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[NRC–2013–0132]

RIN 3150–AJ27

Hearings on Challenges to the Immediate Effectiveness of Orders

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations regarding challenges to the immediate effectiveness of NRC enforcement orders to clarify the burden of proof and to clarify the authority of the presiding officer to order live testimony in resolving these challenges.

DATES: This final rule is effective on November 19, 2015.

ADDRESSES: Please refer to Docket ID NRC–2013–0132 when contacting the NRC about the availability of information for this final rule. You may obtain publicly-available information related to this final rule by any of the following methods:

• *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0132. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room 01–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Esther Houseman, Office of the General Counsel, telephone: 301–415–2267, email: *Esther.Houseman@nrc.gov;* or Eric Michel, Office of the General Counsel, telephone: 301–415–1177, email: *Eric.Michel2@nrc.gov;* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations regarding the issuance of immediately effective orders to clarify the burden of proof in proceedings on challenges to the immediate effectiveness of such orders and the authority of the presiding officer in such proceedings to order live testimony. In NRC enforcement proceedings, the recipient of an order ordinarily may challenge the validity of that order before its terms become effective at a later specified date. However, in certain circumstances, the NRC may issue orders to regulated entities or individuals that are ''immediately effective,'' meaning the order's terms are effective upon issuance and remain in effect even during the pendency of a challenge. These amendments confirm that the recipient of the immediately effective order has the burden to initiate a challenge regarding the order's immediate effectiveness and present evidence that the order, including the need for immediate effectiveness, is not based on adequate evidence. The amendments also clarify that the NRC staff ultimately bears the burden of persuasion that immediate effectiveness is warranted. Additionally, these amendments confirm that the presiding officer in a challenge to the immediate effectiveness of an order may order live testimony, including cross examination of witnesses, if it will assist in the presiding officer's decision. These are not substantive changes to the agency's enforcement procedures, but rather confirm existing burdens and presiding officer authority.

In this final rule, the Commission is not adopting the previously proposed amendment [1] that would have incorporated the concept of ''deliberate ignorance'' as an additional basis upon which the NRC could take enforcement action against an individual for violating the rule. The Commission agrees with public commenters' concern that the subjectivity of the deliberate ignorance standard makes it difficult to implement. This difficulty would make the enforcement process more complex and burdensome, and any corresponding benefits would not outweigh these disadvantages. This decision is discussed in more detail in Section IV, ''Public Comment Analysis,'' of this document.

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I. Background

On January 4, 2006, the U.S. Nuclear Regulatory Commission (NRC) issued an immediately effective order to Mr. David Geisen, a former employee at the Davis-Besse Nuclear Power Station, barring him from employment in the nuclear industry for 5 years.[2] The order

[1] On February 11, 2014, the NRC published the proposed amendments in a proposed rule entitled, ''Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders'' (79 FR 8097). The NRC changed the title of this final rule to ''Hearings on Challenges to the Immediate Effectiveness of Orders'' to more clearly reflect that the proposed changes to the Deliberate Misconduct Rule were not adopted.

[2] *David Geisen,* LBP–09–24, 70 NRC 676 (2009), *aff'd,* CLI–10–23, 72 NRC 210 (2010).

charged Mr. Geisen with deliberate misconduct in contributing to the submission of information to the NRC that he knew was not complete or accurate in material respects. The U.S. Department of Justice (DOJ) later obtained a grand jury indictment against Mr. Geisen on charges under 18 U.S.C. 1001 for submitting false statements to the NRC.[3] In the criminal case, the judge gave the jury instructions under the prosecution's two alternative theories: The jury could find Mr. Geisen guilty if he either knew that he was submitting false statements or if he acted with deliberate ignorance of their falsity. The jury found Mr. Geisen guilty on a general verdict; that is, the jury found Mr. Geisen guilty without specifying whether it found Mr. Geisen acted out of actual knowledge or deliberate ignorance. The United States Court of Appeals for the Sixth Circuit upheld Mr. Geisen's conviction on appeal.[4]

In the parallel NRC enforcement proceeding, brought under the agency's Deliberate Misconduct Rule, § 50.5 of title 10 of the *Code of Federal Regulations* (10 CFR), Mr. Geisen's criminal conviction prompted the NRC's Atomic Safety and Licensing Board (the Board) to consider whether Mr. Geisen was collaterally estopped [5] from denying the same wrongdoing in the NRC proceeding.[6] The Board found and the Commission upheld, on appeal, that collateral estoppel could not be applied because the NRC's Deliberate Misconduct Rule did not include deliberate ignorance and the general verdict in the criminal proceeding did not specify whether the verdict was based on actual knowledge or deliberate ignorance.[7]

The lack of certainty as to the specific basis of the jury's verdict was significant, because if the verdict was based on actual knowledge, the Board could have applied collateral estoppel based on the NRC's identical actual knowledge standard and the same facts in the criminal case.[8] However, because the general verdict could have been based on deliberate ignorance, the Board could not apply collateral estoppel, because the NRC does not recognize conduct meeting the deliberate ignorance knowledge standard as deliberate misconduct. The Commission affirmed the Board's decision.[9] This outcome shows that the Deliberate Misconduct Rule, as presently written, does not provide for an enforcement action on the basis of deliberate ignorance and the Board cannot apply collateral estoppel where a parallel DOJ criminal prosecution proceeding may be based on a finding of deliberate ignorance.

In the Staff Requirements Memorandum (SRM) to SECY–10–0074, ''David Geisen, NRC Staff Petition for Review of LBP–09–24 (Aug. 28, 2009),'' dated September 3, 2010 (ADAMS Accession No. ML102460411), the Commission directed the NRC's Office of the General Counsel (OGC) to conduct a review of three issues: (1) How parallel NRC enforcement actions and DOJ criminal prosecutions affect each other, (2) the issuance of immediately effective enforcement orders in matters that DOJ is also pursuing, and (3) the degree of knowledge required for pursuing violations against individuals for deliberate misconduct. In 2011, OGC conducted the requested review and provided recommendations to the Commission for further consideration. In response, in 2012, the Commission directed OGC to develop a proposed rule that would incorporate the deliberate ignorance standard into the Deliberate Misconduct Rule. As part of this effort, the Commission directed OGC to examine the definitions of deliberate ignorance from all Federal circuit courts to aid in developing the most appropriate definition of this term for the NRC. The Commission also directed OGC to clarify two aspects of the regulations regarding challenges to immediate effectiveness of NRC orders as part of this rulemaking: (1) The burden of proof and (2) the authority of the presiding officer to order live testimony in resolving such a challenge.

This final rule amends 10 CFR 2.202, which governs challenges to, and the presiding officer's review of, the immediate effectiveness of an order. Currently, the Commission may make orders immediately effective under 10 CFR 2.202(a)(5) if it finds that the public health, safety, or interest so requires or if willful conduct caused a violation of the Atomic Energy Act of 1954, as amended (AEA), an NRC regulation, license condition, or previously issued Commission order. This final rule amends the NRC's regulations by clarifying the following: (1) Which party bears the burden of proof in a hearing on a challenge to the immediate effectiveness of an order, and (2) the authority of the presiding officer to call for live testimony in a hearing on a challenge to the immediate effectiveness of an order. In developing these amendments to 10 CFR 2.202, the NRC reviewed the way in which the Board has interpreted the burden of proof in hearings on challenges to the immediate effectiveness of an order. The NRC also reviewed its current regulations and practices regarding the authority of the presiding officer to call for live testimony in hearings on challenges to the immediate effectiveness of an order.

This final rule also makes conforming amendments to 10 CFR 150.2 by adding a cross reference to 10 CFR 61.9b and replacing the cross reference to 10 CFR 71.11 with a cross reference to 10 CFR 71.8. These conforming amendments are necessary because when the NRC first promulgated the Deliberate Misconduct Rule in 1991, it failed to list 10 CFR 61.9b as a cross reference in 10 CFR 150.2; and, although the NRC listed 10 CFR 71.11, which at the time was the 10 CFR part 70 Deliberate Misconduct Rule, as a cross reference in 10 CFR 150.2, the NRC later redesignated the provision as 10 CFR 71.8 and failed to make a conforming amendment to update 10 CFR 150.2.

As discussed further in the following sections, the Commission is not adopting in this final rule the previously proposed amendment to the Deliberate Misconduct Rule to incorporate the concept of deliberate ignorance as an additional basis upon which the NRC can take enforcement action against an individual for violating the rule.

Immediately Effective Orders

The NRC's procedures to initiate formal enforcement action are found in subpart B of 10 CFR part 2. These regulations include 10 CFR 2.202,

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[3] *United States* v. *Geisen,* 612 F.3d 471, 485–86 (6th Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011), (citing *United States* v. *Geisen,* 2008 WL 6124567 (N.D. Ohio May 2, 2008)).

[4] *Id.* at 485–86.

[5] Collateral estoppel precludes a defendant convicted in a criminal proceeding from challenging in a subsequent civil proceeding any facts that were necessary for the criminal conviction. Collateral estoppel applies to quasi-judicial proceedings such as enforcement hearings before the NRC. *See, e.g., SEC* v. *Freeman,* 290 F.Supp. 2d 401, 405 (S.D.N.Y. 2003) (''It is settled that a party in a civil case may be precluded from relitigating issues adjudicated in a prior criminal proceeding and that the Government may rely on the collateral estoppel effect of the conviction in support of establishing the defendant's liability in the subsequent civil action.'') (citations omitted).

[6] *Geisen,* LBP–09–24, 70 NRC at 709–26; *see* 10 CFR 50.5.

[7] The Board stated that ''the [NRC] Staff flatly and unmistakably conceded that the 'deliberate ignorance' theory is not embraced within the 'deliberate misconduct' standard that governs our proceedings.'' *Geisen,* LBP–09–24, 70 NRC at 715 (alteration added). In its decision, the Commission stated ''[t]he distinction between the court's 'deliberate ignorance' standard and the [NRC's] 'deliberate misconduct' standard applied in this case is highly significant, indeed, decisive. The Staff, when moving for collateral estoppel, itself *conceded* that 'the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard'.'' *Geisen,* CLI–10–23, 72 NRC at 251 (emphasis in the original) (alteration added).

[8] *Geisen,* CLI–10–23, 72 NRC at 249.

[9] *Id.* at 254.

''Orders.'' An order is a written NRC directive to modify, suspend, or revoke a license; to cease and desist from a given practice or activity; or to take another action as appropriate.[10] The Commission's statutory authority to issue an order is Section 161 of the AEA.[11] The Commission may issue orders in lieu of or in addition to civil penalties.[12] When the Commission determines that the conduct that caused a violation was willful or that the public health, safety, or interest requires immediate action, the Commission may make orders immediately effective, meaning the subject of the order does not have an opportunity for a hearing before the order goes into effect.[13] Making enforcement orders immediately effective has been an integral part of 10 CFR 2.202 since 1962, and Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. 558(c), expressly authorizes immediately effective orders.

On the same day that the Commission published the 1990 proposed Deliberate Misconduct Rule, ''Willful Misconduct by Unlicensed Persons,'' [14] it also published a related proposed rule, ''Revisions to Procedures to Issue Orders,'' [15] that would expressly allow the Commission to issue orders to unlicensed persons. The Commission may issue these orders ''when such persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is deemed to be necessary or desirable to protect public health and safety or to minimize danger to life or property or to protect the common defense and security.'' [16] This proposed rule concerned amendments to 10 CFR 2.202 and other 10 CFR part 2 provisions.[17] At the time of these proposed rules, the Commission's regulations only authorized the issuance of an order to a licensee. Therefore, the intent of the 1990 proposed Deliberate Misconduct Rule and its companion proposed rule was to establish a mechanism to issue ''an order . . . to an unlicensed person who willfully causes a licensee to be in violation of Commission requirements or whose willful misconduct undermines, or calls into question, the adequate protection of the public health and safety in connection with activities regulated by the NRC under the [AEA].'' [18] These proposed changes were adopted, with some modifications, in the 1991 final Deliberate Misconduct Rule.[19] Specifically, the 1991 final Deliberate Misconduct Rule amended 10 CFR 2.202 and other provisions of 10 CFR part 2 (10 CFR 2.1, 2.201, 2.204, 2.700, and appendix C), to authorize the issuance of an order to unlicensed persons otherwise subject to the NRC's jurisdiction.

On July 5, 1990, the Commission published another proposed rule that would make additional changes to 10 CFR 2.202.[20] These additional changes pertained to immediately effective orders. Primarily, the July 5, 1990, proposed rule would have required that challenges to immediately effective orders be heard expeditiously. The statement of considerations for the July 5, 1990, proposed rule noted that ''the Commission believes that a proper balance between the private and governmental interests involved is achieved by a hearing conducted on an accelerated basis.'' [21] The statement of considerations also stated that a ''motion to set aside immediate effectiveness must be based on one or both of the following grounds: The willful misconduct charged is unfounded or the public health, safety or interest does not require the order to be made immediately effective.'' [22]

In addition, the July 5, 1990, proposed rule provided the following statement regarding the respective burdens of a party filing a motion to challenge the immediate effectiveness of an immediately effective order and of the NRC staff:

> The burden of going forward on the immediate effectiveness issue is with the party who moves to set aside the immediate effectiveness provision. The burden of persuasion on the appropriateness of immediate effectiveness is on the NRC staff.[23]

After receiving public comments on the July 5, 1990, proposed rule, the Commission published a final rule on May 12, 1992.[24] The Commission acknowledged in the May 12, 1992, final rule that ''an immediately effective order may cause a person to suffer loss of employment while the order is being adjudicated'' but recognized that the effects of health and safety violations are paramount over an individual's right of employment.[25] Accordingly, the final rule amended 10 CFR 2.202(c) ''to allow early challenges to the immediate effectiveness aspect of immediately effective orders.'' [26] The final rule also provided for an expedited hearing on both the merits of the immediately effective order and a challenge to set aside immediate effectiveness. The presiding officer in an immediate effectiveness challenge must dispose of a person's motion to set aside the immediate effectiveness of the order ''expeditiously,'' generally within 15 days.[27] Therefore, the Commission struck a balance between the governmental interests in protecting public health and safety and an interest in fairness by requiring that challenges to immediately effective orders be heard expeditiously.

Burden of Going Forward and Burden of Persuasion

In opposing the immediate effectiveness aspect of an order, the party subject to the order, or respondent, must initiate the proceeding by filing affidavits and other evidence that state that the order and the NRC staff's determination that it is necessary to make the order immediately effective ''is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.'' [28] The respondent's obligation to challenge the order is known as the ''burden of going forward.'' [29] Section 2.202, however, has been interpreted to mean that the NRC staff bears the ''burden of persuasion'' to demonstrate that the order itself, and the immediate effectiveness determination, are supported by ''adequate evidence.'' [30] In a 2005 proceeding, the Board described what the NRC staff must prove, stating,

> [T]he staff must satisfy a two-part test: It must demonstrate that adequate evidence—*i.e.,* reliable, probative, and substantial (but not preponderant) evidence—supports a conclusion that (1) the licensee violated a Commission requirement (10 CFR 2.202(a)(1)), *and* (2) the violation was 'willful,' *or* the violation poses a risk to 'the public health, safety, or interest' that requires immediate action (*id.* § 2.202(a)(5)).[31]

Although Mr. Geisen never challenged the immediate effectiveness of the Commission's order, one of the Board's judges raised the concern that 10 CFR 2.202(c)(2)(i) could be interpreted to place the burden of persuasion on the

[10] 10 CFR 2.202(a).

[11] 42 U.S.C. 2201.

[12] Section 2.3.5 of the NRC Enforcement Policy (2013) (ADAMS Accession No. ML13228A199).

[13] 10 CFR 2.202(b).

[14] 55 FR 12374; April 3, 1990.

[15] 55 FR 12370; April 3, 1990.

[16] *Id.* at 12371.

[17] *Id.* at 12373–74.

[18] *Id.* at 12372.

[19] 56 FR 40664; August 15, 1991.

[20] 55 FR 27645.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 27646.

[24] 57 FR 20194.

[25] *Id.* at 20195.

[26] *Id.* at 20194.

[27] *Id.* at 20196. *See also* 10 CFR 2.202(c)(2)(i).

[28] 10 CFR 2.202(c)(2)(i).

[29] *United Evaluation Servs, Inc.,* LBP–02–13, 55 NRC 351, 354 (2002).

[30] *Id.*

[31] *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP–05–02, 61 NRC 53, 61 (2005) (emphasis in original).

party subject to the order to show that the order is based on mere suspicion, unfounded allegations, or error.[32] This final rule clarifies that the burden of persuasion is the obligation of the NRC staff, not the party subject to the order.

Authority of the Presiding Officer to Order Live Testimony

The July 5, 1990, proposed rule's statement of considerations contemplated the possibility of an evidentiary hearing as part of a challenge to immediate effectiveness:

> It is expected that the presiding officer normally will decide the question of immediate effectiveness solely on the basis of the order and other filings on the record. The presiding officer may call for oral argument. However, an evidentiary hearing is to be held only if the presiding officer finds the record is inadequate to reach a proper decision on immediate effectiveness. Such a situation is expected to occur only rarely.[33]

The May 12, 1992, final rule, however, simply stated that ''[t]he presiding officer may call for oral argument but is not required to do so.'' [34] Section 2.319 outlines the presiding officer's authority to ''conduct a fair and impartial hearing according to law, and to take appropriate action to control the prehearing and hearing process, to avoid delay and maintain order,'' including the power to examine witnesses, but this power is not specified in 10 CFR 2.202. This final rule clarifies the presiding officer's authority to order live testimony on challenges to the immediate effectiveness of orders.

II. Discussion

Immediately Effective Orders

This rule amends 10 CFR 2.202(c)(2) to clarify that in any challenge to the immediate effectiveness of an order, the NRC staff bears the burden of persuasion and the party challenging the order bears the burden of going forward.[35] Specifically, the rule states that the NRC staff must show that (1) adequate evidence supports the grounds for the order and (2) immediate effectiveness is warranted.[36]

This rule further amends 10 CFR 2.202(c)(2) to confirm the presiding officer's authority to order live testimony, including cross examination of witnesses, in hearings on challenges to the immediate effectiveness of orders if the presiding officer concludes that taking live testimony would assist in its decision on the motion. Similarly, the rule allows any party to the proceeding to file a motion requesting the presiding officer to order live testimony. The amendments allow the NRC staff, in cases where the presiding officer orders live testimony, the option of presenting its response through live testimony rather than a written response made within 5 days of its receipt of the motion. The NRC does not anticipate that permitting the presiding officer to allow live testimony would cause delay, and even if it were to cause delay, public health and safety would not be affected because the immediately effective order would remain in effect throughout the hearing on immediate effectiveness.

The rule also amends 10 CFR 2.202(c)(2) to clarify that the presiding officer shall conduct any live testimony pursuant to its powers in 10 CFR 2.319, except that no subpoenas, discovery, or referred rulings or certified questions to the Commission shall be permitted for this purpose. Finally, the rule amends 10 CFR 2.202(c)(2) by dividing the paragraph into smaller paragraphs, adding a cross reference to 10 CFR 2.202(a)(5) (the regulation that authorizes the Commission to make an order immediately effective), and making other minor edits to improve clarity and readability.

Conforming Amendments

Section 150.2, ''Scope,'' provides notice to Agreement State licensees conducting activities under reciprocity in areas of NRC jurisdiction that they are subject to the applicable NRC Deliberate Misconduct Rule provisions. When the NRC first promulgated the Deliberate Misconduct Rule in 1991, it failed to list 10 CFR 61.9b as a cross reference in 10 CFR 150.2. At the time, 10 CFR 150.2 listed 10 CFR 30.10, 40.10, and 70.10 as the Deliberate Misconduct Rule provisions applicable to Agreement State licensees conducting activities under reciprocity in areas of NRC jurisdiction.

On January 13, 1998, the NRC revised its regulations to extend the Deliberate Misconduct Rule to include applicants for or holders of certificates of compliance issued under 10 CFR part 71, ''Packaging and Transportation of Radioactive Material.'' [37] This rule designated the 10 CFR part 71 Deliberate Misconduct Rule provision as 10 CFR 71.11.[38] The NRC made a conforming amendment to 10 CFR 150.2 by listing 10 CFR 71.11 as a cross reference.[39] The NRC later redesignated the provision as 10 CFR 71.8 [40] but did not make a conforming amendment to update the cross reference in 10 CFR 150.2. The current 10 CFR 150.2 rule text still lists the 10 CFR part 71 Deliberate Misconduct Rule provision as 10 CFR 71.11.

This rule makes conforming amendments to 10 CFR 150.2 by adding a cross reference to 10 CFR 61.9b and deleting the cross reference to 10 CFR 71.11 and replacing it with a cross reference to 10 CFR 71.8.

III. Opportunities for Public Participation

The proposed rule was published on February 11, 2014, for a 90-day public comment period that ended on May 12, 2014.[41]

IV. Public Comment Analysis

The NRC received comments from six commenters: The Nuclear Energy Institute, Inc. (NEI), the National Association of Criminal Defense Lawyers (NACDL), STARS Alliance LLC (STARS), Hogan Lovells LLP (Hogan Lovells), Troutman Sanders LLP (Troutman Sanders), and an individual, Mr. James Lieberman. All six provided comments on the proposed amendment to the Deliberate Misconduct Rule incorporating the concept of deliberate ignorance. One commenter, Mr. Lieberman, supported the amendment. The other five commenters opposed the amendment. All comments are summarized in this section, by topic. Additionally, two commenters (NEI and STARS) provided comments on the proposed amendments to 10 CFR

[32] *Geisen,* ''Additional Views of Judge Farrar,'' LBP–09–24, 70 NRC at 801 n.12 (''To succeed under the terms of [10 CFR 2.202(c)(2)(i)], the challenge brought by the Order's target must show that 'the order, including the need for immediate effectiveness, is not based on adequate evidence but on *mere suspicion, unfounded allegations, or error.*' In addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well, as is indicated by the next sentence, which requires the challenge to 'state with particularity the reasons why the order is not based on adequate evidence' and to 'be accompanied by affidavits or other evidence relied on.' 10 CFR 2.202(c)(2)(i). All in 20 days, unless extended. *Id.* § 2.202(a)(2).'') (emphasis in the original).

[33] 55 FR 27645–46.

[34] 57 FR at 20196.

[35] The party challenging the order has the obligation to initiate the proceeding, namely, by filing the appropriate motion under 10 CFR 2.202(c)(2)(i). This motion ''must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.'' 10 CFR 2.202(c)(2)(i).

[36] The Administrative Procedure Act provides ''[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'' 5 U.S.C. 556(d).

[37] 63 FR 1890.

[38] *Id.* at 1899.

[39] *Id.* at 1901.

[40] In a 2004 rulemaking amending its regulations concerning the packaging and transport of radioactive materials, the NRC renumbered 10 CFR 71.11 to 10 CFR 71.8 (69 FR 3698, 3764, 3790; January 26, 2004).

[41] 79 FR 8097.

2.202(c) concerning the immediate effectiveness of orders. The NRC received no comments on the proposed amendments to 10 CFR 150.2.

Comments Concerning Deliberate Ignorance

Comment 1: Confusion and Practical Difficulties Associated With Distinguishing Between Deliberate Ignorance and Carelessness, Recklessness, or Negligence

The NEI, NACDL, STARS, Hogan Lovells, and Troutman Sanders commented that deliberate ignorance is an inherently vague and highly subjective criminal knowledge standard and that distinguishing deliberate ignorance from other, non-deliberate states of mind, such as carelessness, recklessness, or negligence, would be difficult in practice. These commenters expressed concern that adoption of the deliberate ignorance standard into the NRC's regulations may confuse NRC staff and could possibly result in enforcement action against individuals who do not commit deliberate violations.

Specifically, Hogan Lovells expressed concern that NRC staff would have difficulty assessing what an individual ''subjectively believed'' and whether the individual deliberately took action to ''avoid learning'' a material fact. The NEI commented that the ''complex, legalistic deliberate ignorance standard would be difficult to apply and would promote unnecessary and wasteful litigation without a counterbalancing benefit to the public.'' The NACDL expressed concern that the ''theoretical distinction between a person who is deliberately ignorant and one who is reckless or negligent'' would be ''almost impossible to maintain'' in the NRC enforcement setting. As additional support for these concerns, NEI, STARS, and Hogan Lovells stated that legal scholars and courts, including the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), have cautioned that a ''deliberate ignorance'' jury instruction in Federal criminal trials should only be used sparingly because of the heightened risk that defendants may be inadvertently or impermissibly convicted on a lesser basis than deliberate ignorance, such as recklessness or negligence. The NACDL, NEI, and Troutman Sanders also argued that in the majority of cases evidence used to support a finding of deliberate ignorance would also serve as circumstantial evidence of actual knowledge, thereby further diminishing the utility of the proposed rule.

One commenter, Mr. Lieberman, expressed support for the incorporation of the deliberate ignorance standard because the text of the rule ''clearly'' distinguished deliberate ignorance from persons who act with recklessness or careless indifference. Mr. Lieberman recommended that the Commission provide several hypothetical examples of how and under what circumstances the deliberate ignorance standard might be applied in the future to more clearly explain how the NRC staff would differentiate between deliberate ignorance and careless disregard in practice.

NRC Response: The Commission agrees with the comments expressing concern that the difficulties in implementing the deliberate ignorance standard would likely outweigh its corresponding benefits. The text of the proposed rule contains multiple subjective elements that would require NRC staff to assess and demonstrate the subjective belief for an individual's actions or inactions. The Commission believes the text of the proposed rule correctly defines ''deliberate ignorance'' in such a way as to distinguish it from careless disregard or other, non-deliberate standards.[42] However, after further consideration of the difficulties in assessing the facts of a case against this separate intent standard, the Commission has decided not to adopt its proposed amendment to incorporate a deliberate ignorance standard into the Deliberate Misconduct Rule. In this regard, the NRC staff already assesses cases against two intent standards cognizable in our enforcement process—deliberateness involving actual knowledge, and all other forms of willfulness, including careless disregard. Careless disregard is different only in degree from the new standard of deliberate ignorance and could frustrate the efficiency of the enforcement process, at least initially, until guidance were issued and enforcement experience established. The Commission also anticipates that, in most NRC enforcement cases, evidence supporting deliberate ignorance would also serve as circumstantial evidence supporting actual knowledge, further diminishing the utility of the proposed rule at this time.[43] Multiple Federal circuits have characterized deliberate ignorance jury instructions as means to properly inform juries that a ''charade of ignorance'' can serve as circumstantial proof of guilty knowledge.[44] Therefore, the benefits associated with the deliberate ignorance standard would likely not outweigh the practical difficulties of its implementation, particularly given that the Commission expects that cases where evidence supports a deliberate ignorance finding but not actual knowledge will be rare.

The Commission acknowledges Mr. Lieberman's support for the rule and, as previously stated, agrees that the text of the proposed rule accurately distinguishes deliberate ignorance from non-deliberate standards, including recklessness, negligence, and carelessness. However, for the reasons previously stated, the Commission is not adopting in this final rule the proposed amendment to the Deliberate Misconduct Rule.

Comment 2: Lack of a Compelling Justification

The NEI, NACDL, STARS, Hogan Lovells, and Troutman Sanders all commented that the proposed rule failed to provide a compelling justification for incorporating the deliberate ignorance standard into the Deliberate Misconduct Rule. Several of these commenters stated that the only justification that the NRC provided for expanding the scope of the rule was the NRC staff's inability to invoke collateral estoppel in the *Geisen* case. These commenters stated that expanding the Deliberate Misconduct Rule cannot be justified by a single case in the Deliberate Misconduct Rule's 25-year history and that to fashion a rule to fit a single case is both unnecessary and bad policy. The NEI commented that the Commission should not view the *Geisen* proceedings as illustrative of an additional or unfair ''burden'' that the NRC staff must overcome in deliberate misconduct enforcement cases. Instead, the case simply illustrated the NRC staff's responsibility in carrying its burden when issuing an enforcement order and that the NRC should not be able to dispense with this responsibility by amending the Deliberate Misconduct Rule.

The NEI and Hogan Lovells also argued that the statement in the proposed rule that ''deficiencies in the

[42] The proposed rule text mirrored the definition provided by the United States Supreme Court in *Global-Tech Appliances, Inc.* v. *SEB S.A.,* 131 S. Ct. 2060 (2011).

[43] *See, e.g., United States* v. *Arbizo,* 833 F.2d 244, 247, 248–49 (10th Cir. 1987) (''One can in fact not know many detailed facts but still have enough knowledge to demonstrate consciousness of guilty conduct sufficient to satisfy the 'knowing' element of the crime . . . Arbizo's case presents evidence supporting both actual knowledge and deliberate avoidance of knowledge of some details of the transaction, either of which justify the [guilty] verdict . . . .'').

[44] *See, e.g., U.S.* v. *Conner,* 537 F.3d 480, 486 (5th Cir. 2008); *U.S.* v. *Delreal-Ordones,* 213 F.3d 1263, 1269 (10th Cir. 2000).

Deliberate Misconduct Rule became apparent'' in the *Geisen* case was incorrect because the *Geisen* case was not a deliberate ignorance case. Rather, the NRC's order only alleged that Mr. Geisen had actual knowledge of the falsity of the statements that he submitted to the NRC, and that the Atomic Safety and Licensing Board agreed that the case was only an actual knowledge case. Therefore, according to the commenters, the NRC should not use the *Geisen* case as a basis for the rule. The commenters noted that, when promulgating the original Deliberate Misconduct Rule in 1991, the Commission stated that the range of actions subject to the rule was not expected to ''differ significantly'' from those that might subject an individual to criminal prosecution, and the commenters noted that one case in nearly 25 years does not rise to the level of a ''significant'' difference.

NRC Response: The Commission disagrees with this comment. Although the Commission recognizes that the benefits of the rule would be limited because it will likely prove decisive in few cases, the Commission disagrees with the comment that the agency lacked adequate justification to consider modification of the regulations to address deliberate ignorance. When promulgating the Deliberate Misconduct Rule in 1991, the Commission stated that deliberate misconduct is a significant and serious matter that poses a distinct threat to public health and safety.[45] The NRC's inability to invoke collateral estoppel in the *Geisen* proceeding was not the sole justification for proposing to amend the Deliberate Misconduct Rule. Rather, the Commission has always considered willful violations of NRC requirements to be of particular concern because the NRC's regulatory program is dependent on licensees and their contractors, employees, and agents to act with integrity and communicate with candor. Therefore, the outcome of the *Geisen* proceeding prompted the Commission to reevaluate the Deliberate Misconduct Rule.

The Commission also disagrees with the comment that the *Geisen* case was not a deliberate ignorance case. While the NRC staff did allege only actual knowledge throughout the enforcement proceeding, the NRC staff did not pursue a deliberate ignorance theory because it conceded deliberate ignorance was not a basis upon which it could pursue enforcement action under the Deliberate Misconduct Rule as currently written.[46] Conversely, DOJ's parallel criminal prosecution of Mr. Geisen in Federal court was based on alternate theories of actual knowledge or deliberate ignorance. The district court provided the deliberate ignorance jury instruction, and Mr. Geisen was convicted on a general verdict. On appeal to the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit), Mr. Geisen challenged the district court's decision to provide the deliberate ignorance jury instruction.[47] The Sixth Circuit reiterated that ''a deliberate ignorance instruction is warranted to prevent a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct,'' but cautioned that this instruction should be used sparingly because of the heightened risk of conviction based on mere negligence, carelessness, or ignorance.[48] Under this standard, the court found the instruction to be proper because the district court's instruction was a correct statement of the law and included a limiting instruction—that ''carelessness, or negligence, or foolishness on [the defendant's] part is not the same as knowledge and is not enough to convict'' foreclosed the possibility that the jury could erroneously convict Geisen on the basis of negligence or carelessness.[49] Moreover, the court found that the evidence supported a conviction based on either actual knowledge or deliberate ignorance.[50] Had the deliberate ignorance standard been incorporated into the NRC's Deliberate Misconduct Rule, collateral estoppel would have been available to the NRC staff in the *Geisen* matter.

As previously stated, the Commission is not adopting the proposed amendment to the Deliberate Misconduct Rule because the practical difficulties are expected to outweigh the potential benefits gained from the rule.

Comment 3: Previous Rejection of the Deliberate Ignorance Standard

The NEI stated that the proposed rule would conflict with the Commission's decision in the 1991 Deliberate Misconduct Rule to exclude from the rule violations based on careless disregard and negligence. Hogan Lovells stated that the Commission rejected the deliberate ignorance standard when it promulgated the original Deliberate Misconduct Rule.

NRC Response: The Commission disagrees with the comment. Although the Commission is not adopting the proposed amendment to the Deliberate Misconduct Rule due to the practical difficulties associated with applying the deliberate ignorance standard, the Commission disagrees with comments suggesting that the deliberate ignorance standard was previously analyzed and explicitly rejected when the Commission promulgated the original Deliberate Misconduct Rule in 1991. The commenter points to a single sentence in the statement of considerations for the proposed rule that discussed ''careless disregard,'' which uses the phrase ''a situation in which an individual blinds himself or herself to the realities of whether a violation has occurred or will occur.'' [51] The proposed rule and final rule did not make any other reference related to willful blindness or deliberate ignorance and did not contain detailed discussion on the standards.

The Commission eventually eliminated ''careless disregard'' from the final rule in response to public comments, which Hogan Lovells characterizes as the Commission's ''considered and intentional decision'' to exclude deliberate ignorance from the rule. However, the Commission disagrees that this limited discussion amounts to an express rejection of the deliberate ignorance standard. In the 1991 final rule, the Commission did not focus on the applicability of collateral estoppel in a parallel criminal action, which was one of the justifications for the proposed rule. Further, rejection of a proposal under previous rulemaking would not prevent future Commissions from reconsidering the matter and reaching a different conclusion. As previously stated, the NRC is not adopting the proposed amendment to the Deliberate Misconduct Rule over concerns that practical difficulties with its implementation are expected to outweigh the potential benefits.

Comment 4: Unsettled Judicial Precedent

The NEI, Hogan Lovells, and STARS stated that the proposed rule is premature because of unsettled judicial precedent. The NEI and Hogan Lovells cited as support the D.C. Circuit's statements in *United States* v. *Alston-Graves* about the use of the deliberate ignorance standard.[52] The NEI also stated that the DC Circuit's opinion

[45] 56 FR 40664, 40674; August 15, 1991.

[46] *See David Geisen,* LBP–09–24, 70 NRC 676, 715 (2009); *Geisen,* CLI–10–23, 72 NRC 210, 251 (2010).

[47] *United States* v. *Geisen,* 612 F.3d 471, 485 (6th Cir. 2010).

[48] *Id.* at 485–86 (citations and internal quotation marks omitted).

[49] *Id.*

[50] *Id.* at 487.

[51] 55 FR 12375; April 3, 1990.

[52] 435 F.3d 331 (D.C. Cir. 2006).

should carry substantial weight in deciding whether to adopt the deliberate ignorance standard because the DC Circuit is the only Federal circuit court that always has jurisdiction and venue to consider challenges to NRC enforcement orders.

Additionally, NEI and Hogan Lovells stated that the Supreme Court case *Global-Tech Appliances, Inc.* v. *SEB, S.A.,* is not directly applicable because it was a patent case, not a criminal case. Therefore, as Justice Kennedy noted in his dissent in the case, the Court was not briefed on whether to endorse the deliberate ignorance standard for all criminal cases requiring the government to prove knowledge.[53] The NEI and Hogan Lovells also noted that Federal courts most commonly apply the deliberate ignorance standard in drug cases.

NRC Response: The Commission disagrees with the comment. Although the Commission is not adopting the proposed amendment to the Deliberate Misconduct Rule due to the practical difficulties associated with applying the deliberate ignorance standard, the Commission disagrees that judicial precedent in this area is unsettled such that the Commission's proposal to adopt the deliberate ignorance standard is premature. In the words of the Supreme Court, the doctrine of willful blindness is ''well established'' in the Federal courts.[54] The history of the deliberate ignorance standard is quite long—the concept has been endorsed and applied in criminal cases for more than 100 years. The Supreme Court endorsed a similar concept in 1899 in *Spurr* v. *United States*.[55] In 1976, the Ninth Circuit in *United States* v. *Jewell* crafted the modern formulation of the deliberate ignorance standard that Federal courts have since adopted and applied.[56] The concept of deliberate ignorance is now widely accepted in the Federal courts, which commonly give and uphold deliberate ignorance jury instructions.[57]

In *Alston-Graves,* the D.C. Circuit ruled on the appropriateness of a deliberate ignorance instruction and found that the lower court committed harmless error giving the instruction—*not* because the instruction itself is improper but because in this particular case the prosecution failed to present sufficient evidence to support it.[58] At no point in *Alston-Graves* did the D.C. Circuit reject the deliberate ignorance standard. Indeed, the court acknowledged that it had previously supported the concept of deliberate ignorance in dicta in a prior case.[59]

The Commission disagrees with the comment that it should give the D.C. Circuit's opinion in *Alston-Graves* more weight relative to other Federal circuits. The Hobbs Act, which NEI cited as providing the D.C. Circuit with jurisdiction and venue over all challenges to NRC enforcement orders, also states that jurisdiction and venue is proper in any court of appeals in which the petitioner resides or has its principal office.[60] Non-licensed individuals challenging enforcement actions could file such challenges where they reside. Therefore, the Commission believes that it would be unwise to give additional weight to the D.C. Circuit's decision not to fully embrace the deliberate ignorance standard and relatively less weight to every other Federal circuit, which have each more fully embraced the deliberate ignorance standard.[61]

Additionally, the Commission disagrees with the comment that the Supreme Court's *Global-Tech* decision is inapplicable. The Court acknowledged that it was not briefed on the question of whether to endorse the deliberate ignorance standard for all criminal cases requiring the government to prove knowledge. In rebutting Justice Kennedy's dissent, the Court stated that it could think of no reason to ''protect . . . parties who actively encourage others to violate patent rights and who take deliberate steps to remain ignorant of those rights despite a high probability that the rights exist and are being infringed.'' [62] The majority's rationale applies with equal force to nuclear regulation. Moreover, although *Global-Tech* is a civil case, it relied on criminal cases to distill a definition of deliberate ignorance and several courts of appeals have referenced or applied *Global-Tech* in criminal jury instructions and criminal sentencing.[63] Additionally, Federal circuits have approved application of the deliberate ignorance standard in a variety of criminal and civil cases.[64]

As previously stated, the NRC is not adopting the proposed amendment to the Deliberate Misconduct Rule because the practical difficulties with its implementation would likely outweigh the potential benefits.

Comment 5: Lack of Guidance

The NEI and STARS stated that the NRC failed to issue draft guidance with the proposed rule and should not make the final rule effective until after the NRC publishes draft guidance for public comment and then finalizes that guidance. The NEI stated that NRC policy requires that the agency issue draft guidance in parallel with proposed rules, citing the SRM to SECY–11–0032, ''Consideration of the Cumulative Effects of Regulation in the Rulemaking Process,'' dated October 11, 2011 (ADAMS Accession No. ML112840466). The NEI further stated that the final rule should require the Director of the Office of Enforcement to formally certify to the Commission that he or she has reviewed the staff's application of deliberate ignorance before issuing any violation relying on the standard. The NEI also suggested that the NRC provide examples of circumstances that are categorically excluded (*i.e.,* safe harbors) from enforcement on the basis of deliberate ignorance.

Mr. Lieberman expressed support for the proposed rule but also suggested that the NRC provide hypothetical examples of conduct that does and does

[53] *Global-Tech Appliances, Inc.* v. *SEB, S.A.,* 131 S. Ct. 2060, 2073 (2011) (Kennedy, J., dissenting).

[54] *Id.* at 2068–69 (majority opinion).

[55] *See id.* at 2069.

[56] 532 F.2d 697 (9th Cir. 1976). *See also, e.g., United States* v. *Caminos,* 770 F.2d 361, 365 (3d Cir. 1985) (''The charge, known as a 'deliberate ignorance' charge, originated in *United States* v. *Jewell.*'').

[57] *Global-Tech,* 131 S. Ct. at 2069; *Alston-Graves,* 435 F.3d at 338.

[58] *Alston-Graves,* 435 F.3d at 341–42.

[59] *Id.* at 340 (citing *United States* v. *Mellen,* 393 F.3d 175, 181 (D.C. Cir. 2004)).

[60] 28 U.S.C. 2342(4), 2343.

[61] The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals have incorporated willful blindness or deliberate ignorance into their pattern or model jury instructions. Pattern or model jury instructions are plain language formulations of case law that judges may provide to juries as legal explanations. These jury instructions are given legal weight through their use in trials and subsequent approval of that use on appeal. The Second Circuit, *see, e.g., United States* v. *Coplan,* 703 F.3d 46 (2d Cir. 2012), and Fourth Circuit, *see, e.g., United States* v. *Poole,* 640 F.3d 114 (4th Cir. 2011), have applied deliberate ignorance or willful blindness in case law.

[62] *Global-Tech Appliances, Inc.* v. *SEB, S.A.,* 131 S. Ct. 2060, 2069 n.8 (2011).

[63] *See, e.g., United States* v. *Goffer,* 721 F.3d 113, 127–28 (2d Cir. 2013); *United States* v. *Brooks,* 681 F.3d 678, 702 n.19 (5th Cir. 2012); *United States* v. *Butler,* 646 F.3d 1038, 1041 (8th Cir. 2011).

[64] *See, e.g., United States* v. *Goffer,* 721 F.3d 113, (2d Cir. 2013) (upholding a deliberate ignorance jury instruction in a case involving charges of conspiracy to commit securities fraud and securities fraud); *United States* v. *Yi,* 704 F.3d 800 (9th Cir. 2013) (upholding a deliberate ignorance jury instruction in a case involving a charge of conspiracy to violate the Clean Air Act); *United States* v. *Brooks,* 681 F.3d 678 (5th Cir. 2012) (affirming provision of the deliberate ignorance jury instruction in a case involving charges of false reporting of natural gas trades in violation of the Commodity Exchange Act and the federal wire fraud statute); *United States* v. *Jinwright,* 683 F.3d 471 (4th Cir. 2012) (finding the provision of the deliberate ignorance instruction was not an abuse of discretion in a case involving charges of a conspiracy to defraud and tax evasion); *Tommy Hilfiger Licensing, Inc.* v. *Goody's Family Clothing, Inc.,* 2003 WL 22331254 (N.D. Ga. 2003) (applying a deliberate ignorance standard to a Section 1117 trademark infringement claim).

not satisfy the deliberate ignorance standard in the statement of considerations for the final rule.

NRC Response: The Commission is in general agreement that, if adopted, the rule would benefit from the development of implementing guidance. However, as stated previously, the Commission is has decided not to adopt the proposed amendments to the Deliberate Misconduct Rule. Therefore, there is no need for draft guidance as requested by the commenters.

Comment 6: Proposed Rule Would Discourage Participation in Licensed Activities and Is Not Necessary To Deter Deliberate Misconduct

The NEI commented that the proposed rule would discourage participation in licensed activities and nuclear employment and noted that the Commission acknowledged this concern in the 1991 Deliberate Misconduct Rule.

The NEI commented that the proposed rule is not necessary for deterrent effect because the risk of criminal prosecution is a sufficient deterrent. The commenter also stated that, rather than expanding the Deliberate Misconduct Rule to encompass more individual behavior, the NRC still has the option in situations where an individual engages in improper conduct beyond the reach of the current Deliberate Misconduct Rule to issue sanctions to the company to address the NRC's concerns.

NRC Response: The Commission acknowledges the commenter's concern with respect to participation and employment in the nuclear field and notes that commenters raised and the Commission responded to a similar concern with respect to the 1991 Deliberate Misconduct Rule.[65] The Commission also acknowledges that the agency continues to have the ability to take enforcement action against a licensee for an individual's conduct that results in a violation of NRC requirements but does not amount to deliberate misconduct. However, as stated previously, the Commission has decided not to adopt the proposed changes to the Deliberate Misconduct Rule because practical difficulties outweigh the potential benefits. Therefore the Commission did not reach this issue.

Comments Concerning Immediately Effective Orders

Citing statements from the *Geisen* Board majority and the additional statement from Judge Farrar, NEI and STARS stated that immediately effective orders should be issued less frequently and be required to contain greater detail. These commenters also stated that the NRC staff should be required to release the Office of Investigations report and all evidence to the individual challenging the order in such a proceeding. The commenters also stated that the Commission should further define what constitutes ''adequate evidence'' for immediate effectiveness challenge purposes. The commenters suggested revising 10 CFR 2.202(a)(5) to remove the reference to ''willful'' violations because the NRC need not make an order immediately effective solely based on the violation's willfulness.

The NEI and STARS proposed further changes to 10 CFR 2.202(c)(2)(ii) to clarify that the person challenging an immediately effective enforcement order need not testify in such a hearing because doing so may compromise his or her Fifth Amendment right against self-incrimination. The commenters also advocated including a requirement imposing more stringent requirements and qualifications for persons testifying on behalf of the NRC staff in challenges to immediately effective orders. Additionally, the commenters stated that the final rule should include an additional sentence stating that if the presiding officer orders live testimony, the parties may cross examine witnesses when it would assist the presiding officer's decision on the motion to set aside the immediate effectiveness of the order.

The NEI and STARS commented that the revision to 10 CFR 2.202(c)(2)(iii) should also require that the NRC staff reply to a motion in writing, rather than providing the option to respond orally, in order to prevent the staff's ability to ''ambush'' or ''sandbag'' the individual challenging the order. These commenters also stated that the final rule should make clear that NRC staff cannot use this opportunity to expand the scope of arguments set forth in the original immediately effective order.

The NEI and STARS commented that the final rule should revise 10 CFR 2.202(c)(2)(viii) to require that if the presiding officer sets aside an immediately effective order, the order setting aside immediate effectiveness will not be stayed automatically and will only be stayed if the NRC staff files and the Commission grants a motion for a stay under 10 CFR 2.342.

NRC Response: The Commission disagrees with these comments and declines to adopt these changes to the NRC's process for issuing and adjudicating immediately effective orders. The proposed rule sought comments on the changes to 10 CFR 2.202(c); however, as stated in the proposed rule, these changes were intended to clarify evidentiary burdens and the authority of the presiding officer. The final rule clarifies that the NRC staff bears the burden of persuasion in hearings challenging the immediate effectiveness of orders and clarifies that the presiding officer has authority pursuant to 10 CFR 2.319 to order live testimony. The final rule also clarifies how live testimony can be requested and in what manner it may take form. The final rule also contains non-substantive changes intended to improve the clarity and readability of 10 CFR 2.202 by dividing the lengthy paragraph (c) into shorter paragraphs.

Several of the commenters' proposed changes are either already addressed in this final rulemaking, or the current rules are adequately flexible to address their concerns without adopting their proposed changes. For example, with respect to the comment recommending that if the presiding officer orders live testimony, then the parties may cross examine witnesses when it would assist the presiding officer's decision on the motion to set aside the immediate effectiveness of the order, the presiding officer already has the power to order cross examination pursuant to 10 CFR 2.319. Additionally, 10 CFR 2.319 currently describes the duty of the presiding officer in an NRC adjudication to conduct a fair and impartial hearing and to take the necessary action to regulate the course of the hearing and the conduct of its participants. Parties can direct concerns that the NRC staff is inappropriately expanding the scope of argument to the presiding officer for resolution pursuant to this authority. The Commission does not agree with concerns that the NRC staff should reply in writing in advance of live testimony to prevent it from ''ambushing'' the individual challenging the order. If testimony of individuals is truthful and complete, knowing the staff's response in advance of testifying should have little bearing on its substance. Further, with respect to the commenters' constitutional concerns, it is well established that the Fifth Amendment privilege against self-incrimination can be asserted in administrative proceedings.[66] Parties have invoked the privilege in NRC enforcement proceedings, including the *Geisen* proceeding.[67] Given the availability of

[65] 56 FR 40675; August 15, 1991.

[66] *See Chavez* v. *Martinez,* 538 U.S. 760, 770 (2003) (citing *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972)).

[67] *See David Geisen,* LBP–06–25, 64 NRC 367, 397 n.131 (2006). *See also, e.g., Steven P. Moffitt,* LBP–06–05, 64 NRC 431, 433 n.2 (2006).

the privilege in NRC enforcement proceedings, the Commission declines to adopt the proposed change.

As for the remaining comments, the Commission appreciates the commenters' input on its process for issuing and adjudicating immediately effective orders, but additional substantive changes to 10 CFR 2.202(c)(2) or proposals to significantly overhaul its procedures for challenging immediately effective orders are beyond the scope of this rulemaking. The Commission notes that the commenters are able to submit these recommendations as a petition for rulemaking via the 10 CFR 2.802 petition for rulemaking process. The Commission takes the commenters' concerns with fairness in its adjudicatory procedures seriously; however, the proposed changes to 10 CFR 2.202 were limited to clarifying changes to address specific concerns regarding the application of 10 CFR 2.202(c) in certain circumstances. The multiple additional procedural changes that the commenters recommend would be more appropriately addressed in the context of a comprehensive assessment of the NRC's rules of practice and procedure in 10 CFR part 2, which would ensure compliance with the NRC's obligations under the Administrative Procedure Act to allow for notice and comment on proposed rules before they are adopted. Adopting the commenters' proposed changes in this rulemaking would not allow for sufficient notice-and-comment opportunities for other interested parties, and the NRC therefore declines to do so.

V. Section-by-Section Analysis

Immediate Effectiveness of Orders Rule Changes

Section 2.202

The rule makes several changes to 10 CFR 2.202(c)(2)(i). The rule revises 10 CFR 2.202(c)(2)(i) by dividing it into several smaller paragraphs. The rule revises paragraph 10 CFR 2.202(c)(2)(i) to include only the first two sentences of the current 10 CFR 2.202(c)(2)(i), which concern the right of the party subject to an immediately effective order to challenge the immediate effectiveness of that order. The rule further revises the first sentence to add a cross reference to 10 CFR 2.202(a)(5) and make other minor, clarifying editorial changes to that sentence.

The rule adds a new paragraph 10 CFR 2.202(c)(2)(ii), which allows any party to file a motion with the presiding officer requesting that the presiding officer order live testimony. Paragraph 10 CFR 2.202(c)(2)(ii) also authorizes the presiding officer, on its own motion, to order live testimony.

The rule redesignates the third sentence of the current 10 CFR 2.202(c)(2)(i) as a new paragraph 10 CFR 2.202(c)(2)(iii), which authorizes the NRC staff to present its response through live testimony rather than a written response in those cases where the presiding officer orders live testimony.

The rule adds a new paragraph 10 CFR 2.202(c)(2)(iv), which provides that the presiding officer shall conduct any live testimony pursuant to 10 CFR 2.319.

The rule makes a minor clarifying change to 10 CFR 2.202(c)(2)(ii) and redesignates that paragraph as 10 CFR 2.202(c)(2)(v).

The rule adds a new paragraph 10 CFR 2.202(c)(2)(vi), which clarifies that the licensee or other person challenging the immediate effectiveness of an order bears the burden of going forward, whereas the NRC staff bears the burden of persuasion that adequate evidence supports the grounds for the immediately effective order and that immediate effectiveness is warranted.

The rule makes minor clarifying changes to the fourth and fifth sentences of 10 CFR 2.202(c)(2)(i), which direct the presiding officer's expeditious disposition of the motion to set aside immediate effectiveness and prohibit the presiding officer from staying the immediate effectiveness of the order, respectively, and redesignates those sentences as a new paragraph 10 CFR 2.202(c)(2)(vii).

The rule makes minor clarifying changes to the eighth sentence of 10 CFR 2.202(c)(2)(i), and redesignates the sixth, seventh, and eighth sentences of 10 CFR 2.202(c)(2)(i) as new paragraph 10 CFR 2.202(c)(2)(viii). These sentences (1) direct the presiding officer to uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness, (2) address the final agency action status of an order upholding immediate effectiveness, (3) address the presiding officer's prompt referral of an order setting aside immediate effectiveness to the Commission, and (4) states that the order setting aside immediate effectiveness will not be effective pending further order of the Commission.

Conforming Amendments to 10 CFR 150.2

This rule revises the last sentence of 10 CFR 150.2 by adding a cross reference to 10 CFR 61.9b and replacing the cross reference to 10 CFR 71.11 with a cross reference to 10 CFR 71.8.

VI. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act, as amended (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. This final rule affects a number of ''small entities'' as defined by the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810). However, as indicated in Section VII, ''Regulatory Analysis,'' these amendments do not have a significant economic impact on the affected small entities. The NRC received no comment submissions from an identified small entity regarding the impact of the proposed rule on small entities.

VII. Regulatory Analysis

The amendments to the rule governing hearings on challenges to immediate effectiveness of orders do not change the existing processes but merely clarify the rule. The final rule makes minor, conforming amendments to 10 CFR 150.2. These amendments do not result in a cost to the NRC or to respondents in hearings on challenges to immediate effectiveness of orders, but a benefit accrues to the extent that potential confusion over the meaning of the NRC's regulations is removed. The NRC believes that this final rule improves the efficiency of NRC enforcement proceedings without imposing costs on either the NRC or on participants in these proceedings.

VIII. Backfitting and Issue Finality

The final rule revises the immediate effectiveness provisions at 10 CFR 2.202 to state that the respondent bears the burden of going forward with evidence to challenge immediate effectiveness and the NRC staff bears the burden of persuasion on whether adequate evidence supports immediate effectiveness. The final rule also revises 10 CFR 2.202 to clarify that the presiding officer is permitted to order live testimony, either by its own motion, or upon the motion of any party to the proceeding.

The revisions to 10 CFR 2.202 clarify the agency's adjudicatory procedures with respect to challenges to immediate effectiveness of orders. These revisions do not change, modify, or affect the design, procedures, or regulatory approvals protected under the various NRC backfitting and issue finality provisions. Accordingly, the revisions to the adjudicatory procedures do not represent backfitting imposed on any

entity protected by backfitting provisions in 10 CFR parts 50, 70, 72, or 76, nor are they inconsistent with any issue finality provision in 10 CFR part 52.

IX. Cumulative Effects of Regulation

Cumulative Effects of Regulation do not apply to this final rule because it is an administrative rule. The final rule only (1) makes amendments to the NRC's regulations regarding challenges to the immediate effectiveness of NRC enforcement orders to clarify the burden of proof and to clarify the authority of the presiding officer to order live testimony in resolving these challenges and (2) makes conforming amendments to 10 CFR 150.2.

X. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883).

XI. National Environmental Policy Act

The NRC has determined that the issuance of this final rule relates to enforcement matters and, therefore, falls within the scope of 10 CFR 51.10(d). In addition, the NRC has determined that the issuance of this final rule is the type of action described in categorical exclusions at 10 CFR 51.22(c)(1)–(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rulemaking.

XII. Paperwork Reduction Act

This final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget (OMB), approval number 3150–0032.

Public Protection Notification

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

XIII. Congressional Review Act

The portion of this action amending 10 CFR 2.202 is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, OMB has not found it to be a major rule as defined in the Congressional Review Act.

XIV. Compatibility of Agreement State Regulations

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** (62 FR 46517; September 3, 1997), this final rule will be a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among the Agreement States and the NRC requirements. The NRC staff analyzed the rule in accordance with the procedure established within Part III, ''Categorization Process for NRC Program Elements,'' of Handbook 5.9 to Management Directive 5.9, ''Adequacy and Compatibility of Agreement State Programs'' (*see http://www.nrc.gov/reading-rm/doc-collections/management-directives/*).

The NRC program elements (including regulations) are placed into four compatibility categories (See the Compatibility Table in this section). In addition, the NRC program elements can also be identified as having particular health and safety significance or as being reserved solely to the NRC. Compatibility Category A are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, and, therefore, do not need to be adopted by Agreement States for purposes of compatibility.

Health and Safety (H&S) are program elements that are not required for compatibility but are identified as having a particular health and safety role (*i.e.,* adequacy) in the regulation of agreement material within the State. Although not required for compatibility, the State should adopt program elements in this H&S category based on those of the NRC that embody the essential objectives of the NRC program elements because of particular health and safety considerations. Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to Agreement States under the Atomic Energy Act, as amended, or provisions of 10 CFR. These program elements are not adopted by Agreement States. The following table lists the parts and sections that will be revised and their corresponding categorization under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs.'' The Agreement States have 3 years from the final rule's effective date, as noted in the **Federal Register**, to adopt compatible regulations.

TABLE 1—COMPATIBILITY TABLE FOR FINAL RULE

Section	Change	Subject	Compatibility	
			Existing	New
Part 2				
2.202(c)	Revised	Orders	NRC	NRC.
Part 150				
150.2	Revised	Scope	D	D.

XV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires that Federal agencies use technical standards that are developed by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or is otherwise impractical. In this rule, the NRC is clarifying two aspects of challenges to the immediate effectiveness of NRC enforcement orders: (1) The burden of proof and (2) the authority of the presiding officer to order live testimony in resolving such a challenge. The NRC is also making conforming amendments to 10 CFR 150.2. This action does not constitute the establishment of a standard that contains generally applicable requirements.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Confidential business information; Freedom of information, Environmental protection, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 150

Criminal penalties, Hazardous materials transportation, Intergovernmental relations, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

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 parts 2 and 150 as follows:

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note.

Section 2.205(j) also issued under Sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note).

■ 2. In § 2.202, revise paragraph (c)(2) to read as follows:

§ 2.202 Orders.

* * * * *

(c) * * *

(2)(i) The licensee or other person to whom the Commission has issued an immediately effective order in accordance with paragraph (a)(5) of this section, may, in addition to demanding a hearing, at the time the answer is filed or sooner, file a motion with the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.

(ii) Any party may file a motion with the presiding officer requesting that the presiding officer order live testimony. Any motion for live testimony must be made in conjunction with the motion to set aside the immediate effectiveness of the order or any party's response thereto. The presiding officer may, on its own motion, order live testimony. The presiding officer's basis for approving any motion for, or ordering on its own motion, live testimony shall be that taking live testimony would assist in its decision on the motion to set aside the immediate effectiveness of the order.

(iii) The NRC staff shall respond in writing within 5 days of the receipt of either a motion to set aside the immediate effectiveness of the order or the presiding officer's order denying a motion for live testimony. In cases in which the presiding officer orders live testimony, the staff may present its response through live testimony rather than a written response.

(iv) The presiding officer shall conduct any live testimony pursuant to its powers in § 2.319 of this part, except that no subpoenas, discovery, or referred rulings or certified questions to the Commission shall be permitted for this purpose.

(v) The presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee or other person and other affected parties.

(vi) The licensee or other person challenging the immediate effectiveness of an order bears the burden of going forward with evidence that the immediately effective order is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error. The NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.

(vii) The presiding officer shall issue a decision on the motion to set aside the immediate effectiveness of the order expeditiously. During the pendency of the motion to set aside the immediate effectiveness of the order or at any other time, the presiding officer may not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person.

(viii) The presiding officer shall uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. The presiding officer will promptly refer an order setting aside immediate effectiveness to the Commission and such order setting aside immediate effectiveness will not be effective pending further order of the Commission.

* * * * *

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

■ 3. The authority citation for part 150 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 53, 81, 83, 84, 122, 161, 181, 223, 234, 274 (42 U.S.C. 2014, 2201, 2231, 2273, 2282, 2021); Energy Reorganization Act of 1974, sec. 201 (42 U.S.C. 5841); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

■ 4. In § 150.2, revise the last sentence to read as follows:

§ 150.2 Scope.

* * * This part also gives notice to all persons who knowingly provide to any licensee, applicant for a license or certificate or quality assurance program approval, holder of a certificate or quality assurance program approval, contractor, or subcontractor, any components, equipment, materials, or

other goods or services that relate to a licensee's, certificate holder's, quality assurance program approval holder's or applicant's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of §§ 30.10, 40.10, 61.9b, 70.10, and 71.8.

Dated at Rockville, Maryland, this 13th day of October, 2015.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2015–26590 Filed 10–19–15; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–1985; Directorate Identifier 2014–NM–214–AD; Amendment 39–18294; AD 2015–21–02]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes. This AD was prompted by reports of un-annunciated failures of the direct current (DC) starter generator, which caused caution indicators of the affected systems to illuminate and prompted emergency descents and landings. This AD requires replacing the DC generator control units (GCUs) with new GCUs and replacing the GCU label. We are issuing this AD to prevent a low voltage condition on the left main DC bus, which, during critical phases of flight, could result in the loss of flight management, navigation, and transponder systems, and could affect continued safe flight.

DATES: This AD becomes effective November 24, 2015.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 24, 2015.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov/#!docketDetail;D=FAA-2015-1985;* or in person at the Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–1985.

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Services Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7301; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc. Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes. The NPRM published in the **Federal Register** on June 25, 2015 (80 FR 36493).

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2014–31R2, dated November 11, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes. The MCAI states:

> Four occurrences of un-annunciated failure of the No. 1 Direct Current (DC) Starter Generator prompted emergency descents and landings resulting from the illumination of numerous caution indications of the affected systems. The functionality of the affected systems such as Flight Management System, Navigation, and transponder systems, were reportedly reduced or lost. Investigation determined the failure was a result of a low voltage condition of the Left Main DC Bus. During critical phases of flight, the loss of these systems could affect continued safe flight.
>
> The original issue of this [Canadian] AD mandated the modification [replacing certain DC GCUs with new GCUs and replacing labels] which introduces generator control unit (GCU) undervoltage protection.
>
> Revision 1 of this [Canadian] AD added a GCU part number to the applicability of Part III of this [Canadian] AD, in order to ensure that all units are fitted with a warning label.
>
> Revision 2 of this [Canadian] AD corrects the GCU part number in the applicability of Part III of this [Canadian] AD.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov/#!documentDetail;D=FAA-2015-1985-0003.*

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (80 FR 36493, June 25, 2015) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting this AD as proposed, except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (80 FR 36493, June 25, 2015) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (80 FR 36493, June 25, 2015).

Related Service Information Under 1 CFR Part 51

Bombardier has issued the following service information.

- Service Bulletin 8–24–84, Revision D, dated April 10, 2014, describes incorporating Bombardier Modification Summary (ModSum) 8Q101710 by replacing the GCU with a new GCU, and replacing the GCU label for airplanes having certain Phoenix DC power GCU part numbers.
- Service Bulletin 8–24–89, Revision C, dated November 4, 2014, describes incorporating Bombardier ModSum 8Q101925 by replacing the GCU with a new GCU, and replacing the GCU label for airplanes having certain Goodrich DC power GCU part numbers.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section of this AD.

Costs of Compliance

We estimate that this AD affects 92 airplanes of U.S. registry.

We also estimate that it takes about 3 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour.