



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

January 22, 1991

MEMORANDUM FOR: NUDOCS  
Document Control Desk  
P1-37, White Flint

FROM: Carolyn F. Evans *Cfe*  
Office of the General Counsel

SUBJECT: DOCUMENTS COMPRISING REGULATORY HISTORY  
AD06-1

The enclosed documents comprise the regulatory history of proposed rule 53 FR 45768, and have been separated for placement in the PDR and Central Files. Documents 1 through 26 are to be placed in the PDR. Documents 27 through 31 are to be placed in Central Files only.

If there are any questions about these documents, please feel free to contact me on extension 21632.

Thank you for your assistance.

Enclosures:  
As stated

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PDR PR  
19 53FR45768 PDR

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PDR

**ADDRESSEE:** Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20535, Attention: Docketing and Service Branch.

Deliver comments to: 2120 L Street NW., Washington, DC, between 7:30 a.m. and 4:15 p.m., Monday through Friday.

Comments received may be examined at: the NRC Public Document Room at 2120 L Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Carolyn F. Evans, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1632.

**SUPPLEMENTARY INFORMATION:** The Commission is aware of the confusion that has arisen regarding who can attend investigative interviews of individuals which are conducted by NRC inspectors or investigators. See, e.g., *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit 1), LBP-82-34B, 15 NRC 918, 990-93 (1982) [discusses the question of whether an interviewee may have a representative of company management present during investigative interview]. As a general matter, a person has a right to be accompanied by counsel or any other individual the person desires during a voluntary interview by NRC representatives. *Id.* The investigator may either accept the individual's conditions for submitting to the voluntary interview or decline the interview. However, absent a subpoena, no person is required to submit to an NRC interview. Thus, to the extent the existence and scope of one's right to be accompanied by counsel or other representative becomes an issue, it is in the context of an interview compelled by administrative subpoena issued pursuant to 42 U.S.C. 2201(c). In these cases, section 6(a) of the Administrative Procedure Act (APA), 5 U.S.C. 555(b), provides that the interviewee "is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

Questions concerning the scope of an interviewee's right to be accompanied by counsel or others, born out of the absence of clear Commission policy on the issue and the lack of clearly developed judicial guidelines, have been raised in essentially three ways. First, in several instances, an interviewee's employer has sought to arrange for a management representative to attend NRC interviews of its employees. Second, the employer has provided corporate counsel, either unilaterally or with the agreement of the employee, to

represent all employees during an NRC interview. Third, an employer has offered to provide its employees, free of charge, non-corporate counsel initially selected by management or independently retained by the individual employee.

Where interviewee is a member of the employer's corporate control group, the presence of corporate counsel at an NRC interview is, except in extraordinary circumstances, not objectionable. Similarly, the fact that an employer has agreed to pay the fees of employee selected, non-corporate counsel should generally be of no concern to the investigative staff unless the fee reimbursement agreement, on its face or in operation, acts as an improper restraint on the employee's potential candor. However, where corporate counsel seeks to represent non-management employees during an NRC investigation, or where the employer effectively selects the employee's non-corporate counsel, the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to the inquiries of the agency and the potential impairment to the efficacy of the NRC investigation become a paramount concern.

In most cases, attempts to interject a corporate presence into investigative interviews of the non-management employees of a licensee or applicant have been satisfactorily resolved through negotiation between company management and NRC staff. However, such ad hoc negotiations have led to unnecessary delay in completing NRC investigations. In order to clearly delineate the rights of individual interviewees, the legitimate interests of the company or licensee, and the responsibilities of the NRC to ensure the public health and safety, the Commission believes it appropriate to announce general guidance to be followed in this area.

The Commission believes as a matter of policy that investigative interviews should be conducted in an atmosphere free of outside influences. The Commission is aware that management has a legitimate interest in NRC inspections and investigations in order to detect and correct any violations of NRC regulations. Moreover, since the policy of the Commission is to hold the licensee or applicant liable for the acts and omissions of its employees and contractors, the licensee or applicant normally has a corporate or financial interest in the outcome of the investigation. Nevertheless, the Commission believes that the purpose of its inspections and investigations (to

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 19

#### Sequestration of Witnesses Interviewed Under Subpoena

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to provide that all persons compelled to appear before NRC representatives under subpoena in connection with an agency investigation (and their counsel, if any) shall, unless otherwise authorized by the NRC official conducting the investigation, be sequestered from other interviewees in the same investigation. The proposed action is necessary because the NRC has encountered difficulties in conducting investigative interviews in an atmosphere free of outside influences. The proposed rule is intended to clarify and delineate the rights and responsibilities of the agency, interviewees and licensees during the conduct of agency investigations and inspections. The proposed amendments are not expected to have any economic impact on the NRC or its licensees.

**DATES:** Comment period expires January 10, 1989. Comments received after this date will be considered if it is practical to do so, but the Commission can only assure consideration of those comments received on or before that date.

protect the public health and safety by identifying unsafe practices and violations of Commission regulations and the Atomic Energy Act), and its interest in ensuring the integrity of the agency's factual findings and regulatory conclusions from such efforts would be better served by excluding all persons from the interview except for the interviewee's counsel.

In cases where dual representation is an issue, the Commission believes that exclusion of the particular counsel chosen by or for the interviewee might be warranted. Where the person being interviewed chooses to be represented by counsel for the licensee or applicant, an inherent potential for a conflict of interest and impairment of the NRC's investigation exists. The Commission recognizes, however, that the attorney can ethically represent multiple clients if he or she fully discloses the potential conflict to the clients and they individually assent to the multiple representation. Such disclosure between counsel and client does not always eliminate or reduce the inherent potential that the multiple representation could impair or impede the Commission's investigation. Dual representation of both the interviewee and the licensee or applicant could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation. The subject could then take steps to structure the flow of information to the NRC or otherwise impede the investigation. Indeed, in three recent cases where the company offered its own attorney to potential witnesses, the attorney stated prior to any interview that he would relate to the company all that took place in the interviews. This produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer. Moreover, should the agency official conducting the investigation determine that an offer of confidentiality to an interviewee is warranted, the purpose for confidentiality could be undermined simply by the presence of counsel who represents other interviewees or the subject of the investigation.

For these reasons, the Commission believes that dual representation could prove detrimental to NRC investigations. Accordingly, the proposed rule provides that where the agency official conducting the investigation determines after consultation with the Office of the General Counsel that there is a reasonable basis to believe that the attendance of a particular attorney might prejudice, impede, or impair the investigation by reason of that

attorney's dual representation of other interests, the particular attorney may be excluded from the interview. The proposed rule further provides that where an interviewee's counsel is excluded and the interviewee is not given reasonable prior notice of an intent to exclude counsel, the interview may be delayed at the interviewee's option for a reasonable period to permit the retention of other counsel. The "reasonable prior notice" standard contemplates affording the interviewee sufficient time in advance of his/her interview to retain new counsel, e.g., one week. The Commission believes that the interest in ensuring the health and safety of the public through vigorous probing of possible regulatory violations justifies the somewhat minor burden on an individual's right to be accompanied by a particular counsel.

Several district courts have upheld an agency's power to exclude a witness' attorney from an investigative interview where the attorney also represented the person under investigation. See *United States v. Steel*, 238 F. Supp. 575 (S.D.N.Y. 1965); *Torras v. Stradley*, 103 F. Supp. 737 (N.D. Ga. 1952); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). One circuit court considering this issue however, reversed a district court decision that held the Internal Revenue Service could deny a third party witness the right to be accompanied by counsel for the taxpayer under investigation. *Bocker v. Commissioners of Internal Revenue*, 275 F.2d 141 (5th Cir. 1960). That court, however, which indicated that a witness has a right to the counsel of his choice, did not decide whether that right could be limited or otherwise qualified through formal rule-making procedures. Two other circuit court decisions, involving the Securities and Exchange Commission's sequestration rule, have also indicated that the terminology of 5 U.S.C. 555(a) means counsel of one's choice. *SEC v. Geapo*, 533 F.2d 7 (D.C. Cir. 1976); *SEC v. Higashi*, 350 F.2d 550 (9th Cir. 1966). Both of those courts, however, indicated that there could be circumstances where an attorney could be barred from the interview, although it could not be done under the facts of those cases.

With this guidance in mind, the Commission realizes that no absolute criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee, applicant, or other organization under investigation. The Commission believes however, that dual representation of interviewees and licensees should be prevented wherever circumstances

require this. An appropriate rule would grant the NRC office conducting the interview the discretion to determine whether the attorney should be allowed to attend the interview. Some factors, which in conjunction with other circumstances may justify exclusion include: (1) Whether the company under investigation suggested that the witness employ the particular counsel and is paying the fee; (2) whether there might be a divergence of interest between the witness and the company unknown to the witness such that the witness might not want the attorney to be present if he were aware of the divergency of interest; (3) whether the investigation could be prejudiced if the attorney is allowed to attend the interview, the greater the potential prejudice the greater the case for excluding. The factors to consider in favor of allowing the attorney to be present include: (1) Whether there is little or no diversity of interest between the witness and the entity being investigated so that an interview of the witness would in effect practically be an interview of the person or company under investigation; (2) whether the nature of the case makes it unreasonable to insist that the witness have separate counsel; and (3) whether there has been any showing of potential prejudice to the investigation by allowing the attorney to be present.

#### 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 APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of choice. 5 U.S.C. 555(b). Questions concerning the scope of this right have arisen in the context of NRC investigative interviews of licensee employees and the presence of outside influences which often undermine the process. These outside influences have essentially arisen in one of three ways. First, an interviewee's employer has



sought to arrange for a management representative to attend agency interviews of its employees. Second, an employer has provided corporate counsel, either unilaterally or with the agreement of employees, to represent all employees during NRC interviews. Third, an employer has offered to provide its employees free of charge, non-corporate counsel, either selected by the employer or individually retained by the employee. Where licensee provides corporate counsel or selects the interviewees' non-corporate counsel, the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to agency inquiry become a major concern. Guidance is required in this area because attempts to resolve multiple representation issues on an ad hoc basis have led to unnecessary delays in completing investigations. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

#### Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The proposed rule, which simply sets forth the rights of licensee employees and other individuals who are compelled to appear before NRC representatives under subpoena, would have no significant economic impact on a substantial number of small entities.

#### Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule. Therefore, a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(e)(1).

#### List of Subjects in 10 CFR Part 19

Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Penalty, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

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 CFR Part 19.

The authority citation for Part 19 continues to read as follows:

Authority: Secs. 53, 63, 81, 103, 104, 161, 166, 66 Stat. 930, 933, 935, 936, 937, 946, 955 as

amended, sec. 234-83 Stat. 444, as amended (42 U.S.C. 2073, 2083, 2111, 2133, 2134, 2201, 2236, 2262); sec. 201, 66 Stat. 1242, as amended (42 U.S.C. 5641); Pub. L. 96-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5651).

For the purposes of sec. 223, 66 Stat. 956, as amended (42 U.S.C. 2273); §§ 19.11 (a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 66 Stat. 946, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(e) are issued under sec. 161c, 64 Stat. 950, as amended (42 U.S.C. 2201(c)).

2. The title of Part 19 is revised to read as follows:

#### PART 19—NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS; INSPECTIONS AND INVESTIGATIONS

3. Section 19.1 is revised to read as follows:

##### § 19.1 Purpose.

The regulations in this part establish requirements for notices, instructions, and reports by licensees to individuals participating in licensed activities and options available to these individuals in connection with Commission inspections of licensees to ascertain compliance with the provisions of the Atomic Energy Act of 1954, as amended, Title II of the Energy Reorganization Act of 1974, and regulations orders, and licenses thereunder regarding radiological working conditions. The regulations in this part also establish the rights and responsibilities of the Commission and individuals during interviews compelled as part of agency inspections or investigations pursuant to Section 161c of the Atomic Energy Act of 1954, as amended, on any matter within the Commission's jurisdiction.

4. Section 19.2 is revised to read as follows:

##### § 19.2 Scope.

The regulations in this part apply to all persons who receive, possess, use, or transfer material licensed by the Nuclear Regulatory Commission pursuant to the regulations in Parts 30 through 35, 40, 60, 61, or Part 72 of this chapter, including persons licensed to operate a production or utilization facility pursuant to Part 50 of this chapter and persons licensed to possess power reactor spent fuel in an independent spent fuel storage installation (ISFSI) pursuant to Part 72 of this chapter. The regulations regarding investigative interviews of individuals apply to all investigations within the jurisdiction of the Nuclear Regulatory Commission other than those involving NRC employees or NRC contractors.

5. In § 19.3, remove the alphabetical designators, rearrange definitions in

alphabetical order, and insert the definition for sequestration in the alphabetical sequence to read as follows:

##### § 19.3 Definitions.

"Sequestration" means the separation of multiple witnesses from each other during the conduct of investigative interviews, and the exclusion of counsel who (1) represents one witness from the interviews of other witnesses or who (2) represents the employing entity of the witness or management personnel from the interview of that witness, when such representation obstructs, impairs, or impedes an agency investigation.

6. New § 19.16 is added to read as follows:

##### § 19.16 Sequestration of witnesses and counsel.

(a) Any person compelled to appear in person at an interview during an agency investigation may be accompanied, represented, and advised by counsel of his or her choice. *Provided, however,* that all witnesses shall be sequestered, and unless permitted in the discretion of the official conducting the investigation, no witness or counsel accompanying the witness (including counsel who also represents the person or employing entity that is the subject of the investigation) shall be permitted to be present during the examination of any other witness called in such proceeding.

(b) When the agency official conducting the investigation determines, after consultation with the Office of the General Counsel, that a reasonable basis exists to believe that the investigation may be obstructed, impeded or impaired, either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness, the agency official may prohibit that attorney from being present during the interview of any witness other than the witness on whose behalf counsel first appeared in the investigatory proceeding. To the extent practicable and consistent with the integrity of the investigation, the attorney will be advised of the reasons supporting the decision to prohibit his or her representation of more than one interviewee during the investigation.

(c) Where a person's counsel is excluded under paragraph (b) of this section from his or her interview and the person is not provided reasonable prior notice of an intent to exclude counsel, the interview shall, at the person's

request, be delayed for a reasonable period of time to permit the retention of new counsel.

Dated at Rockville, Maryland, this 9th day of November 1988.

For the Nuclear Regulatory Commission,  
Samuel J. Childs,

Secretary of the Commission.

(FR Doc. 88-28200 Filed 11-10-88; 8:48 am)  
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NUCLEAR REGULATORY COMMISSION

10 CFR Part 19

Sequestration of Witnesses Interviewed Under Subpoena

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to provide that all persons compelled to appear before NRC representatives under subpoena in connection with an agency investigation (and their counsel, if any) shall, unless otherwise authorized by the NRC official conducting the investigation, be sequestered from other interviewees in the same investigation. The proposed action is necessary because the NRC has encountered difficulties in conducting investigative interviews in an atmosphere free of outside influences. The proposed rule is intended to clarify and delineate the rights and responsibilities of the agency, interviewees and licensees during the conduct of agency investigations and inspections. The proposed amendments are not expected to have any economic impact on the NRC or its licensees.

DATES: Comment period expires January 10, 1989. Comments received after this date will be considered if it is practical to do so, but the

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Commission can only assure consideration of those comments received on or before that date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

Deliver comments to: 2120 L Street, N.W., Washington, DC between 7:30 a.m. and 4:15 p.m., Monday through Friday.

Comments received may be examined at: the NRC Public Document Room at 2120 L Street N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carolyn F. Evans, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1632.

SUPPLEMENTARY INFORMATION: The Commission is aware of the confusion that has arisen regarding who can attend investigative interviews of individuals which are conducted by NRC inspectors or investigators. See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-82-34B, 15 NRC 918, 990-93 (1982) (discusses the question of whether an interviewee may have a representative of company management present during investigative interview). As a general matter, a person has a right to be accompanied by counsel or any other individual the person desires during a voluntary interview by NRC representatives. Id. The investigator may either

accept the individual's conditions for submitting to the voluntary interview or decline the interview. However, absent a subpoena, no person is required to submit to an NRC interview. Thus, to the extent the existence and scope of one's right to be accompanied by counsel or other representative becomes an issue, it is in the context of an interview compelled by administrative subpoena issued pursuant to 42 U.S.C. 2201(c). In these cases, Section 6(a) of the Administrative Procedure Act (APA), 5 U.S.C. 555(b), provides that the interviewee "is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

Questions concerning the scope of an interviewee's right to be accompanied by counsel or others, born out of the absence of clear Commission policy on the issue and the lack of clearly developed judicial guidelines, have been raised in essentially three ways. First, in several instances, an interviewee's employer has sought to arrange for a management representative to attend NRC interviews of its employees. Second, the employer has provided corporate counsel, either unilaterally or with the agreement of the employee, to represent all employees during an NRC interview. Third, an employer has offered to provide its employees, free of charge, non-corporate counsel initially selected by management or independently retained by the individual employee.

Where the interviewee is a member of the employer's corporate control group, the presence of corporate counsel at an NRC interview is, except in extraordinary circumstances, not objectionable. Similarly, the fact that an employer has agreed to pay the fees of employee selected, non-corporate counsel should generally be of no concern to the investigative staff unless the fee



reimbursement agreement, on its face or in operation, acts as an improper restraint on the employee's potential candor. However, where corporate counsel seeks to represent non-management employees during an NRC investigation, or where the employer effectively selects the employee's non-corporate counsel, the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to the inquiries of the agency and the potential impairment to the efficacy of the NRC investigation become a paramount concern.

In most cases, attempts to interject a corporate presence into investigative interviews of the non-management employees of a licensee or applicant have been satisfactorily resolved through negotiation between company management and NRC staff. However, such ad hoc negotiations have led to unnecessary delay in completing NRC investigations. In order to clearly delineate the rights of individual interviewees, the legitimate interests of the company or licensee, and the responsibilities of the NRC to ensure the public health and safety, the Commission believes it appropriate to announce general guidance to be followed in this area.

The Commission believes as a matter of policy that investigative interviews should be conducted in an atmosphere free of outside influences. The Commission is aware that management has a legitimate interest in NRC inspections and investigations in order to detect and correct any violations of NRC regulations. Moreover, since the policy of the Commission is to hold the licensee or applicant liable for the acts and omissions of its employees and contractors, the licensee or applicant normally has a corporate or financial interest in the outcome of the investigation. Nevertheless, the Commission believes that the purpose of its inspections and investigations (to protect the

public health and safety by identifying unsafe practices and violations of Commission regulations and the Atomic Energy Act), and its interest in ensuring the integrity of the agency's factual findings and regulatory conclusions from such efforts would be better served by excluding all persons from the interview except for the interviewee's counsel.

In cases where dual representation is an issue, the Commission believes that exclusion of the particular counsel chosen by or for the interviewee might be warranted. Where the person being interviewed chooses to be represented by counsel for the licensee or applicant, an inherent potential for a conflict of interest and impairment of the NRC's investigation exists. The Commission recognizes, however, that the attorney can ethically represent multiple clients if he or she fully discloses the potential conflict to the clients and they individually assent to the multiple representation. Such disclosure between counsel and client does not always eliminate or reduce the inherent potential that the multiple representation could impair or impede the Commission's investigation. Dual representation of both the interviewee and the licensee or applicant could permit the subject of the investigation to learn, through counsel, the direction and scope of the investigation. The subject could then take steps to structure the flow of information to the NRC or otherwise impede the investigation. Indeed, in three recent cases where the company offered its own attorney to potential witnesses, the attorney stated prior to any interview that he would relate to the company all that took place in the interviews. This produces an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer. Moreover, should the agency official conducting the investigation determine that an offer of

confidentiality to an interviewee is warranted, the purpose for confidentiality could be undermined simply by the presence of counsel who represents other interviewees or the subject of the investigation.

For these reasons, the Commission believes that dual representation could prove detrimental to NRC investigations. Accordingly, the proposed rule provides that where the agency official conducting the investigation determines after consultation with the Office of the General Counsel that there is a reasonable basis to believe that the attendance of a particular attorney might prejudice, impede, or impair the investigation by reason of that attorney's dual representation of other interests, the particular attorney may be excluded from the interview. The proposed rule further provides that where an interviewee's counsel is excluded and the interviewee is not given reasonable prior notice of an intent to exclude counsel, the interview may be delayed at the interviewee's option for a reasonable period to permit the retention of other counsel. The "reasonable prior notice" standard contemplates affording the interviewee sufficient time in advance of his/her interview to retain new counsel, e.g., one week. The Commission believes that the interest in ensuring the health and safety of the public through vigorous probing of possible regulatory violations justifies the somewhat minor burden on an individual's right to be accompanied by a particular counsel.

Several district courts have upheld an agency's power to exclude a witness' attorney from an investigative interview where that attorney also represented the person under investigation. See United States v. Steel, 238 F. Supp. 575 (S.D.N.Y. 1965); Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1952); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949). One circuit

court considering this issue however, reversed a district court decision that held the Internal Revenue Service could deny a third party witness the right to be accompanied by counsel for the taxpayer under investigation. Backer v. Commissioners of Internal Revenue, 275 F.2d 141 (5th Cir. 1960). That court, however, which indicated that a witness has a right to the counsel of his choice, did not decide whether that right could be limited or otherwise qualified through formal rule-making procedures. Two other circuit court decisions, involving the Securities and Exchange Commission's sequestration rule, have also indicated that the terminology of 5 U.S.C. 555(a) means counsel of one's choice. SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976); SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966). Both of those courts, however, indicated that there could be circumstances where an attorney could be barred from the interview, although it could not be done under the facts of those cases.

With this guidance in mind, the Commission realizes that no absolute criteria can be established for determining when the NRC may exclude an interviewee's attorney where the attorney is also counsel for the licensee, applicant, or other organization under investigation. The Commission believes however that dual representation of interviewees and licensees should be prevented wherever circumstances require this. An appropriate rule would grant the NRC office conducting the interview the discretion to determine whether the attorney should be allowed to attend the interview. Some factors, which in conjunction with other circumstances may justify exclusion include: (1) whether the company under investigation suggested that the witness employ the particular counsel and is paying the fee; (2) whether there might be a divergence of interest between the witness and the company unknown to the



witness such that the witness might not want the attorney to be present if he were aware of the divergency of interest; (3) whether the investigation could be prejudiced if the attorney is allowed to attend the interview, the greater the potential prejudice the greater the case for excluding. The factors to consider in favor of allowing the attorney to be present include: (1) whether there is little or no diversity of interest between the witness and the entity being investigated so that an interview of the witness would in effect practically be an interview of the person or company under investigation; (2) whether the nature of the case makes it unreasonable to insist that the witness have separate counsel; and (3) whether there has been any showing of potential prejudice to the investigation by allowing the attorney to be present.

#### 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 APA affords individuals compelled to submit to agency inquiry under subpoena the right to be accompanied by counsel or other representative of

choice. 5 U.S.C. 555(b). Questions concerning the scope of this right have arisen in the context of NRC investigative interviews of licensee employees and the presence of outside influences which often undermine the process. These outside influences have essentially arisen in one of three ways. First, an interviewee's employer has sought to arrange for a management representative to attend agency interviews of its employees. Second, an employer has provided corporate counsel, either unilaterally or with the agreement of employees, to represent all employees during NRC interviews. Third, an employer has offered to provide its employees free of charge, non-corporate counsel, either selected by the employer or individually retained by the employee. Where licensee provides corporate counsel or selects the interviewees' non-corporate counsel, the potential for conflicts of interest among counsel's multiple clients in responding fully and candidly to agency inquiry become a major concern. Guidance is required in this area because attempts to resolve multiple representation issues on an ad hoc basis have led to unnecessary delays in completing investigations. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

#### REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The proposed rule, which simply sets forth the rights of licensee employees and other individuals who are compelled to appear before NRC

representatives under subpoena, would have no significant economic impact on a substantial number of small entities.

#### BACKFIT ANALYSIS

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule. Therefore, a backfit analysis is not required because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

#### LIST OF SUBJECTS IN 10 CFR PART 19

Environmental protection, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Penalty, Radiation protection, Reporting and recordkeeping requirements, Sex discrimination.

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 CFR Part 19.

#### PART 19--NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS; INSPECTIONS

1. The authority citation for Part 19 continues to read as follows:

AUTHORITY: Secs. 53, 63, 81, 103, 104, 161, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 955 as amended, sec. 234.83 Stat. 444, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2236, 2282); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851).  
For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 19.11(a), (c), (d), and (e) and 19.12 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and §§ 19.13 and 19.14(a) are issued under sec. 161c, 68 Stat. 950, as amended (42 U.S.C. 2201(c)).

2. The title of part 19 is revised to read as follows:

PART 19 -- NOTICES, INSTRUCTIONS AND REPORTS TO WORKERS;  
INSPECTIONS AND INVESTIGATIONS

3. Section 19.1 is revised to read as follows:

§ 19.1 Purpose.

The regulations in this part establish requirements for notices, instructions, and reports by licensees to individuals participating in licensed activities and options available to these individuals in connection with Commission inspections of licensees to ascertain compliance with the provisions of the Atomic Energy Act of 1954, as amended, Title II of the Energy Reorganization Act of 1974, and regulations, orders, and licenses thereunder regarding radiological working conditions. The regulations in this part also establish the rights and responsibilities of the Commission and individuals during interviews compelled as part of agency inspections or investigations pursuant to Section 161c of the Atomic Energy Act of 1954, as amended, on any matter within the Commission's jurisdiction.

4. Section 19.2 is revised to read as follows:

§ 19.2 Scope.

The regulations in this part apply to all persons who receive, possess, use, or transfer material licensed by the Nuclear Regulatory Commission pursuant to the regulations in Parts 30 through 35, 40, 60, 61, 70 or Part 72 of this chapter, including persons licensed to operate a production or utilization facility pursuant to Part 50 of this chapter and persons licensed to possess power reactor spent fuel in an independent spent fuel storage installation (ISFSI) pursuant to Part 72 of this chapter. The regulations regarding investigative interviews of individuals apply to all investigations



within the jurisdiction of the Nuclear Regulatory Commission other than those involving NRC employees or NRC contractors.

5. In § 19.3, remove the alphabetical designators, rearrange definitions in alphabetical order, and insert the definition for sequestration in the alphabetical sequence to read as follows:

§ 19.3 Definitions.

\* \* \* \* \*

"Sequestration" means the separation of multiple witnesses from each other during the conduct of investigative interviews, and the exclusion of counsel who (1) represents one witness from the interviews of other witnesses or who (2) represents the employing entity of the witness or management personnel from the interview of that witness, when such representation obstructs, impairs, or impedes an agency investigation.

\* \* \* \* \*

6. New § 19.18 is added to read as follows:

§ 19.18 Sequestration of Witnesses and Counsel.

(a) Any person compelled to appear in person at an interview during an agency investigation may be accompanied, represented, and advised by counsel of his or her choice; provided, however, that all witnesses shall be sequestered, and unless permitted in the discretion of the official conducting the investigation, no witness or counsel accompanying the witness (including counsel who also represents the person or employing entity that is the subject of the investigation) shall be permitted to be present during the examination of any other witness called in such proceeding.

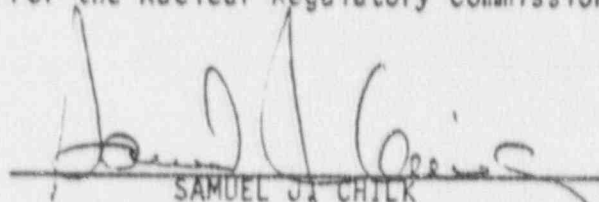
(b) When the agency official conducting the investigation determines, after consultation with the Office of the General Counsel, that a reasonable basis exists to believe that the investigation may be obstructed, impeded or

impaired, either directly or indirectly by an attorney's representation of more than one witness or by an attorney's representation of a witness and the employing entity of the witness, the agency official may prohibit that attorney from being present during the interview of any witness other than the witness on whose behalf counsel first appeared in the investigatory proceeding. To the extent practicable and consistent with the integrity of the investigation, the attorney will be advised of the reasons supporting the decision to prohibit his or her representation of more than one interviewee during the investigation.

(c) Where a person's counsel is excluded under paragraph (b) of this section from his or her interview and the person is not provided reasonable prior notice of an intent to exclude counsel, the interview shall, at the person's request, be delayed for a reasonable period of time to permit the retention of new counsel.

Dated at Rockville, Maryland this 8<sup>th</sup> day of November, 1988.

For the Nuclear Regulatory Commission.

  
SAMUEL J. CHILK  
Secretary of the Commission.