

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of:)
)
CERTAIN LICENSEES REQUESTING) EA-09-293
UNESCORTED ACCESS TO)
RADIOACTIVE MATERIAL)

**ORDER IMPOSING TRUSTWORTHINESS AND RELIABILITY REQUIREMENTS
FOR UNESCORTED ACCESS TO CERTAIN RADIOACTIVE MATERIAL
(EFFECTIVE IMMEDIATELY)**

I

The Licensees identified in Attachment 1¹ to this Order hold licenses issued in accordance with the Atomic Energy Act (AEA) of 1954, as amended, by the U.S. Nuclear Regulatory Commission (NRC or Commission) or an Agreement State, authorizing them to perform services on devices containing certain radioactive material for customers licensed by the NRC or an Agreement State to possess and use certain quantities of the radioactive materials listed in Attachment 2 to this Order. Commission regulations at 10 CFR 20.1801 or equivalent Agreement State regulations require Licensees to secure, from unauthorized removal or access, licensed materials that are stored in controlled or unrestricted areas. Commission regulations at 10 CFR § 20.1802 or equivalent Agreement State regulations require Licensees to control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area and that is not in storage.

II

Subsequent to the terrorist events of September 11, 2001, the NRC issued immediately effective security Orders to NRC and Agreement State Licensees under the Commission's authority to protect the common defense and security of the nation. The Orders required certain manufacturing and distribution (M&D) Licensees to implement

¹ Attachment 1 contains sensitive information and will not be released to the public.

Additional Security Measures (ASMs) for the radioactive materials listed in Attachment 2 to this Order (the radionuclides of concern), to supplement the existing regulatory requirements. The ASMs included requirements for determining the trustworthiness and reliability of individuals that require unescorted access to the radionuclides of concern. Section 652 of the Energy Policy Act of 2005, which became law on August 8, 2005, amended Section 149 of the AEA to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check for “any individual who is permitted unescorted access to radioactive materials 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.” Section 149 of the AEA also requires that “all fingerprints obtained by a Licensee or applicant...shall be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check.” As a result, the trustworthiness and reliability requirements of the ASMs were updated and the M&D Licensees were issued additional Orders imposing the new fingerprinting requirements.

In late 2005, the NRC and the Agreement States began issuing Increased Controls (IC) Orders or other legally binding requirements to Licensees who are authorized to possess the radionuclides of concern. Paragraph IC 1.c of the IC requirements stated that “service providers shall be escorted unless determined to be trustworthy and reliable by an NRC-required background investigation as an employee of a Manufacturing and Distribution Licensee.” Starting in December 2007, the NRC and the Agreement States began issuing additional Orders or other legally binding requirements to the IC Licensees, imposing the new fingerprinting requirements. In the December 2007 Fingerprinting Order, Paragraph IC 1.c of the IC requirements was superseded by the requirement that “Service provider Licensee employees shall be

escorted unless determined to be trustworthy and reliable by an NRC-required background investigation.” However, NRC did not require background investigations for non-M&D service provider Licensees. Consequently, only service representatives of certain M&D Licensees may be granted unescorted access to the radionuclides of concern at an IC Licensee facility, even though non-M&D service provider Licensees provide similar services and have the same degree of knowledge of the devices they service as M&D Licensees. To maintain appropriate access control to the radionuclides of concern, and to allow M&D Licensees and non-M&D service provider Licensees to have the same level of access at customers’ facilities, NRC is imposing trustworthiness and reliability requirements for unescorted access to radionuclides of concern, as set forth in this Order. These requirements apply to non-M&D service provider Licensees that request and have a need for unescorted access by their representatives to the radionuclides of concern at IC Licensee facilities. These trustworthiness and reliability requirements are equivalent to the requirements for M&D Licensees who perform services requiring unescorted access to the radionuclides of concern.

In order to provide assurance that non-M&D service provider Licensees are implementing prudent measures to achieve a consistent level of protection for service providers requiring unescorted access to the radionuclides of concern at IC Licensee facilities, all Licensees identified in Attachment 1 to this Order shall implement the requirements of this Order. In addition, pursuant to 10 CFR 2.202, because of potentially significant adverse impacts associated with a deliberate malevolent act by an individual with unescorted access to the radionuclides of concern, I find that the public health, safety, and interest require this Order to be effective immediately.

III

Accordingly, pursuant to Sections 81, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR

2.202, 10 CFR Parts 20, 30 and 33, IT IS HEREBY ORDERED, **EFFECTIVE IMMEDIATELY**, THAT ALL LICENSEES IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER COMPLY WITH THE REQUIREMENTS SET FORTH IN THIS ORDER.

- A.1. The Licensee shall establish and maintain a fingerprinting program that meets the requirements of Attachment 3 to this Order for individuals that require unescorted access to the radionuclides of concern. The Licensee shall complete implementation of the requirements of Attachment 3 to this Order **within one hundred eighty (180) days** of the date of this Order, or before (1) providing written verification to another Licensee subject to the IC requirements, or (2) attesting to or certifying the trustworthiness and reliability of a service provider for unescorted access to the radionuclides of concern at a customer's facility.
- A.2. **Within ninety (90) days** of the date of this Order, the Licensee shall designate a "Reviewing Official" for determining unescorted access to the radioactive materials as listed in Attachment 2 to this Order by other individuals. The designated Reviewing Official shall be determined to be trustworthy and reliable by the Licensee in accordance with the requirements described in Attachment 3 to this Order and **must be permitted to have** unescorted access to the radioactive materials listed in Attachment 2 to this Order as part of his or her job duties.
- A.3. Fingerprints for unescorted access need not be taken if a designated Reviewing Official is relieved from the fingerprinting requirement by 10 CFR § 73.61, or has been favorably decided by a U.S. Government program involving fingerprinting

and a FBI identification and criminal history records check² within the last five (5) years, or for any person who has an active federal security clearance (provided in the latter two cases that they make available the appropriate documentation³).

The Licensee may provide, for NRC review, written confirmation from the Agency/employer which granted the federal security clearance or reviewed the FBI identification and criminal history records results based upon a fingerprint identification check. The NRC will determine whether, based on the written confirmation, the designated Reviewing Official may have unescorted access to the radioactive materials listed in Attachment 2 to this Order, and therefore, be permitted to serve as the Licensee's Reviewing Official⁴.

- A.4. A designated Reviewing Official may not review the results from the FBI identification and criminal history records checks or make unescorted access determinations until the NRC has approved the individual as the Licensee's Reviewing Official.
- A.5. The NRC will determine whether this individual (or any subsequent Reviewing Official) may have unescorted access to the radionuclides of concern, and

² Examples of such programs include (1) National Agency Check, (2) Transportation Worker Identification Credentials in accordance with 49 CFR Part 1572, (3) Bureau of Alcohol Tobacco Firearms and Explosives background checks and clearances in accordance with 27 CFR Part 555, (4) Health and Human Services security risk assessments for possession and use of select agents and toxins in accordance with 42 CFR Part 73, and (5) Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license in accordance with 49 CFR Part 1572, Customs and Border Patrol's Free and Secure Trade (FAST) Program. The FAST program is a cooperative effort between the Bureau of Customs and Border Patrol and the governments of Canada and Mexico to coordinate processes for the clearance of commercial shipments at the U.S. - Canada and U.S. - Mexico borders. Participants in the FAST program, which requires successful completion of a background records check, may receive expedited entrance privileges at the northern and southern borders.

³ This documentation must allow the NRC or NRC-approved Reviewing Official to verify that the individual has fulfilled the unescorted access requirements of Section 149 of the AEA by submitting to fingerprinting and a FBI identification and criminal history records check.

⁴ The NRC's determination of this individual's unescorted access to the radionuclides of concern in accordance with the process described in Enclosure 4 to the transmittal letter of this Order is an administrative determination that is outside the scope of this Order.

therefore, will be permitted to serve as the Licensee's Reviewing Official. The NRC-approved Reviewing Official shall be the recipient of the results of the FBI identification and criminal history records check of the other Licensee employees requiring unescorted access to the radioactive materials listed in Attachment 2 to this Order, and shall control such information as specified in the "Protection of Information" section of Attachment 3 to this Order.

- A.6. The NRC-approved Reviewing Official shall determine whether an individual may have unescorted access to radioactive materials that equal or exceed the quantities in Attachment 2 to this Order, in accordance with the requirements described in Attachment 3 to this Order.

- B. Prior to requesting fingerprints from a Licensee employee, a copy of this Order shall be provided to that person.

- C.1. The Licensee shall, in writing, **within twenty-five (25) days** of the date of this Order, notify the Commission, (1) if it is unable to comply with any of the requirements described in this Order, including Attachment 3 to this Order, (2) if compliance with any of the requirements is unnecessary in its specific circumstances, or (3) if implementation of any of the requirements would cause the Licensee to be in violation of the provisions of any Commission or Agreement State regulation or its license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.
- C.2. The Licensee shall complete implementation of the requirements of Attachment 3 to this Order **within one hundred eighty (180) days** of the date of this Order.
- C.3. The Licensee shall report to the Commission when they have achieved full compliance with the requirements described in Attachment 3 to this Order. The

report shall be made **within twenty-five (25) days** after full compliance has been achieved.

- C.4. If during the implementation period of this Order, the Licensee is unable, due to circumstances beyond its control, to meet the requirements of this Order by **June 14, 2010**, the Licensee shall request the Commission, in writing, the need for an extension of time to implement the requirements. The request shall provide the Licensee's justification for seeking additional time to comply with the requirements of this Order.
- C.5. Licensees shall notify the NRC's Headquarters Operations Office at 301-816-5100 within 24 hours if the results from a FBI identification and criminal history records check indicate that an individual is identified on the FBI's Terrorist Screening Data Base.

Licensee responses to C.1, C.2., C.3., and C.4. above shall be submitted in writing to the Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Licensee responses shall be marked as "Security-Related Information - Withhold Under 10 CFR 2.390.

The Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by the Licensee.

IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within twenty-five (25) days of the date of this Order. In addition, the Licensee and any other person

adversely affected by this Order may request a hearing of this Order within twenty-five (25) days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made, in writing, to the Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee relies and the reasons as to why the Order should not have been issued. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

A request for a hearing must be filed in accordance with the NRC E-Filing rule, which became effective on October 15, 2007. The E-Filing Final Rule was issued on August 28, 2007, (72 Fed. Reg. 49,139). The E-Filing process requires participants to submit and serve documents over the internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances when the requestor (or its counsel or representative) already holds an

NRC-issued digital ID certificate). Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate also is available on NRC's public website at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public website at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC website at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:00 a.m. and 8:00 p.m., Eastern Time, Monday through Friday. The help line number is (866)-672-7640.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 C.F.R. 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their works.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the Licensee may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty-five (25) days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received.

AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

Dated this 16th day of **December, 2009**.

FOR THE NUCLEAR REGULATORY COMMISSION

Robert J. Lewis, Director /RA/
Division of Materials Safety and
State Agreements
Office of Federal and State Materials
and Environmental Management Programs

Attachments:

1. List of Applicable Materials Licensees
2. Table 1: Radionuclides of concern
3. Requirements for Service Provider Licensees Providing Written Verification Attesting

to or Certifying the Trustworthiness and Reliability of Service Providers for Unescorted Access to Certain Radioactive Material at Customer Facilities, including Requirements for Fingerprinting and Criminal History Checks