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USNRC

June 2, 2009 (9:11am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

June 1, 2009

Merri Horn, Project Manager
Division of Intergovernmental Liaison and Rulemaking
Office of Federal and State Materials and Environmental Management Programs
U.S. Nuclear Regulatory Commission
MS T-8F-42
Washington, D.C. 20555-0001

Subject: Preliminary Draft Rule Language for Physical Protection of Byproduct Material
(Proposed Part 37, Subpart B) RIN 3150-A112

Dear Ms. Horn:

On behalf of the American Association of Physicists in Medicine (AAPM),¹ the following comments on the preliminary draft rule language for the physical protection of certain byproduct material are submitted for your consideration as solicited in an April 17, 2009 *Federal Register* notice (FRN). We appreciate this early opportunity to provide input into the rulemaking process.

As noted in the FRN, this draft preliminary language is part of a 3-prong approach to promulgate NRC physical protection requirements for these materials. In general, the

¹ The American Association of Physicists in Medicine's (AAPM) mission is to advance the practice of physics in medicine and biology by encouraging innovative research and development, disseminating scientific and technical information, fostering the education and professional development of medical physicists, and promoting the highest quality medical services for patients. Medical physicists contribute to the effectiveness of radiological imaging procedures by assuring radiation safety and helping to develop improved imaging techniques (e.g., mammography CT, MR, ultrasound). They contribute to development of therapeutic techniques (e.g., prostate implants, stereotactic radiosurgery), collaborate with radiation oncologists to design treatment plans, and monitor equipment and procedures to insure that cancer patients receive the prescribed dose of radiation to the correct location. Medical physicists are responsible for ensuring that imaging and treatment facilities meet the rules and regulations of the U.S. Nuclear Regulatory Commission (NRC) and various State regulatory agencies. AAPM represents over 6,700 medical physicists.

preliminary draft rule language for the background investigation and access control requirements, proposed for Subpart B of the new Part 37, appears consistent with the security orders issued by the U.S. Nuclear Regulatory Commission to licensees that possess category 1 or category 2 quantities of radioactive material.

AAPM has reviewed the language in all three notices when developing the specific comments on draft Subpart B that are attached to this letter. AAPM intends to submit comments on Subpart C too.

Again, we thank you for the early comment opportunity and look forward to reviewing the proposed rule during the public comment period. If you would like to discuss these comments further, please contact Lynne Fairbent, AAPM's Manager of Legislative and Regulatory Affairs at 301-209-3364 or via email at lynne@aapm.org or me at 720-854-7515 or via email at dpfeiffer@bch.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas E Pfeiffer". The signature is written in a cursive style with a large initial 'D'.

Douglas Pfeiffer, M.S,
Chair of Government and Regulatory Affairs Committee
AAPM

AAPM Specific Comments on Proposed Part 37 Subpart B on Background Investigations and Access Control

Parts 30 and 150:

Conforming changes should be considered for inclusion. Specifically, the Federal Register Notice of May 1, 2009, which contains the preliminary language for Part 37 Subpart C, includes conforming changes to Parts 30 and 150 to recognize the applicability of Part 37 requirements to certain specific licensees and Agreement State licensees. Subpart B, the subject of this FRN, does not contain such conforming changes to Parts 30 and 150 that would appear to also be needed. For completeness, NRC should considering including such conforming changes in the proposed rule for Subpart B to be issued for public comment.

Section § 37.3, “Definitions”:

Certain terms should be considered for inclusion. Specifically, terms such as “Approved Individual,” “Escorted and Unescorted Access”, “Category 1 and Category 2 materials” and “Aggregated” (in terms of material quantity) are not defined yet they are used repeatedly throughout draft Subpart B. It should be noted that such terms are defined in draft Subpart C. Some consideration should be given to including them in the proposed rule for comment or, at a minimum, a determination made that the terms as defined in draft Subpart C are not inadvertently inconsistent with their meaning and use in draft Subpart B.

Section § 37.21, “Personnel access authorization requirements for category 1 and category 2 quantities of radioactive material.”

Clarification is needed on whether aggregation of radioactive material is intended to be captured by Part 37. Specifically, draft Subpart B does not use the term “aggregated quantity” but Subpart C does, e.g., § 37.1201. The regulatory approach in Subpart B and C should be consistent with regard to whether aggregated quantities are captured. Also, the previously issued security orders for category 1 and category 2 materials were applied to quantities in the aggregate. If aggregated quantities are intended to be included, item § 37.21(a) should be revised to read “(1) Each licensee who is authorized to possess *aggregated quantities of category 1 or category 2 quantities of radioactive material* at a facility should.....” Other conforming changes would also be needed, e.g., § 37.31(a).

Section 37.21 Personnel access authorization requirements ..., (c)(iv) states that “Any individual whose assigned duties provide access to shipment information on category 1 quantities of radioactive materials” are subject to the requirements of the access control program. What is not described is the level of “shipping information” that would require a background check. Would knowing the shipping date but not specifically what is being received or that it contains a category 1 quantity of radioactive materials trigger the need for a background check? If knowledge of any information related to the shipment were known, it could result in a significant number of individuals having background checks performed (riggers, facilities project services, etc.). We suggest addition of the word “complete” between “to” and “shipment information”.

Section 37.23, “Program requirements”:

§37.23 Program Requirements, (a) Granting unescorted access authorization. States that investigatory information collected to satisfy the requirements of the rule for individuals who are being considered for unescorted access authorization shall be valid for “60 calendar days”. This 60 days is FAR too short as it can take a much longer time to get the various items approved. For example, it has taken much longer than 60 days just to get an FBI criminal history check back from the FBI. To have to start the investigation all over again would provide no value. The information previously collected is still valid. The 60 days information collection requirement should be removed.

§37.23 Program Requirements, (b) Reviewing official. Paragraph (i) states that the reviewing official must be permitted unescorted access to category 1 or category 2 quantities of radioactive material. While this is not an issue for some licensees, there may be no reason why the reviewing official would need access as a part of their job. Thus, paragraph (i) should be removed.

§37.23 Program Requirements, (f) Procedures. Item (f)(3) where a person who is denied unescorted access cannot have escorted access. The requirement to deny access even with an escort is very problematic. For example, a licensee could identify an individual who worked in a remote facility in another country. It may be problematic to verify that information and therefore the licensee has to deny unescorted access. NRC should allow the licensee to establish a system for allowing escorted access to an individual who has been access under certain conditions.

§37.23 Program Requirements, (f) Procedures. Item (f)(4) regarding denied or terminated unescorted access authorization. It is unclear why the rule requires that the licensee or applicant provide the individual, who has been denied access or had their access terminated, with: 1) an opportunity for an objective review of the information upon which the denial or termination was based; and 2) an impartial and independent internal management review of the decision. Industry believes that this requirement is too prescriptive, in that, the licensee’s or applicant’s internal management decision of *whether* and *how* to conduct an additional objective and independent review of the denial or termination decision is best left to the regulated facility. If the licensee maintains a program in compliance with the applicable requirements, it should have the flexibility to determine when such decisions would benefit from an independent review consistent with its human resource management practices, policies and procedures. NRC’s interest should be focused on whether the program is in compliance with the rule and not disputes between a specific employer and employee regarding denied or terminated unescorted access to materials. As a result, we suggest that all text in item (b) be removed after the words, “opportunity to provide relevant information.”

§37.23 Program Requirements, Item (h), “Records.” The length of time that certain records must be retained needs to be clarified since it is expressed differently in at least 3 sections, i.e., § 37.23(h), § 37.41(l) and § 37.61(a)(5). Specifically, please clarify whether it is three years “after the individual’s employment ends,” or “from the date the individual no longer requires access to the facility,” or “after termination or denial of unescorted access” and

make conforming changes as indicated. The language “from the date the individual no longer requires access to the facility,” should be used because there may be instances where an individual may no longer be employed at Facility A but are then employed at Facility B in the same system and still need access.

Section § 37.25, “Background Investigations”:

The rule does not appear to require that individuals granted unescorted access by the reviewing official to inform the licensee of any information relevant to their background investigation that is new since the last access authorization was granted and may have a bearing on whether their current access should be continued, e.g., local criminal activity. NRC should consider whether such a provision should be included in the proposed rule for public comment.

§37.25 Background checks. (a) Initial Investigation. NRC should provide guidance as to what events discovered in either a credit check or the military history verification could disqualify granting access to an individual.

§37.25 Background checks. Item (a)(6), “Credit history evaluation.” It is unclear why an individual’s “entire” credit history needs to be evaluated. Specifically, other background investigations items such as employment history (§ 37.26(a)(3)) and criminal history (§ 37.26(a)(7)), require that the licensee or applicant consider 5-7 years of history for the individual seeking unescorted access. NRC should consider amending this section to require a 5-year credit history check.

§37.25 Background checks. (a) Initial Investigation. (10). The NRC states that if a previous employer, educational institution, or any other entity does not verify information within 3 business days that the licensee must document the refusal or unwillingness and obtain confirmation via other sources. However, we believe discretion should be left up to the licensee and suggest that the rule be changed to read: “If a previous employer, educational institution, or any other entity within which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee but at least 3 business days, the licensee shall: ...”

§37.25 Background checks. Item (b), “Reinvestigations.” While § 37.31(b)(3) and (4) provide relief from fingerprinting for certain persons undergoing reinvestigation, it is unclear under what conditions and why an individual would ever undergo fingerprinting on more than one occasion given the very nature of the fingerprint and the fact that both FBI and NRC would have processed the fingerprints. Clarification should include information on how long the FBI keeps these individual’s fingerprints on file, and whether they are identified as having undergone review of this unescorted access. If they keep them, then the NRC/Licensee can be notified of changes instead of redoing the process.

Section §37.31, “Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material”:

Item (c) and (c)(1). It is unclear why licensees are prohibited from basing a final access determination solely on the information received from the Federal Bureau of Investigations, particularly in cases involving “an arrest more than 1 year old for which there is no information of the disposition of the case.” Industry believes that there may be arrest cases with no disposition within one year where the licensee or applicant should be able to exercise discretion on whether to grant access, e.g., criminal activity involving stolen electronics or information technology. NRC should consider further clarifying or deleting this requirement.

§37.31 Requirements for criminal history records checks of individuals granted unescorted access to category 1 or ..., (b) General performance objective and requirements, (3) “Fingerprinting is not required if a licensee is reinstating an individual’s unescorted access authorization to category 1 or category 2 quantities of radioactive materials if: (i) The individual returns to the same facility that granted unescorted access authorization **within 365 days** of the termination of their unescorted access authorization; and (2) The previous access was terminated under favorable conditions.” We feel that one year away is far too short to trigger the requirement for re-fingerprinting and FBI criminal history check. Three years might be more acceptable, but the precedent is that other employees are required to be re-fingerprinted every 10 years. Thus, why is fingerprinting required for individuals returning within 10 years?

Rulemaking Comments

From: Merri Horn
Sent: Tuesday, June 02, 2009 6:42 AM
To: Rulemaking Comments
Subject: FW: part 37 subpart B comments
Attachments: AAPM letter Part 37 part B comments final 06-01-09.pdf

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

From: Lynne Fairobent [mailto:lynne@aapm.org]
Sent: Monday, June 01, 2009 10:55 PM
To: Merri Horn
Subject: part 37 subpart B comments

Merri:

I submitted the attached comments through the www.regulations.gov portal just in case there is a system problem.

Lynne

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