



## U.S. Nuclear Regulatory Commission Issues Final Rule Imposing Criminal Penalties for Unauthorized Introduction of Weapons in Certain Licensed Facilities

### Introduction

On October 14, 2009, the U.S. Nuclear Regulatory Commission (“NRC”) published in the Federal Register (74 Fed. Reg. 52667) a final rule which would authorize the imposition of federal criminal penalties for the introduction, without authorization, of weapons or explosives into certain facilities and installations regulated by the NRC. The rule becomes effective on April 12, 2010, and requires the installation of specified signage warning individuals against unauthorized introduction of weapons or explosives.

### Discussion

#### *Legal Basis*

Section 654 of the Energy Policy Act of 2005, “Unauthorized Introduction of Dangerous Weapons,” amended Section 229 of the Atomic Energy Act of 1954 (42 U.S.C. 2278a) (“AEA”) to authorize the NRC to issue regulations making it a federal crime to bring without authorization weapons or explosives into regulated facilities designated by the NRC. The covered facilities include production and utilization facilities and uranium enrichment, uranium conversion and fuel fabrication facilities. Additionally, the rule would apply to high-level waste storage and disposal facilities and independent spent fuel storage installations. For all such protected facilities or installations that do not possess special nuclear byproduct material or source material as of the effective date of the rule, the provision takes effect upon receipt of such material. However, it is not clear when the requirements terminate, *e.g.*, whether this rule continues to apply to covered facilities in decommissioning until the license is terminated.

The final rule is only applicable to certain portions of the facilities. The NRC found that only certain portions of facilities will necessarily pose sufficient security concerns to justify imposition of criminal penalties. Thus, generally, the rule’s application is limited to areas within the protected area and to other areas that are not within a protected area, *per se*, but which are covered by security plans under 10 C.F.R. Part 73. Facilities and installations that already must comply with signage requirements under Department of Energy regulations similar to those promulgated by the NRC are exempted from the NRC’s rule.

#### *Penalties*

Under the terms of the final rule, whoever willfully introduces without authorization weapons or explosives into any protected facility or installation that is enclosed by a fence, wall, floor, roof or other barrier would be guilty of a misdemeanor which is punishable by a fine not to exceed \$5,000

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or imprisonment by not more than one year or both (Section 229c of the AEA). Whoever willfully introduces without authorization weapons or explosives into any other protected facility or installation which is not so enclosed would be subject to a fine of not more than \$1,000 as set forth in Section 229b of the AEA. The Statements of Consideration note that the final rule does not interfere with state prosecution of such crimes, but does allow the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives or any other federal law enforcement agencies to investigate and the Department of Justice to prosecute in addition to or in lieu of a state government for the introduction of weapons or explosives.

### **Signage**

Section 73.75 fulfills the statutorily-mandated requirement that signs be posted conspicuously at all entrances to the protected area, as well as all entrances to buildings not within a protected area that nonetheless contains special nuclear material, byproduct material, or source material, except for those buildings for which security plans are not required under 10 C.F.R. part 73. The signs, with the verbiage contained in Section 73.75(b)(3), must be easily readable day and night by both pedestrian and vehicular traffic, *i.e.*, a performance-based standard. The NRC notes that compliance with the latest version of the Americans with Disabilities Act (“ADA”) signage standards will satisfy the performance standard with respect to those aspects of sign design and placement that the ADA standards address. Other required aspects, *e.g.*, readability at night, would still have to be addressed by each licensee. The posting of additional notices on roadways leading to checkpoints or parking areas is neither required nor prohibited by the rule, but left to a licensee’s discretion. However, inasmuch as the language prescribed by § 73.75 marks the jurisdictional boundary of the rule, signs on roadways not at entrances to protected areas should use wording different than the text of § 73.75 or otherwise indicate that it is advance notice of such requirements. The NRC takes no view on providing temporary storage facilities for workers and visitors who lawfully possess weapons at facility entrances prior to entering a covered facility such as the protected area. Licensees should carefully consider the ramifications of providing such storage.

### **Definitions**

The terms “dangerous weapons, dangerous instrument or material” and “explosives” are not defined in the statute. The NRC has adopted a set of definitions from existing federal criminal statutes. The NRC recognizes that these statutes are relatively broad and may overlap, but nonetheless fulfill the purpose that no legitimate dangerous items be inadvertently left out. For example, the referenced definitions do not provide exceptions for antique weapons, certain recreational and sporting guns, or army surplus ordinance. However, in the statement of considerations, the NRC

states that “[u]nremarkable 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 . . . .” 74 Fed. Reg. 52672, col. 1. The final rule’s definition of dangerous weapons expressly excludes pocket knives with blades of less than 2.5 inches long. As to the term “willful,” the NRC adopts the U.S. Supreme Court standard in *Bryer v. United States*, 524 U.S. 184, 191 (1988), that a willful act is one undertaken with a “bad purpose.” A common way to prove the existence of a “bad purpose” is to show the defendant “acted with knowledge that his conduct was unlawful.” *Id.* at 192. The NRC finds that the Supreme Court decision is consistent with a commenter’s suggestion that the evidence of willful should refer to “evidence of subterfuge, masking, or malevolent intent . . . .” 74 Fed. Reg. 52672, col. 2. Similarly, the NRC definition of “introduce” was meant to cover any conceivable method of introduction and would include the entrance to a protected facility or installation at a location that is not a traditional vehicle or pedestrian entrance. *Id.*

### **Reporting**

In accordance with § 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) of the actual or attempted introduction of contraband into 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.” The NRC also states that licensees who suspect they have uncovered actual attempted violations of this rule are encouraged to promptly notify local or federal law enforcement authorities who may provide additional guidance as circumstances warrant.

### **Conclusion**

The NRC’s final rule should be relatively straightforward to implement. In addition to the signage, some training of security personnel and additional guidance to site personnel may be required.

If there are any questions related to the interpretation or implementation of this new security rule, feel free to contact the undersigned.

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