



STATE OF ALABAMA DEPARTMENT OF
PUBLIC HEALTH

Donald E. Williamson, MD
State Health Officer

DOCKETED
USNRC

September 23, 2010 (11:00a.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

September 17, 2010

Josephine Piccone, Director
Division of Intergovernmental Liaison
and Rulemaking
Office of Federal and State Materials
and Environmental Management Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Opportunity to Comment on Proposed Rule to Amend 10 CFR Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71 and 73 - Physical Protection of Byproduct Material (FSME-10-048)

Dear Ms. Piccone:

The Alabama Office of Radiation Control Staff has reviewed the proposed rule and offers the following comments for your consideration.

The Alabama Office of Radiation Control (ADPH) agrees with the comments submitted by the Organization of Agreement States (OAS) in their letter dated July 8, 2010.

We believe strongly that the rules should only include what was required in the previous orders. Additional requirements should be based on deficiencies in the orders that have become apparent since the orders were issued. Expanding on these orders without due cause is not justified. Over the years that the orders have been in effect, increased control licensees have been inspected and we have established compliance histories on each of them. Nothing we do can provide absolute assurance of 100% protection. To impose additional requirements as a reaction to the very low likelihood of a terrorist event, utilizing licensed sources that are properly protected under the current orders, would make us an instrument of the terrorists on our licensees and ourselves?

Please provide documented evidence that indicates that the current orders are not adequate.

The proposed requirement that the regulating agency make a determination concerning a Reviewing Official based on the FBI fingerprint criminal history check seems ill conceived. The regulating agency is not best suited to make such a determination. The employer has much more to lose by approving an incompetent Reviewing Official than the regulating agency does. The employer also has much more information and personal knowledge of the candidate than the regulating agency. Therefore the employer should approve any Reviewing Official. **Please provide documented evidence that indicates that the current orders are not adequate.**

Further, requiring the Reviewing Official to be an individual that has unescorted access to the licensed Category 1 or Category 2 quantities of radioactive material and safeguards information

is flawed. Most increased control licensees use their Human Resources Department for employee reviews. This is their expertise, and they do not have to have access to either the licensed material or to safeguards information to perform this task. **Please provide documented evidence that indicates that the current orders are not adequate in this area.**

The requirement that the LLEA notify licensees of a degradation of their response capabilities is clearly outside the purview of the regulating agencies. If the LLEA is an elected official, such a requirement could be asking an elected official to inform the citizens who elected him that his job performance is inadequate. LLEAs are not licensees. We have no authority over non-licensed entities. This is simply not enforceable, and should not be considered in rule space.

In summary, we see no need to expand the scope and requirements of the rules beyond that of the orders currently in effect without documented evidence that the orders have been ineffective.

The NRC specifically requested comments on a number of aspects of the proposed rule. Below are our responses.

1. *Does the reviewing official need to be fingerprinted and have a FBI criminal records check conducted?* We agree that the reviewing official (or T&R 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 deemed T&R and have access to licensed radioactive material.

Reviewing Official

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?* There is no documented evidence that we are aware of indicating the current methods used to establish the T&R official have been ineffective.

4. *Does the requirement to fingerprint the reviewing official place too large of a burden on the licensees?* See response to 3.

5. *Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history record?* That will certainly vary from state to state.

Background Investigations

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.

2. *Does a credit history check provide valuable information for the determination of trustworthiness and reliability?* The credit history evaluation concept in the proposed rule does not appear to provide any useful information regarding an individual's likelihood to be a trustworthy and reliable employee. Poor credit and untrustworthiness do not go hand-in-hand. Nothing in our experience with IC licensee compliance indicates credit scores are a valid gauge of trustworthiness or reliability. We believe the requirement for a credit history check is unjustified. It creates an additional cost for IC licensees who would now have to pay for a credit history. Even if a credit history check was warranted, the proposed rule lacks criteria for making a determination on a credit history.

3. *Do the Agreement States have the authority to require a credit history check as part of the background investigation?* We have not received a response from our Legal Department regarding this question, thus we are not sure at this time.

4. *What are the appropriate elements of a background investigation and why are any suggested elements appropriate?* Using the current orders, we have not seen any evidence of malevolent use of radioactive materials. The current background investigations being performed have not been proven inadequate. The additional elements in the proposed rule add no proven security benefit versus the cost of implementation.

5. *Are the elements of the background investigation too subjective to be effective?* Yes.

6. *How much time does a licensee typically spend on conducting the background investigation for an individual?* Unknown. We don't collect this information during the compliance process.

Physical/Information Protection

There was a need to clarify the definition of "Aggregation" as a result of the orders, and that has been accomplished. The licensees have implemented IC's, and if at any time aggregation occurs, it will be detected during routine inspections. Making changes such as how many times aggregation can occur in a 90 day time frame, and requiring notification of such aggregations is unnecessary and confusing.

Each facility needs to have the flexibility necessary to develop a security plan that works best for them. This plan is then reviewed and inspected by the regulating agency to assure adequacy. Every security plan may not need all the prescriptive requirements specified in the proposed rule. Again, please provide documented evidence that indicates that the current orders are not adequate in this area before adding unnecessary and overly prescriptive rules.

1. *Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?* The ADPH believes we do have that authority.

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?* The ADPH has been able to do so in the past, and believes we can continue to do so in the future.

3. *Is the proposed rule adequate to protect the licensee's security plan and implementing procedures from unauthorized disclosure, are additional or different provisions necessary, or are the proposed requirements unnecessarily strict?* We see no problems with either the existing orders or the current provisions for protecting information that would warrant any changes in the rules.

4. *Should other information beyond the security plan and implementing procedures be protected under this proposed requirement?* No, nothing beyond what the existing orders require is necessary.

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)?* They should be the same, and should follow the current requirements of the orders.

LLEA's and Temporary Jobsites

The proposed rule includes requirements involving interactions with LLEA's that appear to be unrealistic and/or unenforceable. Expecting licensees to know all of the proper LLEA's in any part of the country is unrealistic. Since LLEA's are not licensees, neither the states nor the NRC have any authority over them regarding the requirements for the LLEA to contact the licensee when they have a degradation of response capabilities.

1. *Is there any benefit in requiring that the LLEA be notified of work at a temporary jobsite?*
No.

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?* ADPH does not believe such notifications are necessary and that such requirements should be deleted in their entirety.

3. *If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?* See response to 2 above.

4. *Will licensees be able to easily identify the LLEA with jurisdictions for temporary jobsites or does this impose an undue burden?* Based on past experience and multiple layers of LLEA's (state, county, city, constable) ADPH does not believe it will be easy to identify the appropriate LLEA. ADPH does not believe such notifications are necessary and that such requirements should be deleted in their entirety.

5. *Are LLEAs interested in receiving these notifications?* Our experience in this area shows a mix of interest and disinterest by the LLEA's. However, was an event to occur, we believe that the licensee could use the 911 system to evoke an appropriate and effective security related response.

Vehicle Disabling

1. *Should relief from the vehicle disabling provisions be provided?* Yes, there should be provisions for relief.
2. *Have licensees experienced any problems in implementing this aspect of the Increased Controls?* Our licensees have not indicated that they have had particular problems implementing the current requirements.
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?* All rules are subject to Agency exception, based on health and safety. We do not believe there is a need for an exemption to be written into the rule.
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?* See answer to 3.
5. *Does the disabling provision conflict with any Occupational Safety and Health Administration requirements or any State requirements?* Our licensees have not indicated any conflicts.

Reporting Requirements

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?* Yes. ADPH is not in a position to define "suspicious activity" in every circumstance. We believe the licensee is in a better position to determine when suspicious activity is occurring in any given circumstance.
4. *Is the timeframe for reporting appropriate?* Yes.

Transportation Security

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?* It is acceptable to use the current system.
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*

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systems? ADPH believes the current license verification system is adequate. There is not always a specific address for temporary job site locations, especially in rural or remote areas, so address verification is sometimes not possible.

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?* ADPH does not believe that a license needs to be verified for every transfer. An annual check should be sufficient. When the license verification system is implemented, verification of each transfer should be much less burdensome.

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? Has this proved to be a problem?* When the license verification system is implemented, verification of each transfer should be much less burdensome. Until then, as long as the current system is working, it should be continued.

5. *Is preplanning and coordination of the shipments necessary?*

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

NRC Approved Monitoring Plan During Shipment

1. *How could surveillance of the shipment be accomplished while in the classification yard?*

Unknown

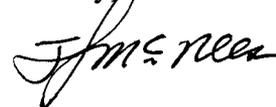
2. *Would the classification yard allow an individual to accompany a shipment while the shipment is held in the classification yard?* Unknown

3. *What precautions might be necessary from a personal safety standpoint?* Unknown

In closing, the ADPH believes that the current requirements of the orders have proven effective. Without documentation of inadequacies of the current orders, we cannot support a rulemaking that goes beyond what is already in place.

Thank you for the opportunity to comment on this proposed rule.

Sincerely,



James L. McNeese, CHP, Director
Alabama Office of Radiation Control