

Attachment 6

Differing View

This view is different from the consensus view of the WG that is provided in the memorandum to the MRB and the Attachments 1, 2, 3, 4, and 5. The consensus view and the differing view contain the opinions of the WG and do not necessarily represent the views of NRC management. This differing view concludes that NRC's implementation of the rule in 10 CFR 34.41(a) is satisfactory to achieve the goal of safety. This differing view endorses the current regulatory approach for reasons other than indicated in Option 1 (Status Quo) and states that another approach is not needed to make the rule more effective.

This differing view recommends that NRC should notify the Agreement States to align their implementation to be essentially identical to NRC's implementation of the rule. Although the Agreement States that are currently not aligned with the NRC's implementation of the rule would be expected to align their programs, the impact caused by not doing so should be minimal on these States. In fact, although an Agreement State may be incompatible for the rule, that finding alone would not be sufficient for the Agreement State to be found unsatisfactory with respect to the IMPEP Non-Common Performance Indicator 1–Compatibility Requirements.

The IMPEP Report excerpt in Attachment 1 provides a recommendation to the NRC, as follows: "The review team noted and the MRB concurred, that the Department presented sufficient information to warrant **reconsideration of how this rule should be implemented**. The review team recommends that NRC, in coordination with the Agreement States, re-evaluate the two-person rule to **assess the effectiveness of the intended outcomes**, including experience from past events, and **propose a strategy and rule interpretation that best achieves the goal of safety**." This differing view discusses three questions derived from the highlighted text: (1) How should the NRC implement the rule in 10 CFR 34.41(a)? (2) Are the intended outcomes of the rule effectively accomplished? and (3) Are changes to NRC's regulatory approach needed to achieve the goal of safety?

1. How should the NRC implement the rule in 10 CFR 34.41(a)? The rule should be implemented as indicated by the Commission in the Statements of Consideration (SOC) for the final rule as published in the Federal Register (62 FR 28948, May 28, 1997). Without significant and compelling new information that indicates ineffectiveness of the rule, the Commission is not likely to expend NRC resources to change the rule or NRC's implementation of the rule.

The rule is prescriptive in requiring a radiographer to be accompanied by at least one other qualified radiographer or radiographer's assistant whenever radiography is performed at a location other than a permanent radiographic facility and by stating that radiography may not be performed if only one qualified individual is present. The qualification requirements are listed in 10 CFR 34.43.

The surveillance aspect of the rule is performance-based in that it requires a licensee who performs radiography at a temporary job site to assign at least one other qualified individual to observe the operations and provide immediate assistance to prevent unauthorized entry.

NRC has already provided guidance documents and generic communications that are aligned with the Commission's approved regulatory approach described in the SOC. Since 1998, the NRC staff implemented the rule to accomplish the desired outcomes as evidenced by enforcement actions and technical assistance requests (TARs) which have consistently reinforced the regulatory approach for the rule.

The implementation change described by Option 2 should not be recommended because it is different from the Commission's approved regulatory approach. Option 2 describes the contents of a RIS that would clarify implementation of the rule to allow a radiographer to use the source while the additional qualified individual is involved with duties other than observing operations and assisting to prevent unauthorized access. The RIS would provide specific clarification of terms, such as, "immediate assistance" and "nearby" rather than to use the common dictionary meaning for the rule text and the terms used in the SOC.

The SOC states that, "the purpose of the second individual is to provide immediate assistance when required and to prevent unauthorized entry into the restricted area." The words, "when required," are being misconstrued in Option 2 to permit the second individual to indirectly observe operations while tending to duties which may be unrelated to safety. The words, "when required," as used in the SOC mean that because the second individual is observing (dictionary meaning is "to watch attentively") operations the second individual is also capable of providing immediate assistance to prevent unauthorized entry into the restricted area. In other words, because the second individual is attending the use of the source the individual is also in a position to meet and deal with an intruder into the area. This is the essential function of the second individual who has recognized responsibility because they are qualified to maintain safe operations during actual use of the source. This is the manner in which NRC is implementing the surveillance component of the rule and it should not be changed.

2. Are the intended outcomes of the rule effectively accomplished? The intended outcomes of the rule are to maintain safety by preventing unnecessary radiation exposures to workers and members of the public. Safety is maintained by requiring qualified individuals to observe operations and prevent unauthorized entry. If interrupted by intruders into the area, a qualified individual would be capable of retracting the source into the shielded device to prevent unnecessary radiation exposure. If an equipment failure occurred and the source could not be secured in the shield, a radiographer and at least one other qualified individual would secure the area and implement the licensee's emergency procedure to successfully store the source in the shield.

There is no specific information to assess the effectiveness of the rule. The NMED data does not specifically correlate the circumstances of the events to the rule. The data does not indicate the rule as root cause or contributing factor for the events. Since licensees are not required to report attempts to breach the established perimeter around the area, the NRC and the Agreement States do not have specific information about the rule as a factor in preventing unnecessary radiation exposures.

Enforcement actions include cases that involved unqualified individuals and radiographic operations that were performed by only one individual. None of the cases involved radiation overexposures to workers or members of the public.

3. Are changes to NRC's strategy and rule interpretation needed to achieve the goal of safety?

Some of the Agreement States are implementing the rule to permit licensees to perform radiography when only one qualified individual is observing operations and the other qualified individual is nearby in a darkroom, processing the film. While such implementation departs from NRC's interpretation and implementation of the rule, the NMED data does not provide specific information about the effectiveness of the implementation of the rule by these States. Consequently, it should be considered that these States are achieving the goal of safety as effectively as the NRC.

The surveillance statement in 10 CFR 34.41(a) is intended to be different than the surveillance statement in 10 CFR 34.51. The compatibility designations are respectively Category B and Category C and should not be changed so that both sections are Category C. Section 34.41(a) states, "... The additional qualified individual shall observe operations and be capable of providing immediate assistance to prevent unauthorized entry." Section 34.51 states, "... the radiographer, or the other individual present, as required by § 34.41, shall maintain continuous direct visual surveillance of the operation to protect against entry into the high radiation area".

Section 34.41(a) is written so that either a radiographer or a radiographer's assistant may observe operations. The term, "qualified individual" refers to "at least one other qualified radiographer or an individual who has at a minimum met the requirements of § 34.43(c)." The rule provides flexibility for a licensee and is performance-based. As Category B, the same degree of flexibility should be afforded to a licensee operating within an Agreement State's jurisdiction. A change from Category B to Category C would allow an Agreement State to be more restrictive than the rule and may reduce the degree of flexibility for a licensee operating within the State's jurisdiction. Such a change may not be needed to achieve the goal of safety.

Section 34.51 is compatibility Category C and the rule text is again written to provide flexibility for a licensee to assign either a radiographer or a radiographer's assistant to maintain continuous direct visual surveillance of operations within the vicinity of the high radiation area. As Category C, an Agreement State may be more restrictive than the rule and require that a licensee only assign a radiographer to protect against entry into the high radiation area.

The regulatory approach for 10 CFR 34.41(a) and 34.51 is sufficient and no change is needed to achieve the goal of safety.