

**RULEMAKING ISSUE
(Notation Vote)**

June 27, 2010

SECY-10-0085

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED RULE: "ENHANCED WEAPONS, FIREARMS
BACKGROUND CHECKS AND SECURITY EVENT
NOTIFICATIONS" (RIN: 3150-AI49)

PURPOSE:

To obtain Commission approval to include security event notifications as part of the proposed "Enhanced Weapons, Firearms Background Checks and Security Event Notifications" rule and allow the Executive Director for Operations to approve the proposed rule (enclosure).

SUMMARY:

The proposed rule would implement the Firearms Guidelines that were issued by the U.S. Nuclear Regulatory Commission (NRC), after obtaining the approval of the U.S. Attorney General (AG), to implement the authority of the new section 161A of the Atomic Energy Act (AEA), "Use of Firearms by Security Personnel." The NRC published the Firearms Guidelines in the *Federal Register* on September 11, 2009 (74 FR 46800).

AEA section 161A confers upon the Commission the authority to authorize a licensee's or certificate holder's security personnel to possess and use enhanced weapons (*e.g.*, machine guns) and to allow this statutory provision to preempt State, local, and certain Federal firearms laws. In addition, security personnel with access to any weapon must undergo a firearms background check that would include fingerprinting and a check against the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS) database.

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The proposed rule also contains new and revised security notification requirements in Appendix G, "Reportable Safeguards Events," to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical Protection of Plants and Materials" and 10 CFR 73.71, "Reporting of Safeguards Events" for attacks and imminent threats to power reactors and Category I strategic special nuclear material facilities.

BACKGROUND:

As part of the Energy Policy Act of 2005, the AEA was amended by the addition of section 161A. Subsection d of section 161A required the Commission to issue the Firearms Guidelines, with the approval of the U. S. Attorney General. The Firearms Guidelines provide direction to the NRC, FBI, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on the implementation of this statute.

In parallel with the development of the Firearms Guidelines, the NRC staff developed proposed implementing regulations. On October 26, 2006 (71 FR 62663), the NRC published a proposed rule that would implement the Firearms Guidelines then under development as part of a larger proposed rule, "Power Reactor Security Requirements." However, as a result of changes made to the draft Firearms Guidelines between publication of the proposed rule and issuance of the Guidelines, the NRC concluded that it would need to make significant changes to the content of the proposed rule. These changes required additional notice and opportunity for public comment. The time required to publish a revised proposed rule on the Firearms Guidelines, receive comments, and incorporate them could not be accommodated within the schedule to issue the final Power Reactor Security Requirements rule. Therefore, the NRC staff recommended in SECY-08-0050, "Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues," dated April 17, 2008, (Agencywide Documents Access and Management System (ADAMS) Accession Number ML072920440) to bifurcate the Power Reactor Security Requirements rule and the Firearms rule into two separate rules. In SECY-08-0050 the NRC staff also provided the Commission with the latest Firearms Guidelines for its review and approval and recommended the Commission delegate to the NRC Executive Director for Operations (EDO) the authority to sign the proposed Firearms rule to expedite its publication in the *Federal Register*.

On July 8, 2008, in SECY-08-0050A, "Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues – Supplemental Information," (ADAMS Accession Number ML081910207), the NRC staff supplemented SECY-08-0050 by sending the Commission a new version of the Firearms Guidelines for review and approval because of additional comments from the Department of Justice (DOJ) staff. The NRC staff also recommended that the proposed Firearms rule have a 45-day (rather than the agency's typical 75-day) comment period to expedite the issuance of the final rule and repeated the recommendation that the Commission delegate to the EDO the authority to sign the proposed Firearms rule with the final rule being reviewed and approved by the Commission.

In Staff Requirements Memorandum (SRM) SRM-SECY-08-0050/0050A, entitled, "Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues," dated August 15, 2008 (ADAMS Accession Number ML082280364), the Commission approved the Firearms Guidelines and delegated authority to the EDO to publish the proposed Firearms rule with a 45-day comment period.

On July 9, 2008, in SECY-08-0099, "Final Rulemaking – Power Reactor Security Requirements," (ADAMS Accession Number ML081650474), the staff recommended the Commission approve the final rule for the Power Reactor Security Requirements. The NRC staff also recommended removing the sections in the Power Reactor Security Requirements rule on the new and revised security notification requirements in § 73.71 and Appendix G to Part 73, "Reportable and Recordable Safeguards Events," and placing them in the proposed Firearms Guidelines rule.

In SRM-SECY-08-0099, dated December 17, 2008 (ADAMS Accession Number ML083520252), the Commission approved the Final Power Reactor Security Requirements rule and the movement of the security notification requirements in § 73.71 and Appendix G to Part 73 to the proposed Firearms Guidelines rule.

Once the Commission approved the Firearms Guidelines in SRM-SECY-08-0050/0050A, the Firearms Guidelines were sent to DOJ in August 2008 for approval. The Attorney General did not approve the Firearms Guidelines before the change in administration. Thus, Attorney General approval of the Firearms Guidelines was left to the new Attorney General, who directed a new review of the Firearms Guidelines. As a result of this additional review, DOJ made additional, non-substantive editorial changes to the Firearms Guidelines.

The Attorney General approved the Firearms Guidelines on July 7, 2009, and returned them to the NRC. Because the DOJ made changes subsequent to the Commission's August 15, 2008, SRM approving the Firearms Guidelines, the staff returned the revised Firearms Guidelines to the Commission for approval in COMSECY-09-0020, "Firearms Guidelines," dated August 12, 2009 (ADAMS Accession Number ML092250127). In SRM-COMSECY-09-0020, "Staff Requirements – COMSECY-09-0020 – Firearms Guidelines," dated August 31, 2009 (ADAMS Accession Number ML092430125), the Commission approved the final Firearms Guidelines and retained the earlier delegation and instructions of SRM-SECY-08-0050/0050A.

With the approval of the Firearms Guidelines by the Attorney General on July 7, 2009, and by the Commission (SRM-COMSECY-09-0020) on August 31, 2009, section 161A of the AEA took effect on September 11, 2009 (74 FR 46800), when the NRC published the Firearms Guidelines in the *Federal Register*.

DISCUSSION:

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (EPAc), Pub. L. 109-58. Section 653 of the EPAc amended the AEA by adding new section 161A (42 U.S.C. § 2201a). Section 161A provides new statutory authority to the Commission to enhance security at designated facilities of NRC licensees and certificate holders, and to enhance security with respect to designated radioactive material or other property owned or possessed by an NRC licensee or certificate holder, or being transported to or from a facility owned or operated by a licensee or certificate holder. This authority is divided into two components. The first section permits the Commission to authorize security personnel of certain NRC licensees or certificate holders to transfer, receive, possess, transport, import, and use firearms, ammunition, or devices listed in the section (*i.e.*, enhanced weapons), if the NRC makes certain determinations so they may obtain enhanced weapons that they were not previously permitted to own or possess under previous Commission authority.

The second section permits the Commission to authorize security personnel of licensees and certificate holders to possess weapons, devices, ammunition, or other firearms, notwithstanding State, local, and certain Federal firearms laws (including regulations) that prohibit the transfer, receipt, possession, transport, import, or use of certain weapons, devices, and ammunition. This is referred to hereinafter as “preemption authority.” Before the enactment of section 161A, with limited exceptions, only Federal, State, or local law-enforcement agencies could lawfully possess “machine guns.” Under section 161A authority, however, security personnel of Commission licensees and certificate holders who obtain the necessary authorization from the NRC may lawfully possess enhanced weapons that they previously were not authorized to possess, as long as they also comply with applicable ATF requirements.

The benefit for licensees or certificate holders of obtaining enhanced weapons would be an increase in their defensive capabilities (e.g., firepower). The benefits that would accrue to a licensee or certificate holder obtaining preemption authority are primarily related to protection from prosecution from violation of State, local, and certain Federal firearms laws. Because obtaining enhanced weapons and preemption authority is voluntary, each licensee or certificate holder will independently determine if this greater defensive capability or regulatory flexibility is to their advantage.

Section 161A also requires that security officers of a licensee or certificate holder who have access to any weapons that are used as part of their protective strategy shall complete a “firearms background check” by the AG. As described in the proposed Firearms Guidelines rule, a firearms background check requires a security officer to submit their fingerprint impressions and other personal identify information on NRC Form 754, “Armed Security Personnel Firearms Background Check” (ADAMS Accession Number ML092650459), to the NRC. The NRC will forward the information to the FBI who will check the individual against the National Instant Background Check System (NICS) database to determine whether the individual is prohibited from possessing firearms or ammunition under Federal or State law. The FBI established the NICS system following the enactment of the Brady Bill in 1994. The NICS database provides a process for background checks of individuals before they obtain firearms from an ATF Federal firearms license holder.

The results of the NICS check is then returned to the NRC who will forward it to the submitting licensee or certificate holder. Compliance with the requirements for fingerprinting and firearms background check is mandatory for the security officers of licensees and certificate holders independent of their decision to obtain enhanced weapons and preemption authority.

In addition to implementing the Firearms Guidelines, the staff is recommending changes to 10 CFR 73.71, “Reporting of Safeguards Events,” and Appendix G to Part 73, “Reportable Safeguards Events”. The recommended changes would require licensees and certificate holders to report certain safeguards events to the NRC Headquarters Operations Center and to record certain security events in a safeguards event log that captures additional details on the specific security events reported or recorded. The timing of these reports range from within 15 minutes to 24 hours of discovery, depending on the significance and impact of the event being reported or recorded.

Significant security events, such as actual or imminent hostile actions, warrant immediate NRC action, so licensees and certificate holders must report these events within 15 minutes of discovery. Upon notification of an actual or imminent hostile act, the NRC will rapidly

communicate this information to other NRC licensees and certificate holders and to other Federal agencies to enable them to immediately increase the response level of their security defenses. Other less serious but still significant events require reports within 1 hour of discovery. Events involving suspicious activities and potential tampering or unauthorized operation of components require reports within 4 hours and 8 hours of discovery, respectively.

Licensees and certificate holders that possess enhanced weapons would be required to report to the NRC within 1 hour or 4 hours from the discovery of a stolen or lost enhanced weapon. The NRC requires licensees or certificate holders to report within 24 hours of the receipt of an adverse inspection or enforcement finding or other adverse notice from ATF regarding the licensee's or certificate holder's possession, receipt, transfer, or storage of enhanced weapons.

The enclosed proposed rule also contains the staff's responses to stakeholder comments concerning the Firearms Guidelines provisions and security event reports and records received on the October 2006 proposed Power Reactor Security Requirements rule.

In SECY-08-0050A, the staff proposed that upon issuance of the proposed firearms guidelines rule the public be given a 45-day comment period. The public had provided comments on the rule when it was published as part of the proposed Power Reactor Security Requirements rule in October 2006 so a shorter review period was justified by the staff. In addition, the shorter comment period would expedite the issuance of the final Firearms rule. However, because a number of years have past since the last public review of the proposed rule the staff is now recommending the Commission increase the public comment period to 90 days. The longer review time is recommended to allow the public and stakeholders sufficient time to review and comment on the proposed rule and the two supporting draft regulatory guides (DG-5019, "Reporting and Recording Safeguards Events" (ADAMS Accession Number ML100830413) and DG-5020, "Applying for Enhanced Weapons Authority, Applying for Preemption Authority, and Accomplishing Firearms Background Checks Under 10 CFR Part 73" (ADAMS Accession Number ML100321956)). The supporting draft regulatory guides will be noticed and made available to the public concurrent with the publication of the proposed Firearms rule.

The above changes to 10 CFR Part 73 for enhanced weapons, preemption authority, firearms background check, and security event notifications were reviewed by the Commission as part of the October 2006 proposed Power Reactor Security Requirements rule. In addition, the Commission delegated to the EDO the authority to publish the proposed Firearms rule in SRM-SECY-08-0050/0050A. In October 2009 a change was made to the proposed Firearms rule for licensees and certificate holders that are subject to the requirements of 10 CFR 73.54, "Protection of Digital Computer and Communication Systems and Networks", that was not part of the original proposed rule delegated to the EDO. This new regulation in 10 CFR 73.54 requires power reactor licensees to establish and maintain a cyber security program at their facilities which provides a high assurance that digital computer and communication systems and networks are adequately protected against cyber attacks, up to and including the design-basis threat and to report and record cyber security events under 10 CFR 73.71 and Appendix G of Part 73. An example of a cyber security event to be reported to the NRC would be the discovery that a cyber attack has occurred or has been attempted against systems, networks, or equipment that would compromise or has compromised the facility's safety, security, or emergency preparedness functions. The licensees and certificate holders report the cyber security event to the NRC Headquarters Operations Center within 1 hour to 24 hours of discovery, depending on the significance and impact of the event being reported or recorded.

Since the Commission had not previously reviewed this change to the proposed Firearms rule, the staff recommends that the Commission delegate this additional authority to the EDO to publish the cyber security event notifications as part of the proposed rule. The staff would provide the final Firearms rule to the Commission for its review and approval after the staff evaluates and addresses all the public comments.

The staff is recommending these changes to ensure prompt reporting of actual or imminent hostile actions. Timely reporting permits the NRC to communicate hostile action against the facilities and activities it regulates to senior Federal officials and other licensees and certificate holders, and facilitates NRC's execution of its strategic missions; protecting public health and safety, the common defense and security, and the environment.

It should be noted that if the Commission desires to make changes to the language in the proposed Firearms Guidelines rule pertaining to the enhanced weapons, preemption authority, or the firearms background check that impacts the Firearms Guidelines, the NRC will need to resubmit the Firearms Guidelines to the Commission and the Attorney General for re-approval and then republish the Firearms Guidelines in the *Federal Register*.

RECOMMENDATIONS:

1. That the Commission:

- Delegate to the EDO the authority to issue the new cyber security notification changes in the proposed firearms guidelines rule for publication in the *Federal Register*. The Commission has previously delegated to the EDO the authority to issue the enhanced weapons provisions of the proposed rule.
- Issue simultaneously with the proposed rule the two draft implementing guidance documents.
- Extend the public comment period on the proposed firearms guideline rule from 45 days to 90 days.

2. Note:

- That the proposed Firearms Guidelines rule will be published in the *Federal Register*, allowing 90 days for public comment.
- That appropriate Congressional committees will be informed of this action.
- That the proposed rule contains new or amended information collection requirements that must be submitted to the Office of Management and Budget for approval on or immediately after the date of publication.

RESOURCES:

The resources required to develop and publish the proposed firearms guidelines rule, evaluate and address stakeholder comments received, and develop a final rule are included in the fiscal year (FY) 2011 and FY 2012 rulemaking budgets request as follows:

FY 2011: 0.6 full-time equivalents (FTE) for the Office of Office of Nuclear Reactor Regulation (NRR), 0.5 FTE for the Office of Nuclear Security Resource and Incident Response, 0.1 FTE for the Office of New Reactors. 0.1 FTE for the Office of Administration (ADM), 0.3 FTE for the Office of Nuclear Material Safety and Safeguards, 0.1 FTE for the Office of Information Services, and 0.1 FTE for the Office of the General Counsel (OGC). Resources needed for FY 2011 total is 1.8 FTE.

FY 2012: 0.2 FTE for NRR

The Office of Nuclear Material Safety and Safeguards resources needed to support this rulemaking are less than 0.1 FTE and therefore, are not specifically budgeted.

The additional resources required by ADM to administer and implement the firearms background check program in FY 2012 are 0.5 FTE (the first year of implementation) and in FY 2013 and each subsequent year are 0.2 FTE. However, since this is a cost-reimbursable program there is no impact on budgeted FTE for ADM.

COORDINATION:

The Office of the General Counsel has reviewed the proposed rule and has no legal objection. The Office of the Chief Financial Officer has reviewed the resources required and has no objection.

The Advisory Committee on Reactor Safeguards (ACRS) did not review the proposed rule because the Commission determined in SRM-M031002, dated October 31, 2003 (ADAMS Accession Number ML033040278), that issues associated with threat assessment, physical security, or force-on-force assessments are outside the ACRS's area of expertise, and involve intelligence information not available to the ACRS.

/RA by Martin J. Virgilio for/

R. W. Borchardt
Executive Director
for Operations

Enclosure: *Federal Register* Notice

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Enclosure: *Federal Register* Notice

*via e-mail

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