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05 October 2010

PR 30,32,33,34,35,36,37,39,51,71, and 73 (75FR33901)

To: 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)

Ms. Piccone,

PetroChem Inspection Services, Inc. has reviewed the proposed rule and offer the following comments for consideration.

§37.21 Personnel access authorization requirements

In proposed Part 37.21(a)(3), each licensee subject to Part 37 must submit information concerning the requirements of this subpart. This is an unnecessary burden to both the licensees who have already implemented a program and the regulatory program. Except for some new requirements posed in this part, e.g., nominating reviewing officials and credit checks, to which we are opposed (see comments below), the licensees subject to this part have already been inspected multiple times. A compliance history has already been established and these licensees should be exempted from having to resubmit existing information.

§37.23 Access authorization program requirements

This proposed rule replaces the concept of the trustworthiness and reliability official in the current fingerprinting orders with the concept of a reviewing official. Those orders have been in effect for two years now and we are not aware of any situations that have occurred to change the situation and that now warrant the inclusion of a reviewing official. We are opposed to the concept of the reviewing official because it provides no plausible added benefit to the existing structure under the orders.

The proposed rule now requires the Agreement State to make a determination on approving a Reviewing Official based on the FBI fingerprint criminal history check alone, only one item out of the several items required for an access authorization program.

This is a fragmented approach at best because the Agreement State is attempting to make a determination on one piece of information on an individual and the licensee is attempting to make a determination based on separate pieces of information. So, neither the Agreement

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State nor the licensee will have benefit of the complete set of information on an individual in order to make an informed determination.

We know that many IC licensees use their Human Resources department to review employees' qualifications for a job, including verification of employment, education and true identity. The proposed requirement that the Reviewing Official must be permitted access to safeguards information or unescorted access to Category 1 or Category 2 quantities of radioactive material means that Human Resources personnel are either prohibited from doing the access authorization checks or must be permitted access.

Neither option is in the best interest of safety/security. The requirement either creates an untenable business model for IC licensees with no evidence that the current system under the orders is in any way flawed, or it creates a radiation safety/security issue by permitting Human Resources staff access to safeguards information and radioactive material.

The proposed rule now puts the burden of review of fingerprint results on the regulatory body. There are no criteria for making determinations on the findings. Without regulatory criteria, sound enforcement of regulatory determinations is not possible. In addition, there has been no evidence to show that the current reviews being done by the IC licensees are inadequate. With the current national and state economic situations, it is inconceivable that such a rule would be imposed with no compelling evidence of threat to public safety/security.

With regard to the questions posed about the reviewing official, we offer the following:

1. *Does the reviewing official need to be fingerprinted and have a FBI criminal records check conducted?* No. We oppose the concept of the reviewing official and believe there has been no justification presented that would render the current practice of using a trustworthiness and reliability official either unsafe or unsecure.

2. *Are the other aspects of the background investigation adequate to determine the trustworthiness and reliability of the reviewing official?* See above response.

3. *Are there other methods that could be used to ensure that the reviewing official is trustworthy and reliable?* See above response.

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

5. *Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history record?* That is undetermined at this time.

§37.25 Background Investigations

The proposed rule incorporates additional items, such as a credit history evaluation and a local criminal history review, to the required background investigation. In the five years since the orders have been in effect, we are not aware of any situations that have occurred that now warrant the inclusion of a credit history check.

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None of the items required for the background investigation have any criteria for evaluation. IC licensees are required to determine their own basis for evaluating background investigation results and approving individuals for unescorted access based on that determination.

As long as the IC licensee has established that criteria and is following it, the regulatory agency has no recourse to deem it inappropriate because any challenge to a licensee's determination is as subjective as the licensee's original determination. Therefore, compliance determinations are performance-based.

It is unclear at this time whether an Agreement State has the authority to require a credit history check. 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. The proposed rule lacks criteria for making a determination on the credit history.

Nothing in our experience with IC licensee compliance indicates credit scores are a valid gauge of trustworthiness or reliability. This is especially true with the nation's current economic climate. Thousands of citizens have lost jobs and are now unemployed, creating often significant impact on their credit scores.

The economic climate and unemployment in this country have negatively impacted many citizens' credit histories, with no corresponding degradation of those individuals' trustworthiness or reliability. Also, there still do exist trustworthy American citizens who conduct business only in cash and may have limited credit history, if any. These situations are not indicators of a person's trustworthiness or reliability.

With regard to the questions posed about background investigations, we offer the following:

1. *Is a local criminal history review necessary in light of the requirements for a FBI criminal history records check?* This seems redundant and overly burdensome.

2. *Does a credit history check provide valuable information for the determination of trustworthiness and reliability?* No it does not without justified criteria for evaluation of the results.

3. *Do the Agreement States have the authority to require a credit history check as part of the background investigation?* This is undetermined at this time. As discussed above, without evaluation criteria, determination of compliance would be performance-based. As long as the licensee documented some sort of criteria and followed it, they would be in compliance with such a requirement.

4. *What are the appropriate elements of a background investigation and why are any suggested elements appropriate?* It is our understanding that the intent of increased control requirements is to prevent malevolent use of certain 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.

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6. *How much time does a licensee typically spend on conducting the background investigation for an individual?* The time can vary from a few days to a few weeks. Many times it may require going back to the individual for additional information.

Subpart C - Physical Protection Requirements During Use

If an IC licensee aggregates sources and it results in a combined quantity of radioactive material that meets the Category 1 or 2 quantities, the requirements should be implemented. This is a clear concept. The proposed rule adds parameters that muddy this concept are very difficult to implement and verify through inspections.

The proposed rule adds requirements for implementing if a licensee aggregates multiple times within 90 days with a single notification to the regulatory agency or no more than once in any 90-day period with notification each separate time and requires a 90-day prior notification if they plan to aggregate. We disagree with these concepts because they create a confusing gray area that will only lead to findings of unintentional noncompliance.

The proposed rule requires that an IC licensee develop a security plan and specifically prescribes what needs to be included in the plan. IC licensees have already developed their programs to implement the IC and fingerprinting orders. Those programs have already been inspected and compliance verified. The preamble states that security plans are important for the implementation of a performance-based regulation. This statement appears in conflict with the actual rule text which goes on to specifically prescribe what must be in the plan.

The proposed rule also requires training and refresher training in the proposed security plan. Only the licensees' employees who have a need to know are aware of the licensee's security program and those employees are familiar with it. We don't believe there is a need for this training unless something specific about the program changes. In that case, a requirement to familiarize employees who have a need to know about any specific change in the security program is all that is needed.

The concept of security zones are included in the proposed rule and are required to be used by IC licensees. We disagree with this concept because it is nebulous and unworkable in actual work environments of the types of licensees who must comply with this regulation. Per the proposed rule, security zones may be temporary or permanent, either of which requires constant monitoring.

The IC licensees' procedures that have been put into place to meet the current IC orders create security and have been verified through inspections. Since the time the orders have been in effect, we are not aware of any situations that have occurred that now warrant the inclusion of a security zone designation. To require implementation of such an abstract concept and require additional resources be committed to it is unnecessary and burdensome with no resulting added benefit.

With regard to the questions posed about some of the physical protection requirements, we offer the following:

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1. *Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?* It is believed that the Agreement States do possess 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?* Depending on the information being requested, DSHS may seek an opinion from the Attorney General's Office to use a statutory provision that would allow the information to be withheld.

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 believe the current provisions for protecting information that in place in accordance with the IC and fingerprinting orders are sufficient.

4. *Should other information beyond the security plan and implementing procedures be protected under this proposed requirement?* No. We disagree with the concept of formalizing what is already in place, adding requirements to it, and calling it a security plan.

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.

The proposed rule adds requirements regarding interactions with local law enforcement agencies (LLEA). There appears to be an unrealistic expectation or perception regarding LLEA coordination. It is inconceivable to believe that LLEA would ever notify a licensee that their response capabilities have become degraded, not only because that would appear to be an open invitation to the criminal sector, but also, if capabilities are degraded, logically LLEA would not have the capability to start calling IC licensees either.

All states and major cities have extensive experience dealing with natural disasters such as hurricanes. In these situations where there might be a temporary drain on local LLEA resources, there are plans in place for augmenting those capabilities. This requirement is not only unrealistic, but unenforceable.

The proposed requirement that an IC licensee notify the regulatory agency if a LLEA declines to participate in coordination activities creates an unnecessary burden for the regulatory agencies that will now be required to notify the Department of Homeland Security or contact the LLEA directly to explain the importance of cooperating. DSHS suggests that if NRC believes this is truly a critical issue, NRC should coordinate with the federal Department of Homeland Security's Nuclear Sector Government Coordination Council to engage law enforcement from a broader perspective.

The proposed requirement for IC licensees to provide advance notification to LLEA at temporary jobsites is unrealistic and an unnecessary burden. This becomes a huge stumbling block for licensees that go into other jurisdictions at temporary job sites.

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The licensee cannot possibly get a copy of all the LLEA's in the United States, let alone the Counties, municipalities, and/or cities in which they will be working. 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 determine who the local law authority is there. In many reciprocity 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. In addition to the safety considerations, the delay time this requirement will create poses significant cost impacts to the industries, as well as the clients they service.

It has been our experience with increased control inspections that there are indeed multiple overlapping LLEA jurisdictions and it has often taken licensees some time to determine which is the first responder. This requirement appears to reflect a lack of true understanding of the nature of the temporary job site work that is done with Category 2 sources in particular, or the concept of using the 911 system when law enforcement is needed.

With regard to the questions posed about LLEA, we offer the following:

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?* PetroChem does not believe such notifications provide a benefit when considering the significant resource impact of this requirement.

3. *If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?* PetroChem does not believe such notifications provide a benefit when considering the significant resource impact of this requirement.

4. *Will licensees be able to easily identify the LLEA with jurisdictions for temporary jobsites or dies this impose an undue burden?* PetroChem's, industrial radiographers do extensive temporary jobsite work. It has been our experience with increased control inspections that there are indeed multiple overlapping LLEA jurisdictions and it has often takes some time to determine which is indeed the first responder. This requirement appears to reflect a lack of true understanding of the nature of the temporary job site work that is done with Category 2 sources in particular. The requirement is an undue burden and we do not support it.

5. *Are LLEAs interested in receiving these notifications?* It is our belief that LLEAs have a mission to respond and to protect and serve and that they will do so with or without a notification. We believe that multiple notifications for work in temporary jobsites, which may likely involve multiple LLEA jurisdictions, will become a nuisance. We believe that if a security-related situation were to occur at a temporary jobsite, it would be far more effective for the IC licensee to immediately contact LLEA, through the 911 system, and relay that the situation

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involves significant quantities of radioactive material. A requirement for such notifications only creates opportunities for unintentional non-compliance by the licensees.

With regard to the questions posed about special requirements for mobile sources, we offer the following:

1. *Should relief from the vehicle disabling provisions be provided?* Yes. Temporary jobsite work is often done in dangerous environments, where life and death decisions come before increased control requirements.

2. *Have licensees experienced any problems in implementing this aspect of the Increased Controls?* Yes. PetroChem has had past problems with the increased control requirements for disabling the vehicles being in conflict with a facility's safety rules. See response to the above question.

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?* There should be an overriding exemption. A requirement to request an exemption for each special circumstance creates a workload issue for both the IC licensee and the regulatory agency.

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?* It should not be for the oil and gas industry only. The chemical plants present the same sort of situation. The exemption should be worded to address risk and resulting safety issues.

5. *Does the disabling provision conflict with any Occupational Safety and Health Administration requirements or any State requirements?* Yes. There have been past instances where the disabling provision has caused conflict and it is burdensome to the LLEA's.

With regard to the questions posed about transportation security, we offer 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?* It is our opinion to wait and phone verification should be acceptable.

2. *We are interested in how address verification might work for shipments to temporary jobs 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?* NRC should be aware that there is not always a specific address for temporary job site locations, especially in rural or remote areas. Those types of job sites are identified by directions or GPS coordinates. It is felt that the type of requests and the frequency of them, an additional workload burden may result.

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?* Considering that

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the majority of transfers are with entities the company has delat with for some time, an annual check should be sufficient.

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?* If the implementation of an NRC web-based licensing system would provide current license information, that would be the best solution. At present, we rely upon the licensee to send us a copy of the current license.

There appears in the proposed rule no compelling evidence that there are fundamental flaws in the current orders. While they may be presented in the proposed rule as necessary enhancements, we disagree and can find no added benefit that would warrant the significant additional resource burden that would be incurred.

Sincerely,

Ronald J. Hayden
Corporate RSO