of such orders, be heard expeditiously. The revisions proposed herein address this and other related matters.

As the rule is structured, currently and under the April 3 proposal, the recipient of an order may answer it by consenting to the order or by challenging it by demanding a hearing. Where the hearing demand concerns an order that is immediately effective, the person or persons to whom the order is issued are nevertheless required to comply with its provisions pending the completion of the hearing. The imposition of this requirement is necessary to enable the Commission to carry out its responsibility for protecting the public health, safety, and interest. The public health, safety, and interest must be held paramount over any conflicting private interests. At the same time, fairness considerations dictate that the interests of the recipients be accommodated to the extent it can be done without impediment to the Commission's exercise of its responsibility. To

this end, the Commission is proposing further changes to § 2.202, in addition to those published on April 3.

The Commission believes that a proper balance between the private and governmental interests involved is achieved by a hearing conducted on an accelerated basis. The revisions proposed herein add a provision to the earlier proposed § 2.202 directing that any requested hearing on an immediately effective order will be conducted expeditiously, giving due consideration to the rights of the parties. Another added provision allows challenges to be made at the outset on the need for immediate effectiveness. Such a challenge can be initiated by a motion by the recipient of the order to set aside the immediate effectiveness of the order.

A motion to set aside immediate effectiveness must be based on one or both of the following grounds: the willful misconduct charged is unfounded or the public health, safety or interest does not require the order to be made immediately effective. No other ground for challenge is permitted inasmuch as no other ground is relevant. The motion must set out specifically its supporting reasons and must be accompanied by any necessary affidavits providing the factual basis for the request.

The added provision also specifies that a motion to set aside the immediate effectiveness of an order will be decided promptly by the presiding officer (an atomic safety and licensing board or an administrative law judge as designated by the Commission) before the presiding officer takes up any other matter not necessary to the resolution of that request.

To assure prompt decision, the provision establishes short time periods for action by the parties as well as by the presiding officer. It is expected that the presiding officer normally will decide the question of immediate effectiveness solely on the basis of the order and other filings in the record. The presiding officer may call for oral argument. However, an evidentiary hearing is to be held only if the presiding officer finds the record is inadequate to reach a proper decision on immediate effectiveness. Such a situation is expected to occur only rarely.

In deciding the question of immediate effectiveness under § 2.202 as proposed herein, the presiding officer will apply an adequate evidence standard. This standard is analogous to the evidence necessary to find probable cause to make an arrest, to obtain a search warrant, or to obtain a preliminary hearing on a criminal matter. In a criminal enforcement context, "[p]robable cause is deemed to exist where facts and circumstances within affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." (United States v. Hill, 500 F.2d 315, 317 (5th Cir. 1974)). In the context of the proposed rule, adequate evidence is deemed to exist when facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges of willful misconduct, if any, contained in the order are true and/or that the action specified in the order is necessary to protect the public health, safety or interest.

The Commission believes that the "probable cause" standard, adapted as the adequate evidence standard for use in the Commission's proceedings involving challenges to the immediate effectiveness of orders, serves the public interest. Commission orders often deal with willful misconduct or other circumstances that threaten harm to the public health, safety or interest. In some instances, the threat may be imminent. In other instances, while no violation may be involved, information available to the Commission may indicate the need for certain immediate action to provide reasonable assurance that the public health, safety, and interest will be protected. In all cases, it is imperative that the Commission be able to take whatever measures that may be necessary to protect the public health, safety, and interest. The adequate evidence standard for deciding questions of immediate effectiveness enables the Commission to proceed with necessary protective action on the basis of reasonably trustworthy information without having to await the completion of a full hearing on the merits of the order. At the same time, it provides the affected parties a measure of protection against forced compliance, before a hearing, with an order that is insubstantially founded. The adequate evidence standard has been applied to allow an agency to suspend persons from bidding on government contracts (and thus allowing the suspension to remain in effect for a reasonable period without a hearing), where significant governmental interests are involved and the risk of erroneous deprivation of an individual's interest is slight. See Transco Security Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981), cert. denied, 454 U.S. 820 (1981); Horne Brothers, Inc. v. Laird, 463 F.2d 1268, (D.C. Cir. 1972). Those same considerations support adoption of the adequate evidence rule here.

The following example illustrates how the Commission intends that the adequate evidence standard will be applied. A common type of order directs a licensee to take or desist from taking certain action because of an asserted willful violation of a license or regulation. An affidavit by a cognizant NRC official that sets forth facts sufficient to lead a reasonably cautious person to believe that the asserted willful violation did occur is sufficient to sustain the immediate effectiveness of the order. As another example, an order directs a licensee to take certain action because the Commission is in possession of information indicating that the ordered action is necessary to protect the public health, safety or interest. Similarly, an affidavit by a cognizant NRC official that sets forth sufficient information to lead a reasonably cautious person to believe that the ordered action is necessary to protect the public health, safety, or interest is sufficient to sustain the immediate effectiveness of the order. This standard does not require evidence by persons with first hand knowledge of the facts. Nor does it call for a balancing of evidence between that provided by the NRC staff and that provided by the person seeking to set aside immediate effectiveness. It is not a preponderance of the evidence test. Rather, if the staff's evidence is sufficient to cause a person of reasonable caution to believe that the order is properly founded, that is, the conduct or activities of the person identified in the order present a public health, safety, or interest threat that requires immediate remedial action, the presiding officer is required to uphold the immediate effectiveness of the order. In this regard, the presiding officer must view the evidence presented in a light most favorable to the staff and resolve all inferences in the staff's favor.

The burden of going forward on the immediate effectiveness issue is with the party who moves to set aside the immediate effectiveness provision. The burden of persuasion on the appropriateness of immediate effectiveness is on the NRC staff.

The Commission intends that a motion to set aside the immediate effectiveness of an order will be the only mechanism for challenging immediate effectiveness. In the circumstance, a presiding officer will not entertain any motion to stay the immediate effectiveness of an order; nor will a presiding officer issue sua sponte such a stay. In general, the Commission expects that, through the licensing board's imposition of shortened response periods and expedited filing mechanisms, a motion to set aside immediate effectiveness will be decided within fifteen (15) days of the date the hearing request and accompanying motion are referred to the presiding officer. See 10 CFR 2.772(j).

A presiding officer's order upholding the immediate effectiveness of an order will constitute the final agency action on immediate effectiveness. A presiding officer's order setting aside immediate effectiveness will be referred promptly to the Commission for review and will not be effective pending further order of the Commission.

The Commission's authority under § 2.202 to issue immediately effective orders includes the authority to issue amendatory or supplemental orders that are immediately effective. Section 2.202 will remain the same in this respect. If such an order is issued by the staff after a hearing has been

ordered, the licensee or other person affected may move that the immediate effectiveness of the amendatory or supplemental order be set aside pending completion of the hearing on the merits. Such a motion will be given expedited consideration by the presiding officer and decided on the basis described above.

Notwithstanding the factors that call for expedited resolution of disputes arising out of immediately effective orders, there may be instances when overriding public interest considerations require delay in the proceeding on the merits. The revisions proposed herein to the earlier proposed § 2.202 include a provision allowing reasonable delays in the conduct of the proceedings on the merits where good cause exists. As an example of the kind of good cause warranting delay, there may be a need for further investigation by the Commission or the U.S. Department of Justice. In such instances, to allow the Commission to investigate further into the matter or the Department of Justice to undertake criminal investigation without prejudice to possible prosecution of any discovered crime, it may be necessary to hold the hearing on the immediately effective order in abeyance for a reasonable period of time. The proposed revision to § 2.202 allows the Commission, either on motion by the staff or any other party, to delay the hearing in such cases, for such periods as may be appropriate in the circumstances. The proposed revision, however, does not authorize delay in the proceeding on a motion to set aside immediate effectiveness. The length of a delay in the proceeding on the merits should be based on a balance of the competing interests involved. See Logan v. Zimmerman Brush Co., 455

U.S. 422, 434 (1982). Such a motion will be expeditiously heard and decided.

#### Environmental Impact: Categorical Exclusion

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

On April 3, 1990 (55 FR 12370), the Commission proposed amendments to make the Commission's Rules of Practice more consistent with the Commission's existing statutory authority and to provide the Commission with the appropriate procedural framework to take action, in appropriate cases, in order to protect the public health and safety. The proposed amendments also were to make clear the distinction between orders - e.g., directions to take or desist from taking certain actions - and demands for information. Only orders were proposed to be made immediately effective and subject to hearing, consistent with existing regulations. Neither the existing regulations nor the proposed amendments, however, contained provisions requiring that any such hearing be conducted expeditiously. The amendments proposed by this rulemaking supplement the earlier proposal by adding provisions directing the expeditious conduct of any hearing on an immediately effective order but allowing delays in the conduct of such hearings in certain circumstances where good cause for delay is shown, and establishing a separate, informal procedure for dealing rapidly with challenges to the immediate effectiveness of such order.

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 for dealing with orders that are made immediately effective. 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 section 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards found in 13 CFR 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 CFR 50.109(a)(1). Accordingly no backfit analysis pursuant to 10 CFR 50.109(c) is required for this proposed rule.

## List of Subjects in 10 CFR 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. 553, the NRC is proposing to adopt the following amendments to 10 CFR 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. 87-615, 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. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); 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, 182, 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, 2.719 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 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 2.801 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. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). 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. Section 2.202 is revised to read as follows:

§ 2.202 Order.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take 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 or her 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 in writing to the order;

(4) Specify the issues for hearing;

(5) State the effective date of the order, and

(6) Provide, for stated reasons, that the proposed action be immediately effective, pending further order, where the Commission finds that the public health, safety or interest so requires or that the violation or conduct causing the violation is willful.

(b) The licensee or other person to whom the Commission has issued an order under paragraph (a) of 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 paragraph (d) of this section, the answer may include a demand for a hearing.

(c)(1) If a hearing is demanded, the Commission will issue an order designating the time and place of hearing. If a hearing is demanded with respect to an immediately effective order, the hearing will be conducted expeditiously, giving due consideration to the rights of the parties.

(2) The licensee or other person to whom the Commission has issued an order may, in addition to demanding a hearing, move to set aside the immediate effectiveness of the order. The motion shall state with particularity the reasons why the immediate effectiveness of the order should be set aside and shall be accompanied by affidavits or other evidence relied on. The Commission staff shall respond within (5) days of the filing of the motion. The motion shall be decided by the presiding officer expeditiously before any other matter unnecessary to the disposition of the motion. The presiding officer shall exercise its powers to regulate the conduct of the proceeding, including reducing the times specified in subpart G for particular actions, to assure expeditious consideration and disposition of the motion. During the pendency of the motion or at any other time, the presiding officer shall not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person. The presiding officer shall uphold the immediate effectiveness of the order if it finds that there

is adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. An order setting aside immediate effectiveness will be referred promptly to the Commission itself and will not be effective pending further order of the Commission.

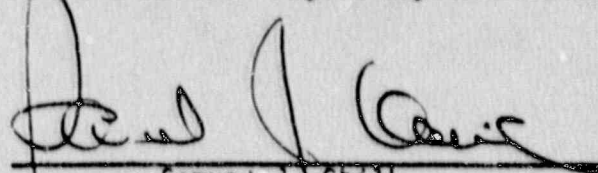
(3) Except as provided in paragraph (c)(2) of this section, the Commission may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee and other affected parties.

(d) An answer 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 a consent 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 consent 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) If the order involves the modification of a Part 5U licensee and is a backfit, the requirements of § 50.109 of this chapter shall be followed unless the licensee has consented to the action required.

Dated at Rockville, Maryland, this 28<sup>th</sup> day of June 1990.

For the Nuclear Regulatory Commission.

A handwritten signature in dark ink, appearing to read "Samuel J. Chilk", written over a horizontal line.

Samuel J. Chilk,  
Secretary of the Commission.