

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

Docket No. 50-142

(UCLA Research Reactor)

(Proposed Renewal of Facility
License)

AFFIDAVIT OF LOREN L. BUSH, JR.

STATE OF MARYLAND
COUNTY OF MONTGOMERY ss:

I, Loren L. Bush, Jr., being duly sworn do depose and state as follows:

1. My name is Loren Bush. I am employed by the Nuclear Regulatory Commission in the Operating Reactor Programs Branch, Office of Inspection and Enforcement (IE), NRC Headquarters.
2. The purpose of my affidavit is to respond to a request by Colleen Woodhead, Office of the Executive Legal Director (ELD) to provide a summary of the development of the security inspection program at nonpower reactors to the Atomic Safety and Licensing Board for their consideration in the matter of a proposed renewal of a license for the UCLA research reactor.

I am providing this information to assist the Board in understanding the complex route that the development of this inspection program has taken. I will attempt to provide a comprehensive picture rather than limit myself to the bits and pieces to which I (or any other person may) have specific personal knowledge. Some of the information I will provide precedes my employment with the NRC, some of the other information is based upon peripheral involvement. Considering (a) the number of reorganizations that have affected IE, (b) the departure of knowledgeable staff, (c) the informal manner in which some matters were handled (especially the reasons for decisions not being documented), and (d) the loss of files (through routine file reduction programs, shifts in office assignments, and changes in file maintenance responsibility) that may have shed some light on portions of this complex matter, I will endeavor to provide as accurate an account as I can of the factors that impact on

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the matter under question. The information I am providing is a combination of facts as I know them or believe them to be, and my perceptions thereof. In the time available, I have not conducted a comprehensive search of NRC files to support the information provided, nor do I believe such a search would shed additional pertinent information.

3. The Board should be aware of some key points before I go any further:
 - a. The inspection program authorizes and encourages inspectors to go beyond compliance with the rules and requirements to determine overall adequacy of measures and programs. Furthermore, inspectors are encouraged where, in their professional judgment, any inadequacies are identified or suspected, to provide appropriate feedback so that corrective actions, to include changes in rules, plans, and programs, can be considered.
 - b. The inspection programs and procedures are generic in nature. Not all inspection requirements apply to all facilities.
 - c. The approved security plan, and amendments thereto, is the basis for conducting inspections of nonpower reactor (NPR) facilities for compliance with regulatory requirements.
 - d. The inspection program does not impose any requirements on licensees. Inspection procedures paraphrase rules so that compliance with specific requirements can be determined. In some instances, the inspection procedures ask the inspector to examine licensee practices for consistency with generally accepted industry practices that are not in the rules. In a few instances, inspectors have been asked to inquire into matters not resolved by the NRC staff and provide feedback.
 - e. The staff was not sensitive to the issues raised before this Board, and did not detect the problem because:
 - o Nonpower reactors, as a class of licensee, have received a low priority because of the spectrum of issues involving all licensees and management's decisions concerning allocation of fixed resources to deal with those issues, and because the staff is of the opinion that NPRs constitute, on a relative basis, little risk to public health and safety. The security inspection program has also received a low priority.
 - o Documents, such as inspection reports, which could have helped identify the problem were not thoroughly reviewed by the HQ staff for the above reasons and because of the chronic shortage of resources.
4. Why do inspection procedures 81405, "Security Plan," and 81455, "Protection Against Radiological Sabotage," include sabotage? These procedures were written in 1977, and were based, in part, upon interim guidance that

the Office of Nuclear Reactor Regulation (NRR) had provided NPR licensees. At that time, some of the technical staff were of the opinion that there may be a possible threat to public health and safety from plants operating at the higher power levels and having a high fission product inventory in the core. Because the amount of radiation exposure that would constitute the threshold level had not been determined to everyone's satisfaction (although a release exceeding the 10 CFR 100 siting criteria was generally accepted as the threshold to insure a low risk of public exposure) and a comprehensive study had not been conducted concerning power levels and fission product inventory, it was decided to write the procedures in a manner that would cause the inspector to question whether NPRs at 1 MW or higher should protect against sabotage and then to provide the appropriate feedback. This level was selected because it was believed to be very conservative and would probably be lower than what would be determined by careful analysis.

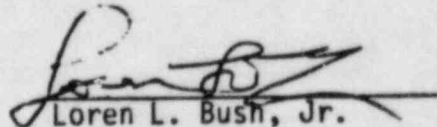
5. Why do draft inspection procedures 81N22, "Security Organization," and 81N38, "Records and Reports," dated September 1980, refer to radiological sabotage? These procedures were developed by a contractor and were not thoroughly reviewed; they were to be used only on an interim basis pending revision. In 81N22, the objective was to verify that the security organization was capable of performing their duties; 10 CFR 73.40(a) was paraphrased and sabotage was inappropriately included in the procedure. In 81N38, the objective was to verify that the required incident reports had been submitted; 10 CFR 73.71(b) was written in a conservative manner to require each licensee to report any incident involving theft, diversion, or radiological sabotage.
6. Why are these procedures not current? Some of the factors that apply are:
 - a. Sometime subsequent to the issuance of 10 CFR 73.67, it was decided that the 81400 Series of inspection procedures (IPs) would continue to be used until new procedures that addressed the new rules could be written. It was not essential that these IPs be immediately revised because
 - ° The approved security plan would continue to be the governing requirement for compliance.
 - ° Due to severely limited resources, safeguards inspections at NPRs had been formally discontinued. However, inspections could be conducted as the availability of unbudgeted resources might permit, and as events and licensee performance may dictate.
 - b. The low priority given security inspection programs at NPRs, as described in paragraph 3e, above.
 - c. The several reorganizations in IE that:
 - ° resulted in loss of key knowledgeable staff,
 - ° caused a lack of continuity in management and our approach to programmatic issues involving safeguards, and

- resulted in the successive dissolutions of the Safeguards Division and the Safeguards Branch, resulting in an organization where the few safeguards resources were dispersed among several organizational subelements and not provided with a focal point that could have assured consistency and established priorities between safeguards program elements.
- d. IE was not aware of some policy decisions bearing on this matter, partly caused by low priority, lack of resources, and reorganizations, but also by occasional lapses in the communication from NMSS of their policy decisions.
- e. There was a need to revise the entire safeguards inspection program, primarily because of the flood of new rules. NPRs were given the lowest priority.
- f. There seemed to be many decisions still to be made by the Commission:
 - SECY 79-38 indicated that there was a possibility that sabotage may be a concern at a very small number of NPRs.

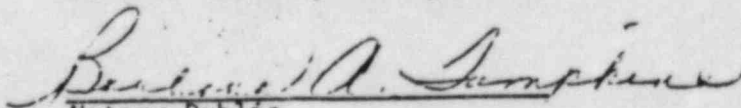
Note: An August 1981 memorandum from the Office of the Executive Director for Operations (EDO) informed the Commission (IE was omitted from distribution) that the staff, based upon a study by the Los Alamos Scientific Laboratory, had concluded that only one NPR has any potential of a dangerous release from an act of sabotage and that NPR does not operate with either the frequency or at the power levels necessary for it to cause a public health and safety problem. For this one nonpower reactor, the staff concluded that resolution of any continuing concern could be handled through licensing actions rather than rulemaking.

- SECY 79-187 B and C recommended that Category I (formula quantity of SSNM) NPRs use 10 CFR 73.60 in addition to 10 CFR 73.67 in the interim while studies were being completed.
- SECY 82-456 proposed amendments to solve the long term Category I NPR problem.
- A recent Commission Policy Statement encourages the use of LEU in NPRs. The Commission has requested staff to develop implementing rules to include interim security measures.

- g. The 81N00 draft procedures were written to replace the 1977 version of the 81400 series. However, when the draft 81N00 procedures, dated September 1980, were provided by the contractor, it was decided by IE management that the procedures would be field tested and used on an interim basis for Category II and III (moderate and low quantity of SNM) facilities; the 1977 version of the 81400 series would continue to be used at the few Category I facilities until the Commission decided what protection was going to be required for NPRs holding Category I material. In all cases the approved security plan would continue to govern. To replace the 81N00 Series, the contractor provided IP 81480, "General Requirements for MSNM Fixed Sites", and IP 81485, "General Requirements for LSNM Fixed Sites", dated December 1981, however, the new management did not accept them for use at NPRs, although they were adopted for use at fuel facilities. A current revision to IPs 81480 and 485 was provided for comment/concurrence in January 1984, and will be issued following Commission action on SECY 83-500.
7. Why does MC 2545, dated January 27, 1984 contain language concerning radiological sabotage? The changes to this manual chapter concerning safeguards inspections at NPRs were made to restore the safeguards inspection program that had been discontinued in 1980. In so doing, those procedures currently in use in the field were listed in Table 5 as the applicable inspection procedures. These included IP 81455, "Protection Against Radiological Sabotage," described in paragraph 4, above.
8. Why do recent inspection reports indicate that certain NPRs were inspected for protection against radiological sabotage? Although several reasons can be postulated from the information provided in the preceding paragraphs, it appears that the principal reason is that IP 81455, "Protection Against Radiological Sabotage" has been available for use. Improper use of this procedure, generally, appears to be based upon the mistaken belief that the procedure was applicable when in fact it was not.
9. IE and NMSS have initiated corrective actions, as reported in SECY 83-500A.
10. I attest that the foregoing affidavit is an accurate account to the best of my knowledge and belief.


Loren L. Bush, Jr.

Subscribed and sworn to before
me this 16th day of May, 1984.


Notary Public
My commission expires: July 1, 1986



UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF INSPECTION AND ENFORCEMENT
Washington, D.C. 20555

INSPECTION AND ENFORCEMENT MANUAL

PSAS

CHANGE NOTICE 84-14

SUPERSEDED:
Number

Date

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TRANSMITTED:
Number

Date

2545/1

05/02/84

DISTRIBUTION: Standard

Issue Date: 05/02/84



UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF INSPECTION AND ENFORCEMENT
Washington, D.C. 20555

INSPECTION AND ENFORCEMENT MANUAL

DQASIP

TEMPORARY INSTRUCTION 2545/1

PHYSICAL SECURITY INSPECTION PROGRAM FOR NONPOWER REACTORS

2545/1-01 PURPOSE

To provide temporary guidance to the Regions pending revision to the 81400 Series inspection procedures currently in use.

2545/1-02 OBJECTIVES

To clarify policy concerning conduct of the physical security inspection program at nonpower reactors, particularly in regard to the issue of protection against sabotage.

2545/1-03 RESPONSIBILITIES

- 03.01 Director, Office of Inspection and Enforcement. Establishes the inspection policies and programs.
- 03.02 Regional Administrator. Manages the implementation of the physical security inspection program.

2545/1-04 BACKGROUND

It has been determined that the Safeguards Inspection Program at nonpower reactors needs to be revised to assure consistency with current requirements as set forth in 10 CFR 73.60 and 73.67.

2545/1-05 POLICIES

- 05.01 Policy has been, and will continue to be, that inspectors are authorized and encouraged to go beyond compliance with the rules and requirements to determine overall adequacy of measures and programs. Furthermore, inspectors are encouraged where, in their professional judgment, any inadequacies are identified or suspected, to provide appropriate feedback to IE and the licensing office so that corrective actions, to include changes in rules, plans and programs, can be considered.

Issue Date: 05/02/84

2545/1-05.02

- 05.02 Inspection programs and procedures are generic in nature. Where an inspection requirement or procedure does not apply at a particular facility, the inspector will continue to indicate in the 756 System that the requirement or procedure has been closed with 0% completed.
- 05.03 Use of standardized terminology in correspondence transmitting inspection reports to licensees should be reviewed to ensure there are no incorrect or misleading phrases. For nonpower reactors, terms such as sabotage, industrial sabotage, and radiological sabotage are inappropriate.

2545/1-06 NONPOWER REACTOR SAFEGUARDS INSPECTION PROGRAM

- 06.01 Formula Quantity of Nonexempt Material. Inspection procedures 81405 through 81450 are to be used for nonpower reactors actually possessing a formula quantity of nonexempt SNM. IP 81455 and those portions of 81405 pertaining to sabotage are not to be used.
- 06.02 Less than a Formula Quantity of Nonexempt Material. The 81N00 Series of procedures are to be used until replaced, except that any portions which refer to sabotage are not to be used. IP 81480 concerning physical security inspections at nonpower reactors authorized to possess special nuclear material (SNM) of moderate (MSNM) and low (LSNM) strategic significance will be issued following commission action on SECY 83-500.

2545/1-07 EXPIRATION

This temporary instruction will remain in effect until September 30, 1985 or when a revised 81400 series of inspection procedures are issued for use at all nonpower reactors, whichever ever occurs first.

2545/1-08 CONTACT

Questions concerning this temporary instruction should be addressed to Loren Bush at (301) 492-8080.

END

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
JUN 8 1984

'84 JUN -8 P3:09

COMMISSIONERS:

Nunzio J. Palladino, Chairman
- Victor Gilinsky¹
- Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal

SERVED JUN 8 1984

In the Matter of
THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA
(UCLA Research Reactor)

Docket No. 50-1420L
(Proposed Renewal of Facility
License)

ORDER
(CLT-84-10)

This proceeding concerns the University of California's application to renew the license for its Argonaut research reactor at the Los Angeles campus (UCLA). In the course of this proceeding, the Atomic Safety and Licensing Board held that 10 C.F.R. 73.40(a) requires UCLA to take some measures to protect the reactor from potential sabotage. LBP-83-25A, 17 NRC 927 (1983), and LBP-83-67, 18 NRC 802 (1983). The extent of those measures is an issue in the current adjudication.

The NRC staff, a party to this proceeding, believes that the Licensing Board's interpretation is contrary to NRC licensing practice. Therefore, the staff has requested Commission approval to initiate a rulemaking proceeding which would amend 10 C.F.R. 73.40(a) to explicitly

¹Commissioner Gilinsky has recused himself from this proceeding.

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incorporate the staff's interpretation of that requirement. Such Commission approval could be taken as the Commission's tentative adoption of staff's interpretation.

The Committee to Bridge the Gap (CBG), the intervenor in this proceeding, contends that the staff's proposal is an ex parte communication and an impermissible interlocutory appeal which bypasses the NRC's normal adjudicatory procedures.

The staff has lodged a response to CBG. Staff believes that the opportunity to comment in a rulemaking proceeding provides CBG an adequate opportunity to comment to the Commission. Staff also claims that the rule is necessary to prevent placing other reactor licenses in jeopardy.

This situation raises some difficult issues regarding the interplay between the staff's participation as a party to an adjudication and its obligation to recommend to the Commission the resolution of issues by rulemaking. We need not reach those issues today. It is sufficient to note that the staff has made no showing as to why the available adjudicatory procedures are inadequate to address the Licensing Board's decision.

Accordingly, the Commission declines the staff's request to initiate a rulemaking proceeding to modify the Licensing Board's decision in LBP-83-25A and LBP-83-67. To eliminate any ex parte connotation, staff is instructed to provide copies of SECY-83-500 and SECY-83-500A to the parties to this proceeding. If the staff continues to believe that the Licensing Board's interpretation of 10 C.F.R. 73.40(a) requires prompt

Commission attention, then the staff should avail itself of the available adjudicatory procedures.²

Chairman Palladino's dissenting views are attached.

It is so ordered.



For the Commission

A handwritten signature in cursive script, appearing to read "Samuel J. Chilk".

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 8th day of June, 1984.

²These procedures include: (1) a motion requesting the Licensing Board to certify the issue to the Appeal Board pursuant to 10 C.F.R. 2.718(i) and 2.730(f); or (2) a motion to the Appeal Board to certify this issue to itself pursuant to 10 C.F.R. 2.718(i).

DISSENTING VIEWS OF CHAIRMAN PALLADINO

I disagree with that portion of the Commission's order that declines to initiate rulemaking because "the staff has made no showing as to why the available adjudicatory procedures are inadequate to address the Licensing Board's decision." Order at 2.

The Commission majority appears concerned that rulemaking may short-circuit the adjudicatory process. However, it appears that rulemaking was proposed by the NRC staff at the Licensing Board's suggestion. See NRC Staff Response to Board Order Concerning Contention XX at 5 (Dec. 13, 1983). Thus, it does not appear to me that the intent of the staff was to short-circuit the adjudicatory process.

Adjudication can address what NRC regulations require, but it is not a way to modify the regulations. Assuming that the staff first pursues its adjudicatory options as the majority suggests, the Licensing Board's interpretation of the regulations might be upheld on review. At that point under the majority's approach, the staff could apparently request rulemaking to amend the regulations and the Commission might conclude that rulemaking would be appropriate. Thus, I question what is to be gained by forcing the staff first to pursue adjudication before proposing rulemaking. On the contrary, delay in addressing

the question of rulemaking may create unnecessary uncertainty for other licensees.

I believe that the better course would be for the Commission to consider rulemaking now and propose an amendment to the rules if there exists a sound supporting technical basis.

I do not intend these views to intimate a judgment on my part on any issue in the UCLA proceeding. I have reached no such judgment.

NUCLEAR REGULATORY COMMISSION

10 CFR PART 73

Clarification of General Physical Protection Requirement

AGENCY: Nuclear Regulatory Commission.

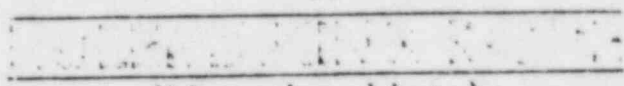
ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its general physical protection requirement for fixed sites to clarify the intent that physical protection against sabotage or theft, or both, must be provided only as required by specific sections of 10 CFR Part 73 which apply to designated classes of facilities or material. This action is deemed necessary because a recent ruling by an Atomic Safety and Licensing Board has made an interpretation of the general requirement which is different from its intent and application. This amendment will clarify the Commission's policy regarding the intent of the general physical protection requirement and will codify its present application.

DATES: Comments must be received on or before (sixty days) . 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: Comments or suggestions regarding the proposed amendment should be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch or hand delivered between 8:15 AM and 5:00 PM to Room 1121, 1717 H Street, NW., Washington, DC. Comments received will be available for examination and copying at the NRC Public Document Room at 1717 H Street, NW., Washington, DC 20555.

December 6, 1983



(Notation Vote)

SECY-83-500

For:

The Commissioners

From:

William J. Dircks
Executive Director for Operations

Subject:

CLARIFICATION OF GENERAL PHYSICAL PROTECTION REQUIREMENT

Purpose:

To obtain approval to publish for public comment, a proposed amendment to 10 CFR 73.40(a). This amendment will clarify the intended application and codify current practice regarding the need to address theft or sabotage, or both, in the physical protection plans for special nuclear material.

Category:

Minor policy issue.

Discussion:

The staff is proposing to amend the general physical protection requirement in 10 CFR 73.40(a) to clarify and codify the policy and practice regarding the application of this paragraph. This action is necessary because of a recent interpretation of this provision by an Atomic Safety and Licensing Board.

Background

Section 73.40(a) currently states that "Each licensee shall provide physical protection against radiological sabotage and against theft of special nuclear material at the fixed sites where licensed activities are conducted. Physical security systems shall be established and maintained by the licensee in accordance with security plans approved by the Nuclear Regulatory Commission." This provision is used only as a general statement of the need for physical protection and not as a detailed requirement. The detailed physical protection requirements for each class of licensed facility or material are presented in other sections of Part 73.

CONTACT:
C. J. Withee, SGFF
427-4040

In a recent ruling (LBP-83-25A and LBP-83-67), an Atomic Safety and Licensing Board has held, citing 10 CFR 73.40(a) as the basis for its decision, that a facility subject to 10 CFR 73.67 must specifically treat both theft and sabotage in its physical protection plan even though Section 73.67 only mentions the threat of theft. The Board concluded that, because both the threats of theft and sabotage are mentioned in 10 CFR 73.40(a), detailed requirements which ostensibly cover only one of the threats do not fully satisfy the general requirement in Section 73.40(a), and hence, the threat not mentioned in the detailed requirements in Section 73.67 must be separately treated in a licensee's physical protection plan. The Board also ruled that, lacking specific requirements, the hearing process should determine the appropriate measures that should be applied in the case at issue (UCLA research reactor) to protect against sabotage. In reaching its decision, the Board did not rule on the degree of need for sabotage protection at facilities subject to 10 CFR 73.67 nor the degree to which measures that provide protection against theft also provide protection against sabotage. The Board based its decision solely on its reading and interpretation of the regulation as written. The Board went further to suggest that, if policy and practice differ from the Board's interpretation, the Commission should amend the regulation to be consistent.

Staff's policy and practice has been to provide detailed requirements in Part 73 that are sufficient to define the extent to which protection against sabotage or theft, or both, must be addressed by specific classes of licensees. Therefore, if a licensee satisfies the detailed requirements in the section which applies to its specific class, the general requirement in Section 73.40(a) will be satisfied. This is the staff's practice even when the detailed requirements mention only theft or only sabotage as a threat. Physical security plans are evaluated and approved on this basis.

There has been a long-standing policy that acts of sabotage are not included in Section 73.67. The issue of physical protection for special nuclear material of moderate and low strategic significance (Category II/III) materials was first presented to the Commissioners in SECY 77-79. Staff recommended that no specific protection measures should be required for dispersion scenarios. The Commission approved the general approach by staff and gave the following direction:

"The grading of physical protection measures for nuclear material should be described in perspective to its potential weapons worth, particularly uranium enriched less than 20 percent in the isotope uranium-235 and plutonium and U-233 in quantities less than 2 Kgs."

On March 9, 1978, staff submitted a proposed Category II/III rule to the Commission in SECY 78-142 and stated the following:

"Although nuclear materials might be involved in a threat to the public through a dispersion scenario, such as sabotage, SECY 77-79 states the risk from dispersion of small or moderate quantities of nuclear materials (including irradiated materials) does not appear to pose a risk to the public sufficient to justify specific protection measures for these materials at this time."

When staff submitted a final rule to the Commission on January 16, 1979 (SECY 79-38), the Commission paper stated that the proposed amendments did not include sabotage protection.

When the Commission approved publication of the final rule (Chilk's memo of June 28, 1979), staff was requested to take a closer look at the need for specific protection against sabotage in the rule. In its reply to the Commission (Dircks' memo of August 13, 1981), staff stated the following:

"Additional protection against sabotage or the dispersal of plutonium would not be justified since the potential consequences to the public health and safety possibly arising from these events would be no greater in magnitude than those which might occur from the use of unregulated chemical or biological agents. The problem of sabotage of fuel in NPRs has been found to be minimal. A Los Alamos National Scientific Laboratory study concluded that only one reactor has any potential of a dangerous radiological release from an act of sabotage and that reactor does not operate with either the frequency or at the power levels necessary for it to cause a public health and safety problem."

The threats of both sabotage and theft cited in Section 73.40(a) have not been applied to all types of licensees. The sections of Part 73 treating specific licensee classes have been used to define the necessary physical protection measures for each class.

The Board's recent ruling has shown that differing interpretations can result from the present wording of 10 CFR 73.40(a). The Board's interpretation could impact several classes of licensees, not just those subject to 10 CFR 73.67. To preclude such an eventuality, staff proposes to issue a clarification of Section 73.40(a).

Recommendation: That the Commission:

1. Approve the proposed amendment and authorize publication of Enclosure A in the Federal Register for public comment.
2. Certify, in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. This Certification is included in the enclosed Federal Register Notice.
3. Note:
 - a. That the Congressional Committees will not be notified of this Commission action.
 - b. That, in accordance with 10 CFR 51.5(d)(3), neither an environmental impact statement nor a negative declaration need be prepared since the amendments are not significant from the standpoint of environmental impact.
 - c. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it as required by the Regulatory Flexibility Act.
 - d. That a public announcement will not be issued.
 - e. That copies of this notice will be distributed to affected licensees and other interested persons by the Office of Administration.
 - f. That during its 283rd meeting, November 17-19, 1983, the ACRS decided not to comment on this proposed amendment.
 - g. That a Regulatory Analysis is attached as Enclosure B.



William J. Dircks
Executive Director for Operations

Enclosures:

- A - Federal Register Notice
- B - Regulatory Analysis

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, December 23, 1983.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, December 16, 1983, 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.

DISTRIBUTION:

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FEDERAL REGISTER PACKAGE FOR
THE PROPOSED CLARIFYING AMENDMENT
TO 10 CFR 73.40(a)

ENCLOSURE A

FOR FURTHER INFORMATION CONTACT: Dr. C. J. Withee, Fuel Facility Safeguards Licensing Branch, Division of Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 427-4040.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission is proposing to amend its general physical protection requirement for fixed sites, 10 CFR 73.40(a), to clarify and codify its policy and practice regarding the application of this paragraph. This action is necessary because of a recent differing interpretation of this provision by an Atomic Safety and Licensing Board.

Section 73.40(a) currently states that "Each licensee shall provide physical protection against radiological sabotage and against theft of special nuclear material at the fixed sites where licensed activities are conducted. Physical security systems shall be established and maintained by the licensee in accordance with security plans approved by the Nuclear Regulatory Commission."

The Commission uses this provision only as a general statement of the need for physical protection and not as a detailed requirement. Detailed physical protection requirements for each class of licensed facility are presented in other sections of Part 73. It has been Commission policy and application to rely upon the detailed requirements in the other sections of Part 73 to define the extent to which protection against sabotage or theft, or both, must be addressed by specific classes of licensees (i.e. if a licensee satisfies the detailed requirements in the section which applies to its specific class, then the general need for physical protection as described in 73.40(a) will be satisfied). This has been considered to be sufficient even when the detailed requirements mention only theft or only sabotage as a threat.

In a recent ruling, an Atomic Safety and Licensing Board decided, citing § 73.40(a) as the basis for its decision, that a facility subject to the physical protection requirements of § 73.67 must specifically treat both theft and sabotage in its physical protection plan, even though § 73.67 mentions only the threat of theft. The Board concluded that, because both the threats of theft and sabotage are mentioned in § 73.40(a), detailed requirements which ostensibly cover only one of the threats do not fully satisfy the general requirement in § 73.40(a), and hence, the threat not mentioned in the detailed requirements in § 73.67 must be separately treated in a licensee's physical protection plan. In reaching its decision, the Board did not rule on the degree of need for sabotage protection at facilities subject to § 73.67 nor on the degree to which measures that provide protection against theft also provide protection against sabotage. The board based its decision solely on its reading and interpretation of the regulation as written. The Board went further to suggest that, if the Commission's policy and practice differ from the Board's interpretation, the regulation should be modified.

The Board's recent ruling has shown that differing conclusions can result from the present wording of § 73.40(a). Also, the Board's interpretation could impact several classes of licensees and not just those subject to § 73.67. Therefore, to avoid any future differences, a clarification of § 73.40(a) is being proposed that expressly incorporates into the text of 10 CFR 73.40(a) the Commission's policy and application referred to above.

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 will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule would amend 10 CFR Part 73 to codify current Commission policy and practice. Because this rule merely clarifies current practice and is in fact more lenient than other interpretations of the general physical protection requirement, there is no economic impact on any current or future licensee.

PAPERWORK REDUCTION ACT STATEMENT

This proposed amendment 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.).

ENVIRONMENTAL IMPACT

Pursuant to the Commission's regulations in 10 CFR Part 51, paragraph 51.5(d), neither an environmental impact statement nor a negative declaration need be prepared since these amendments are not significant from the standpoint of environmental impact.

REGULATORY ANALYSIS

The Commission has prepared a regulatory analysis of this proposed amendment. The analysis explains why there is no impact from this regulatory action and discusses

the potential for problems if the action is not taken. The analysis is available for inspection and copying in the NRC Public Document Room, 1717 H Street, NW., Washington, DC. Single copies of the analysis may be obtained from Dr. Carl J. Withee, Mail Stop 881-SS, Fuel Facility Safeguards Licensing Branch, Division of Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 427-4040.

LIST OF SUBJECT TERMS IN 10 CFR PART 73

Hazardous materials-transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting requirements, Security measures.

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, notice is hereby given that the NRC is proposing to adopt the following amendment to 10 CFR Part 73.

PART 73 - PHYSICAL PROTECTION OF PLANTS AND MATERIAL

1. The authority citation for Part 73 is revised to read as follows.

AUTHORITY: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); sec. 201, 88 Stat. 1242, as amended, sec. 204, 88 Stat. 1245 (42 U.S.C. 5841, 5844).

Section 73.37(f) is also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789 (42 U.S.C. 5841 note).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§73.21, 73.37(g), 73.55 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§73.20, 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.55, 73.67 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§73.20(c)(1), 73.24(b)(1), 73.26(b)(3), (h)(6), and (k)(4), 73.27(a) and (b), 73.37(f), 73.40(b) and (d), 73.46(g)(6) and (h)(2), 73.50(g)(2), (3)(iii)(B) and (h), 73.55(h)(2), and (4)(iii)(B), 73.70, 73.71, 73.72 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In §73.40, paragraph (a) is revised to read as follows:

§73.40 Physical Protection. General requirements at fixed sites.

(a) Each licensee shall provide physical protection at the fixed sites where licensed activities are conducted, either* against radiological sabotage, or [and] against theft of special nuclear material, or against both, as required by [at-the-fixed-sites-where-licensed-activities-are-conducted] and in accordance with the specific requirements contained in other sections of this Part which are applicable to the specific class of facility or material. Physical security systems shall be established and maintained by the licensee in accordance with security plans approved by the Nuclear Regulatory Commission.

* * * * *

Dated at Washington, DC, this _____ day of _____ 1983.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.

*Comparative text has new words underlined and deleted words in brackets and dashed through.

REGULATORY ANALYSIS
FOR PROPOSED CLARIFYING
AMENDMENT TO 10 CFR 73.40(a)

Enclosure B

REGULATORY ANALYSIS

Clarification of General Physical Protection Requirements

Statement of Problem

Paragraph 10 CFR 73.40(a) currently states that "Each licensee shall provide physical protection against radiological sabotage and against theft of special nuclear material at the fixed sites where licensed activities are conducted. Physical security systems shall be established and maintained by the licensee in accordance with security plans approved by the Nuclear Regulatory Commission." The Commission uses this provision only as a general statement of the need for physical protection and not as a detailed requirement. The detailed physical protection requirements for each class of licensed facility are presented in other sections of Part 73. It has been Commission policy and application that the detailed requirements in the other sections of 10 CFR Part 73 define the extent to which protection against sabotage or theft or both must be addressed by specific classes of licensees.

In a recent ruling, an Atomic Safety and Licensing Board has held that a facility licensed under 10 CFR 73.67 must specifically treat both theft and sabotage in its physical protection plan even though section 73.67 mentions only the threat of theft. The Board based its decision on its reading and interpretation of the regulations as written. Thus, the Board concluded that, because both the threats of theft and sabotage are mentioned in the general provision paragraph (10 CFR 73.40(a)), detailed requirements which mention only one of the threats do not fully satisfy the general provision.

The Board's recent ruling has shown that different interpretations can result from the present wording of 10 CFR 73.40(a). Such interpretations could impact

several classes of licensees, not just those licensed under 10 CFR 73.67. Therefore, to preclude such an eventuality, a clarification of the language in paragraph 73.40(a) is needed.

An amendment in the language will codify current practice for all fixed site licensees who must provide physical protection. Because paragraph 73.40(a) applies only to fixed sites, no similar clarification is needed for the regulations covering transport of special nuclear material (SNM).

The significance of taking no action to address the problem would be to allow various interpretations of the intent of Section 73.40(a) to be made. Such varying interpretations could cause problems in future licensing and relicensing actions. Other Licensing Boards also might interpret the regulatory language in accordance with the interpretation made by the current Board.

Objective

The objective of this rulemaking action is to clarify the NRC's policy and practice regarding the use and relationship of Section 73.40(a) and the other sections of Part 73 which contain detailed requirements for specific classes of licensees. This amendment will codify the current application of 73.40(a) and show the basis under which physical protection plans are presently approved. Thus, future differing interpretations regarding the intent of the general provisions paragraph will be eliminated.

Alternatives

Two alternatives were considered in detail: 1) making a clarifying amendment to the current rule language, or 2) taking no rulemaking action while continuing current licensing practice.

Consequences

The cost and benefit of making the clarifying amendment are summarized as follows:

- 1) In the future, the possibility for making differing interpretations of the NRC's policy and application regarding 73.40(a) will be eliminated.
- 2) Current and future licensees will not be economically impacted because the amendment merely codifies a course of action that the NRC is already pursuing.
- 3) There will be no cost to NRC operations.

The impact of not making the rule clarification is summarized as follows:

- 1) A lack of clarity about the intent of the regulation would be allowed to continue; this situation has already required extra staff time and effort in one licensing hearing which is not yet resolved. An estimated additional 0.4 to 0.8 staff year would be expended in litigating the additional security measures which should be provided to specifically protect against sabotage. This issue could come up in future licensing and relicensing hearings, and the probable impact on staff time and resources is uncertain.

Conclusion

Alternative 1 (issuing a clarifying amendment to 73.40(a)) should be implemented. The cost to the Commission is negligible and by eliminating the possibility for making various interpretations concerning the regulation's intent, much staff and licensee time can be saved in the UCLA hearing and in future licensing and relicensing actions.



RULEMAKING ISSUE

(Information)

April 20, 1984

SECY-83-500A

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: CLARIFICATION OF GENERAL PHYSICAL PROTECTION REQUIREMENT

Purpose: To inform the Commission of certain information which has become known subsequent to the submittal of SECY 83-500 and which is relevant to the proposal for clarification of 10 CFR 73.40(a).

Discussion: In SECY 83-500 the staff stated that, since the adoption of 10 CFR 73.67, there has been a policy that protection against acts of sabotage at nonpower reactors is not included in regulatory requirements. This policy has been reflected in a number of places. For instance, the Federal Register Notice publishing 10 CFR 73.67 as a final rule (44FR43280, July 24, 1979), in explaining the deletion of a requirement for entry searches, reads, "The primary objective of entry searches is to detect materials which could be useful in sabotage. Since protection against sabotage is not within the scope of the proposed amendments, an entry search requirement is not necessary."

Staff also stated in SECY 83-500 that the general requirement of 10 CFR 73.40(a) was satisfied if a licensee met the detailed requirements in the section of Part 73 which applied to its specific class. For the class of licensees using or possessing special nuclear material of moderate or low strategic significance, including nonpower reactor licensees, the specific section is 10 CFR 73.67.

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Since submitting SECY 83-500 staff has reviewed the documentation relating to the implementation of its policy and has found that the following situations exist:

- o Many licensee security plans contain the terms sabotage, radiological sabotage, or industrial sabotage.
- o Guidance refers to industrial sabotage in introductory paragraphs and identifies for licensee use a compendium of equipment and procedures which may be used to protect against sabotage or theft, or both.
- o Some safeguards inspection modules, procedures and reports of inspection findings for nonpower reactors do address sabotage protection.
- o The introductory paragraph of a generic letter for transmitting reports of security inspections for all classes of licensees refers to protection against both industrial sabotage and theft of special nuclear material.

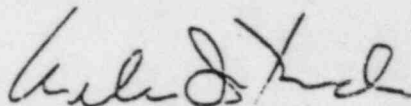
Nevertheless, it has been the intent of the NRC staff to require nonpower reactor licensees, as well as all other licensees using or possessing special nuclear material of moderate or low strategic significance, to meet only the physical protection requirements of 10 CFR 73.67. Regulatory Guide 5.59, "Standard Format and Content Guide for a Licensee Physical Security Plan for the Protection of Special Nuclear Material of Moderate or Low Strategic Significance," was issued when 10 CFR 73.67 was adopted. Although the introduction to this guide refers to protection against "industrial sabotage," the body of the guide follows the format of 10 CFR 73.67 and contains no specific requirements to provide protection against sabotage. This guide was used by licensees in preparing their plans to meet the new regulations. It was also used by the NRC staff in reviewing and approving the plans submitted pursuant to these regulations.

To bring regulatory activities in line with safeguards policy, staff has begun action to:

1. Inform nonpower reactor licensees, through NRR, that their plans were not reviewed against sabotage and that such measures are not required by the regulations.

2. Provide guidance to Regional Offices to revise the standardized terminology contained in transmittal letters to remove any ambiguity that might indicate that nonpower reactors were inspected for protection against sabotage.
3. Issue a Temporary Instruction to clarify the safeguards inspection program requirements, and follow with formal revisions to the program requirements and guidance documentation.
4. Correct Regulatory Guide 5.59, the primary guidance document for submitting physical security plans required by 10 CFR 73.67, by revising the introductory paragraph which summarizes all of the regulations dealing with physical protection, to make clear that the Guide does not address sabotage.

To complete efforts to resolve misunderstandings regarding current policy and procedures, it is important that the Commission affirm SECY 83-500 to revise 10 CFR 73.40(a).



William J. Dircks,
Executive Director for Operations

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