Arkansas Department of Health

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Governor Mike Beebe
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October 1, 2010

Josephine Piccone, Ph.D., Director
U.S. Nuclear Regulatory Commission
Office of Federal and State Materials
and Environmental Management Programs
11545 Rockville Pike
Rockville, Maryland 20852

Re: Opportunity to Comment on Proposed Rule to Amend 10 CFR Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71 and 73 - Physical Protection of Byproduct Material (FSME-10-048)

Dear Dr. Piccone:

The Arkansas Department of Health (Department), Radioactive Materials Program, has reviewed the U.S. Nuclear Regulatory Commission's (NRC) Proposed Rule for Physical Protection of Byproduct Material; 10 CFR Parts 30, 32, 33, 34, 35, 36, 37, 39, 51,71, and 73, published in the *Federal Register*, Vol. 75, No. 114, June 15, 2010. **Docket ID NRC-2008-0120**.

The Department has reviewed the proposed rule and provides the following general comments and specific responses to questions contained in the *Federal Register* notice. Also, the Department has reviewed and fully supports the Organization of Agreement States (OAS) analysis and comments on the proposed rule as submitted to the Secretary of the Commission on July 8, 2010.

The proposed rule is overly prescriptive and certainly appears not to be risk based as purported. All licensees are not the same as assumed by the requirements of the proposed rule. Compared to the currently approved trustworthiness and reliability programs required by the IC and Fingerprinting Orders, much of the proposed rule seems unnecessary and burdensome and may not be justified. It seems the current programs are working quite well. Of course, improvement is always needed; however, the complete rework of an apparently adequate program that has been jointly developed and implemented by the NRC and Agreement States is not justified.

Also, the proposed rule places decision-making responsibilities regarding trustworthiness and reliability on both the licensee and the regulatory agency (NRC or Agreement State) but provides little or no guidance that would assist both the parties. To date, the NRC has seemed reluctant to provide this guidance, yet continues to move forward on this rulemaking when the Agreement States have been very vocal about the need for this guidance.

During the 2010 Organization of Agreement States meeting in Portland, Oregon, NRC Commissioner William C. Ostendorff stated that that the Increased Control Orders were "robust" but because of "NRC operational experience" these requirements needed adjustments detailed in the rulemaking. It would certainly seem that with the Agreement States regulating approximately 87% of the radioactive materials licenses in the nation, the Agreement States operational experience should have at least equal consideration.

It would be safe to say that the Agreement States have conducted more Increased Control inspections and security evaluations than the NRC since the implementation of the Increased Control Orders. Therefore, the operational and practical understanding of the Orders, together with the knowledge of the effectiveness of the Orders that the collective Agreement States have gained during this time, should be taken into consideration by the NRC.

This knowledge and understanding should be helpful to the NRC in improving this rulemaking to avoid pitfalls as discussed in the items below.

The following comments and responses are provided.

10 CFR Part 37.21, Personnel Access Authorization Requirements, Paragraph (a)

This paragraph establishes the requirement for a licensee to "...establish, implement, and maintain its access authorization program in accordance with the requirements of this subpart." including current licensees with approved access authorization programs established under the Orders. Further, these licensees are required to submit information about "...the licensee's compliance with this subpart..." within thirty days, as prescribed in paragraph (a) (3). This requirement is unnecessary and creates a burden to both the licensee and the regulatory agency because these programs should already be known and have been previously inspected and documented by the regulatory agency. This is unnecessary work for the regulators and licensees.

Also, 10 Part 37.21 (a) does not address the requirements for currently approved access authorization programs nor the actions that must be taken by the licensee within a specific timeframe.

The NRC must provide additional information and guidance on the requirements of 10 Part 37.21 (a) which is necessary for both the licensees and the regulatory agency.

10 CFR Part 37.23, Access Authorization Requirements, Paragraph (b)

The proposed rule establishes the requirement for licensees to nominate individuals to be reviewing officials and submit the names and fingerprints to the regulatory agency for a criminal records check, rather than continuing the currently accepted and proven practice of the trustworthiness and reliability official established by the Orders. The trustworthiness and reliability official requirements established by the Orders have worked well with no known identified security problems or instances of collusion. The need to revise these requirements in favor of the reviewing official proposal has not been satisfactorily justified by the NRC.

Arkansas has the authority to require fingerprinting of the Reviewing Official; however, the Department DOES NOT seek nor want the authority to perform fingerprint reviews to approve Reviewing Officials. The Department does not have the law enforcement training or experience to review fingerprint results to accurately and consistently make decisions approving or rejecting the nominated individual as the Reviewing Official. Additionally, because of the Arkansas Freedom of Information statute, the Department is NOT able to completely protect the findings of the criminal history records check from public release. The proposed rule puts the burden of review of fingerprint results on the regulatory body which will result in a resource burden.

In addition to the resource burden, there are no criteria for making a consistent determination on the finding of the fingerprint reports. This lack of criteria or guidance will result in inconsistent approval or denial of the nominated reviewing official by the regulators who will be making the determination. It raises the issue of how denied individuals for Reviewing Official duties will be tracked to avoid going to another jurisdiction for approval.

Arkansas does not believe it is necessary to fingerprint and perform a criminal history records check for the Reviewing Official if the individual does not have unescorted access to the Category 1 and Category 2 quantities of radioactive material, nor does it believe that it is required that the Reviewing Official have unescorted access. Requiring a company to assign the specific job duty of Reviewing Official (with unescorted access to the Category 1 and Category 2 quantities of radioactive material) to an individual who must be qualified as a Radiation Worker seems to possibly be an invasion of their rights to operate their business as they see fit. The Reviewing Official should be deemed trustworthy and reliable by the licensee under the Orders and the NRC should not impose job duty requirements.

Of course, on a case-by-case basis, if unescorted access is a routine job requirement for a specific Reviewing Official, certainly that individual must undergo fingerprinting and a criminal record check to receive the proper security authorization. It is mandatory that any Reviewing Official granted unescorted access to the Category 1 and Category 2 quantities of radioactive material also receive and satisfactorily complete radiation safety training required by the licensee.

In summary, Arkansas believes the trustworthiness and reliability official established under the current Orders should remain. Further, the process to identify and qualify the trustworthiness and reliability official should remain as the responsibility of the licensee and not the regulatory agency because the licensee has more direct personal knowledge and experience with the individual identified to be the trustworthiness and reliability official. The licensee is required to complete a background check on the items identified in 37.25, yet the individual nominated as the Reviewing Official may not be approved by the regulatory authority based on fingerprint results. The licensee (typically the Human Resources Section) has knowledge and experience in identifying and qualifying personnel through the established Human Resources procedures and practices. In the real world, the licensee has more knowledge and experience with the individual than the regulator so the whole background investigation should be conducted by the licensee. Denial by the regulator should not be solely based on the results of fingerprint results.

The regulatory agency must insure compliance with regulatory requirements through periodic inspections as is presently done.

The following response is provided to the questions relating to the Reviewing Official presented in the Federal Register on page 33909:

1. Does the reviewing official need to be fingerprinted and have a FBI criminal records check performed?

   Response: No. As stated above, Arkansas does not support the reviewing official concept and further believes the trustworthiness and reliability official established under the current Orders should remain.

2. Are the other aspects of the background investigation adequate to determine the trustworthiness and reliability of the reviewing official?

   Response: Yes. If the rule is adopted, specific guidance and acceptance or rejection criteria must be available for use by the regulatory agency.

3. Are there other methods that could be used to ensure that the reviewing official is trustworthy and reliable?

   Response: Unknown at this time, except the licensee should perform the complete review.

4. Does the requirement to fingerprint the reviewing official place too large a burden on the licensee?

   Response: No

5. Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history record?

   Response: The Department does not agree that this function should be performed by the regulatory agency and does not seek nor want the authority to conduct criminal history records review to approve Reviewing Officials.

<u>10 CFR Part 37.25, Background Investigations</u>

Additional requirements for the already-required background investigation are proposed by this Section of the proposed rule. These additional requirements that the licensee must complete include credit history evaluation, verification of true identity, military history verification, and criminal history review from local criminal justice resources.

Arkansas believes these additional requirements will be a burden to the licensees and, in the absence of specific justifiable evidence that the currently approved trustworthiness and reliability programs required by the Orders are not adequate, adoption of the proposed rule must be reconsidered. Also, the absence of NRC guidance including acceptance or rejection criteria for each of these requirements (that must be known prior to adoption of the proposed rule) further supports the conclusion that adoption of the proposed rule must be reconsidered. This information must be available to licensees and the regulatory agency.

The following response is provided to the questions relating to the background investigation requirements presented in the Federal Register on page 33910:

1. Is a local criminal history review necessary in light of the requirement for a FBI criminal history records check?

   Response: This requirement appears to be unnecessary and burdensome to the licensee.

2. Does the credit history check provide valuable information for the determination of trustworthiness and reliability?

   Response: No. This appears to be overly burdensome to the licensee who may already be personally familiar with the character of the employee. This requirement impacts resources of the licensee and may cause questions regarding an invasion of privacy. Given the current economic conditions and environment, an individual's credit history may not be truly reflective of an individual's trustworthiness and reliability. Because of identity theft and the probable incorrect information in a credit history report, the validity of a credit history check is highly questionable.

   As noted above, specific guidance including acceptance or rejection criteria for evaluating an individual's credit history and interpreting the findings of the evaluation must be available to licensees and the regulatory agency prior to the adoption of the proposed rule.

3. Do the Agreement States have the authority to require a credit history check as part of the background investigation?

   Response: Arkansas has the authority to require a credit history check as part of the background investigation. In the absence of complete guidance on this requirement, there very well may be many inconsistencies in determining an individual's trustworthiness and reliability.

4. What are the appropriate elements of a background investigation and why are any suggested elements appropriate?

   Response: As noted above, the currently approved trustworthiness and reliability programs-background investigation required by the Orders appears to be satisfactory.

5. Are the elements of the background investigation too subjective to be effective?

   Response: Yes. Without guidance or criteria, all aspects of the background investigation, including fingerprint results, are too subjective to be effective.

6. How much time does a licensee typically spend on conducting the background investigation for an individual?

   Response: Unknown. This depends on the type and size of the licensee's business and operations and the skills and experience of the Trustworthy & Reliable Official.

10 CFR Part 37.43, General Security Program Requirements

No comments.

The following response is provided to the questions relating to the security program requirements presented in the Federal Register on page 33914:

1. Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?

   Response: Yes. The Department believes adequate authority currently exists. But has previously stated, the State's Freedom of Information Act will not protect information submitted for approval of a Reviewing Official.

2. Can the Agreement States protect the information from disclosure in the event of a request under a State's Freedom of Information Act or comparable State law?

   Response: Yes. The Department believes adequate authority and procedures exist to protect identified security related information. The State's Freedom of Information Act will not protect information submitted for approval of a Reviewing Official.

3. Is the proposed rule adequate to protect the licensees' security plan and implementing procedures from unauthorized disclosure, are additional or different provisions necessary, or are the proposed requirements unnecessarily strict?

   Response: Yes.

4. Should other information beyond the security plan and implementing procedures be protected under this proposed requirement?

   Response: No. The current proposed rulemaking is overly burdensome and prescriptive for the licensee. There is no risk based determination why this is necessary for all licensees affected by the enhanced security orders. Security now has become more important than health and safety.

5. Should the background information elements for determining whether an individual is trustworthy and reliable for access to security information be the same as for determining access to category 1 and category 2 quantities of radioactive material (with the exception of fingerprinting)?

   Response: Yes. There should be no difference.

10 CFR Part 37.45, LLEA Coordination and Notification

This section of the proposed rule adds significant and unnecessary and burdensome requirements to the LLEA coordination and notification requirements that have been successfully implemented under the Orders. These additional requirements include:

- Advanced notification ("...at least three business days prior...") of the LLEA by licensees of anticipated work at a temporary job site in a specific jurisdiction. Or, if the three day notification is not possible, to notify the LLEA as soon as possible via telephone, facsimile, or e-mail.

The coordination of security plans and notification requirements of work at temporary job sites creates an extra burden to both the licensee and the LLEA. The mandate to require the licensee to initiate these contacts with LLEA without possible response from the LLEA may accomplish nothing but aggravation and frustration for the licensee and the LLEA. Additionally, there may be instances of overlapping local jurisdictions in which it may be difficult for a licensee to identify the responsible LLEA in a given area. As others have suggested, the use of the 911 notification system is the appropriate notification system for response to a possible security related incident at a temporary job site.

Certainly, it is expected that the LLEA will respond to a security event in fulfillment of their responsibility to protect life and property, regardless of what the property may be. It must be recognized that LLEA resources are somewhat limited in Arkansas. In many rural jurisdictions in Arkansas, there may already be a limited number of LLEA officers available to respond to an event resulting in possibly increased or delayed response times. The additional proposed coordination of security plans and notification requirements of work at temporary job sites creates additional burden for the LLEA.

From the enforcement perspective, the proposed rule requires the licensee to document (1.) efforts to coordinate security plans with the LLEA, and (2.) advanced notification of the LLEA of temporary job sites within the LLEA jurisdiction. This action will now require regulatory agency inspectors to visit LLEAs to determine licensee compliance, resulting in longer inspection times and possibly creating a situation that may be interpreted by the LLEA as intrusive.

The current coordination and notification processes implemented under the Orders requires the licensee to "...establish liaison with the LLEA to provide them an understanding of the potential consequences associated with theft or sabotage of the radioactive material...LLEA can appropriately determine the priority of its response...inform the LLEA...of the potential hazards associated with loss of control...". These processes appear to be working well and appear to be providing the necessary information to both the licensee and the LLEA, and they seem to provide the LLEA adequate technical radiological information, pose limited intrusiveness on LLEAs, and allow the LLEA to perform the work they are trained to perform. And, most importantly, provide the needed LLEA involvement.

- Notification by the LLEA "...whenever the LLEA's response capabilities become degraded..."

This proposed requirement is absolutely unnecessary and would probably violate a LLEA "need-to-know" procedure. How will this proposed rule be enforced by the regulatory agency? Why would the LLEA want to make this information known to the public? What benefits are to be gained? This is not a realistic proposed rule.

The following response is provided to the questions relating to the LLEA coordination and notification requirements presented in the Federal Register on page 33916:

1. Is there any benefit in requiring that the LLEA be notified of work at a temporary job site?

   Response: No. As others have stated, the 911 notification system is the proper system to use to notify the LLEA in the correct jurisdiction.

2. Should notifications be made by licensees for work at every temporary job site or only those where the licensee will be working for longer periods, such as the 7 day timeframe proposed in the rule?

   Response: No. The advanced notification of the LLEA of work at temporary job sites should be deleted from the proposed rule.

3. If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?

   Response: See response to Question 2, above.

4. Will licensees be able to easily identify the LLEA with jurisdiction for temporary job sites or does this impose an undue burden?

   Response: See introductory paragraph to this section above regarding the difficulty in determination of the responsible LLEA. It is believed that this proposed requirement will create an unnecessary burden on both the licensee and the LLEA. What is to happen if the wrong LLEA is notified?

5. Are LLEAs interested in receiving these notifications?

   Response: The Department believes the LLEA will not support this type of notification but will respond to a security event when notified through the 911 notification system. The Department recommends that NRC contact LLEAs nationwide about receiving these notification requirements and for the impact it might have on them before adopting this rule.

The following response is provided to the questions relating to mobile device requirements presented in the Federal Register on page 33917:

1. Should relief from the vehicle disabling provisions be provided?

Response: Yes. When other potential health and safety threat issues of the job site or work environment outweigh the security control requirements, relief from the requirements should be provided.

2. Have licensees experienced any problems in implementing this aspect of the Increased Controls?

   Response: No. There have not been any problems in implementing this aspect of the Increased Controls observed in Arkansas.

3. Should there be an exemption written into the regulations or should licensees with overriding safety concerns be required to request an exemption from the regulations to obtain relief from the provision?

   Response: An exemption should be written into the regulations; however, the licensee must provide adequate justification (basis and rationale) for claiming the exemption.

4. If an exemption is included in the regulations, should it be a blanket exemption for the oil and gas industry?

   Response: No. The exemption should be written to address potential health and safety and significant business loss threats of the job site, equipment or work environment.

5. Does the disabling provision conflict with any Occupational Safety and Health Administration requirements or any State requirements?

   Response: Unknown

The following response is provided to the questions relating to the reporting of events requirements presented in the Federal Register on page 33917:

1. Are theses the appropriate items and thresholds to be reported to the LLEA?

   Response: Yes

2. Are these the appropriate items and thresholds to be reported to the NRC?

   Response: Yes

3. Should suspicious activities be reported? If they are reported, what type of activities should be considered suspicious?

   Response: Yes. The licensee is best qualified to identify suspicious activities at the permanent facility, temporary job site, or while in transit. Perhaps the NRC should provide guidance or criteria to identify suspicious activities.

4. Is the time frame for reporting appropriate?

   Response: Yes

The following response is provided to the questions relating to the license verification requirements presented in the Federal Register on page 33918:

1. Should there be a requirement for verification of the license for transfers of category 2 quantities of radioactive material or would it be acceptable to wait for the system being developed before requiring license verification for transfers of category 2 quantities of radioactive material?

   Response: The present license verification process is acceptable until the "system being developed" is implemented and fully operable.

2. We are interested in how address verification might work for shipments to temporary job sites and the ability of both licensees and the Agreement States to comply with such a requirement. For example, would States be able to accommodate such requests with their current record systems?

   Response: The present license verification process should adequately handle the shipments of radioactive material. From a practical viewpoint, source delivery is typically made to the licensee's address and the licensee then transports the source to the temporary job site. In Arkansas, rarely, if ever, is a source delivered to a temporary job site by a commercial carrier.

3. We are also seeking comment on the frequency of the license verification. For example, should a licensee be required to check with the licensing agency for every transfer or would an annual check (or some other frequency) of the license be sufficient?

   Response: Following the implementation of a fully operable license verification system and based on the current understanding of the system capabilities, license verification for every transfer would be acceptable. However, until the system is operable, the current process of the transferring licensee requesting and receiving an up-to-date copy of the receiving licensee's license prior to the transfer (and discussing the license with the appropriate regulatory agency as required) is adequate.

4. If an annual check is allowed, how would the transferring licensee know if a license has been modified since the last check and that the license is still authorized to receive the material?

   Response: See above response.

The following response is provided to the questions relating to the requirements for an approved monitoring plan while the shipment is in a railroad classification yard presented in the Federal Register on page 33921:

1. How could surveillance of the shipment be accomplished while in the classification yard?

   Response: Unknown

2. Would the classification yard allow an individual to accompany a shipment while the shipment is held in the classification yard?

   Response: Unknown

3. What precautions might be necessary from a personal safety standpoint?

   Response: Unknown

Considering the level of effort and the amount of time various Agreement State personnel and organizations (OAS, CRCPD) have worked in partnership with the NRC in developing and implementing the IC and Fingerprinting Orders, the State of Arkansas is very disappointed in the overly prescriptive content of the proposed rule and the resurgence of issues that were previously discussed and agreed upon as resolved in the Orders. Much of the proposed rule, if adopted, will be burdensome to licensees, LLEAs and regulatory agencies, both States and the NRC.

The Orders seem to have been implemented satisfactorily under public health and safety. Therefore, the necessity for such comprehensive revision of the Orders in the absence of a demonstrated need is not justified. Certainly, the Orders can and should be improved (taking into account the gained operational experience of the Agreement States and NRC) but not at the unjustified level of the proposed rule.

The NRC should most definitely reconsider adoption of the proposed rule as presented.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

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cc: Bernard Bevill, Section Chief
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