



Organization of Agreement States

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July 8, 2010

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ATTN: Rulemakings and Adjudications Staff
Secretary
U.S. Nuclear Regulatory Commission
Washington DC, 20555-0001

July 9, 2010 (11:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

RE: docket ID NRC-2008-0120

To Whom It May Concern:

The Organization of Agreement States (OAS) Executive Board has reviewed the above document and would like to submit the following comments.

One of our goals is to promote consistent, high-quality standards in radiation protection. OAS has previously provided comments to this rule in our letter dated October 14, 2009. We can echo NRC Commissioner Svinicki's concern as noted in her comment on the rule, when she states, "there are a number of substantive concerns regarding the practicability of some of the changes proposed in the new rule, which extend beyond the measures imposed in the NRC's post-September 11, 2001 security orders to this community of licensees". Also, as the Commissioner suspected, the comments we made previously remain substantive concerns that require a more practical means of being addressed. Additionally, it appears that the majority of our previously submitted comments were either not taken into account or were completely ignored. This is particularly concerning to us.

In general, OAS continues to believe that the regulations should reflect the Orders, and any expansion should be based on evidence where the Orders were ineffective. The Conference of Radiation Control Program Directors, our sister organization, shares this position and presented it at the NRC Security Briefing on April 23, 2009. We believe the Orders are adequate and implementation issues have been addressed through the use of frequently asked questions posted on the NRC Increased Controls and Security Tool Box. Our comments address changes proposed for access authorization program requirements, background investigations, and LLEA coordination and notification.

We would like to offer the following specific issues/comments regarding the proposed rule:

10 CFR 37.23 Access authorization program requirements

Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin

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The Reviewing Official is responsible for determining trustworthiness and reliability of individuals for unescorted access to Category 1 and Category 2 quantities of radioactive materials (RAM). The licensee will be required to nominate a Reviewing Official and submit the name to the regulatory body (NRC/Agreement State) for approval.

State Issues:

1. This regulatory approval is based only on the results of the fingerprints for a criminal history records check. The remaining 9 other items of the background investigation performed by the licensee are not part of the regulatory body's approval process. The burden of approval will be placed on the regulatory agency without full knowledge of the individual's total work history and complete background check.
2. Some states may not have the authority to adjudicate fingerprints for approval. This was an issue when the Orders were being developed. States do not have the training or law enforcement experience to make qualified analysis of the fingerprint results, resulting in the rule possibly being applied inconsistently across the nation.
3. A majority of the states oppose the proposed Reviewing Official concept. The Orders currently allow the licensee to designate and determine their Trustworthy and Reliable Official and we feel this is sufficient. As proposed, it is unknown what the impact on Agreement States' resources will be to begin approving Reviewing Officials.
4. The Reviewing Official will have to be granted unescorted access to Category 1 and Category 2 quantities of RAM. Essentially, this means that a licensee's Human Resources department representative which currently performs all the necessary pre-hiring checks cannot serve as a Reviewing Official as these individuals would not have a need for unescorted access to Category 1 and Category 2 quantities of RAM. This causes us great concern as HR personnel are really the hiring experts for their companies.

10 CFR 37.25 Background Investigations

Background investigations were part of the Increased Controls and Fingerprinting Orders. Under these Orders, the background investigation included employment history, education, personal references, and fingerprinting and the review of an FBI identification and criminal history records check. The rule adds verification of true identity, military history verification, credit history evaluation, and criminal history review (from local criminal justice resources) that the licensee will be required to perform to complete the background investigation.

State Issues:

1. This rule is overly prescriptive and an increased burden to the licensee. We are unaware of how the current process required under the Orders was suddenly determined to be inadequate from a performance standpoint. Obtaining the required information under the Orders was troublesome for some groups of people, i.e. foreign nationals, research students, etc, and to now require this and much more may be too much for some individuals and licensees. The cost of obtaining all the necessary information may be burdensome to licensees.

2. There is currently no guidance available that would assist the licensee to know what might be an acceptable background check. This was discussed during the development of the Fingerprint Orders. With the added criteria, especially the credit history evaluation, the absence of such guidance will become even more of a concern.

10 CFR 37.45 LLEA coordination and notification

The existing Increased Control Order already required licensees to 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 realistic potential vulnerability of the sources containing such radioactive material. Under the current Orders, pre-arranged LLEA coordination is not required for temporary job sites, however, the proposed rule would add a requirement that licensees provide advance written notification to the "appropriate LLEA" at least three business days prior to beginning work at temporary job sites where the licensee will use or store category 1 or category 2 quantities of radioactive material for more than seven consecutive calendar days.

The proposed rule also adds a requirement that a licensee request that the LLEA notify the licensee whenever the LLEA's response capabilities become degraded or it becomes incapable of providing an armed response.

State issues:

1. There appears to be an unrealistic expectation regarding LLEA coordination and any associated advanced notification requirements. There is no practical means for licensees to identify every local Law Enforcement Agency in the United States, let alone notify the appropriate LLEA in the area where they may be working (especially if they are only staying within one LLEA jurisdiction). It may even be that regulatory staff is not aware of each of these LLEAs. There can also be overlapping and/or redundant jurisdictions that may lead to confusion. Unless it is an area known to the licensee, because they either have a permanent facility in that area or have been there multiple times, it may not be practical to expect them to identify the local law authority.
2. In many cases, the licensee is notified of the necessity of work on the same day the work is required. These jobs often involve repair of critical oil and gas infrastructure which could be delayed while attempting to determine which LLEA has jurisdiction and coordinating with them.
3. The requirement that a licensee request the LLEA to notify it of degraded capabilities seems unnecessary and clearly unenforceable. Q&A 13 on page 33915 of the Federal Register Notice suggests that this rule is intended to address conditions such as a severe shortage of law enforcement during a recovery from a natural disaster. It may be unrealistic to expect a LLEA under these circumstances to notify its local radiographer or blood bank that its armed response capability may have become degraded.

In the FR Notice, the NRC specifically requested comments on a number of aspects of the proposed rule. The attachment to this letter provides our comments on the questions in the FR.

Over 85% of the nation's radioactive materials licensees are located in Agreement States. The impact of changes in regulation on state programs should be greatly considered. A compelling technical position for variation and/or enhancement from the original orders is needed to justify the added financial and regulatory burden to our licensees, and the regulatory Agencies within the Agreement States. Thank you for your consideration in a matter that has great significance to state radiation control programs.

OAS Responses to Specific Requests for Comment in FR

Page 33909: The NRC is specifically requesting comment on this aspect of the proposed access authorization program. In developing comments on this issue, consider the following questions:

(1) Does the reviewing official need to be fingerprinted and have a FBI criminal records check conducted?

We agree that the reviewing official needs to be fingerprinted and have a FBI criminal records check conducted. However, we believe that this review should continue to be done by the licensee, not the regulator. Furthermore, we do not believe the reviewing official needs to be T&R'd and have access to the radioactive material.

(2) Are the other aspects of the background investigation adequate to determine the trustworthiness and reliability of the reviewing official? **Yes.**

(3) Are there other methods that could be used to ensure that the reviewing official is trustworthy and reliable?

Only that this review should continue to be done by the licensee, not the regulator.

(4) Does the requirement to fingerprint the reviewing official place too large of a burden on the licensee? **We do not believe that it does.**

(5) Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history record?

This answer will depend on the legislation in each state. Furthermore, the policy of having the approval of reviewing officials performed by the regulator is ill conceived. The burden shouldn't be placed on the regulatory agency for determining that a person should or should not be granted access to the radioactive materials.

Page 33910: The NRC is specifically inviting comment on the elements of the background investigation. Please consider the following questions in developing comments:

(1) Is a local criminal history review necessary in light of the requirement for a FBI criminal history records check?

No. We are unaware of any problem developing from the current process of relying on an FBI criminal history check. We also feel that one may not be capturing all the information

the proposed rule seeks. For example, many local criminal history checks may reveal crimes that are not necessarily reported into the FBI criminal history database and vice versa. This could be problematic in the long run if a person frequently moves around, as their criminal history may not follow them.

(2) Does a credit history check provide valuable information for the determination of trustworthiness and reliability?

This is an unnecessary extension of the current process in the IC and Fingerprinting Orders for background investigations. We believe this is not a wise addition to the proposed requirements.

(3) Do the Agreement States have the authority to require a credit history check as part of the background investigation?

This answer will depend on the legislation in each state, but the policy of requiring a credit history check as part of the background investigation is ill conceived. This needs to be investigated further.

(4) What are the appropriate elements of a background investigation and why are any suggested elements appropriate?

The elements of the background investigation currently required by the IC and Fingerprinting Orders have worked well and do not need to be extended unnecessarily. The area which needs to be reviewed is the background investigation for foreign nationals and students. To obtain the required information has been troublesome for a majority of licensees.

(5) Are the elements of the background investigation too subjective to be effective?

The elements of the background investigation currently required by the IC and Fingerprinting Orders are already somewhat subjective; however, they have worked well enough. Extending them unnecessarily by adding credit history and other elements will only add to the subjectivity and make the process less effective. In addition see our comments to the previous question for foreign nationals and students.

(6) How much time does a licensee typically spend on conducting the background investigation for an individual?

We are unsure of the exact time spent by licensees, except to note that this is likely to vary greatly from licensee to licensee.

Page 33914: The NRC is specifically inviting comment on the requirement to protect security-related information. Please consider the following questions in developing comments:

(1) Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?

This answer will depend on the legislation in each state. However, since the basis for this rule is now "public health and safety", rather than "common defense and security", there is no continued need for any of the security information to be considered to be SGI or SGI-M.

(2) Can the Agreement States protect the information from disclosure in the event of a request under a State's Freedom of Information Act, or comparable State law?

This answer will depend on the legislation in each state.

(3) Is the proposed rule adequate to protect the licensees' security plan and implementing procedures from unauthorized disclosure, are additional or different provisions necessary, or are the proposed requirements unnecessarily strict?

The rule is adequate with the understanding that since the basis for this rule is now "public health and safety", rather than "common defense and security", there is no continued need for any of the security information to be considered SGI or SGI-M.

(4) Should other information beyond the security plan and implementing procedures be protected under this proposed requirement? **No.**

(5) Should the background investigation elements for determining whether an individual is trustworthy and reliable for access to the security information be the same as for determining access to category 1 and category 2 quantities of radioactive material (with the exception of fingerprinting)?

Yes, but these elements should be limited to those currently included in the requirements of the IC and Fingerprinting Orders.

Page 33916: The NRC is specifically inviting comment on the requirement to contact the LLEA for work at a temporary jobsite. Please consider the following questions in developing comments:

(1) Is there any benefit in requiring that the LLEA be notified of work at a temporary jobsite?

No. We feel the current E-911 system is adequate.

(2) Should notifications be made by licensees for work at every temporary jobsite or only those where the licensee will be working for longer periods, such as the 7 day timeframe proposed in the rule?

The requirement to contact the LLEA for work at a temporary jobsite should be deleted in its entirety. This is troublesome for licensees that may be involved on a temporary jobsite that will cross multiple jurisdictions, especially all in the same day.

(3) If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?

No. As stated above, we do not believe that any notification to a LLEA for a temporary job site is necessary.

(4) Will licensees be able to easily identify the LLEA with jurisdiction for temporary jobsites or does this impose an undue burden?

This may be a nearly impossible task in some situations and does impose a huge unnecessary burden.

(5) Are LLEAs interested in receiving these notifications?

It is our opinion that they do not want to be bothered by these notifications, but this may be best answered by trying to contact each of the many LLEAs and asking them.

Page 33917: The NRC recognizes the need to balance security measures against health and safety concerns and is willing to consider some form of relief from the proposed vehicle disabling requirements. The NRC is specifically requesting comment on this issue. Please consider the following questions when developing comments on this issue:

(1) Should relief from the vehicle disabling provisions be provided?

Yes, in certain instances, such as, when the vehicle is under a higher security requirement such as a nuclear power plant or refinery.

(2) Have licensees experienced any problems in implementing this aspect of the Increased Controls?

As we do not routinely keep track of this type of data, the exact nature of this is not known.

(3) Should there be an exemption written into the regulations or should licensees with overriding safety concerns be required to request an exemption from the regulations to obtain relief from the provision?

The basis for an exemption would be on case-by-case basis and would be difficult to write into the regulations. Requesting an exemption on a case-by-case basis would allow the regulator to review whether the exemption was warranted or not.

(4) If an exemption is included in the regulations, should it be a blanket exemption or a specific exemption for the oil and gas industry?

As we stated above, we do not believe that writing an exemption into the rule is feasible, and would recommend that any exemptions be handled on a case-by-case basis.

(5) Does the disabling provision conflict with any Occupational Safety and Health Administration requirements or any State requirements?

This issue is unknown at this time as we do not track this data.

Page 33917: A licensee would be required to report any actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material as soon as possible after initiating a response, which includes notification of the LLEA. The licensee would be required to submit a written report to the NRC within 30 days after the initial notification. A licensee would also be required to report any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material to both the LLEA and the NRC. The NRC is specifically requesting comment on the reporting requirements. Please consider the following questions when developing comments on this issue.

- (1) Are these the appropriate items and thresholds to be reported to the LLEA? **Yes.**
- (2) Are these the appropriate items and thresholds to be reported to the NRC? **Yes.**
- (3) Should suspicious activities be reported? If they are reported, what type of activities should be considered suspicious?

Suspicious activities should be reported. The licensee is the best judge of what type of activities would be considered suspicious at its facility.

- (4) Is the timeframe for reporting appropriate? **Yes.**

Page 33918: We are specifically inviting public comment on several aspects of license and address verification. In developing comments on this aspect, consider the following:

- (1) Should there be a requirement for verification of the license for transfers of category 2 quantities of radioactive material or would it be acceptable to wait for the system being developed before requiring license verification for transfers of category 2 quantities of radioactive material?

The current system of license verification is acceptable until the system being developed is ready for implementation.

- (2) We are interested in how address verification might work for shipments to temporary job sites and the ability of both licensees and the Agreement States to comply with such a requirement. For example, would States be able to accommodate such requests with their current record systems?

The current system of license verification, as opposed to address verification, is acceptable for shipments to temporary job sites.

- (3) We are also seeking comment on the frequency of the license verification. For example, should a licensee be required to check with the licensing agency for every transfer or would an annual check (or some other frequency) of the license be sufficient?

When the NRC's license verification system is fully implemented, it would be appropriate to verify each transfer. Until then, this verification need only be done once as long as the recipient's license has not expired.

(4) If an annual check is allowed, how would the transferring licensee know if a license has been modified since the last check and that the licensee is still authorized to receive the material?

This issue will be resolved when the NRC's license verification system is fully implemented. Furthermore, we would ask to see the data on how large an issue this is to date? We do not feel this is an issue now and should not even be considered at this point. The current requirement for obtaining a copy of the license before transfer has worked fine.

(5) Is preplanning and coordination of the shipments necessary?

Yes, for category 1 shipments. No, for category 2 shipments.

Proposed § 37.79(b)(1)(ii) would require that the licensee have an NRC-approved monitoring plan to ensure that no unauthorized access to the shipment takes place while the shipment is in a railroad classification yard. The NRC is specifically seeking comment on the feasibility of this requirement. In developing comments on this aspect, consider the following questions:

(1) How could surveillance of the shipment be accomplished while in the classification yard?
Unknown at this time.

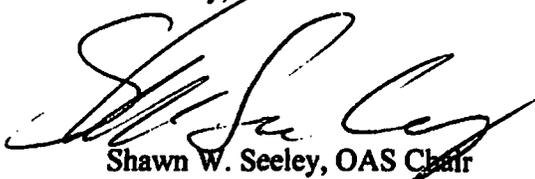
(2) Would the classification yard allow an individual to accompany a shipment while the shipment is held in the classification yard? **Unknown at this time.**

(3) What precautions might be necessary from a personal safety standpoint? **Unknown at this time.**

In closing, we would again thank you for the opportunity to comment on any issue such as this one. These are initial thoughts as we move forward with changes to 10 CFR 20. We firmly believe that early and substantive involvement of stakeholders for consideration is highly desirable and will serve to improve the final product.

Thank you for allowing us to comment on this proposed rule and we look forward to the continued participation of the OAS in future NRC initiatives.

Sincerely,



Shawn W. Seeley, OAS Chair
Maine Radiation Control Program
286 Water Street, 4th Floor
Augusta, ME 04333-0011
207-287-5696
shawn.seeley@maine.gov

Rulemaking Comments

From: Seeley, Shawn [Shawn.Seeley@maine.gov]
Sent: Thursday, July 08, 2010 2:12 PM
To: Rulemaking Comments
Cc: OAS Executive Board; Lewis, Robert; Costello, Francis; Pavlechko, Frank; Katanic, Janine
Subject: docket ID NRC-2008-0120
Attachments: oas comment part 37 rule 7 8 10.pdf

Attached please find comments on the above referenced subject matter on behalf of the Organization of Agreement States.

Shawn W. Seeley

Shawn W. Seeley, Health Physicist
Radiation Control Program
Division of Environmental Health
Maine Center for Disease Control & Prevention
Department of Health & Human Services
286 Water Street, 4th Floor, 11 SHS
Augusta, ME 04333-0011
207-287-5696 fax: 207-287-3059

Email: shawn.seeley@maine.gov

Online at www.maineradiationcontrol.org

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From: "Seeley, Shawn" <Shawn.Seeley@maine.gov>

To: <rulemaking.comments@nrc.gov>

CC: "OAS Executive Board" <oasboard@agreementstates.org>,

"Lewis, Robert" <Robert.Lewis@nrc.gov>,

"Costello, Francis" <fcostello@state.pa.us>,

"Pavlechko, Frank" <Frank.Pavlechko@nrc.gov>,

"Katanic, Janine" <Janine.Katanic@nrc.gov>

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