

RULEMAKING ISSUE
(Affirmation)

November 27, 2006

SECY-06-0234

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations /RA/

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

PURPOSE:

To request Commission approval for publication of the final rule.

SUMMARY:

Section 656 of the Energy Policy Act (EPAct) mandates that the U.S. Nuclear Regulatory Commission (NRC) establish a system of manifests and security background checks related to transfer of nuclear materials, pursuant to an NRC import or export license; and to issue final regulations within one year after passage of the EPAct regarding exceptions to the provisions of Section 1701 of the Atomic Energy Act (AEA), as amended. After considering the status and extent of NRC's regulatory program, NRC published a proposed rule, codifying a set of exceptions, based on the system of Orders it had already issued. As a result of our consideration of public comments received, the final rule text continues to read the same as the proposed rule text. This paper does not address any new commitments.

BACKGROUND:

On August 8, 2005, the President signed the EPAct into law. Section 656 of the EPAct added Section 1701 to the AEA, which placed three broad requirements on the NRC: 1) establish a

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system for manifests of import/export shipments of radioactive materials; 2) require security background checks of persons receiving or accompanying import/export shipments of certain radioactive materials, to become effective on a date established by the Commission; and 3) issue a regulation, within one year after enactment of the EPAct, excepting shipments of certain types of radioactive materials or classes of individuals from the requirements of Section 170I of the AEA.

DISCUSSION:

Rulemaking Considerations Related to Proposed Rule to Implement Section 656 of the EPAct

In preparing the proposed rule to implement Section 656, the staff determined that, based on existing requirements for shipping papers for radioactive materials already in place in Department of Transportation regulations, and incorporated by reference in NRC regulations in 10 CFR Part 71, an appropriate system is already established to ensure that shipments of radioactive materials, that would be affected by Section 656, are accompanied by shipping papers (i.e., a manifest) appropriately describing the materials being transported. Thus, NRC did not include any additional requirements for manifesting of radioactive material shipments in the proposed rule. In addition, the staff determined that the most appropriate and comprehensive approach for establishing requirements for security background checks is as part of the broader considerations of NRC's rulemaking to implement Section 652 of the EPAct. Section 652 mandates that the Commission require fingerprinting and criminal history record checks for any individual permitted unescorted access to risk-significant radioactive material. The Section 652 proposed rule is currently in preparation; its schedule calls for issuance of a proposed rule, in Fall 2007, and a final rule, in Fall 2008. While the Section 652 rulemaking is being conducted, NRC has a regulatory framework for security background checks through a system of Orders regarding unescorted access to risk-significant sources of radioactive material.

Issuance of Proposed Rule

Consistent with Section 656(b), the Commission proposed to amend NRC's regulations to except from the security background check requirements of Section 170I those licensees that have not received NRC Orders containing requirements for background checks for trustworthiness and reliability, that include fingerprinting and criminal history record checks, as a prerequisite for unescorted access to risk-significant radioactive materials. Orders restricting access, based on fingerprinting and criminal history record checks, have been issued for pool-type irradiator licensees, manufacturing and distribution (M&D) licensees, and licensees that make shipments of radioactive materials in quantities of concern (RAMQC). Thus, these licensees satisfy the requirements of Section 170I through compliance with the requirements contained in their existing Orders (or new or amended Orders). Also, if additional Orders for fingerprinting and criminal history checks for unescorted access to radioactive material were to be issued to licensees other than those noted here, licensees who receive any such new Orders would no longer be excepted from the security background check requirements of Section 170I.

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 licensees that have 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.

The proposed rule was published in the *Federal Register* on August 30, 2006 (71 FR 51534).

Public Comments

The proposed rule public comment period closed September 29, 2006, and two comment letters were received, one from the Organization of Agreement States (OAS) and one from the Nuclear Energy Institute (NEI). The OAS comment letter indicated that the NRC approach in the rulemaking seemed reasonable to the OAS Executive Board. The NEI comment letter indicated that NEI supported the proposed rule as drafted. However, NEI also stated that there were two areas of confusion regarding the applicability of the rulemaking, in particular that: there are a number of power reactor licensees that have personnel who come in contact with radioactive materials in transit but who are not covered by additional Orders nor existing rules in 10 CFR. In addition, NEI was concerned as to where this Section 656 rulemaking will end and where the referenced Section 652 rulemaking, due for issuance in late 2007, will start.

In response to the NEI concerns, it can be noted that the "Supplementary Information" in the *Federal Register* notice (FRN) issuing the proposed rule stated that this Section 656 rulemaking is relying on the framework of the system of NRC Orders, either in place or to be put into place, as the basis for codifying exceptions. This allows for a consistent approach, for radioactive materials, that NRC considers appropriate, at this time, for exception from the requirements of Section 170I of the AEA, as amended by the EPA. Orders for fingerprinting and criminal history checks, for persons at licensed facilities shipping RAMQC, were issued in October 2006. As noted previously, the Section 652 rulemaking will take a more comprehensive approach in establishing requirements for security background checks, for licensees, and for unescorted access to radioactive material. To the extent that personnel at a nuclear power plant handle risk-significant material and are not currently covered by regulation and/or Order with regard to background checks and fingerprinting, consideration can be given to including such licensees in NRC's framework of Orders. If such additional Orders are issued, licensees receiving any such new Orders would no longer be excepted from the security background check requirements of Section 170I, under the provisions of this Section 656 rule. With regard to the second point raised by NEI, the FRN for the proposed rule notes that NRC intends to address background checks and fingerprinting for criminal history record checks, for unescorted access to risk-significant materials, in a more comprehensive manner under the rulemaking to implement Section 652 of the EPA. The requirements for exceptions in this Section 656 rulemaking were issued as part of a mandate of Section 656 of the EPA for a limited subset of licensee employees. The requirements for exceptions in this Section 656 rulemaking will be revisited and may be modified and/or superseded by the more comprehensive Section 652 rulemaking.

Content of Final Rule

After review of the public comments, the staff is recommending making final the approach in the August 30, 2006, proposed rule (i.e., 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 to individuals who have undergone background checks, for trustworthiness and reliability, which include fingerprinting and criminal history record checks). As of October 2006, Orders for fingerprinting and criminal history record checks for unescorted access to radioactive materials have been issued to pool-type irradiator licensees, M&D licensees, and licensees that make shipments of RAMQC. Under the provisions of the final rule, if additional Orders for fingerprinting and criminal history checks for unescorted access to radioactive material are issued to licensees other than those noted above, licensees that receive any such new Orders would no longer be excepted from the security background check requirements of Section 170I.

NRC Strategic and Performance Goals

This final rule is consistent with NRC's strategic objectives and performance goals. The final rule contains 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 adequate protection of the public health and safety and the environment and common defense and security. Assuring that material is transferred in a secure manner ensures protection of public health and safety and the environment and the common defense and security. Also, specific requirements for exceptions make NRC's actions more effective and efficient. This rulemaking is being conducted in an open process, including availability for public comment. The proposed rule was published in the *Federal Register*, for a 30-day public comment period.

RESOURCES:

FSME has sufficient resources budgeted in FY 2007 to complete this rulemaking.

AGREEMENT STATE COORDINATION AND COMPATIBILITY:

The staff has analyzed the final 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 final rule are limited to providing exceptions to requirements in Section 170I of the AEA, as amended by the EPA Act, 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.

The proposed rule was reviewed by the OAS during the public comment period. The OAS comment letter indicated that the NRC approach in the rulemaking seemed reasonable to the OAS Executive Board.

RECOMMENDATIONS:

That the Commission:

1. Approve the enclosed notice of final rulemaking for publication in the *Federal Register*.

2. Certify that the final rule will not have a significant economic impact on a substantial number of small entities.
3. Note:
 - a. A Regulatory Analysis and a Regulatory Flexibility Analysis have not been prepared for this rulemaking because it does not impose any regulatory burdens on licensees.
 - b. Appropriate Congressional committees will be informed of this action.
 - c. No Office of Management and Budget review under the Paperwork Reduction Act is required, because the final rule amendment contains no new or amended information collection requirements.

COORDINATION:

The Office of the General Counsel has no legal objection to the final rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections. The final 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

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