# RULEMAKING ISSUE
## AFFIRMATION

June 12, 2009 SECY-09-0087

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: FINAL RULE ESTABLISHING CRIMINAL PENALTIES FOR THE UNAUTHORIZED INTRODUCTION OF WEAPONS INTO FACILITIES DESIGNATED BY THE NUCLEAR REGULATORY COMMISSION

PURPOSE:

(1) To obtain Commission approval to promulgate a final rule that would make it a Federal crime to, without authorization, willfully carry, transport or otherwise introduce or cause to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon certain facilities or installations subject to the regulatory authority of the Nuclear Regulatory Commission (NRC).

(2) To obtain Commission approval to commence a rulemaking that would examine whether, and to what extent, these criminal penalties should be extended to additional facilities subject to NRC regulatory authority.

BACKGROUND:

Section 654 of the Energy Policy Act of 2005 (EP Act), "Unauthorized Introduction of Dangerous Weapons," amended section 229 of the Atomic Energy Act (AEA), "Trespass on Commission Installations," to authorize the NRC to issue regulations that make it a Federal crime to bring, without authorization, weapons or explosives into facilities designated by the Commission. The amendment also requires the posting of this regulation "conspicuously" at each such facility.

On June 17, 2008, the staff submitted SECY-08-0083, which contained a draft proposed rule for implementing this AEA amendment. SECY-08-0083 also provides a discussion on the text and history of this EP Act provision, which will not be reiterated here. Subsequently, on August 12, 2008, the Commission issued SRM-SECY-08-0083 directing the staff to publish the

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certain exceptions for antique firearms, sporting and recreational weaponry and ammunition, and surplus army ordinance – exceptions that are clearly inappropriate for highly secure nuclear facilities – the rule's use of the § 930(g)(2) definition of "dangerous weapon" effectively nullifies these exceptions, because, (b)(5) the items covered by the exceptions would nonetheless fall within the § 930(g)(2) "dangerous weapon" definition. The draft statement of considerations accompanying the rule further clarifies that these exceptions found in the existing "firearm" definitions are not meant to be operative for purposes of this NRC rule and that the § 930(g)(2) definition of "dangerous weapon" is intended, among other things, to cover those otherwise exempted items.

(b)(5) the term "other dangerous instrument or material" would be left undefined, to serve as a "catch-all" term in case there are dangerous items that would not readily fall within the "dangerous weapon" or "explosive" definitions. But given the broad nature of the definitions being used for the latter two terms, reliance upon the "dangerous instrument or material" catch-all term should rarely, if ever, be necessary.

Another change from the proposed rule's text would clarify the definition of the specific facility areas that the rule would cover. For the relevant types of facilities, the proposed rule clearly prohibited introduction of weapons, explosives, and other dangerous instruments or materials (1) into the protected areas of facilities that have protected areas; and, (2) for facilities that do not have protected areas, into those buildings or areas which contain nuclear or radioactive materials. Yet, for facilities that have both a protected area and buildings or other sites outside the protected area that nonetheless contain nuclear or radioactive material, the rule's applicability to the outside-the-protected-area buildings and sites was less clear. One commenter also expressed concern that some portions of facilities that have not traditionally been treated as secure but which do contain some radioactive material might be covered by this rule.

To address these issues, the draft final rule's posting provisions are revised to cover only those portions of a covered type of facility that are required by Part 73 to have a security plan in place. In addition to providing clarity to the rule's coverage, the draft final rule's reliance upon the Part 73 security plan requirements to define its scope would ensure that the rule will not criminalize activity involving portions of facilities that, from the NRC's perspective, have relatively low security sensitivity. In addition, a new term—"protected facility or installation"—is added to the criminal penalties portion of the draft final rule to ensure that the posting requirements and the criminal penalties will apply coextensively, and to also allow simpler reference in the rule text to just those portions of facilities that the rule is intended to cover.

One definition included in the proposed rule has been expanded and clarified in the draft final rule. The proposed rule's definition of "introduce" relied entirely upon notices posted pursuant to the rule to define when an "introduction" has occurred (i.e., by specifying that "introduction" occurs when a prohibited item passes a notice). One commenter asserted that the proposed rule's definition of introduce did not clearly cover a situation in which a person with a weapon located outside the protected area fires into the protected area. Although the staff disagrees with this commenter's assertion, on the grounds that a bullet or other projectile fired into a

section 229 criminal penalties, which appear to have been drafted with potential trespassers, rather than sign posters, in mind. Further, Congress granted the NRC broad discretion to craft rules under section 229. Accordingly, there appears to be room for the Commission to determine, if it deems it appropriate from a policy perspective, that a willful failure by licensees to post notices as specified in § 73.75 would not result in criminal penalties. If the Commission makes such a determination, only minor changes to the draft final rule would be necessary. The Commission should be aware, though, that because of the ambiguity in section 229, the ultimate decision on whether to prosecute a willful violator of § 73.75 would rest with DOJ. In addition, even in the absence of prosecution, the NRC still retains broad authority to impose administrative sanctions on violators of the posting requirements.

In response to public comments, the staff has also included additional guidance in the statement of considerations regarding format requirements for posted notices. In the proposed rule, the standard provided was purely performance-based, requiring only that the signs be "easily readable day and night." Several commenters, however, suggested more specific standards. In the interest of providing more specific direction while retaining flexibility, the statement of considerations accompanying the final rule provides additional guidance, stating that licensees who desire more concrete standards have the option of following up-to-date Americans with Disabilities Act (ADA) standards relating to the design and placement of signs. Adherence to ADA standards, under this approach, would ensure that a licensee's sign satisfies the "easily readable" portion of the standard, at least with respect to those aspects of sign design and placement that the ADA standards address. However, other methods that satisfy the "easily readable" standard from a performance-based standpoint would still suffice for purposes of the rule, and licensees must still ensure nighttime readability—an issue the ADA standards, at least in their current form, do not specifically address. Because this option of following ADA standards is technically guidance rather than a requirement, the staff decided against including it in the rule text itself. Furthermore, the ADA standards may change over time, and any necessary adjustments by the NRC as a result would be easier to implement through updating guidance rather than amending the regulation.

One modification in the attached draft final rule to the set of facilities covered by the rule involves those facilities that, by virtue of being covered by similar Department of Energy (DOE) regulations, would potentially be covered by two similar (yet not identical) Federal criminal provisions pertaining to unauthorized introduction of weapons, which both establish criminal penalties for violations and require the facilities in question to post notices. While this draft final rule and the DOE rule do not establish precisely the same criminal penalties, both regulations would serve the same basic function with respect to these facilities (i.e., permitting federal prosecution of persons who introduce weapons or other dangerous items into the facilities without authorization). Accordingly, to avoid redundancy, and to avoid potentially conflicting or otherwise inconsistent regulation of the posting requirements imposed upon facilities by each regulatory scheme, the draft final rule excludes from its coverage those facilities that are already covered under DOE's existing rules relating to unauthorized introduction of weapons, explosives, and other dangerous instruments or materials. This would encompass, for example, the USEC gaseous diffusion enrichment facilities.

(b)(5)

SCHEDULING REQUIREMENTS:

The final rule gives licensees 180 days from issuance of the rule to implement the new regulation by posting the required signs, in response to industry comments indicating that the proposed 90-day timeframe could prove insufficient, and in the absence of any comments to the contrary. No other industry resources would be required.

RESOURCES:

Licensee implementation of the final rule will be accomplished as part of the baseline security inspection program. Therefore, no additional NRC resources would be required to implement this rule.

RECOMMENDATIONS:

That the Commission:

1. Approve the enclosed *Federal Register* notice, which would amend 10 CFR Part 73, for publication in the *Federal Register*.

2. To satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed *Federal Register* notice.

3. Note:

   a. 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, 5 U.S.C. 605(b);

   b. The staff has determined that this action is not a "major rule," as defined in the Congressional Review Act of 1996, 5 U.S.C. 804(2), and has confirmed this determination with the Office of Management and Budget. The appropriate Congressional and Government Accountability Office contacts will be informed.

   c. The appropriate Congressional committees will be informed.

   d. The Office of Public Affairs will issue a press release when the final rule is filed with the Office of the Federal Register.

e. (b)(5)

4. Authorize the staff to begin work on another rulemaking that would address hospitals, academic facilities, and certain other types of facilities possessing and using byproduct materials.

COORDINATION:

Comments from the Office of the Executive Director for Operations, Office of Federal and State Materials and Environmental Management Programs, Office of Nuclear Material Safety and Safeguards, Office of Nuclear Security and Incident Response, Office of Nuclear Reactor Regulation, Office of Enforcement, Office of Investigations, Office of Information Services, and the Office of Administration have been incorporated.

Stephen G. Burns
General Counsel

Enclosures:
1. Draft Final Rule
2. Text of incorporated statutory definition

J:\LC\Adler\Final Trespassing rule SECY Paper - Rev 5 - Incorporating Office Comments Revised06-05-2009.doc

ADAMS ACCESSION NUMBER:

| OFFICE | OGC | OGC | OGC | OGC |
|---|---|---|---|---|
| NAME | JAdler | TRothschild | JGray | SBurns |
| DATE | 6/10/09 | 6/10/09 | 6/10/09 | 6/11/09 |

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**Enclosure 1**

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150-AI31

[NRC-2008-0458]

Criminal Penalties; Unauthorized Introduction of Weapons

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations to authorize the imposition of Federal criminal penalties on those who, without authorization, introduce weapons or explosives into specified classes of facilities and installations subject to the regulatory authority of the NRC. This action is necessary to implement section 229, "Trespass on Commission Installations," of the Atomic Energy Act of 1954, as amended (AEA).

**DATE:** This rule is effective on **[insert 180 days after publication]**.

**ADDRESSES:** You can access publicly available documents related to this document using the following methods:

**Federal e-Rulemaking Portal:** Go to http://www.regulations.gov and search for documents filed under Docket ID [NRC-2008-0458]. Address questions about NRC dockets to Carol Gallagher at 301-415-5905, e-mail Carol.Gallagher@nrc.gov.

**NRC's Public Document Room (PDR):** The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

**NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at http://www.nrc.gov/reading-rm/adams.html. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

**FOR FURTHER INFORMATION CONTACT:** James E. Adler, Office of the General Counsel, telephone 301-415-1656, e-mail: james.adler@nrc.gov.

**SUPPLEMENTARY INFORMATION:**

I. Background

II. Public Comments

III. Discussion of the Final Rule

IV. Voluntary Consensus Standard

V. Finding of No Significant Environmental Impact: Environmental Assessment

VI. Paperwork Reduction Act Statement

VII. Regulatory Analysis

VIII. Regulatory Flexibility Certification

IX. Backfit Analysis

X. Congressional Review Act

XI. Agreement State Compatibility

## I. Background

Section 654 of the Energy Policy Act of 2005, "Unauthorized Introduction of Dangerous Weapons," amended § 229 of the AEA (42 U.S.C. 2278a) to authorize the NRC to issue regulations that make it a Federal crime to bring, without authorization, weapons or explosives into facilities designated by the NRC. This rule implements that legislative provision.

In 1956, Congress added § 229 to the AEA. That section made it a crime to bring weapons or explosives, without authorization, into facilities owned by the Atomic Energy Commission. With the enactment of the Energy Reorganization Act in 1974, this provision covered facilities now owned or occupied by the U.S. Department of Energy (DOE) as well as the buildings occupied by the NRC. Section 229 of the AEA did not extend to facilities regulated by the NRC. Over the years, there were incidents where individuals were successful in bringing weapons into NRC-regulated facilities without authorization. Fortunately, the individuals were not terrorists or others with malevolent intent and no damage was done. In such circumstances, the NRC had the ability to take action against its licensee for violation of security requirements, but could not refer the matter to the U.S. Department of Justice (DOJ) for criminal prosecution of the individual; any criminal sanctions had to be sought by the State under State law. Beginning in the late 1980s, the NRC submitted legislative proposals to Congress requesting that Congress enact legislation that would make it a Federal crime to bring weapons or explosives, without authorization, into NRC-designated facilities.

Congress enacted the requested legislation in § 654 of the Energy Policy Act of 2005, amending § 229 of the AEA (42 U.S.C. 2278a.). This section authorizes the NRC to

> issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to person or property, into or upon any facility, installation, or real property subject to the jurisdiction, administration, in the custody of the Commission, or subject to the licensing authority of the Commission or certification by the Commission under this Act or any other Act.

Section 229 also requires that "every such regulation of the Commission shall be posted conspicuously at the location involved."

## II. Public Comments

The NRC published a proposed rule on September 3, 2008 (73 FR 51378) and provided the opportunity for public comment. The *Federal Register* notice for the proposed rule identified certain issues about which the NRC was particularly interested in receiving comments. These issues included:

(1) Whether the rule's scope should be extended beyond the facilities listed in the proposed rule to additionally cover hospitals and other classes of facilities licensed to possess nationally tracked sources that are in the National Source Tracking System;

(2) Whether terms used in the proposed rule such as "dangerous weapon," "dangerous instrument or material," and "explosive" should be further defined, and what such definitions should be;

(3) Whether such definitions, if provided at all, should be set forth in the rule itself or in a guidance document;

(4) Whether the proposed 90-day implementation period provides licensees sufficient time to acquire and install the signs that the rule would require licensees to post;

(5) Whether the proposed rule's language regarding sign location is sufficient; and

(6) Whether the proposed rule's performance-based standard (i.e., "easily readable day and night") should be replaced with more detailed requirements or with a reference to a preexisting signage standard, such as the standards promulgated under the Americans with Disabilities Act.

Seventeen comments were received. A few commenters addressed the issue of which facilities should be covered by the rule. Some of these commenters favored extending

coverage to hospitals and other facilities possessing nuclear or radioactive material. Reasons given by such commenters included:

(1) Anyone who introduces a dangerous weapon, explosive, or other dangerous material into such a facility most likely intends to do harm;

(2) Anyone bringing such an item into a hospital or other facility that stores nuclear or radioactive material should expect to be penalized for doing so;

(3) Signs will ensure that the rule is not violated by accident, although anyone who intends to cause harm in a covered facility would likely not be deterred by the rule anyway; and

(4) Those seeking to access nuclear or radioactive materials in such facilities for illicit purposes would likely be able to locate those materials even if there are no signs posted pursuant to this rule. Thus, it is not valid to view such signs as rendering sensitive materials easier to find and therefore less secure.

Another commenter, however, recommended against extending the sign-posting requirement to these facilities. This commenter (a major medical institution) reasoned that:

(1) Signs would attract attention to the location of nationally tracked sources, thereby potentially rendering them *less* secure, given that many licensees currently try to avoid drawing attention to the locations of such materials;

(2) The strong language in the posting could be frightening to patients in hospitals, who may already be in a vulnerable state due to their medical situations; and

(3) Persons with unescorted access to facility areas of concern can simply be trained both to understand the rule themselves and to warn persons they escort about the rule's existence.

This commenter also noted that if the National Source Tracking System is expanded to include Category 3 and 1/10$^{th}$ Category 3 sources, an expansion of the rule to cover hospitals or other facilities would reach substantially more facilities than it otherwise would.

Several of the comments recommended that the NRC provide definitions of terms such as "dangerous weapon," "explosive," and "dangerous instrument or material." Commenters' justifications for recommending definitions of these terms included promoting consistency in licensee reporting of violations of this rule and minimizing ambiguity in a rule whose violation may result in criminal prosecution. One commenter suggested that the content of these definitions should relate to the security capabilities of licensees to avoid prohibiting introduction of items that could not realistically be used to overpower plant security teams. Another commenter recommended that definitions be included in the rule itself, with further information and illustrations provided in a guidance document. Another commenter recommended that the posted notices identify any items that ordinary persons would not expect to be considered dangerous, but which nonetheless pose special hazards in light of the nature of the facility or the material located at the facility. Lastly, one commenter recommended that another term used in the proposed rule, "introduce," be defined more clearly to ensure that the rule will apply to a person who introduces a dangerous instrument (e.g., a bullet) into the protected area by some means that does not require the person to pass beyond a sign (e.g., by firing a gun from outside the protected area).

As to the proposed 90-day implementation period, two industry commenters recommended that the period be extended to 180 days to allow sufficient time for sign procurement and installation. No other commenters expressed views on this issue.

A few comments addressed the issue of sign location. One of these comments recommended installing signs not only at entrances, but also within protected areas to serve as additional reminders. Another comment sought clarification regarding areas outside the protected area but which nonetheless contain nuclear or radioactive material, such as licensee effluent treatment facilities, low-enriched uranium storage facilities, and radioactive waste storage facilities. The comment recommended that the posting requirement not apply to such areas, in light of the fact that entrants to such areas are not required to be searched prior to

entry. Lastly, one commenter suggested allowing licensees the option of posting notices on roadways leading to facility checkpoints or parking areas, in addition to the notices required to be posted at vehicle and pedestrian entrances, in order to provide advanced warning and thus facilitate the avoidance of protected areas by people carrying weapons.

Several commenters addressed the issue of sign characteristics. Some commenters recommended inclusion of specific rules regarding text size and color. One commenter suggested requiring lighting to ensure readability at night, while other commenters preferred the more flexible performance-based standard (i.e., "easily readable day and night") utilized in the proposed rule. No commenters objected to the requirement that the notices be readable at night.

A number of comments also addressed topics beyond those specifically identified in the statement of considerations for the proposed rule. One commenter recommended that the rule require establishment of temporary weapons storage sites at pedestrian and vehicle entrances, so that persons lawfully carrying firearms can store any weapons before entering and pick them up when they leave. Another commenter recommended that the rule be harmonized with existing DOE signage regulations to avoid confusion or redundancy for those facilities that would be required to comply with both regulatory schemes. One commenter recommended that the rule define the term "willful" as "an intentional act which may include evidence of subterfuge, masking, or malevolent intent." Finally, the DOJ recommended that the statement of considerations for the final rule clarify that the Federal Bureau of Investigation is not the only Federal entity other than the NRC that could potentially conduct investigations of suspected violations of this rule.

All of these comments are discussed and addressed in Section III below.

## III. Discussion of the Final Rule

The NRC is amending 10 CFR 73.81, "Criminal Penalties," and adding § 73.75, "Posting," to implement § 654 of the Energy Policy Act of 2005. Under the regulations, the

unauthorized willful introduction of any dangerous weapon, explosive or any other dangerous instrument or material likely to produce substantial injury or damage to persons or property upon the facilities or installations subject to §§ 236a.(1) or (4) of the AEA will be subject to the criminal penalties set forth in § 229 of the AEA. Consistent with the Energy Policy Act § 654 requirement that the regulation be posted conspicuously at each location involved, § 73.75 will require licensees to post notices at such facilities or installations.

Facilities Covered

The NRC here is primarily concerned with dangers posed by the unauthorized introduction of weapons or explosives or other dangerous items when nuclear material and radioactive material are present. By listing these facilities in section 236 of the AEA, Congress has recognized the potential danger that could result from sabotage of such facilities; consequently, the NRC believes it prudent to also make the willful unauthorized introduction of weapons or explosives into or upon these facilities a Federal crime. The covered facilities include production and utilization facilities and uranium enrichment, uranium conversion and fuel fabrication facilities. The rule also covers some of the facilities listed in AEA § 236a.(2). Specifically, this rule would apply to high-level waste storage and disposal facilities and independent spent fuel storage installations. The remaining waste facilities and installations listed in § 236a.(2) that are subject to Agreement State jurisdiction may be covered in a future rulemaking. For other classes of licensees, the unauthorized introduction of weapons or explosives will continue to be governed, absent other Federal legislation, by State law.

The final rule accounts for the fact that not all portions of the listed classes of facilities will necessarily pose sufficient security concerns to justify imposition of criminal penalties. Therefore, the rule's application is limited to areas within a facility or installation's protected area, as well as portions of facilities or installations that are not within a protected area *per se* but for which security plans under 10 CFR Part 73 must nonetheless be in place. The term "protected facility or installation" has also been added to the final rule to refer solely to those

portions of facilities that the criminal penalties are intended to protect. The rule's reference to security plan requirements under Part 73, which was not included in the proposed rule, should resolve the ambiguity identified by a commenter regarding certain portions of facilities that are outside the protected area but which nonetheless contain nuclear or radioactive materials.

The NRC has limited the rule's applicability to the facilities listed in §§ 73.75(a) and 73.81(c)(2)(i) because the unauthorized introduction of a weapon or explosive into these facilities poses the greatest health and safety risk and because the NRC already pervasively regulates these facilities. Other facilities—such as hospitals—that contain radioactive materials are not as extensively regulated by the NRC. In order to apply § 73.81 to these other facilities, the NRC would have needed to interact with Agreement States and other State and Federal regulators to further assess the need for application of § 73.81 to these classes of facilities and to determine the proper placement of the required notices and the best way to implement this regulation. As suggested by a public comment, adding posted notices—which, under the statute, is a required complement to the imposition of criminal penalties—to facilities such as hospitals could raise substantial policy and implementation issues. While the NRC acknowledges the recommendations of some commenters that hospitals and other facilities be addressed via this rule, the NRC believes that such extension would raise additional complexities that would be best addressed in a separate rulemaking, should the NRC determine at a future date that expansion of the scope of this rule is warranted.

The NRC is not including the following facilities or materials even though they are listed in § 236 of the AEA:

- Subsection 236a.(3) covering any nuclear fuel for a utilization facility licensed under this Act, or any spent fuel from such a facility. Section 229 of the AEA specifically applies to "facilities and installations," while this subsection applies to "nuclear fuel" and "spent nuclear fuel." Fuel is neither a facility nor installation; therefore, § 229, by its terms, is not applicable to this subsection.

- Subsection 236a.(5) covering any "production, utilization, waste storage, waste treatment, waste disposal, uranium enrichment, uranium conversion, or nuclear fuel fabrication facility" during construction of the facility, if the destruction or damage caused or attempted to be caused could adversely affect public health and safety during operation of the facility. The NRC is primarily concerned with dangers posed by the unauthorized introduction of weapons or explosives into facilities when special nuclear material, byproduct material, or source material is present. Therefore, § 73.81(c) will apply only to those facilities designated in § 73.81(c)(2)(i) upon the receipt of such material. However, if an unauthorized introduction of a weapon or explosive results in sabotage covered by AEA § 236 before the receipt of special nuclear material, byproduct material, or source material, this would already constitute a Federal crime. Although the proposed rule utilized the terms "nuclear material" and "radioactive material" instead of "special nuclear material, byproduct material, or source material," the former terms are potentially vague and imprecise. Therefore, the final rule is using the latter terminology in order to avoid potential misinterpretation. This change, which appears in §§ 73.75(b)(2) and 73.81(c)(4), is intended to be clarifying rather than substantive.
- Subsection 236a.(6) covering any "primary or backup facility from which a radiological emergency preparedness alert or warning system is activated." These facilities do not contain special nuclear material, byproduct material, source material, or the controls needed to operate a facility.
- Subsection 236a.(7) pertaining to other materials or property that the NRC designates by order or regulation. The NRC is excluding this section because the rulemaking implementing this subsection of § 236 has not commenced. The NRC may revisit this exclusion as part of the rulemaking implementing the Energy Policy Act of 2005 revisions to § 236, or in a separate rulemaking.

In response to a public comment, one class of facilities and installations that is

exempted under the final rule includes those facilities and installations that already must comply with similar signage requirements under DOE regulations. DOE regulations already criminalize the unauthorized introduction of dangerous weapons, explosives, or other dangerous instruments or materials into or upon various facilities and installations within DOE's jurisdiction and require that such facilities and installations post notices to that effect. The DOE regulations, however, establish criminal penalties that, while not substantially different, are nonetheless not identical to those being established by this rule. Exempting these facilities from this rule avoids establishing what would in effect be identical crimes punishable by different penalties with respect to those facilities.

Criminal Penalties, Investigation, and Prosecution

Under the rule's terms, whoever willfully introduces, without authorization, weapons or explosives into or upon any protected facility or installation (as defined in § 73.81(c)(2)) that is enclosed by a fence, wall, floor, roof, or other barrier would be guilty of a misdemeanor, and upon conviction, could be punished by a fine not to exceed $5,000, or imprisonment for not more than one year, or both, as set forth in section 229c of the AEA. Whoever willfully introduces, without authorization, weapons or explosives into or upon any other protected facility or installation would be, upon conviction, punishable by a fine of not more than $1,000, as set forth in section 229b of the AEA will be subject to criminal penalties under Federal law. The maximum penalties would vary based upon whether the facility in question is enclosed by a fence, wall, floor, roof, or other barrier. The proposed rule's version of 73.81(c)(1) was worded in a manner that, when read in conjunction with AEA sections 229b and 229c, was circular and potentially confusing. The final rule therefore contains a reworded section 73.81(c)(1), and also adds a § 73.81(d), which more precisely coordinates between the prohibition contained in 73.81(c)(1) and the criminal penalties in AEA sections 229b and 229c that will apply to violations of § 73.81(c)(1). This modification is not, however, intended to change the substance of the rule in any way.

This final rule does not interfere with State prosecution of these crimes under State law, but it does allow the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or other Federal law enforcement agencies to investigate and DOJ to prosecute in addition to, or instead of, the State government.

The final rule amends § 73.81(b), listing § 73.75 as one of the provisions in Part 73 that are not issued under sections 161b, 161i, or 161o of the AEA. Therefore, violations of the posting requirements in § 73.75 will not trigger criminal liability under AEA section 223. However, sections 229b and 229c of the AEA expressly state that the criminal penalties they set forth will apply to anyone who "shall willfully violate any regulation of the Commission issued pursuant to subsection a." (i.e., section 229a of the AEA). Because § 73.75, which sets forth the posting requirements, is being issued pursuant to Congress's authorization in AEA section 229a "to issue regulations relating to" the introduction of dangerous weapons, explosives, or other dangerous instruments or materials into NRC-designated facilities, the criminal penalties set forth in section 229b and 229c would apply to willful violations of the § 73.75 posting requirements. To avoid any potential confusion on this point, the new § 73.81(d) in the final rule expressly states that § 73.75 is being issued under AEA section 229a and also notes that AEA sections 229b and 229c provide for criminal penalties for willful violations of regulations issued under section 229a.

Regulatory Burden – Posting of Signs

This regulation would not impose any burden on States. The only burden the regulation would impose on licensees is the statutorily-mandated requirement that signs containing the quoted text in § 73.75 be posted conspicuously at each of the listed facilities. The rule requires that these signs be posted at all entrances to the protected area, as well as all entrances to buildings not within a protected area that nonetheless contain special nuclear material, byproduct material, or source material (except with respect to buildings for which security plans are not required under 10 CFR Part 73). The link between the posting requirements and the

NRC's security plan requirements under Part 73 has been added to the final rule in response to a public comment to ensure consistency between the NRC's security regulations and the criminal penalties (and licensee posting obligations) being established. The signs may also include other prohibitions already posted at the point of entry.

Although one commenter recommended that additional signs be posted within each facility or installation to serve as further reminders of the regulation's criminal penalties, any person who willfully brings a prohibited item into the facility or installation will have already committed the crime by the time such reminder signs are encountered. The posting of such signs, therefore, will not be required, but licensees are not precluded from posting additional signs.

As the rule states, the signs must be easily readable day and night by both pedestrian and vehicular traffic. The NRC, in response to comments, is providing a 180-day implementation period for this requirement to allow licensees sufficient time to acquire and install the appropriate signs.

The posting requirement is primarily performance-based, stating that signs should be "easily readable day and night." Accordingly, any design and placement that renders the notice "easily readable day and night" will satisfy this standard. Although one commenter suggested requiring lighting in order to ensure readability at night, the NRC believes it is sufficient to rely upon the performance-based standard for night readability, because different facilities, as well as different sign locations at each facility, may have different lighting needs.

Although the "easily readable day and night" standard is primarily performance-based, it is the NRC's view that compliance with an up-to-date version of the Americans with Disabilities Act (ADA) signage standards (currently set forth at 28 CFR Part 36, Appendix A, section 4.30) will satisfy the "easily readable day and night" standard with respect to those aspects of sign design and placement that the ADA standards address. In their present version, for instance, the ADA standards address topics such as character proportion, character height, finish and

contrast, and mounting location and height. Providing licensees the option of relying upon the ADA standards to help ensure compliance with the "easily readable day and night" standard should promote an appropriate balance of flexibility and predictability. The ADA standards may not, however, address all aspects of the "easily readable day and night" standard. For example, the current ADA standards do not address readability at night. Therefore, the ADA standards may, in practice, serve only as partial guidance with respect to sign design and placement.

One commenter recommended that the rule require licensees to provide a means for workers and visitors who lawfully possess weapons to temporarily store them at facility entrances prior to entering, such that the weapons could be retrieved later upon exiting. In the NRC's view, the presence or absence of temporary weapons storage for this purpose is primarily a convenience and logistical issue of potential concern to licensees, their employees, and other plant visitors; it is not an issue of significant regulatory concern that the NRC must address. Therefore, the final rule will neither prohibit nor mandate the presence of such temporary weapons storage at the entrances to affected facilities or installations.

Similarly, the posting of additional notices on roadways leading to checkpoints or parking areas is neither required nor prohibited by the rule and is, therefore, left to the licensee's discretion. It is important to note, however, that the location of a posted notice will define the point at which introduction into the facility occurs for purposes of this final rule, at least where introduction occurs at a traditional vehicle or pedestrian entrance to the facility. Accordingly, licensees wishing to post notices in addition to those required by § 73.75, such as to provide advance notice about the § 73.81 criminal penalties to workers or visitors who are approaching a facility entrance or a courtesy storage site for prohibited items, would be advised to ensure that such notices will not be mistaken for the notices required to be posted at facility entrances under § 73.75. This could be accomplished, for instance, by not using the precise language on the "advance warning" notices that is required to be used on the notices posted pursuant to § 73.75. Such additional "advance warning" notices, of course, would not take the place of the

notices that § 73.75 requires to be posted at all vehicle and pedestrian entrances to each protected facility or installation.

Although the text of the final rule does not specifically address such situations, there may, as a practical matter, be cases in which a covered facility does not require its own posted notices. This would seem most likely to occur when one covered facility is embedded completely within the protected area of another covered facility (for example, an independent spent fuel storage facility located entirely within a nuclear power plant's protected area). Because § 73.75(b)(1) requires the posting of notices for protected areas only at the protected area's entrances, the embedded facility would not require its own notices if none of the embedded facility's entrances serve as entrances to the larger protected area.

One non-substantive change to the § 73.75 posting provision is that a new subsection 73.75(a) has been added to identify the categories of facilities to which § 73.75 applies. This eliminates an unnecessary cross reference to § 73.81(c). Another non-substantive change involves § 73.81(c)(2) of the proposed rule. The requirement found in that provision was redundant, serving merely to remind readers that there are associated posting requirements in § 73.75. Because some of the definitions in § 73.81(c) of the final rule perform a similar reminder function by referencing the § 73.75 posting requirements, § 73.81(c)(2) is unnecessary and has been removed.

Definitions of Key Terms

The unauthorized introduction—whether by carrying, transporting, discharging of a firearm, or otherwise—of weapons, explosives, or other dangerous instruments or materials into or upon the area marked by the posted notices will constitute a Federal crime under this final rule. For purposes of this final rule, "without authorization" means lacking authorization, as part of one's official duties, to carry the item in question. Accordingly, the introduction of weapons by security guards, peace officers, or military personnel as part of their official duties would be "authorized" and these individuals would not be subject to criminal sanctions under this rule.

Additionally, the introduction of potentially dangerous industrial tools, machinery, or other materials into a facility as part of one's job duties would likewise not be subject to criminal sanctions under this rule.

As noted above, a new term "protected facility or installation" has been added to the final rule. This term, which encompasses solely those portions of facilities that the criminal penalties are meant to protect, is included to ensure that the posting requirements under § 73.75 and the criminal penalty provisions under § 73.81 will be consistent with one another (a task previously performed by the proposed rule's definition of "introduce") and to create a simple means of referring, in § 73.81(c)(1), to the facility areas that provision is meant to cover.

The terms "dangerous weapons," "dangerous instrument or material," and "explosives" are not defined in the statute that these regulations would implement. In addition, the DOE regulations referred to above utilize these same terms to define comparable criminal conduct but do not define them. The NRC has determined, however, that enforcement could be enhanced by providing definitions for at least some of these terms. Furthermore, a number of public comments recommended providing definitions to promote clarity and consistency in the rule's implementation.

Accordingly, the NRC, after consultation with DOJ, has adopted a set of definitions from existing Federal criminal statutes. A newly inserted definition for the rule's term "dangerous weapon" references existing definitions found at 18 U.S.C. 921(a)(3) and 26 U.S.C. 5845(a) for the term "firearm" and the 18 U.S.C. 930(g)(2) definition of the term "dangerous weapon."[1] Although these relatively broad incorporated definitions may overlap with one another in many respects, the rule references each of them in order to ensure that no legitimately dangerous items will be inadvertently left uncovered by this rule. In addition, a new definition for "explosive" incorporates the definition of "explosive" found at 18 U.S.C. 844(j). The referenced

[1] Because the term "dangerous weapon" as used in 18 U.S.C. 930(g)(2) does not expressly cover firearms, the NRC believes it is appropriate to incorporate definitions of "firearm" as well.

"firearm" definitions do provide exceptions for antique weapons, certain recreational and sporting guns, and army surplus ordinance. Those exceptions, however, will have no effect for purposes of this final rule, because antique weapons, recreational and sporting guns, and army surplus ordinance still fall within the terms of the 18 U.S.C. 930(g)(2) definition of "dangerous weapon," which broadly covers any "weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury." This is appropriate because even the types of weapons excepted under the "firearm" definitions are not appropriate for introduction, without authorization, into highly secure nuclear facilities.

The NRC does not plan to issue guidance for licensees beyond what is contained in this statement of considerations to further define these terms. The NRC considers extensive guidance to licensees regarding the reporting requirements associated with this final rule to be unnecessary. The purpose of the rule is to criminalize the introduction of items that licensee security plans should already be prohibiting as part of their existing security efforts. Such items include guns, explosives, and any other items that would pose a legitimate security threat if brought into a protected facility without authorization. Unremarkable personal items such as pocket knives attached to key chains, butter knives in lunch boxes, and so on are not intended to be covered by this rule, and so would not trigger any licensee reporting requirements absent some further facts (such as, for example, evidence of intent to commit sabotage) which would implicate some other criminal provision or other basis for reporting the incident. Indeed, the 18 U.S.C. 930(g)(2) definition of "dangerous weapon," which the final rule's definition of "dangerous weapon" incorporates, expressly excludes pocket knives with blades less than 2 1/2 inches long. With these principles in mind, as well as the additional clarity provided by the definitions of "dangerous weapon," "firearm," and "explosive" that are being incorporated from existing Federal criminal statutes, the NRC expects that licensees will be able to comply with the reporting requirements associated with this rule without additional formal guidance. As

explained in the next section of this statement of considerations, however, the NRC, after consulting with DOJ, will consider whether to adopt any additional guidance that is submitted by the regulated community to the NRC for review.

As to the term "willful," the NRC is also declining a commenter's recommendation that the term be defined. The NRC expects that prosecutors and courts will define the term as it is usually defined when used in Federal criminal statutes. The U.S. Supreme Court has stated that, "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998). One common way to prove the existence of a "bad purpose" is to show that the defendant "acted with knowledge that his conduct was unlawful." *Id.* at 192. This is consistent with one commenter's suggestion that the definition of willful should refer to "evidence of subterfuge, masking, or malevolent intent," because such evidence would tend to indicate that the defendant knew the conduct in question was unlawful. Further, the easily readable notices posted at all vehicle and pedestrian entrances will help to ensure that all visitors are aware of the prohibition.

The definition of the term "introduce," which was included in the proposed rule, is replaced in the final rule for clarification purposes with a new § 73.81(c)(3), which serves to define the entire phrase that is used in § 73.81(c)(1) (i.e., "carrying, transporting, or otherwise introducing or causing to be introduced"). The new § 73.81(c)(3) removes any possible suggestion that the terms "carrying," "transporting," and "otherwise introducing" should be analyzed separately, rather than as a single concept meant to cover any conceivable method of introduction. The new provision also more expressly accounts for the fact that entrance to a protected facility or installation might occur at a location that is not a traditional vehicle or pedestrian entrance, and which therefore might not be in the vicinity of a notice posted pursuant to § 73.75. For instance, a perpetrator carrying a prohibited item might try to enter the facility by breaching a fence, wall, or other barrier, or by some other means that occurs away from the vehicle and pedestrian entrances and any § 73.75 notices. Under the proposed rule's

formulation, it could have been unclear in these circumstances whether or when an introduction has actually occurred, because the proposed rule relied entirely upon the location of the notice to define when an "introduction" occurs. The new § 73.81(c)(3), therefore, relies upon a common sense concept of entering a facility for those instances where entry does not occur at a traditional "entrance." When entrance to the facility does occur at a traditional vehicle or pedestrian entrance, however, the § 73.75 notice will remain the boundary marker for purposes of this rule.

Relationship of Rule to Licensee Security Procedures

As explained in the statements of consideration for the proposed rule, this rule should not require any changes to licensee security procedures. Under § 73.71(b)(1) and paragraph I(d) of appendix G to Part 73, licensees are required to report within one hour, followed by a written report within 60 days, "the actual or attempted introduction of contraband into a protected area, material access area, vital area, or transport." For purposes of the final rule, weapons, explosives, or other dangerous instruments or materials that are introduced without authorization would be "contraband." Licensees should note that the purpose of this rule is to broaden Federal prosecutorial authority, not to change licensee security practices.

With that said, licensees who suspect they have uncovered actual or attempted violations of this rule are encouraged to promptly notify local or Federal law enforcement authorities, who may provide additional guidance as circumstances warrant. Licensees may also, of course, contact the NRC for further guidance. The NRC does not currently plan to issue any additional guidance regarding the procedures that licensees should employ upon discovering actual or suspected violations or attempted violations of this rule. If licensees desire additional guidance regarding the procedural steps to follow after discovery of suspected or actual violations or attempted violations of this rule, the NRC is willing to review and consider whether to adopt any guidance that the regulated community sees fit to propose. The NRC anticipates that it would consult with DOJ before endorsing any proposed guidance.

Finally, the NRC notes that the preexisting responsibilities of licensees to maintain the security of their facilities are not altered by the fact that this rule is now making one particular class of security threat—the unauthorized introduction into protected facilities of dangerous weapons, explosives, or other dangerous instruments or materials—a Federal crime.

## IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this final rule, the NRC is establishing criminal penalties for the unauthorized introduction of weapons or explosives into or upon certain facilities and installations subject to the regulatory authority of the NRC. This action does not constitute the establishment of a standard that contains generally applicable requirements.

## V. Finding of No Significant Environmental Impact: Environmental Assessment

The NRC has determined under the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and that, therefore, an environmental impact statement is not required. The basis for this determination is as follows:

The Need for the Rule:

This final rule is needed to implement § 229 of the AEA. In § 654 of the Energy Policy Act of 2005, Congress amended § 229 of the AEA, authorizing the NRC to issue regulations making it a Federal crime to, without authorization, introduce weapons or explosives into specified classes of facilities and installations subject to the regulatory authority of the NRC.

Section 229 was also amended to require that each such regulation be posted conspicuously at the location involved.

Environmental Impacts of the Rule:

The NRC has completed its evaluation of the rule and concludes that it will not cause any significant environmental impact. The only action required by the rule is the requirement in § 73.75 that licensees place a notice at each entrance to the protected area and to any buildings not within a protected area that contain special nuclear material, byproduct material, or source material and which are required to have security plans under 10 CFR Part 73. Licensees already post notices at the entrances to facilities, and this rule allows licensees to combine the notice required in § 73.75 with these other notices. The NRC requested public comments on the environmental assessment included with the proposed rule, which likewise predicted that there would be no significant environmental impacts, but no comments on the topic were received. The final rule includes essentially the same posting requirements that were found in the proposed rule, with only minor clarifications as to which buildings and areas are, and are not, covered by the posting requirements, as well as additional information regarding permissible sign formats. Therefore, the NRC has concluded that there will be little to no environmental impact of creating and posting the notices required by this final rule. Accordingly, the NRC concludes that there will be no significant environmental impacts associated with this action.

Alternatives to the Proposed Action:

As an alternative to the proposed action, the NRC staff considered not promulgating this rule (the "no-action" alternative). This would result in leaving unfulfilled the congressional authorization the NRC had sought. Moreover, because implementation of the rule would not result in any significant environmental impacts, the no-action alternative would not significantly reduce environmental impacts.

Accordingly, the NRC has determined in this environmental assessment that there will be no significant offsite impact to the public from this action.

## VI. Paperwork Reduction Act Statement

This rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule does not establish any reporting requirements. In addition, the posting requirements contained in this rule are not included in the definition of information collection. This is because the text to be printed on the required notices is being completely supplied by NRC regulation (10 C.F.R. 73.75(b)(3)), and a requirement to publicly disclose information that was originally provided by the Federal Government does not constitute an "information collection." 5 CFR 1320.3(c)(2).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

## VII. Regulatory Analysis

A regulatory analysis has not been prepared for this regulation. Congress authorized the NRC to implement by regulation § 654 of the Energy Policy Act of 2005, which establishes as a Federal crime the unauthorized introduction of weapons or explosives into NRC-designated facilities. The AEA requires that signs be conspicuously posted to warn facility entrants of the criminal prohibition. The only costs associated with implementing the rule are the costs to procure, post, and maintain these signs. The NRC estimates these costs to be $50 per sign, with an estimated average of six signs per affected facility, for an average total cost of $300 per facility. Based upon the number of facilities that would be covered by this rule if it were effective

today, the NRC views $50,000 as a conservative industry-wide cost estimate. The NRC considers this cost to be reasonable because of the express congressional requirement that any facilities covered by regulations promulgated under AEA § 229a.(1) post such regulations "conspicuously," because the signs are required to be posted only at locations where entry into covered facilities would ordinarily occur, and because the signs will help prevent unintentional criminal violations.

## VIII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the NRC certifies that this rule does not have a significant economic impact on a substantial number of small entities. The companies that own the facilities affected by this rule do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

## IX. Backfit Analysis

The NRC has determined that a backfit rule, 10 CFR 50.109, 70.76, 72.62, 76.76, does not apply to this rule and that a backfit analysis is not required. A Backfit analysis is not required because the only actions required by the rule are the procuring and posting of signs. The conspicuous posting of notices is expressly required by § 229a.(2) of the AEA for any facility covered by regulations promulgated under § 229a.(1), and so the requirement to post notices does not result from an exercise of NRC discretion. In any event, the posting of notices pursuant to this rule does not require the modification of or additions to systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.

Likewise, the criminal penalties established by this rule merely authorize Federal prosecution of certain crimes, and therefore do not require the modification of or additions to

systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.

## X. Congressional Review Act

In accordance with the Congressional Review Act (5 U.S.C. 801-808), the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of the Office of Management and Budget.

## XI. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the NRC on June 30, 1997, and published in the Federal Register on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility Category "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA, or the provisions of Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State.

List of Subjects in 10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping 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. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 73.

**PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS**

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005). Section 73.1 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C, 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96 295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99 399, 100 Stat. 876 (42 U.S.C. 2169).

2. Section 73.75 is added to read as follows:

§ 73.75 Posting.

(a) This section applies to:

(1) Production or utilization facilities;

(2) High-level waste storage or disposal facilities and independent spent fuel storage facilities;

(3) Uranium enrichment, uranium conversion, or nuclear fuel fabrication facilities.

(b) (1) Licensees or certificate holders operating facilities described in subsection (a) that have a protected area shall conspicuously post notices at every vehicle and pedestrian entrance to the protected area.

(2) Licensees or certificate holders operating facilities described in subsection (a) that include buildings not within a protected area that nonetheless contain special nuclear material, byproduct material, or source material shall conspicuously post notices at the personnel and vehicle entrances to each such building, except with respect to buildings for which no security plan is required under this part.

(3) The required notices must state: "The willful unauthorized introduction of any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property into or upon these premises is a Federal crime. (42 U.S.C. 2278a.)"

(4) Every notice posted under this section must be easily readable day and night by both pedestrian and vehicular traffic entering the facility or installation.

(5) These notices may be combined with other notices.

(c) This section does not apply to facilities that, in addition to being regulated by the NRC under a license or certificate of compliance issued by the Commission, are also covered by U.S. Department of Energy regulations imposing criminal penalties, and associated posting requirements, under section 229 of the Atomic Energy Act with respect to unauthorized introduction of dangerous weapons, explosives, or other dangerous instruments or materials likely to produce substantial injury or damage to persons or property.

3. In § 73.81, paragraph (b) is revised and paragraphs (c) and (d) are added to read as follows:

§ 73.81 Criminal penalties.

* * * * *

(b) The regulations in part 73 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§ 73.1, 73.2, 73.3, 73.4, 73.5, 73.6, 73.8, 73.25, 73.45, 73.75, 73.80, and 73.81.

(c) (1) No person without authorization may carry, transport, or otherwise introduce or cause to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property into or upon a protected facility or installation.

(2) As used in this section:

(i) "Protected facility or installation" means any production or utilization facility, high-level waste storage or disposal facility, independent spent fuel storage facility, uranium enrichment, uranium conversion, or nuclear fuel fabrication facility, but does not include those portions of such facilities that are not required under § 73.75(b) of this part to be identified by notices posted at their pedestrian and vehicle entrances, and does not include facilities described in § 73.75(c) of this part.

(ii) "Without authorization" means not authorized as part of one's official duties to carry the weapon, explosive, or other instrument or material;

(iii) "Dangerous weapon" includes any firearm, as defined in either 18 U.S.C. 921 or 26 U.S.C. 5845, or dangerous weapon, as defined in 18 U.S.C. 930;

(iv) "Explosive" means any explosive as defined in 18 U.S.C. 844(j).

(3) An item, such as a dangerous weapon, explosive, or other dangerous instrument or material, is considered to have been carried, transported, or otherwise introduced or caused to be introduced into or upon a protected facility or installation for purposes of paragraph (c)(1) once the item has traveled past a notice posted pursuant to § 73.75 of this part at a vehicle or pedestrian entrance to the protected facility, or once the item has entered the protected facility or installation at a location that is not a vehicle or pedestrian entrance to the facility, whether

such entry is accomplished through, over, under, or around a fence, wall, floor, roof, or other structural barrier enclosing the protected facility or installation or by any other means.

(4) For all protected facilities or installations that do not possess special nuclear material, byproduct material, or source material as of the effective date of this rule, this provision shall take effect upon receipt of such material at the applicable facility or installation.

(d) Sections 229.b and 229.c of the Atomic Energy Act of 1954, as amended, provide for criminal penalties for willful violations of regulations issued under section 229.a of the Act. The regulations in Part 73 that are issued under section 229.a of the Act are as follows: §§ 73.75 and 73.81(c).

Dated at Rockville, Maryland, this __ day of ___, 2009.

For the Nuclear Regulatory Commission.

_____

Annette Vietti-Cook,
Secretary of the Commission.

**Enclosure 2**

**Statutory Definitions Referenced in Draft Final Rule**

*Definition of "firearm" from 18 U.S.C. § 921*

**(a)** As used in this chapter--

. . . .

**(3)** The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

**(4)** The term "destructive device" means--

**(A)** any explosive, incendiary, or poison gas--

**(i)** bomb,

**(ii)** grenade,

**(iii)** rocket having a propellant charge of more than four ounces,

**(iv)** missile having an explosive or incendiary charge of more than one-quarter ounce,

**(v)** mine, or

**(vi)** device similar to any of the devices described in the preceding clauses;

**(B)** any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

**(C)** any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

. . . .

**(16)** The term "antique firearm" means--

**(A)** any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

**(B)** any replica of any firearm described in subparagraph (A) if such replica--

**(i)** is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

**(ii)** uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

**(C)** any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

*Definition of "firearm" from 26 U.S.C. § 5845*

**(a)** Firearm.--The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

**(b)** Machinegun.--The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

**(c)** Rifle.--The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

**(d)** Shotgun.--The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

**(e)** Any other weapon.--The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

**(f)** Destructive device.--The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other

propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

**(g)** Antique firearm.--The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

*Definition of "dangerous weapon" from 18 U.S.C. § 930*

**(g)** As used in this section --

. . . .

**(2)** The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

*Definition of "explosive" from 18 U.S.C. § 844*

**(j)** . . . the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.