

DOCKETED  
USNRC

June 1, 2009 (9:49am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

May 29, 2009

Merri Horn  
Division of Intergovernmental Liaison  
And Environmental Management Programs  
U.S. Nuclear Regulatory Commission  
Two White Flint North  
11545 Rockville Pike  
Rockville, Maryland 20852

Dear Ms. Horn:

Please find enclosed the State of Arkansas' comments on the proposed Part 37, Subpart B rulemaking addressing Fingerprinting and Background Check Requirements.

It is the State's position that this rulemaking is overly prescriptive and invasive for the licensees. This rulemaking will also impact the Agreement states' limited resources in a negative manner.

The State of Arkansas fully supports the comments made by The Conference of Radiation Control Program Directors (CRCPD) regarding this proposed rulemaking.

If you have any question, please feel free to contact Steve E. Mack, Program Coordinator, or Katia D. Gray, Health Physicist at (501) 661-2173.

Sincerely,

Steve E. Mack, Program Coordinator

Katia D. Gray, Health Physicist

**State of Arkansas Comments on Proposed Part 37, Subpart B Rulemaking  
Addressing Fingerprinting and Background Check Requirements**

**37.21**

This requirement is for access authorization to Category 1 or Category 2 quantities of radioactive material. It should be noted that the table for Category 1 and Category 2 quantities is based on a different methodology for determining activity i.e. total possession while the Increased Controls requirements were based on Table 1 Radionuclides of Concern(RAMQC). The methodology for determining RAMQC only dealt with collocated sources.

This regulation changes the rules for determining whether or not a licensee would have to comply with these regulations. There are presently licensees who were not required to comply with the Increased Controls and Fingerprinting/Background checks who would now be required to comply. And at present that compliance would only be with the Access Control portion of the original Increased Controls orders.

**37.21(c)(3)**

This requirement states that the licensee should only approve for unescorted access to Category 1 or Category 2 quantities of radioactive material those individuals with job duties that permit unescorted access to Category 1 or Category 2 quantities of radioactive material.

However, 37.23(b)(1)(i) requires that the Reviewing Official(s) must be permitted unescorted access to Category 1 or Category 2 quantities. There is no requirement here of their job duties, level of radiation safety training or that they even be trained at all.

**37.21(c)(ii)**

This indicates that both the vehicle driver and any accompanying individuals for road shipments are subject to an access authorization program. This is a far reaching regulation if there are individuals who will not be given unescorted access to the Category 1 or Category 2 material. If they are not left alone with the material, then they would not be required to be subject to the access authorization program.

**37.21(a)(4)**

This indicates that a licensee cannot approve an individual who had been rejected for unescorted access. It does not include any indicators or limits as to time frames or the possibility that an individual might indeed make the necessary personal changes to eventually become eligible for unescorted access.

**State of Arkansas Comments on Proposed Part 37, Subpart B Rulemaking  
Addressing Fingerprinting and Background Check Requirements**

**37.23(b)(1)(ii)**

This requirement indicates that the NRC (and assuming Agreement States) will “approve” reviewing officials.

This regulation will be overreaching and intrusive into a licensee’s Radiation Safety Program. The regulatory agency, whether state or federal, should only set forth requirements and limits for licensees to follow; not be proscriptive in who should or should not be approved.

If this regulation is approved, as is, perhaps the regulatory agencies should also be prescriptive in limiting licensees to less than Category 2 activities.

In addition, what is the process the NRC would use to determine the approval? The NRC would only have limited information available based on the name and the fingerprinting card submitted by the licensee. They would not have the information gathered by the licensee to comply with Increased Control #1 to include employment check, education check and personal references. Does the NRC intend to obtain all of this documentation and actually review it for each and every Reviewing Official?

**37.23(b)(1)(ii)**

This requirement also indicates that reviewing officials are the only individuals who can make trustworthiness and reliability determinations. This does not allow for a company president, CEO, Administrator, etc. to make a trustworthiness and reliability determination. These are the individuals who would be designating individuals to be a Reviewing Official, but could not make a determination of trustworthiness and reliability. (Also see note on 37.23(b)(1)(iii))

**37.23(b)(1)(iii)**

This states that a reviewing official cannot approve other individuals to act as reviewing officials. If a company president, CEO, Administrator, etc. submits their own name for “approval” as a reviewing official, they later could not designate others as reviewing officials.

**37.23(b)(2)**

This requirement again states that the reviewing officials will be approved by the NRC (and assuming Agreement States) without any description of a process to be utilized or criteria to be used. In addition, it is proscriptive and intrusive.

**37.23(b)(3)**

See note regarding 37.23(b)(2) above.

**37.23(b)(4)**

What would this denial be based on? Unfortunately, without a procedure, it appears that such a denial would only be based on limited information.

**State of Arkansas Comments on Proposed Part 37, Subpart B Rulemaking  
Addressing Fingerprinting and Background Check Requirements**

**37.23(c)(2)(i)**

This requires a licensee to retain any documentation collected up to the point of the withdrawal of consent, should an individual decide to withdraw consent. Why should the licensee be required to retain the information collected, if the individual withdraws consent and the licensee has no intention of approving or denying the individual for unescorted access.

**37.23(e)(1)(2)(3)**

If this is approved as regulation, there are no determining factors of approval or denial. This would be codified as regulation and would therefore be left up to interpretation. If the Reviewing Official makes a determination based on its' own evaluation and criteria; the regulator may have their own criteria for evaluating someone.

**37.23(f)(3)**

This requirement states that an individual denied unescorted access authorization shall not be allowed access to Category 1 or Category 2 materials even with an escort. This is a complete reversal from the initial Increased Controls; in that, the individual could still work if they were escorted by an individual who had been approved for unescorted access. Following this logic, no one can have access to Category 1 or Category 2 materials even if escorted; therefore making the whole discussion of escorted or unescorted moot.

**37.23(f)(4)**

Are the individuals participating in the "impartial and independent internal management review" required to be approved for unescorted access or "approved" by the NRC as reviewing officials? Since these individuals would be making a final decision of access authorization, how can they not be approved as a reviewing official since these requirements would now be codified into regulations?

**37.25**

There are now ten (10) elements to the background investigation versus the original four(4) in the Increased Controls requirements. In addition, there are no deciding factors provided, given that these would now be codified into regulations. For example, would there now be a minimum acceptable credit score (element 6) that the NRC would like to see enforced? Elements 8 and 9 are also very open-ended and available for any interpretation.

**37.61(a)(4)**

What will the representative use to "determine compliance with the regulations and laws?" Again, since this will codify the previous requirements, what are the deciding factors?

## Rulemaking Comments

---

**From:** Merri Horn  
**Sent:** Monday, June 01, 2009 6:50 AM  
**To:** Rulemaking Comments  
**Subject:** FW: Fingerprinting and Background Check Comments  
**Attachments:** Fingerprinting Comments Final.doc

I received the attached comments from the State of Arkansas on the Part 37 Subpart B preliminary language (74 FR 17794; 4/17/09).

---

**From:** Katia Gray [mailto:Katia.Gray@arkansas.gov]  
**Sent:** Friday, May 29, 2009 3:40 PM  
**To:** Merri Horn  
**Cc:** Jared Thompson; Steve Mack  
**Subject:** Fingerprinting and Background Check Comments

Dear Ms. Horn:

Please find enclosed the State of Arkansas' comments on the proposed Part 37, Subpart B rulemaking addressing Fingerprinting and Background Check Requirements. A hard copy will be sent by Fed Ex today.

Sincerely,

Katia D. Gray  
Health Physicist  
Arkansas Department of Health  
Radioactive Materials Program  
4815 West Markham, Slot H-30  
Little Rock, AR 72205  
Phone: (501) 661-2586  
Fax: (501) 661-2849

In a crisis, you don't rise to the occasion, you sink to the level of your training.  
*John Rennie, Editor in Chief, Scientific American.*

### CONFIDENTIALITY NOTICE:

The information contained in this e-mail message and any attachment is the property of the State of Arkansas and may be protected by state and federal laws governing disclosure of private information. It may contain information that is privileged, confidential, or otherwise protected from disclosure. It is intended solely for the use of the addressee. If you are not the intended recipient, you are hereby notified that reading, copying or distributing this e-mail or the information herein by anyone other than the intended recipient is STRICTLY PROHIBITED. The sender has not waived any applicable privilege by sending the accompanying transmission. If you have received this transmission in error, please notify the sender by reply e-mail immediately, and delete this message and attachments from your computer.

Received: from HQCLSTR01.nrc.gov ([148.184.44.79]) by TWMS01.nrc.gov  
([148.184.200.145]) with mapi; Mon, 1 Jun 2009 06:49:39 -0400  
Content-Type: application/ms-tnef; name="winmail.dat"  
Content-Transfer-Encoding: binary  
From: Merri Horn <Merri.Horn@nrc.gov>  
To: Rulemaking Comments <Rulemaking.Comments@nrc.gov>  
Date: Mon, 1 Jun 2009 06:49:34 -0400  
Subject: FW: Fingerprinting and Background Check Comments  
Thread-Topic: Fingerprinting and Background Check Comments  
Thread-Index: AcngIUdFE6UM7Y44TNOVFTzWwBQg+gCEP46Q  
Message-ID:  
<D841D501B2C4D244B75AB897F70C149499FCD05666@HQCLSTR01.nrc.gov>  
Accept-Language: en-US  
Content-Language: en-US  
X-MS-Has-Attach: yes  
X-MS-Exchange-Organization-SCL: -1  
X-MS-TNEF-Correlator:  
<D841D501B2C4D244B75AB897F70C149499FCD05666@HQCLSTR01.nrc.gov>  
MIME-Version: 1.0