

## **RULEMAKING ISSUE NOTATION VOTE**

June 20, 2006

SECY-06-0139

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations

SUBJECT: SECURE TRANSFER OF NUCLEAR MATERIAL  
(RIN: 3150-AH90)

PURPOSE:

To request Commission approval to publish a proposed rule, in the *Federal Register*, that would amend 10 CFR Part 73. The proposed amendment would implement requirements for the secure transfer of nuclear materials, as required by Section 656 of the Energy Policy Act (EPAcT) of 2005, by specifically excepting certain licensees from provisions of Section 170I of the Atomic Energy Act (AEA), as amended.

SUMMARY:

Section 656 of the EPAcT requires the U.S. Nuclear Regulatory Commission (NRC) to establish a system of manifests and to require security background checks, related to transfer or receipt of nuclear materials, pursuant to an NRC import or export license; and to issue final regulations, within 1 year after passage of the EPAcT, regarding exceptions to the provisions of Section 170I of the AEA, as amended. An appropriate system for manifests already exists in U.S. Department of Transportation (DOT) and NRC regulations. A comprehensive approach for security background checks will be included as part of NRC's planned rulemaking to implement Section 652 of the EPAcT. While the Section 652 rulemaking is being conducted, NRC has a

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regulatory framework for security background checks through a system of Orders regarding unescorted access to risk-significant sources of radioactive material. Therefore, the rulemaking that the staff is conducting at this time, under Section 656, is only to codify exceptions that the staff has developed based on licensees not included in the system of Orders issued by NRC. The staff anticipates that these requirements for exceptions will be revisited and may be superseded by the more comprehensive Section 652 rulemaking.

#### BACKGROUND:

On August 8, 2005, the President signed the EAct into law. Section 656 of the EAct added Section 170I to the AEA, which requires the Commission to establish a system to ensure that materials transferred or received in the United States, by any party, pursuant to an import or export license issued by NRC, are accompanied by a manifest, and that each individual receiving or accompanying the transfer of such materials be subject to a security background check conducted by appropriate Federal entities. Section 656 identifies radioactive materials to be covered by these provisions; however it also directs the Commission to issue regulations, within 1 year after enactment of the EAct, identifying those radioactive materials or classes of individuals that, consistent with the protection of the public health and safety and the common defense and security, are appropriate exceptions to requirements of Section 170I of the AEA.<sup>1</sup>

#### DISCUSSION:

As noted, Section 656 of the EAct has three broad elements: 1) establish a system for manifests of import/export shipments of radioactive materials; 2) require security background checks of persons receiving or accompanying import/export shipments of radioactive materials; and 3) issue a regulation excepting shipments of certain types of radioactive materials or classes of individuals from the requirements of Section 170I of the AEA, as amended by the EAct. The proposed approach for carrying out the mandate of these elements of Section 656 is discussed in the following sections.

#### *Establish a system of manifests for shipments of radioactive material*

Requirements for manifests for shipments of radioactive materials already exist in DOT regulations at 49 CFR Part 172. Specifically, 49 CFR Part 172.202(a) requires that shipping papers with radioactive shipments must indicate: the basic description of the material; the total quantity of material; and the number and type of packages. In addition, 49 CFR Part 172.203 requires that descriptions of a shipment containing radioactive material must include: the name of each radionuclide in the material; a description of the physical and chemical form of the material; the activity contained in each package of the shipment; and labeling of each package being transported. NRC has adopted the DOT requirements into its regulations by cross-reference, at 10 CFR Part 71.5, where it is stated that each licensee that transports licensed material outside the site of usage, or where transport is on public highways, or that delivers licensed material to a carrier for transport, shall comply with the applicable requirements of the DOT regulations at 49 CFR Parts 107, 171-180, and 390-397.

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<sup>1</sup>The text of Section 656 actually refers to "...exceptions to the requirements of Section 170D of the AEA"; however, that is a misprint. The correct citation is to Section 170I.

Based on the existing requirements for shipping papers for radioactive materials already in place in DOT regulations and by reference in NRC regulations in Part 71, an appropriate system is already established to ensure that shipments of radioactive materials are accompanied by papers (i.e., a manifest) appropriately describing the materials being shipped. Thus, the requirements of the EAct have been met in this area and is not including in this proposed rule any additional requirements for manifests for radioactive material shipments.

*Requirements for security background checks for persons receiving or accompanying shipments of radioactive materials*

Section 656 of the EAct states that each individual who “accompanies” or “receives” the transfer of radioactive materials, in the United States, pursuant to an NRC import or export license, shall be subject to a security background check<sup>2</sup> conducted by appropriate Federal entities. Section 656(c) of the EAct also indicates that such background check requirements would become effective on a date established by the Commission.

The staff believes that the most appropriate and comprehensive approach for establishing requirements for security background checks is as part of the broader considerations of NRC’s planned rulemaking to implement Section 652 of the EAct. Section 652 mandates the Commission to require fingerprinting and criminal history record checks for any individual who is permitted unescorted access to radioactive material “...that the Commission determines to be of such significance to the public health and safety or the common defense and security, as to warrant fingerprinting and background checks.” The individuals referred to under Section 656 are a subgroup (i.e., those transferring radioactive material pursuant to an export or import license) of the larger group of individuals at a licensed facility, with unescorted access to radioactive material, who would ultimately be included under a Section 652 rulemaking. The goal of the Section 652 rulemaking is that requirements for access are coherent and use a graded approach for the wide range of licensees impacted by Section 652, including those who might import or export radioactive material, and that there be coordinated consideration of appropriate exceptions, and of both domestic and import/export transport.

The current schedule for the rulemaking to implement Section 652 calls for issuance of a proposed rule in the Fall of 2007 and a final rule in the Fall of 2008. While the comprehensive Section 652 rulemaking is being conducted, adequate protection of the common defense and security is provided by a combination of the system of NRC Orders to a range of licensees whose licenses provide for unescorted access to risk-significant sources of radioactive material, and the system of transport security at other Federal agencies. A brief discussion of these efforts follows.

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<sup>2</sup> The term “security background check” is not defined in Section 656. In related regulatory efforts, NRC has used various terms, including “background check,” to determine whether an individual is trustworthy and reliable, and included items like identity verification, employment and education history, personal references, etc., in the check. In addition, Section 652 of the EAct refers to “criminal history record check” as a check made by obtaining an individual’s fingerprints and obtaining records check results from the Attorney General.

NRC has issued an extensive series of Orders, during the period 2002-2005, that include background check requirements for access to the range of facilities that it licenses and for shipment of radioactive material in quantities of concern (RAMQC). The purpose of these Orders has been to impose certain security measures to supplement existing regulations, in 10 CFR Part 20, or equivalent Agreement State regulations, for securing licensed materials from unauthorized access. The Orders note that conditions for access to risk-significant sources are governed by an appropriate need-to-know and by background checks, to determine the trustworthiness and reliability of individuals having unescorted access to the material. The Orders for unescorted access to radioactive material issued to date do not include fingerprinting for a criminal history record check. Currently, the staff is preparing additional Orders to pool-type irradiator licensees, manufacturing and distribution (M&D) licensees, and licensees making shipments of RAMQC, to require fingerprinting and criminal history record checks for unescorted access to the risk-significant sources of radioactive material at their facilities, and anticipates issuing these orders in the Summer of 2006. These Orders would cover individuals with unescorted access to radioactive material at these facilities; persons "receiving" material pursuant to an import/export license would be a subset of the persons covered by the Orders.

In addition, there are various regulatory initiatives, in place or underway, at other Federal agencies that have separate statutory authority in the area of transportation security, specifically for protecting movement of international trade across U.S. borders and maximizing security of the international supply chain. The Transportation Security Administration (TSA) of the Department of Homeland Security (DHS) has regulations for both civil aviation security and maritime and land transportation security, with specific requirements for Federal fingerprint-based criminal history record checks for various transport personnel. Such personnel include: aircraft flight crew members; persons with authority to perform checked baggage or cargo functions; and drivers involved in land transport of hazardous materials. Personnel involved in these functions can be disqualified if the checks indicate potential security risks. Similarly, the United States Coast Guard (USCG), also an agency of DHS, has requirements for security at U.S. ports and background checks for maritime personnel. In addition, there are DHS initiatives being implemented, such as name-based background checks on U.S. port workers and the more comprehensive nationwide biometric-based Transportation Worker Identification Credential (TWIC) program.<sup>3</sup> The staff views the transport security requirements of these DHS agencies, that apply to the nation's hazardous material transportation infrastructure as a whole, as the most effective long-term solution to implementing certain of the provisions of Section 656 of the EAct. The staff will work with other Federal agencies with authorities in the area of transport security, during the Section 652 rulemaking, to assure a coordinated Federal approach and to consider other Federal agency programs that are developed and initiated.

#### *Issue regulations with exceptions to the requirements of Section 170I of the AEA*

The staff proposes, consistent with Section 656(b), to conduct a rulemaking to codify exceptions from the requirements of Section 170I of the AEA, as amended. As noted above, Section 656(b) of the EAct requires NRC to issue regulations, within 1 year after enactment of the EAct, identifying radioactive materials or classes of individuals that, consistent with the

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<sup>3</sup> TSA and USCG recently published a proposed rule in the *Federal Register* on implementing the TWIC program for the maritime sector (see 71 FR 29395; May 22, 2006).

protection of the public health and safety and the common defense and security, are appropriate exceptions to requirements of Section 170I of the AEA, as amended.

Consistent with Section 656(b), the staff is proposing to amend NRC's regulations to except, from the security background check requirements of Section 170I, those licensees that have not received NRC Orders restricting unescorted access to radioactive materials, based both on background checks for trustworthiness and reliability and on fingerprinting and criminal history record checks. As of May 2006, Orders issued regarding unescorted access to radioactive materials have only been based on background checks. However, as noted above, it is anticipated that Orders restricting unescorted access, based on fingerprinting and criminal history record checks, will be issued by the Summer of 2006 for pool-type irradiator licensees, M&D licensees, and licensees making shipments of RAMQC. Under the proposed rule, those licensees not receiving NRC Orders for both fingerprinting and background checks would be excepted from the security background check requirements of Section 170I of the AEA. The rationale for the exceptions is that they are consistent with the system of Orders, issued to certain licensees, that NRC has instituted for protection of the common defense and security. The materials possessed and transferred by the licensee groups having received Orders have been deemed, during the process of issuance of the Orders, to be appropriate for immediately requiring certain security measures for unescorted access; based on potential higher risk resulting from malevolent use of those materials.

Using the framework of the existing system of Orders to codify exceptions allows for consistency in approach, with regard to exceptions for some radioactive materials from the security background check requirements of Section 170I of the AEA, as amended by the EPAct. As discussed above, the staff intends to address fingerprinting for criminal history record checks, and background checks, for licensees, in a more comprehensive manner, under the rulemaking to implement Section 652 of the EPAct. One of the elements of that rulemaking, as required by Section 652, will be determining requirements for access to quantities of radioactive material, subject to regulation by the Commission, that the Commission determines to be of such significance to the public health and safety or to the common defense and security as to warrant fingerprinting and background checks. Thus, the requirements for exceptions in this Section 656 rulemaking will be revisited, and may be superseded, by the more comprehensive Section 652 rulemaking. In this Section 656 rulemaking, the staff is therefore making a risk-informed decision to except licensees other than those licensees with risk-significant sources (i.e., pool-type irradiator, M&D, and those making shipments of RAMQC) from requirements of Section 170I. In the future more comprehensive Section 652 rulemaking, the staff will consider whether the exceptions for security background checks should be modified.

#### Strategy for Implementation Periods

Section 656(c) of the EPAct provides that amendments to the AEA take effect upon Commission issuance of regulations, under Section 656(b) of the EPAct. Consistent with this provision, the requirements for exceptions proposed in this amendment would become effective on the date of issuance of a final rule.

Section 656(c) of the EAct also provides that background check requirements are to become effective "...on a date established by the Commission." As discussed above, as the Commission is planning to make a more comprehensive analysis of security background check requirements, as part of the Section 652 rulemaking, it is anticipated that an effective date for these requirements will be established at the time of issuance of a final Section 652 rule. With regard to manifest requirements, the staff notes, as discussed above, that existing NRC and DOT regulations require shipments of radioactive material to be accompanied by shipping papers (i.e., a manifest).

#### Paperwork Reduction Impact

This proposed rule would amend NRC's regulations to implement the mandate of Section 656 of the EAct, which was signed into law on August 8, 2005. The proposed amendment would contain exceptions to requirements, in Section 170I of the AEA, as amended, and would not contain any information collection requirements. Therefore, this rule is not being submitted to the Office of Management and Budget for approval of information collection requirements.

#### NRC Strategic and Performance Goals

This proposed rule is consistent with NRC's strategic objectives and performance goals. The proposed rule would contain provisions for exceptions to requirements in Section 170I of the AEA, related to secure transfer of nuclear material, which are consistent with NRC's statutory authority to ensure protection of the public health and safety and the environment and common defense and security. Assuring that material is transferred in a secure manner will ensure protection of public health and safety and the environment and the common defense and security. Also, specific requirements for exceptions will make NRC's actions more effective and efficient. This rulemaking is being conducted in an open process, including availability for public comment. The staff plans to post the draft proposed rule on NRC's Rulemaking Web Page upon issuance of this Commission Paper. If approved by the Commission, the proposed rule will be published in the *Federal Register* for a 30-day public comment period.

#### AGREEMENT STATE COORDINATION AND COMPATIBILITY:

On March 3, 2006, a copy of the draft proposed rule was posted on NRC's Technical Conference Forum so that Agreement States could have an early opportunity to review and comment on the staff's proposal. We received comments from the States of New York, Texas, Illinois, and Washington, whose comments included: the need for a rule; compatibility designations; and specific implementation aspects, including transshipments, excepted individuals, licensee and Federal agency interfaces, and costs and amounts of shipments. After considering these comments, the staff made a number of revisions to the draft proposed rule.

The staff has analyzed the proposed rule, under the procedures established within Part III of Handbook 5.9 to Management Directive 5.9, "Categorization Process for NRC Program Elements." Compatibility discussions are contained in the *Federal Register* document. The staff has determined the appropriate Compatibility Category for this rulemaking to be



Compatibility Category NRC. The requirements in this proposed rule are limited to providing exceptions to requirements in Section 170I of the AEA, as amended by the EPAct, and are based on a system of Orders, developed under NRC's authority, to protect the common defense and security, which cannot be relinquished to the Agreement States.

#### RESOURCES:

To complete the rulemaking, a total of 0.8 full-time equivalents (0.55 for NMSS, and 0.25 for all other offices) will be required. The staff is not preparing a regulatory analysis and regulatory flexibility evaluation, so there are no contractor resources included. These resources are included in the fiscal year 2006 budget. The information on resources and schedule reflects the current environment. If a significant amount of time (greater than 30 days) passes, or the Commission provides the staff direction that differs from, or adds to, the staff's recommended actions, this section of the paper will need to be revisited after issuance of the draft Staff Requirements Memorandum.

#### COMMITMENT:

1. The staff will post the draft proposed rule on the NRC website subsequent to issuance of this document.

#### RECOMMENDATION:

That the Commission:

1. Approve, for publication, in the *Federal Register*, the proposed amendment to Part 73 (Enclosure).
2. Note:
  - a. The *Federal Register* document will provide 30 days for public comment.
  - b. A draft Regulatory Analysis and a regulatory flexibility analysis have not been prepared for this rulemaking because it does not impose any regulatory burdens on licensees.
  - c. Appropriate Congressional committees will be informed of this action.
  - d. No Office of Management and Budget review is required, because the proposed amendment contains no information collection requirements.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections. The proposed rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

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Enclosure:  
*Federal Register* notice



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Enclosure:  
*Federal Register* notice

**ML060390265**

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