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Date: 7/30/2007 6:39:23 PM
Subject: AGREEMENT STATE AUTHORITY TO FINGERPRINT (RCPD-07-004)

This is in response to RCPD-07-004.

First, we believe the Commission should re-examine whether all IC licensees truly warrant the requirement to fingerprint for criminal history records check. The IC categories represent a wide range of radioactive material quantities. Some of these IC categories may not possess quantities of radioactive materials that would be comparable to those found in utilization facilities or have the same security implication as safeguards information. We believe the three subitems of 42 USC § 2169 (a)(1)(B)(i) should be viewed as comparable to one another. The interpretation of radioactive materials "of such significance" should reinforce the notion that not all IC licensees possess quantities as vast as utilization facilities or need "safeguards" protection.

Second, our answer to NRC's request pertaining to "citations to any State statutes, regulations, or other laws that might affect a State's ability to collect fingerprints or the use of information obtained as a result of the required FBI identification and criminal history records check" is as follows:

In this state employers are not permitted to inquire about a person's criminal history unless expressly authorized by statute. See RCW 43.43.838(5). Washington law does not currently authorize an employer to inquire about an employee's criminal history as suggested by NRC in this situation.

Under RCW 43.43.832, the only businesses or organizations authorized to obtain criminal history information are those that educate, train, treat, supervise, house, or provided recreation to developmental disabled persons, vulnerable adults, or children less than sixteen years of age. Also see WAC 446-20-285.

The Washington State Patrol (WSP) may share criminal history information only as expressly authorized by statute. RCW 43.43.838(1) authorizes only five specific types of recipient.

In the opinion of our Assistant Attorney General (AAG), the WSP would not have authority to take fingerprints at the request of an employer and forward those to the FBI or the NRC unless the WSP was expressly authorized to do so by statute. Although there are a number of state laws requiring a criminal background check by the FBI for licensing purposes, none apply to this situation. Our AAG has discussed this with her counterpart who advises the WSP and she concurs with this opinion. In her view, a change in state law would be required if the WSP were to be involved in taking the fingerprints and forwarding them to the FBI or the NRC.

We understand that in 2005 a similar issue arose regarding commercial haulers of hazardous materials. Pursuant to federal law, the federal Transportation Security Administration mandated fingerprinting and an FBI criminal background check for

commercial drivers applying for a hazardous materials endorsement. The WSP did not have to become involved in this process because the TSA arranged to have the fingerprints taken at TSA fingerprinting locations. Although the state Department of Licensing implements this requirement and issues the endorsement, the WSP did not need to be involved because the fingerprints are taken by the TSA and forwarded by the TSA to the FBI.

Also, it is not clear how the criminal history information will be used by the licensees in making their employment decisions. A Washington law may affect how an employer uses criminal conviction information for hiring purposes. Chapter 9.96A RCW concerns the restoration of employment rights of convicted felons. RCW 9.9A.020 provides, with some exceptions, that a person may not be denied public employment or denied a license issued by the state or any political subdivision of the state, or the right to practice a trade or profession for which a license is required based solely on a prior felony conviction. However, a person may be denied public employment or a license if the conviction directly relates to the specific employment sought and if the conviction is less than ten years old. How this statute would apply to a prospective applicant for employment will depend of the facts of a specific case.

Finally, our AAG listened in on the June 27 conference call between Agreement States and the NRC, and has reviewed RCPD-07-004. Although the NRC's general counsel stated that under § 274b of the Atomic Energy Act (42 USC § 2021 (b)) Agreement States are authorized to implement these requirements without further authorization in State statute, our AAG believes we are on firmer ground if NRC adopts a rule that would requires fingerprinting rather than rely on this more circuitous logic. Adopting federal rules as state rules is clearly permitted in this state.

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