

# **POLICY ISSUE NOTATION VOTE**

April 26, 2012

SECY-12-0066

FOR: The Commissioners

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: CRIMINAL PENALTIES FOR THE UNAUTHORIZED INTRODUCTION  
OF WEAPONS INTO FACILITIES DESIGNATED BY THE U.S.  
NUCLEAR REGULATORY COMMISSION AND FOR SABOTAGE OF  
NUCLEAR FACILITIES OR FUEL

## PURPOSE:

The purpose of this paper is to request Commission approval of two staff recommendations about rulemakings for criminal penalties. First, the staff recommends that the Commission approve the staff's assessment that the wrongful introduction of weapons on the premises of facilities possessing byproduct material, such as hospitals and academic facilities, should not be subject to criminal sanctions under Section 229, "Trespass on Commission Installations," of the Atomic Energy Act of 1954, as amended (AEA). Second, the staff recommends that the Commission defer a decision on whether to proceed with a rulemaking to add certain radioactive materials or other property to the scope of criminal penalties for sabotage identified in Section 236, "Sabotage of Nuclear Facilities or Fuel," of the AEA. This paper does not address any new commitments or resource implications.

## SUMMARY:

In response to Commission direction, the staff established a working group consisting of representatives from the Office of Nuclear Security and Incident Response (NSIR), the Office of Federal and State Materials and Environmental Management Programs, and the Organization of Agreement States (OAS) to obtain additional input and to assess the need for rulemaking to develop additional regulations implementing the criminal penalty provisions of either

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Section 229 or Section 236 of the AEA, or both. Based on the results of staff's assessment (enclosed), the staff does not consider that future rulemaking is warranted for designating additional facilities, including hospitals and academic facilities, as being within the scope of Section 229 of the AEA. The staff also recommends that the decision on whether to conduct a rulemaking to designate certain radioactive materials or other property as being within the scope of Section 236 should be deferred while the Commission considers action on chemical security and Recommendation 2 of the 2010 Radiation Source Protection and Security Task Force Report and while Congress considers other pertinent criminal sanctions legislation.

#### BACKGROUND:

In 1956, Congress added Section 229 to the AEA. Section 229 made it a Federal crime to bring weapons or explosives, without authorization, into facilities owned by the Atomic Energy Commission. After the enactment of the Energy Reorganization Act in 1974, this provision covered facilities owned or occupied by the Department of Energy, as well as the buildings occupied by the Nuclear Regulatory Commission (NRC). However, Section 229 of the AEA did not extend to facilities regulated by the NRC.

Over the years, incidents of individuals bringing weapons into NRC-licensed facilities without authorization have occurred. Fortunately, the individuals were not terrorists or others with malevolent intent and no damage occurred to these facilities. In such circumstances, the Commission could take action against licensees for violation of security requirements, but could not refer the matter to the Department of Justice (DOJ) for criminal prosecution of the offending individual under Section 229 of the AEA. Therefore, any criminal sanctions had to be sought by the State, under State law.

Beginning in the late 1980s, the Commission submitted legislative proposals to the Congress requesting legislation that would make it a Federal crime to bring weapons or other explosives, without authorization, into NRC-designated facilities. In 2005, Congress enacted Section 654 of the Energy Policy Act of 2005 (EPAAct). Section 654 of the EPAAct amended Section 229 of the AEA, making it a Federal crime to bring, without authorization, weapons or explosives into facilities designated by the Commission. NRC staff informally told Congressional staff before the enactment of the legislation that if given this authority, the Commission would likely designate a limited class of facilities that would pose the highest sabotage risk.

The NRC published a proposed rule in the *Federal Register* (73 FR 51378, September 3, 2008) implementing the NRC's authority to impose Federal criminal penalties on individuals who, without authorization, introduce weapons or explosives into specified classes of facilities and installations subject to the regulatory authority of the NRC. In addition, the NRC sought comments on whether the rule's scope should be extended beyond the facilities listed in the proposed rule to cover hospitals and other classes of facilities. The NRC received 17 comments on the proposed rule. These comments were addressed in the final rule published in the *Federal Register* on October 14, 2009 (74 FR 52667). The final rule did not designate facilities possessing byproduct material, such as hospitals and academic facilities, as being within the scope of Section 229 of the AEA.

In 2005, Section 655 of the EPAAct amended Section 236 of the AEA to provide criminal sanctions for sabotage of certain commercial nuclear facilities, nuclear fuel, and material or

property not previously within the scope of Section 236. Section 236.a(7) of the AEA authorizes the NRC to identify certain radioactive materials or other property for inclusion within the scope of the criminal penalties in Section 236 if the Commission determines by rulemaking or order that such material or other property is of significance to public health and safety or the common defense and security.

In SECY-09-0087, "Final Rule Establishing Criminal Penalties for the Unauthorized Introduction of Weapons into Facilities Designated by the Nuclear Regulatory Commission," dated June 12, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091630284), the staff proposed an approach for conducting a follow-on rulemaking to consider whether any other facilities or other radioactive material were appropriate for designation under Section 229 or Section 236 of the AEA. In its Staff Requirements Memorandum (SRM) on SECY-09-0087, dated September 22, 2009 (ADAMS Accession No. ML092650473), the Commission disapproved the staff's request to conduct a separate, follow-on rulemaking addressing the inclusion of byproduct material facilities such as hospitals, academic facilities, and other types of facilities within the scope of Section 229 of the AEA. Instead, the Commission directed the staff to:

Conduct an assessment to determine whether including any such facilities is warranted considering existing Federal, State, and local laws regarding the introduction of firearms and other weapons into these types of facilities, as well as other relevant facility specific considerations. The staff should engage with appropriate stakeholders, including the Organization of Agreement States. If the staff concludes, based on its assessment, that additional rulemaking is warranted, it should submit a rulemaking plan for the Commission's approval explaining the need for the rule and describing the views of stakeholders.

The staff has now completed that assessment.

#### DISCUSSION:

In response to SRM-SECY-09-0087, the staff sought stakeholder input as part of its assessment (enclosed) to determine whether the wrongful introduction of weapons or explosives into hospitals, academic facilities, and other types of facilities possessing byproduct material should be subject to criminal sanctions under Section 229 of the AEA. In conducting this assessment, the staff considered comments received in response to the proposed rule issued on September 3, 2008 (73 FR 51378) Criminal Penalties; Unauthorized Introduction of Weapons. In addition, the staff solicited additional comments on these issues through a 90-day comment period (76 FR 43937, July 22, 2011), a Webinar, and through dialogue with the OAS.

In response to these additional outreach efforts, four new comments were received by the staff. All four new commenters opposed conducting further rulemaking to expand the scope of Section 229 to implement criminal penalties for the wrongful introduction of weapons or explosives into hospitals, academic facilities and other types of byproduct facilities. Only one commenter supported rulemaking with respect to Section 236 of the AEA to implement criminal penalties for sabotage. The following sections summarize the staff's conclusions based on the recent assessment.

### Criminal Penalties for Wrongful Introduction of Weapons or Explosives

The staff has concluded that designating specified facilities possessing byproduct material as being within the scope of Section 229 of the AEA is not warranted. The staff does not consider that applying the additional criminal penalty provisions of Section 229 would prove to be a significant additional deterrent against individuals who are determined to commit malevolent acts at hospitals, academic facilities and other additional classes of byproduct material facilities. Therefore, the burden that would be imposed as a result of a rulemaking to designate additional classes of facilities possessing byproduct material would not be justified. Both the NRC and the Agreement States would incur costs associated with the rulemaking and subsequently ensuring licensee compliance with the posting of warning signs (potentially, about 360 NRC licensees and about 1,200 additional Agreement State licensees based on the National Source Tracking System). Licensees would incur costs to post and maintain warning signs.

Furthermore, the States and other Federal agencies have a variety of existing laws available to prosecute and penalize individuals determined to commit such malevolent acts at hospitals, academic facilities and other additional classes of facilities possessing byproduct material. In some cases, these laws impose more stringent penalties than those authorized under Section 229 of the AEA. Additionally, the Administration is urging Congress to promptly enact legislation which will implement the International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention for the Physical Protection of Nuclear Material. This legislation would impose criminal sanctions on any individual who knowingly and unlawfully possesses or uses radioactive materials or a radioactive device with the intent of causing death, serious bodily injury or substantial damage to property or the environment. This legislation may be enacted before the NRC could publish a final rule designating specified facilities possessing byproduct material as being within Section 229. Moreover, the possible sanctions under the proposed legislation are greater than those contained in the AEA.

The NRC, in its regulations implementing Section 229 of the AEA, has already identified the most significant classes of facilities and materials that should be subject to the criminal sanctions set forth in this section of the AEA. The NRC is not legally obligated to designate additional facilities under Section 229. For the reasons set forth, the staff does not perceive a need for further rulemaking to designate additional specified facilities possessing byproduct material as being within the scope of Section 229 of the AEA.

### Criminal Penalties for Sabotage

The NRC has not previously issued regulations to implement the authority of Section 236 of the AEA. Instead, the agency has viewed the language of this statute as plain enough to enable the DOJ to initiate prosecutions for criminal acts, particularly involving the most significant facilities that the NRC regulates, including nuclear power reactors and major fuel cycle facilities. A rulemaking would allow the NRC to identify certain radioactive material or other property for inclusion within the scope of Section 236.a(7) if the Commission determines that such material or other property is significant to the public health and safety or the common defense and security.

In assessing whether further rulemaking to expand the scope of Section 236 of the AEA is warranted, the NRC staff considered the following additional types of material:

- materials in Appendix I, “Category 1 and 2 Radioactive Materials,” to Title 10 of the *Code of Federal Regulations* Part 73, “Physical Protection of Plants and Materials”;
- production reactor spent nuclear fuel (SNF) and naval reactor SNF;
- source material in the physical form of uranium hexafluoride (UF<sub>6</sub>).

The Category 1 and 2 radioactive materials were selected for review based on the analysis of a significant radiological dispersal device discussed in the 2010 Radiation Source Protection and Security Task Force Report. Production reactor SNF, naval reactor SNF, and UF<sub>6</sub> were selected to fill gaps in Sections 236.a(1) and 236.a(3) of the AEA. A rulemaking to expand the scope of Section 236 would provide Federal criminal sanctions for destroying or causing damage to these materials during transport to or from NRC-licensed facilities.

Currently, Section 236.a(3) of the AEA pertains only to SNF from a utilization facility. The primary benefit for including production reactor and naval reactor SNF as radioactive material under the authority of Section 236.a(7) is to fill a gap and provide Federal criminal sanctions for destroying or causing damage to the material during transport to or from NRC-regulated facilities. Because production reactor and naval reactor SNF could be stored at or transported with SNF from utilization facilities to an NRC-regulated geological repository operating area, the same Federal criminal sanctions for malevolent acts against this type of material may be appropriate. However, because of the uncertainties in the national strategy for disposing of SNF, there does not appear to be a compelling need, at this time, for a rulemaking to expand the scope of Section 236 to include these materials. Including UF<sub>6</sub> as radioactive material under the authority of Section 236.a(7) would provide Federal criminal sanctions for malevolent acts during transport. The basis for concluding that sabotage of UF<sub>6</sub> could cause consequences that are significant to public health and safety would need to be consistent with the outcomes of the option selected for regulating chemical security at NRC-licensed facilities.<sup>1</sup>

Including certain radioactive material or other property within the scope of the criminal penalties in Section 236 of the AEA may provide DOJ with additional tools for combating terrorists and other malevolent actors. However, a determination of the list of radionuclides and quantities to use in a subsequent rulemaking would need to be coordinated with NRC activities to implement the Recommendation 2<sup>2</sup> of the 2010 Radiation Source Protection and Security Task Force Report as well as consideration of ongoing actions related to chemical security. These activities may result in revising the security assessment decision making framework methodology<sup>3</sup> to consider contamination and/or resultant economic consequences. The staff can not develop the required regulatory basis for a rulemaking to expand the scope of Section 236 to include these

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<sup>1</sup> SECY-11-0108, “Regulation of Chemical Security,” dated August 5, 2011 (ADAMS Accession No. ML111460426) discusses this issue.

<sup>2</sup> The task force recommendations appear in SECY-11-0169, “U.S. Nuclear Regulatory Commission Implementation Plan for the Radiation Source Protection and Security Task Force Report” (ADAMS Accession No. ML113070551).

<sup>3</sup> Attachment 2, “Framework Methodology” (ADAMS Accession No. ML043200720) to SECY-04-0222, “Decision-Making Framework for Materials and Research and Test Reactor Vulnerability Assessments,” dated November 24, 2004 (ADAMS Accession No. ML043080333) provides details on the security assessment decision making framework methodology.

materials until these activities are completed.

The NRC could conduct a rulemaking to implement the provisions of Section 236 using a "common defense and security" basis without the need for the Agreement States to have compatible program elements. An Agreement State licensee authorized to possess Category 1 or Category 2 radioactive materials would be subject to such a rule. A rulemaking expanding the scope of Section 236 to include these additional types of radioactive material and other property would pose no burden on licensees. The only burden would be on the NRC to support rulemaking. However, this burden to the NRC must be weighed against the benefits resulting from such a rulemaking. The staff does not consider that designating these additional materials as being within the scope of Section 236 would provide significant additional deterrence against individuals determined to commit malevolent acts. Therefore, the staff considers there would be minimal decrease in the threat or risk of sabotage of these materials.

Furthermore, a decision to proceed with a rulemaking to include Category 1 and 2 radioactive materials and UF<sub>6</sub> is dependent upon the NRC's action to implement the Recommendation 2 of the 2010 Radiation Source Protection and Security Task Force Report, and further Commission direction to the staff on actions related to chemical security. Additionally, because of the uncertainties in the national strategy for disposing of high-level waste, the staff does not consider that there is a compelling need, at this time, for a rulemaking to include production and naval reactor SNF within the scope of Section 236 of the AEA. As discussed above, the States and other Federal agencies already have a variety of laws available to prosecute and penalize individuals determined to commit malevolent acts against Commission-designated material or property. Finally, legislation to implement new nuclear security conventions that would impose increased criminal sanctions for sabotage of nuclear materials may be enacted before the NRC could publish a final rule. Such legislation would likely obviate the need for the NRC to engage in a rulemaking to designate additional materials as being within the scope of Section 236.

The NRC is not legally required to designate additional facilities under Section 236 of the AEA. For the reasons set forth above, the staff recommends deferral of a decision on the need for rulemaking to designate additional materials as being within the scope of Section 236.

#### RECOMMENDATIONS:

The staff recommends that the Commission approve the following:

1. No further rulemaking is warranted to impose Federal criminal penalties in Section 229 on individuals who, without authorization, introduce weapons or explosives into facilities possessing byproduct material.
2. Rulemaking to establish Federal criminal penalties for sabotage of materials and property under Section 236 should be delayed until after the resolution of 2010 Task Force Recommendation 2 and consideration of actions related to chemical security and while Congress considers other pertinent criminal sanctions legislation.

#### COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. The Office of General Counsel has reviewed this Commission paper and

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has no legal objection. The staff considered the views of OAS in the development of the enclosed working group assessment.

***/RA by Martin J. Virgilio for/***

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Enclosure:  
Working Group Assessment

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Enclosure:  
Working Group Assessment

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