

Analysis of Firearms Guidelines Changes and Impacts on the October 2006 Proposed Power Reactor Security Rule

BACKGROUND:

The NRC published a proposed power reactor security rule in October 2006 which included provisions implementing the firearms guidelines mandated by section 161A. of the Atomic Energy Act of 1954, as amended (AEA).¹ The staff used the version of the firearms guidelines existing in September 2006 to develop the proposed rule language. The text of the proposed rule was consistent with that version of firearms guidelines. Two new sections were created and two existing sections and an appendix in Title 10 to the *Code of Federal Regulations* (10 CFR) Part 73 were modified in the proposed rule to implement this new authority.²

However, subsequent to the publication of the proposed rule, the U.S. Department of Justice (DOJ) requested significant changes to the firearms guidelines. The staff agreed to these changes and developed the necessary wording to provide the Commission with flexibility to implement the firearms guidelines effectively. The staff has evaluated the final version of the firearms guidelines (see Enclosure 1) against the version that existed in September 2006 which was used to develop the proposed rule that the public commented on. The staff has identified 11 substantive technical differences between the final version of the firearms guidelines and the October 2006 proposed rule text that would impact the language of a final rule. The staff has also identified two administrative changes that would improve the regulatory clarity of a final rule.

DISCUSSION:

The staff had recognized that the language of the final version of the firearms guidelines might differ significantly from the version of the firearms guidelines under consideration in September 2006. Therefore, changes from the proposed rule text might be required to ensure that the final rule text is consistent with the final version of the firearms guidelines. The NRC had noted this possibility in the proposed rule *Federal Register* notice (at 71 FR 62666) and had indicated that it would take appropriate actions to ensure the language of the final rule conforms with the final version of the firearms guidelines while being mindful of the NRC's obligation to provide stakeholders notice and opportunity to comment on proposed regulations.

The staff has identified 11 substantive technical differences between the September 2006 version and the final version of the firearms guidelines that would impact the language of a final rule. The staff has also identified two administrative changes that would improve the regulatory clarity of a final rule. A discussion of these 11 differences and the staff's proposal to address 10 of these differences and to address the 2 administrative issues are provided below. The staff is not recommending any changes for issue number 4. Ultimately, the text of the final rule implementing the firearms guidelines must be consistent with the language of the final firearms guidelines. Note: the section numbers mentioned in this list are from the firearms guidelines and are provided as an aid to the reader.

¹ 10 CFR Parts 50, 72, and 73, "Power Reactor Security Requirements; Proposed Rule," (RIN 3150-AG63) published in the *Federal Register* on October 26, 2006 (71 FR 62663).

² See sections 10 CFR 73.2, 73.8, 73.18, and 73.19 and Appendix G, "Reportable Safeguards Events," to Part 73.

Summary of Differences and Recommended Solutions

1. In Section 5, an exemption process was added, for existing licensees and certificate holders that currently possess machineguns, when a “delayed” response is received to a firearms background check (i.e., a check under the Federal Bureau of Investigation’s [FBI’s] National Instant Criminal Background Check System [NICS]). This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would provide an exemption process for existing licensees and certificate holders currently possessing machineguns.
2. In Section 5, a new requirement for periodic firearms background checks was added. The firearms guidelines require a recurring firearms background check at least every five (5) years. This requirement is in conflict with the proposed language for 10 CFR 73.18(b)(2) which stated that no further firearms background checks are required subsequent to the initial firearms background check. Additionally, no Office of Management and Budget (OMB) recordkeeping or reporting burdens were identified for these recurring checks. **Solution:** The direct final rule and companion proposed rule would require recurring firearms background checks to be completed every three (3) years. This would permit the fingerprints submitted for the firearms background check to be synchronized with the fingerprint checks for the access authorization program requirements for critical group personnel contained elsewhere in Part 73, and thereby minimize licensee and certificate holder costs. A new OMB information collection analysis of these revised recordkeeping and reporting requirements would be developed and OMB approval sought.
3. In Section 5, a new restriction on untimely submission by an individual of his (her) appeal information to the FBI would lead to barring or abandonment of an individual’s appeal of an adverse firearms background check. This provision is in conflict with the proposed new 10 CFR 73.18(p). In addition, the new requirement for a licensee or certificate holder to resubmit a proposed NRC Form 754, “Armed Security Personnel Firearms Background Check,” for further consideration of a new firearms background check also was not addressed in proposed rule. **Solution:** The direct final rule and companion proposed rule would address the consequences to an individual of untimely submission of information on appeal. The rule would also provide for the ability of a licensee or certificate holder to resubmit an individual for a background check, thereby preventing an unintended, untimely submission of information by an individual from becoming a permanent debarment of the individual.
4. In Section 6, the firearms guidelines permits the Commission to specify additional permissible reasons to remove enhanced weapons from a facility authorized to possess such weapons (i.e., for reasons other than for training or for escorting shipments of radioactive material or other property). This provision was not addressed in the proposed rule. **Solution:** The staff is not recommending adding any additional permissible reasons at the present time, since no additional removal needs have been identified. Therefore, no additional rulemaking is required to address this issue. However, this authority is available to the Commission if needed in the future.
5. In Section 6, a new requirement to conduct periodic accountability (i.e., inventory) requirements for enhanced weapons was added. A requirement to complete these

inventories at least annually was added. These provisions were not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would require two types of periodic inventories of any enhanced weapons possessed by a licensee or certificate holder. The first inventory would be conducted monthly and would verify the number of enhanced weapons present at the licensee's or certificate holder's facility (i.e., a "piece-count" inventory). The licensee or certificate holder may use electronic technology (e.g., bar codes on weapons) to conduct this inventory. The monthly inventories would not include weapons that are stored in locked containers which are sealed with a high-integrity, tamper-indicating device (TID) (e.g., "ready-service" in-plant storage containers). The second type of inventory would be conducted every six (6) months and would verify the serial number of all enhanced weapons. The six-month inventory would include any weapons stored in locked and TID-sealed storage containers. Both types of inventories would be conducted by teams of two individuals to prevent a single individual from manipulating the inventory results.

6. In Section 6, the firearms guidelines provide that the issuance of an enhanced weapon to a security officer [to accomplish their official duties] is not considered a transfer of an enhanced weapon under Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations. ATF regulations require that all transfers of enhanced weapons (i.e., weapons registered with ATF under the National Firearms Act (NFA)) be reviewed and approved by ATF in advance (see 26 U.S.C. 5812). The ATF review process can take a month or more in normal circumstances. Consequently, NRC, DOJ, and ATF staffs agreed this standard approach would be impractical for enhanced weapons issued to a security officer on a routine basis. Security officers are typically issued their weapons from the licensee's armory at the beginning of their duty shift and the security officer then returns the weapons to the licensee's armory at the end of their duty shift. A transfer would also trigger tax implications. This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would clarify that the issuance of an enhanced weapon [by an authorized licensee or certificate holder] to an individual security officer is not considered a "transfer" of an NFA-registered weapon. Therefore, ATF's transfer requirements under 27 CFR Part 479, "Machine Guns, Destructive Devices, and Certain Other Firearms," would not apply to this situation.
7. In Section 6, the firearms guidelines provide that a licensee or certificate holder possessing enhanced weapons must notify the NRC and local authorities of the theft or loss of an enhanced weapon registered under the NFA (see 26 U.S.C. 5841). Independent of NRC requirements, licensees and certificate holders who possessed enhanced weapons are required under 27 CFR 479.141 to immediately notify ATF of any stolen or lost weapons registered under the NFA. **Solution:** The direct final rule and companion proposed rule would require licensees and certificate holders to notify local law enforcement authorities within four (4) hours of notifying ATF of such a theft or loss. The rule would also require the licensee or certificate holder to notify the NRC of any such theft or loss within either: (i) four (4) hours of notifying ATF for a weapon that was stolen or lost outside their protected area, or (ii) one (1) hour of discovery for a weapon that was stolen or lost inside their protected area. The shorter notification time would be required when the theft or loss of an enhanced weapon occurred inside the facility's protected area and thus would have a greater likelihood of affecting the security of a

facility. These event notification requirements would be consolidated in a single paragraph in 10 CFR 73.71. No changes would be required to Appendix G, "Reportable Safeguards Events," to Part 73.

8. In Section 6, the firearms guidelines provide requirements on the transport of weapons (i.e., when not in use to escort shipments, they must be unloaded and locked in a secure container). This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would clarify that weapons being transported to or from the licensee's or certificate holder's facility must be unloaded and locked in a secure container. In contrast, weapons being used while escorting a shipment of radioactive material or other property must be maintained in a state of loaded readiness and be accessible (i.e., ready for use). Weapons and their ammunition may be transported in the same secure container.
9. In Section 7, the firearms guidelines provide provisions for the termination, modification, suspension, or revocation of a licensee's or certificate holder's authority under section 161A. A requirement for the NRC to notify ATF of any such actions does not exist. Furthermore, a process for re-application following such actions also does not exist. **Solution:** The direct final rule and companion proposed rule would require the NRC to notify ATF of the termination, modification, suspension, or revocation of a licensee's or certificate holder's Section 161A. authority. A process for a licensee's or certificate holder's re-application for this authority following termination, suspension, or revocation (of such authority) would also be specified.
10. In Section 8, some of the definitions in the firearms guidelines are not consistent with the proposed definitions in 10 CFR 73.2 (e.g., the definition for *enhanced weapons*). Additionally, new definitions were not included in the proposed 10 CFR 73.2 for the terms: *firearms background check*, *NICS check*, *NICS response*, and *satisfactory firearms background check* which are defined in the firearms guidelines. **Solution:** The direct final rule and companion proposed rule would revise the definitions in 10 CFR 73.2 to match the definitions contained in the firearms guidelines.
11. In Section 8, the firearms guidelines provide cross references for weapons terms and NICS terms from current ATF and FBI regulations, rather than replicating these terms in the firearms guidelines. This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would add cross references to the appropriate ATF and FBI regulations in 10 CFR 73.2, rather than fully replicating these ATF and FBI definitions in 10 CFR 73.2.

In addition to these 11 technical issues, the staff would address 2 administrative issues in the supplemental proposed rule, as follows:

12. In the information collection requirements of 10 CFR 73.8 of the proposed rule, a place holder was added for the OMB control number for Paperwork Reduction Act purposes for the FBI's current fingerprint form (Form FD-258) and proposed NRC Form 754. The FBI recently received the OMB control number for this form and provided this information to the staff. **Solution:** The direct final rule and companion proposed rule would list the new OMB control number for the FBI's fingerprint form FD-258 and refer to

10 CFR 73.19 as one of the sections of Part 73 where this burden is required (see also issue 13 below). The OMB control number would also be specified for NRC Form 754.

13. As originally developed by the staff, the order of presentation of the new regulations implementing the firearms guidelines first set forth the requirements on firearms background checks and then identified the classes of licensee or certificate holders to whom these provisions and the provisions for obtaining enhanced weapons and preemption authority or preemption authority alone would apply. Based upon discussions with staff and industry representatives, the staff now views this structure as not being logical and recognizes that this may cause confusion for both industry and the public. **Solution:** The staff would add regulatory clarity to the structure by switching the order of presentation of the implementing regulations in the direct final rule and companion proposed rule. Specifically, the staff would switch the content of 10 CFR 73.18 and 73.19 (i.e., 10 CFR 73.18 would describe the classes of licensees and certificate holders covered by section 161A. authority and 10 CFR 73.19 would then describe the firearms background check requirements for such classes of facilities and radioactive material).

Conclusion

The staff considered whether these necessary changes to the implementing language could be made in a final rule or whether further public notice and opportunity for comment would be appropriate. Given the number of technical differences, their substantive nature, and that some could not have been foreseen by commenters, the staff is recommending that the Commission 1) approve the staff solutions to the identified issues; 2) that the staff issue a direct final and companion proposed rule to provide additional opportunity for stakeholders comments and expeditious implementation of the new Authority of 161A.; and 3) that the Commission delegate to the Executive Director for Operations the authority to sign the direct final rule and companion proposed rule to expedite their issuance. The revised implementing text would be consistent with how the staff proposes to address issues 1 thru 3 and 5 thru 13. No further action is required on issue 4.

RECOMMENDATION

The staff will develop a direct final rule, accompanied by a companion proposed rule, which incorporates the solutions for issues 1 thru 3 and 5 thru 13. This rule will revise 10 CFR 73.2, 73.8, 73.18, 73.19, and 73.71. No changes are required to Appendix G to Part 73 to address the final version of the firearms guidelines.