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# PUBLIC SUBMISSION

**Docket:** NRC-2022-0119

Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working At Nuclear Power Plants

**Comment On:** NRC-2022-0119-0001

Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants

**Document:** NRC-2022-0119-DRAFT-0003

Comment on FR Doc # 2022-12611

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## General Comment

See attached file(s)

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## Attachments

Final BTI Comment on Access Authorization RIS

August 12, 2022

**Subject: Regulatory Issue Summary (RIS), “Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants” (NRC-2022-0119)**

Dear NRC Staff,

I write to reiterate concern regarding the U.S. Nuclear Regulatory Commission (NRC) staff’s use of the term “high assurance” in regulatory documents governing nuclear security (in general) and in the subject RIS (specifically). It is not clear why the NRC staff feels compelled to remind licensees of their obligations under Title 10 *Code of Federal Regulations* (CFR) 73.56 – almost 20 years after the regulation was codified – other than to take issue with “ambiguous language” in Personnel Access Data System (PADS) Administrator Bulletin 2017-09. The Nuclear Energy Institute (NEI) issued the bulletin on November 3, 2017, to establish guidance for meeting § 73.56. That guidance has been accepted tacitly and applied during the intervening five years. The RIS not only introduces regulatory instability; it does so in a quest for “high assurance.” The RIS concludes: “Licensees must have an access authorization program that provides **high assurance** [emphasis added] that individuals granted UA or certified UAA are trustworthy and reliable.”

On January 20, 2022, I raised a similar concern<sup>1</sup> during a public meeting to discuss alternative physical security requirements for advanced reactors. On April 27, 2022, Steve Nesbit, then President of the American Nuclear Society (ANS), and I, on behalf of the Breakthrough Institute (BTI), wrote a letter to the Commission<sup>2</sup> expressing concerns with proposed “high assurance” language in the limited-scope change to § 73.55, “Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage.”

The reference to “high assurance” in the RIS and any other regulatory document or rule perpetuates ambiguity, confusion, a long-standing misapplication of “**high** assurance of protection” for physical security, and regulatory overreach beyond NRC’s legal mandate for nuclear security, which is no different than its mandate for safety: to provide **reasonable** assurance of **adequate** protection of public health and safety. Moreover, establishing a “high assurance” standard in new regulatory documents defies prior Commission direction and contravenes the NRC’s Principles of Good Regulation, among other things delineated in the April 27, 2022, letter.<sup>3</sup>

During an NRC public meeting to discuss the subject RIS on August 9, 2022, I reminded NRC staff that the question of reasonable versus high assurance for nuclear security has already been decided by the Commission. On October 5, 2016, the Commission issued its Staff Requirements Memorandum (SRM) for Commission Paper SECY-16-0073, “OPTIONS AND RECOMMENDATIONS FOR THE FORCE-ON-

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<sup>1</sup> NRC ADAMS No. ML22024A064, pages 46-48

<sup>2</sup> NRC ADAMS No. ML22122A218

<sup>3</sup> NRC ADAMS No. ML22122A218

FORCE INSPECTION PROGRAM IN RESPONSE TO SRM-SECY-14-0088.” In its SRM, the Commission explicitly and unequivocally defined the assurance standard for security and directed the staff to modify its regulatory posture accordingly:

*In implementing the NRC's regulatory program, either in developing new regulations, inspecting licensee compliance with regulations, or executing the FOF program, the staff should be mindful that the concept of “high assurance” of adequate protection found in our security regulations is equivalent to “reasonable assurance” when it comes to determining what level of regulation is appropriate. The NRC should not be applying a “zero risk” mentality to security any more than we should be doing so with respect to safety. The staff should operate under this paradigm and **eliminate ambiguity on this point** [emphasis added] in its guidance documents or other internal directives, instructions, or training materials, to the extent such ambiguity exists.<sup>4</sup>*

After reading this direction verbatim during the August 9, 2022, public meeting, I reminded the NRC staff that the Commission provided this explicit direction in uncharacteristically strident terms, *sua sponte*, to curb an overly zealous regulatory posture in the NRC staff’s force-on-force exercise program. I then asked how the NRC staff squares the Commission’s unequivocal direction in 2016 with the RIS conclusion that “licensees must have an access authorization program that provides **high assurance** [emphasis added] that individuals granted UA or certified UAA are trustworthy and reliable.”

The NRC staff responded that it does not intend to apply a high assurance standard and will apply a reasonable assurance standard to its regulation of access authorization. However, it appears that the RIS represents a new NRC staff position on the sufficiency of guidance in NEI Bulletin 2017-09 for meeting § 73.56 with **high assurance**. In other words, the NRC staff now deems the NEI’s 2017 guidance to be insufficient to establish, with high assurance, that “individuals granted UA or certified UAA are trustworthy and reliable.” This constitutes a backfit.

During the August 9, 2022, public meeting, the NRC staff acknowledged that its own research of the “high assurance” standard in Part 73, going back as far as 1974, did not yield any support for Part 73’s divergence from the “reasonable assurance of adequate protection” standard applied broadly to regulatory decision-making. I agreed, noting that former Commissioner Bill Ostendorff and Jason Zorn, then executive assistant to former Chairman Steve Burns, drew the same conclusions in 2016.

The NRC staff proceeded to explain that, since the Commission did not direct them to revise Part 73’s “high assurance” language in 2016, they face a dilemma of reconciling a disparate assurance standard in the rule with the Commission’s direction as the staff develops new regulatory documents. When I asked if the NRC staff can proactively initiate a revision of Part 73 – and noted it could readily do so under the limited-scope rule change in progress – NRC staff responded that NRC management would need to support such an initiative, implying that obtaining such support would be a challenge.

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<sup>4</sup> NRC ADAMS No. ML16279A345

Rather than eliminate ambiguity consistent with Commission direction in 2016, the draft RIS perpetuates it. The NRC staff cited the “high assurance” language in Part 73 as basis for perpetuating ambiguity. Proactive measures to revise the “high assurance” standard to “reasonable assurance” in Part 73 would resolve a dilemma long recognized by NRC staff. However, the NRC staff appears to be waiting for Commission direction to undertake the solution.

The NRC staff should perform a backfit analysis to justify issuance of a RIS that appears to raise the bar on what has been accepted tacitly over the last five years. If the change in position passes the backfit test and the RIS is justified, the NRC staff should remove any reference to “high assurance” in the next iteration of the draft RIS. If the NRC staff feels constrained by the current rule language, then it should revise the sentence in the RIS conclusion section as follows: "Licensees must have an access authorization program that ~~ensures provides high assurance~~ that individuals granted UA or certified UAA are trustworthy and reliable." This revision would be consistent with other passages throughout the RIS and would avoid defiance of Commission direction.

As long as Part 73 includes the term “high assurance,” ambiguity persists; moreover, regulatory ratcheting in defiance of Commission direction will continue. The Commission should direct the NRC staff to correct the problematic language in Part 73. The staff appears unlikely to do so proactively and, in the interim, faces what it perceives to be an insurmountable dilemma while Part 73 includes a “high assurance” standard.

Sincerely,



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