

RULEMAKING ISSUE NOTATION VOTE

December 14, 2009

SECY-09-0181

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED RULE: PHYSICAL PROTECTION OF BYPRODUCT
MATERIAL (RIN 3150-A112)

PURPOSE:

To request Commission approval to publish a proposed rule in the *Federal Register* that would add a new part 37 to Title 10 of the Code of Federal Regulations (CFR) and make conforming changes to parts 30, 32, 33, 34, 35, 36, 39, 51, 71, and 73. The proposed rule would amend the regulations to put in place security requirements for the use of category 1 and category 2 quantities of radioactive material and for shipments of small quantities of irradiated reactor fuel.

SUMMARY:

The U.S. Nuclear Regulatory Commission (NRC) staff recommends that the Commission approve publication of this proposed rule. The proposed rule includes security requirements that would be applied to byproduct material, specifically to category 1 and category 2 quantities of radioactive material. This rulemaking would place the security requirements for use of category 1 and category 2 quantities of radioactive material into a new part 37 of the CFR. It would also address transportation security of shipments of 100 grams or less of irradiated reactor fuel. In developing the proposed rule the staff considered the various security orders, lessons-learned during implementation, the recommendations of the Independent External Review Panel and the Materials Program Working Group, and stakeholder comments on the preliminary rule language.

CONTACTS: Merri Horn, FSME/DILR
(301) 415-8126

Robert MacDougall, FSME/DILR
(301) 415-5175

The proposed rule addresses access authorization, physical protection during use, and physical protection during transportation.

BACKGROUND:

Commission regulations provide requirements for the safe use, transit, and control of licensed material. A licensee's loss of control of risk-significant radioactive material, whether it is inadvertent or through a deliberate act, could result in significant adverse impacts that could reasonably constitute a threat to the public health and safety or the common defense and security of the United States. After the attacks of September 11, 2001, the Commission determined that certain licensed material should be subject to enhanced security provisions and safeguarded during transport, and that individuals with unescorted access to risk-significant radioactive material should be subject to background checks. The Commission issued these enhanced security provisions through a series of security orders.

The NRC used a graded approach, based on the relative risk and quantity of material possessed by the licensee, to issue the security orders. The first series of orders were issued to certain panoramic and underwater irradiator licensees that possessed more than 370 Terabecquerels (10,000 Curies) of radioactive material (EA-02-249; June 6, 2003). The next series of orders were issued to certain manufacturing and distribution (M&D) licensees (EA-03-225; January 12, 2004). These orders require the implementation of additional security measures and the protection of the licensee's physical protection information as Safeguards Information-Modified Handling (SGI-M). In addition, the NRC issued orders related to transportation security. The first transportation security orders were issued to certain licensees that might be expected to transport radioactive materials in quantities of concern (category 1 quantities) (EA-05-006; July 19, 2005). Subsequently, the NRC issued orders (EA-05-090; November 14, 2005) to other licensees authorized to possess certain risk-significant quantities of radioactive material (category 1 and 2 quantities). These orders contained provisions for security during use and for transportation security. The Agreement States issued legally binding requirements to their licensees.

In 2005, Congress passed, and the President signed, the Energy Policy Act of 2005 (EPAAct). The EPAAct amended Section 149 of the Atomic Energy Act (AEA) to authorize the Commission to require the fingerprinting of any individual who is permitted unescorted access to radioactive material or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks. Under this new authority, the Commission determined that individuals with access to category 1 and category 2 quantities of radioactive material warrant fingerprinting and background checks. On October 17, 2006, the NRC issued orders to panoramic and underwater irradiator licensees (EA -06-248), M&D licensees (EA-06-250), and licensees making shipments of category 1 quantities of radioactive material (EA-06-249) to require fingerprinting and Federal Bureau of Investigation criminal history records checks for individuals permitted unescorted access to risk-significant quantities of radioactive material at their facilities. On December 5, 2007, the NRC issued orders to all other NRC licensees that possessed category 1 or category 2 quantities of radioactive material (EA-07-305). The Agreement States issued legally binding requirements to their licensees.

The requirements put in place by the orders provide the Commission with reasonable assurance that public health and safety and the common defense and security continue to be adequately protected given the current threat environment.

Although a security order is legally binding on the licensee receiving the order, a rule makes requirements generally applicable to all licensees. In addition, notice and comment rulemaking allows for public participation and is an open process. This rulemaking would place the security requirements for use of category 1 and category 2 quantities of radioactive material into the regulations. In developing the proposed rule the staff considered the various security orders, lessons-learned during implementation, the recommendations of the Independent External Review Panel and the Materials Program Working Group, and stakeholder comments on the preliminary rule language. In addition a petition for rulemaking filed by the State of Washington was considered during the development of the proposed rule.

The staff posted preliminary proposed rule language for subparts B, C, and D of part 37 on <http://www.regulations.gov> for public comment. The staff considered the comments received on the preliminary language in finalizing the proposed rule language. The Statements of Consideration addresses those areas where a substantive change to the rule text was made based on public comment.

DISCUSSION:

The staff is proposing to place the security requirements for use of category 1 and category 2 quantities of radioactive material into a new part 37. The new part would consist of seven subparts. Subpart A would contain the general provisions, such as the purpose and scope, definitions, and information collection requirements. Subpart B would contain the requirements for the background investigations and access authorization program. Subpart C would contain the security requirements for use of the radioactive material. Subpart D would contain the transportation security requirements. Subpart E would be reserved for future provisions. Subpart F would contain the records and reporting requirements, and subpart G would contain the enforcement provisions. Conforming changes would be made in other parts of the regulations, as appropriate. The draft *Federal Register* notice containing the proposed rule is contained in Enclosure 1. The key aspects of subparts B, C, and D are discussed in the following paragraphs and in more detail in the *Federal Register* notice.

Subpart B

Subpart B contains the proposed provisions for the background investigation and access authorization program. The requirements would be applied to any licensee that possesses radioactive material at or above the category 2 threshold. Licensees would be required to submit information on compliance with the access authorization requirements within 30 days of the effective date of the rule. The key components of an access authorization program include the use of a reviewing official, informed consent, personal history disclosure, background investigations, use of procedures, and the right to correct and complete information before an adverse determination. Reinvestigation would be required every 10 years.

The proposed rule includes a list of categories of individuals that would be relieved from fingerprinting, identification, criminal history records check, and other elements of background investigations, and a list of those that would be subject to the access authorization program.

Individuals subject to the access authorization program would be anyone with unescorted access to category 1 or category 2 quantities of radioactive material. Unescorted access is defined as solitary access to category 1 or category 2 quantities of radioactive material granted to an approved individual. Unescorted access includes solitary access to sufficient quantities of radioactive material such that an individual could successfully accumulate lesser quantities of material into a category 1 or category 2 quantity. Also included in the access authorization program would be individuals associated with the shipment of category 1 quantities of radioactive material and the reviewing official. In order to ensure that the reviewing official undergoes an access authorization review, the proposed rule requires that the reviewing official be permitted access to either SGI or category 1 or category 2 quantities of radioactive material. Licensees would be required to review the program every 12 months.

Subpart C

Subpart C contains the proposed provisions for physical protection during use of category 1 and category 2 quantities of radioactive material. In general, subpart C would require licensees that are authorized to possess category 1 or category 2 quantities of radioactive material to develop a security program, while only those that aggregate the radioactive material at or above the category 2 threshold would be required to implement and maintain the security program. Within 30 days of the effective date of the rule, licensees would be required to submit information concerning the licensee's compliance with subpart C. Licensees that do not currently (at the time of rule implementation) possess an aggregated quantity of radioactive material at the category 1 or category 2 level would be required to notify the NRC 90 days before aggregating the radioactive material in such a manner that the quantity equals or exceeds the category 2 threshold.

The objective of the security program would be to enable the licensee to monitor, and without delay detect, assess, and respond to any actual or attempted unauthorized access to category 1 or category 2 quantities of radioactive materials. A licensee's security program would include a written security plan, implementing procedures, training, use of security zones, coordination with the local law enforcement agency (LLEA), notification of LLEA for temporary job sites, testing and maintenance of security-related equipment, security measures, and a program review. The subpart would also establish special requirements for enhanced security measures for mobile sources, and for times when tamper-indicating and alarm systems must be disabled to permit the maintenance of equipment or replacement of radioactive materials.

During NRC management review and concurrence of the proposed rule text, there was considerable discussion related to the proposed requirements for coordination with LLEAs. Specifically, it was pointed out that the existing Increased Controls Orders for materials licensees require that a licensee "shall have a pre-arranged plan with LLEA for assistance in response to an actual or attempted theft, sabotage, or diversion of such radioactive material or of the devices which is consistent in scope and timing with a realistic potential vulnerability of the sources containing such radioactive material." In the proposed rule, the NRC-Agreement State working group agreed upon text that requires the licensee to include with other information provided to the LLEA "[a] request to establish a written agreement with the LLEA that describes the LLEA's commitments to provide a response in accordance with this section [§ 37.45.]"

Based on experience gained through implementation of the Increased Controls Orders, it was recognized that there may be circumstances when a licensee is unable to comply with a

requirement to obtain a written agreement from an LLEA due to the LLEA's unwillingness to participate in establishing a written agreement. The proposed rule text therefore requires the licensee to notify NRC if the LLEA has not responded to the licensee's request for coordination within 60 days, or if the LLEA notifies the licensee that the LLEA does not plan to participate in coordination activities. This proposed requirement is consistent with the Commission's requirements for reactor licensee emergency planning. In 10 CFR 50.47, "Emergency Plans," the Commission recognized that on rare occasions, a licensee may be unable to comply with a requirement based on non-participation of state and or local officials, even after the licensee has demonstrated a sustained, good faith effort to elicit their participation.

Subpart D

Subpart D contains the proposed security provisions for the transport of category 1 and category 2 quantities of radioactive material and for shipments of 100 grams or less of irradiated reactor fuel. The requirements would be applied in a graded approach with more measures placed on transport of category 1 quantities of radioactive material and irradiated reactor fuel. The proposed measures address preplanning and coordination activities, advance notice for category 1 shipments, reporting in the event of a lost or missing shipment or suspicious activities related to the theft or diversion of the shipment.

For road shipments of category 1 quantities of radioactive material, licensees would be required to use a carrier that has established movement control centers that maintain position information, use a telemetric position monitoring system, and establish redundant communications that allow the transport to contact the movement control center. For rail shipments of category 1 quantities of radioactive material, licensees would be required to ensure that the shipment is monitored by a telemetric position monitoring system, ensure that reports are made to the communication center, and have an NRC-approved monitoring plan that covers the time when the shipment is in the classification yard. The requirements for small quantities of irradiated reactor fuel would be the same as for category 1 quantities of radioactive material. For shipments of category 2 quantities of radioactive material, licensees would be required to either use a carrier that has an established package tracking system, maintains constant control and/or surveillance during transit, and has the capability for immediate communication to summon appropriate response or assistance, or if they choose to transport the material maintain constant control and/or surveillance during transit, and have the capability for immediate communication to summon appropriate response or assistance.

Specific Areas for Public Comment

The *Federal Register* notice requests public comment on seven issues that the NRC staff is considering for inclusion in the final rule. These issues are addressed in more detail in the Statements of Consideration (SOC). The first issue is whether or not the reviewing official should be fingerprinted with a criminal records check conducted as part of the process of determining his or her trustworthiness and reliability. If the individual approving access to the radioactive material does not undergo the complete background investigation, it could be perceived that there is a gap in security. The only way that the NRC can require the reviewing official to be fingerprinted is to require the individual to be permitted access to safeguards information or category 1 or category 2 quantities of radioactive material. In many organizations the reviewing official may be a human resources person that ordinarily would not need access to radioactive material or safeguards information. As written, the NRC would need to review the

criminal history records of the reviewing official for NRC licensees and Agreement State officials would review the criminal history records of their licensees. Some Agreement States have indicated that they may not have authority to review criminal history records. This issue is addressed in question B5 in the SOC.

The second is the appropriate elements of a background investigation. Stakeholders have questioned the inclusion of some of the background investigation elements. Questions were raised on potential inconsistent implementation due to the subjectivity of some of the elements and the value of the information received. One State indicated that it may not have legal authority to require individuals to submit information regarding credit history and character and reputation determinations. This issue is addressed in question B8 in the SOC.

The third issue is the protection of information section. Questions were raised regarding which elements of the background investigation should be used to determine if an individual should have access to the protected information and what information should be subject to the requirements of this section. This issue is addressed in question C6 of the SOC.

The fourth issue is the proposed requirement for notification of the LLEA for work at a temporary jobsite. Stakeholders have questioned the value of this requirement. Some fear that the LLEA may be overburdened by receipt of the notifications and unsure as to what to do with the information. Some have questioned how a licensee will be able to identify the LLEA in an unfamiliar area and that this will impose an undue burden on the licensee and LLEA without a corresponding benefit. This issue is addressed in question C15 in the SOC.

The fifth issue is whether an exemption or alternative to the requirement for disabling the vehicle for mobile devices should be included in the regulations for circumstances in which there may be an overriding health and safety concern. Commenters on the preliminary rule language raised the concern in connection with oil and gas field service vehicles that may be needed to quickly evacuate a work area. This issue is addressed in question C17 in the SOC.

The sixth issue is whether licensees transferring category 1 or category 2 quantities of radioactive material should be required to verify that the license and address of the receiving licensee are valid. Because category 2 quantities of radioactive material are often sent to temporary jobsites, there are potential issues associated with address verification. If a verification of license is required should it be at every transfer or could it be conducted annually? This issue is addressed in question D4 in the SOC.

The last issue is the need for an NRC-approved monitoring plan for temporary storage of category 1 quantities of radioactive material in a railroad classification yard. There are potential personal safety issues for an individual to remain with the material while it is stored in the classification yard. It is not clear what measures the railroad will allow. This issue is addressed in question D21 in the SOC.

Regulatory Basis for Issuance of the Proposed Regulations

The NRC issued some of the previously discussed orders under its authority to protect the common defense and security. These included the orders to panoramic and underwater irradiator licensees, M&D licensees, and licensees that might be expected to transport category 1 quantities of radioactive materials. The orders were issued to both NRC and Agreement State

licensees. The remaining orders were issued to NRC licensees under the NRC's authority to protect the public health and safety. To effect nationwide implementation of this latter subset of orders, each Agreement State issued legally binding requirements to licensees under their regulatory jurisdiction.

With respect to whether the following regulations are being issued under "public health and safety" or "common defense and security," it should be recognized that almost all regulations relating to the security of radioactive materials serve both purposes to some degree. For example, securing radioactive materials with multiple barriers protects the public health and safety by preventing the unknowing theft of radioactive materials—such as someone stealing a vehicle with material stored in the vehicle but whose target is the vehicle—which could result in the unintentional exposure of members of the public to the material. The barriers also protect the common defense and security by preventing the theft of the radioactive material by potential terrorists or others targeting the specific material intending to use it to detrimentally impact the defense and security of the nation. However, the designation of the authority being used for these regulations does have significance in determining whether Agreement States or the NRC will be responsible for overseeing the implementation of these requirements for Agreement State licensees.

Although the NRC relinquishes its regulatory authority to Agreement States for certain materials, under Section 274(m) of the AEA no such agreement will affect the authority of the Commission to take regulatory action to protect the common defense and security. Thus, as evidenced by orders issued to Agreement State licensees after the events of September 11, 2001, the NRC always has the ability to take necessary steps to address particular common defense and security needs. If these regulations were to be issued under the NRC's common defense and security authority, only the NRC would have the authority to impose these requirements on Agreement State licensees and the NRC would be responsible for inspection and enforcement of these requirements for Agreement State licensees.

There are no specific criteria that provide guidance for determining whether an issue is related to the protection of the common defense and security or protection of the public health and safety. When regulations, such as these, complement both the NRC's public health and safety and common defense and security missions, the operative question is whether NRC oversight is necessary to fulfill the common defense and security aspects of the regulations. The NRC considers proper control of radioactive material to be vital to public health and safety. A licensee's loss of control of high-risk radioactive material has a potential to result in significant adverse health effects through unintentional or unauthorized use and subsequent exposure. The staff believes that the Agreement States can consistently and adequately implement the physical protection requirements on a nationwide basis, and as such, there will be no need for independent NRC action to protect the common defense and security. The NRC has continual oversight of individual Agreement State programs through its Integrated Materials Performance Evaluation Program (IMPEP). As always, NRC retains the authority under Section 274(m) of the AEA to take any necessary actions to protect the common defense and security should individual licensees or State programs develop issues requiring immediate action. The Commission also has the authority under Section 274(j) to terminate or suspend all or part of its agreement with a State and reassert the Commission's licensing and regulatory authority when the Commission determines that doing so is necessary to protect the public health and safety. The failure of an individual Agreement State to implement compatible and adequate legally binding requirements to protect radioactive materials within its jurisdiction could disrupt the entire

national scheme to protect radioactive materials such that it might raise serious public health and safety, or common defense and security concerns that the NRC would have to address. To date, however, Agreement States have effectively demonstrated their ability to protect the public health and safety.

As long as all Agreement States continue to implement compatible and adequate security requirements, there appears to be no benefit to the public health and safety, or common defense and security goals that would justify removing oversight of these requirements from an established regulatory program overseeing Agreement State licensees. Implementing these regulations under the NRC's public health and safety authority would avoid potential complications of licensees being subject to dual regulation for a single activity. Thus, the staff is proposing to issue these regulations under its public health and safety authority, and these regulations will be applicable to Agreement State licensees through the Agreement State Program.

Implementation

The staff is recommending that the final rule be effective 180 days after publication in the *Federal Register*. This would provide time for licensees to put in place the necessary programs, develop procedures, and conduct training on the new requirements. While most of the proposed provisions are similar to those contained in the Orders, there are differences. The Agreement States would be required to issue compatible regulations within 3 years. The provisions put in place for the inspection of licensees in Agreement States that received the Orders issued under common defense and security would remain in place until the Agreement State implements the regulations. For those States that entered into 274.i Agreements, the State would continue inspections under its Agreement. For those States that did not enter into 274.i Agreements, the NRC would continue to conduct the inspections until the State has put in place the new requirements. The NRC would terminate the Orders once the requirements have become effective.

No change to the enforcement policy should be necessary for implementation of part 37. However, inspection procedures would need to be updated. The training program for Agreement State staff may need to be updated to address those security reviews that would now be conducted under Agreement State authority. The staff will also develop guidance to address part 37 implementation that will be available for public comment during the comment period on the proposed rule.

The proposed Part 37 rule will require licensees to develop a security plan for the protection of Category 1 and 2 quantities of radioactive material and to protect the licensee-generated security information by limiting access to individuals with a need-to-know and that have been determined to be trustworthy and reliable. Currently, 10 CFR 73 requires the security plans developed by these types of licensees to be designated as Safeguards Information – Modified Handling (SGI-M). Because of the requirements in 10 CFR 73, the information protection requirements for these licensees will be different than for the rest of licensees that will be implementing the information protection requirements of the proposed Part 37 (i.e., licensees currently implementing the Increased Controls (IC) requirements). The security requirements in the proposed Part 37 are similar to the requirements imposed on IC licensees, which do not contain safeguards information, therefore, the staff considers that a revision to Part 73 in a separate rulemaking is appropriate to remove the SGI-M handling requirements for the security

plan developed by large panoramic and underwater irradiators and M&D licensees. The staff will make this proposal to the Commission in separate correspondence. Until such time that Part 73 can be amended to reflect this change, the NRC would remain responsible for conducting inspections against the SGI-M handling requirements for both NRC and Agreement State licensees. The staff plans to maintain the SGI-M handling requirements for the transportation of Category 1 quantities of radioactive material.

Strategic Goals and Objectives

The proposed rule is consistent with NRC strategic objectives and performance goals. The proposed rule would continue to ensure the protection of public health and safety and the common defense and security. The proposed rule would improve the security of category 1 and category 2 quantities of radioactive material and continue to ensure the secure use and management of radioactive materials. The rulemaking will be conducted in an open process that allows the public to comment on the enhanced security measures that up to this point have not been subject to public comment because the requirements were mandated through the use of orders. The proposed rule will be published in the *Federal Register* for a 120-day public comment period. The staff is proposing 120 days instead of the normal 75-day public comment period because of the length and complexity of the proposed rule. The additional time will also allow time for public workshops on the guidance document(s).

AGREEMENT STATE ISSUES:

The Agreement States were represented on the working groups and the steering committee associated with this rulemaking. A copy of the draft proposed rule *Federal Register* notice was provided to the Agreement States so they could have an early opportunity for review. The Organization of Agreement States (OAS) and the following Agreement States provided comments on the draft Federal Register notice: Arkansas, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Minnesota, New Hampshire, Ohio, Oklahoma, Rhode Island, Texas, Utah, Washington, and Wisconsin. Some of the Agreement State comments provided the State's views on the issues for which we are specifically inviting public comment. These comments will be considered during development of the final rule, along with any other comments received on these issues. Some of the comments related to implementation and were referred to the guidance working group for consideration. Several comments resulted in revisions to the discussion section of the SOC and proposed rule language to provide additional emphasis or clarity. Some States indicated that the requirements in the proposed rule were too specific, while other States recommend that more specific provisions be added to some areas. Several of the States objected to any requirements beyond those required by the Increased Control Orders. The major topics of concern raised by the Agreement States related to fingerprinting of the reviewing official, elements of the background investigation, reinvestigations, LLEA coordination at temporary jobsites, security plans, and security zones. These issues are briefly discussed in the following paragraphs.

One area of major disagreement is the proposed requirement to fingerprint the reviewing official. Three States indicated support for the requirement, and five States expressed opposition to the requirement. Twelve States and OAS expressed views on who should approve the reviewing official. Views ranged from NRC conducting the review, Agreement States conducting the review, to allowing the licensee to make the decision. At least one State indicated that it may not have the authority to conduct the review, and one State indicated that it may not have the

authority to protect the background investigation information from release to the public. Several States expressed concern that the reviewing official must be allowed access to radioactive material as the reviewing official is often part of human resources and would not normally have access to radioactive materials. Fingerprinting of reviewing officials was also the topic of working group and steering committee discussion. The steering committee recommended that the provision be included in the rule and that NRC invite specific comment on the issue. This is the approach that has been taken.

Another area of Agreement State comment is the elements to be included in the background investigation. Ten States and OAS provided comments on at least one aspect of the background investigation elements. The States objected to the inclusion of a credit history, employment history, and the character and reputation determination. One State didn't think that the State had the statutory authority to require licensees to require individuals to submit information regarding credit history and character and reputation determinations. Reasons given for opposition were the concern that the credit history checks and other reference checks were an invasion of privacy; the licensee should be able to determine what it will use as qualifying or disqualifying criteria; use of a credit history and the character and reputation determination are very subjective; employment history checks and the character and reputation determination may be considered discriminatory; the character and reputation determination might be illegal and is based on emotion instead of facts; and the subjectivity of several of the elements would result in inconsistency in implementation. One State suggested the inclusion of a check for legal status of the individual. In response to the State's comments, the NRC staff added text to specifically invite comment on this topic

Four States and OAS objected to the requirement to conduct reinvestigations, except for individuals who transferred from another company and had not already been subject to a background investigation by the current licensee. The States believed that the use of the licensee's own performance evaluation process for the previous 10 years and its evaluations of the individual's trustworthiness and reliability would be more accurate than a formal reinvestigation. One State supported the reinvestigation and suggested that the character and reputation element should be included in the reinvestigation. In addition, five States and OAS specifically objected to the reinvestigation provision for the reviewing official. The NRC staff believes that periodic reinvestigation is an important aspect of a security program because an individual's situation may change over time in a manner that could adversely affect his or her trustworthiness and reliability. No changes have been made on the reinvestigation provisions in response to State comments.

An area of major disagreement is the proposed requirement to require LLEA notifications for temporary jobsites. Ten States and OAS expressed concern over this requirement. Most States indicated that the provision is unrealistic, impractical, and not implementable. The States believe that it is not practical to expect a licensee to determine the LLEA with jurisdiction at a temporary jobsite as the LLEA could be city, county, or state, or a combination of jurisdictions. One of the States noted that the States sometimes have difficulty keeping track as various federal, state, and local LLEA cover different areas. Licensees typically move during the course of the day and enter multiple jurisdictions and therefore, may have trouble identifying the appropriate LLEA. States felt that as these jobs often involve repair of critical oil and gas infrastructure, the work could be delayed while the licensee attempts to determine which LLEA has jurisdiction. States also indicated that the notification places undue time burdens on all LLEAs to confirm and educate them and that repeat notices to LLEAs may desensitize the

LLEAS to the need for an immediate response to a true emergency, and would create more confusion and disorganization for LLEAs by flooding them with vast amounts of trivial paperwork that does not require their immediate attention or response. One State offered an alternative to require the work crew to have daily contact with the home office regarding status and location. Failure to report as directed would prompt an investigation by the home office, which would lead to LLEA notification as appropriate. In response to the State's comments, the NRC staff has left the requirement in the proposed rule but has added text to specifically invite comment on this topic.

Five States and OAS expressed concern over the proposed requirements for a written security plan and the use of security zones. These States indicated that licensees already have programs in place under the orders, that the program has already been inspected and verified under the licensees' increased control plans, and that there is no need to rename these plans. As for the security zones, the States felt that the use of security zones would introduce a new and confusing term and that there is no need for a new special term for the areas currently under the orders. The States also indicated that referring to an area as a security zone may draw unnecessary attention to the area. The NRC staff notes that the orders will be withdrawn when the final rule is effective, and the security plan and its implementation is what NRC and States will be inspecting against. The staff also believes that a plan is necessary to document how a particular licensee is implementing the requirements. In addition, the area in which a licensee implements the security measures needs to be called something for identification purposes and spelling out the requirements. The States did not provide convincing arguments for eliminating the requirements for either security plans or security zones.

NRC staff has analyzed the proposed rule in accordance with the procedures established within Part III of the Handbook to Management Directive 5.9, "Categorization Process for NRC Program Elements." The proposed rule has different compatibility designations depending on the specific section of the rule. Enclosure 2 is a table that contains the draft compatibility determination for the proposed rule; compatibility is also addressed in Section V of the SOC. Two Agreement States provided comments suggesting a change in the compatibility designations. One State suggested changing the compatibility of § 37.79(a)(2) from compatibility "B" to compatibility "C" and another State suggested changing the compatibility of § 37.45(a) and (b) from compatibility "B" to compatibility "C". The NRC staff believes that both of these requirements have transboundary implications and thus has not made the requested change. The Standing Committee on Compatibility reviewed the proposed rule and agreed that these proposed amendments to the NRC regulations are a matter of compatibility between the NRC and the Agreement States. The Committee and the staff have reached agreement on the compatibility designations.

COMMITMENTS:

1. The staff plans to publish guidance document(s) for public comment during the public comment period on the proposed rule.
2. The staff plans to host at least one workshop on the guidance documents during the comment period.
3. The staff will provide an options paper on potential changes to the SGI-M handling provisions in Part 73.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the proposed amendments to Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71, and 73 (Enclosure 1).
2. Note:
 - a. That the proposed amendments will be published in the *Federal Register*, allowing 120 days for public comment.
 - b. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).
 - c. That a draft Regulatory Analysis has been prepared for this rulemaking (Enclosure 3).
 - d. That an Environmental Assessment has been prepared for this rulemaking (Enclosure 4).
 - e. That appropriate Congressional committees will be informed of this action.
 - f. That a press release will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register.
 - g. An Office of Management and Budget (OMB) review is required and a clearance package will be forwarded to OMB no later than the date the proposed rule is submitted to the Office of the Federal Register for publication.

RESOURCES:

To complete the rulemaking, the following resources are budgeted.

| Office | Fiscal Year (FY) 2010 | FY2011 |
|--------|-----------------------|--------|
| FSME | 1.3 | 0.1 |
| NSIR | 0.2 | 0.0 |
| ADM | 0.2 | 0.02 |
| NRO | 0.1 | 0.1 |
| NMSS | 0.2 | 0.2 |
| NRR | 0.1 | 0.1 |
| OGC | 0.3 | 0 |
| Total | 2.7 | 0.72 |

The estimated resources are included in the fiscal year (FY) 2010 President's Budget and FY 2011 budget request.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections. The rule suggests changes in information collection requirements that must be submitted to OMB no later than the date the proposed rule is forwarded to the *Federal Register* for publication.

/RA/ Martin Virgilio for

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Draft Compatibility Table
3. Draft Regulatory Analysis
4. Environmental Assessment

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WITS200500382/EDATS: EDO-2007-0349
WITS200600065/EDATS: SECY-2007-0243
WITS200600398/EDATS: EDO-2007-0159
WITS200700184/EDATS: SECY-2007-0165

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| OFFICE | DILR | DILR | D/MSSA | DILR |
| NAME | MHorn | MDelligatti;MHorn for | RLewis;TReis for | MShaffer;MThaggard for |
| DATE | 11/10/09 | 11/10/09 | 11/03/09 | 11/19/09 |
| OFFICE | OCFO | NRR | OIS | OGC |
| NAME | JDyer;TPulliam for by email | ELeeds;BBoger for by email | RNichols;CC for | BJones NLO by email |
| DATE | 9/10/09 | 9/18/09 | 10 / 27 /09 | 11 / 17 /09 |
| OFFICE | OE | ADM | NSIR | Tech Editor |
| NAME | RZimmerman;BSosa by memo | MLesar by memo | RZimmerman;GPurdy by email | PTressler |
| DATE | 11 / 16 /09 | 9 / 17 /09 | 9 / 24 /09 | 11 /24/09 |
| OFFICE | FSME | EDO | | |
| NAME | CMiller | MVirgilio for RWBorchardt | | |
| DATE | 11 /27/09 | 12/14/09 | | |

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