

12 October 2010

PR 30,31,32,33, 34,35,36,37,39,51,71, and 73
(75FR33901)

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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

DOCKETED
USNRC

October 18, 2010 (3:19pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

Dear Ms. Piccone:

After reviewing the proposed rule and attending the public comments session in Austin, Texas in September, we at *Stork Testing & Metallurgical Consulting, Inc.* (*STMC*), would offer the following comments for consideration by the USNRC.

STMC is in complete agreement with Texas Department of State Health Services- Radiation Control Program (DSHS) and the Organization of Agreement States (OAS) and would like to put forth the following comments. These comments follow and are based in part on various communication from the above.

§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 sub-part. We at *STMC* feel that this is an unnecessary burden to us as a licensee as we already have a program in place. Except for some new requirements proposed in this part, eg. nominating reviewing officials, and credit checks, to which we are opposed (comments below). We have been inspected multiple times and have a compliance history established and feel we should be exempted from having to resubmit existing information. *STMC* also feels that this would add to the burden that the regulators are already under (we are tax payers too).

§37.23 Access Authorization Program Requirements:

This proposed rule replaces the concept of the trustworthiness and reliability official in the current finger printing orders with the concept of a reviewing official. *STMC* is aware that the viewing official concept was discussed at great length in both the working group that developed the fingerprinting requirements and the steering committee to that working group. There were several reasons why the reviewing official concept was not incorporated into the finger printing orders.

The finger print orders have been in effect for several years and there have been no known incidents occurring that would change the situation and that now warrant the inclusion of this Reviewing Official. *STMC* is opposed to the concept of the Reviewing Official because it provides no plausible added benefit to the existing structure that exists under the current orders. The proposed rule will require the Agreement State to make a determination of the Reviewing

Official on only one out of the several items required for an access authorization program, the FBI finger print criminal history check alone. Since neither the Agreement State or the licensee will have the benefit of the complete set of information on an individual in order to make an informed determination, it is a fragmentary approach to the process at best.

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At *STMC*, we, like many other licensees, use our Human Resources Department to review employee's qualifications for a job, including verification of employment, education and true identity. The proposed requirement that the Reviewing Official must be allowed unescorted access to Category 1 or 2 quantities of radioactive materials or permitted access to safeguards materials means that Human Resources personnel are either prohibited from doing the access authorization or must be permitted access. Neither option is in the best interests of safety / security. Because of some the testing performed by *STMC*, we have to meet **ITAR and other Export Controls** requirements and we maintain control of facility access. The requirement as it is written either creates a radiation safety / security issues by permitting Human Resources personnel access to radioactive material or access to safeguards information or creates an untenable business model for Increased Controls licensees with no evidence that current system under the orders is flawed in any way.

This proposed rule now puts the burden of review of the finger print results squarely on the shoulders of the regulatory body. To add to the resource burden, there are no criteria for making determinations on the findings. Sound enforcement of regulatory determinations without regulatory criteria is not possible. It is inconceivable that such a rule would be imposed with no compelling evidence of threat to public safety / security.

STMC presents the following in regards to questions about the Reviewing Official:

- 1. Are the other aspects of the background investigation adequate to determine the trustworthiness and reliability of the Reviewing Official?** *See the following response.*
- 2. Does the Reviewing Official need to be fingerprinted and have an FBI background criminal records check?** No. *STMC* is opposed to the concept of the Reviewing Official and believes there is no justification presented that would render the current practice of using a trustworthiness and reliability official either unsafe or unsecure.
- 3. Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history?** This is undetermined at this time, but the probability is high that in many states the answer would be no.
- 4. Does the requirement to fingerprint the Reviewing Official place too large of a burden on the licensee?** *See response to question 2*
- 5. Are there other methods that could be used to ensure that the Reviewing Official is trustworthy and reliable?** *See response to question 2.*

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§37.25 Back Ground Investigations

The proposed rule incorporates additional items such as a credit history evaluation and a local criminal history review, to the required FBI background investigation. It is our (*STMC*) understanding that the credit history evaluation concept was much discussed during the working group phase and was not incorporated into the orders. This has the appearance of an ill-conceived attempt to incorporate in rule a concept that did not have consensus and was not incorporated after going through the working group process. In the five or so years that the orders have been in effect, has there been any situation that has occurred that would now warrant the inclusion of a credit history check?

There no are criteria set forth for any of the requirements for the background investigation. How do we as I/C licensees, evaluate the results of this investigation and approve individuals for unescorted access? Currently, compliance determinations are performance based. As long as the licensee has established that criteria and is following it, then the regulatory agency (Texas DSHS, in our case) would have to deem us in compliance.

The following is quoted directly from Texas DSHS:

" It is unclear at this time whether DSHS 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 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 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."

STMC presents the following in regards to questions about background investigations:

- 1. How much time does a licensee typically spend on conducting the background investigation for an individual?** This is an unknown. In the case of *STMC*, a background investigation is part of the pre-hire process. But, as with every else, cost in hiring is a major factor in the decision on whether not add to personnel. A higher cost factor will affect which department could bring on new personnel, allowing a department with less onerous hiring checks to grow, while causing the department with the more expensive costs to grow more slowly, if at all.
- 2. Are the components of the said background checks too subjective to achieve the desired objective?** Absolutley.

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3. **Does a credit history check provide valuable information for the determination of trustworthiness and reliability?** No. It is useless without justifiable evaluation criteria.
4. **Is a local criminal history review necessary in light of the requirements for an FBI criminal history records check.** This another unjustified cost factor that is redundant and overly burdensome.
5. **What are the appropriate elements of a background investigation and why are any suggested elements appropriate?** While it understood the intent of Increased Control requirements is to prevent the malevolent use of certain radioactive materials, the additional elements of the proposed rule have no proven security benefit versus the cost. The current background being performed have not at this juncture proven to be inadequate.
6. **Do the Agreement States have the authority to require a credit check as part of the background investigation?** DSHS questions whether they have the statutory authority to require this. We feel (*STMC*), as discussed earlier, without criteria for evaluation, the determination of compliance would be performance based. As long the licensee documented some kind of criteria and followed it, the licensee would therefore be in compliance with the requirement.

Subpart C- Physical Requirements During Use:

This proposed rule requires that I/C licensees develop a security plan and specifically prescribes what must be in the plan. We (*STMC*) have already developed a program to do this in order to implement the I/C and fingerprinting orders. These programs have already gone through multiple inspections and compliance verified. The preamble states that security plans are important for the implementation of a performance-based regulation. This statement seems to be at odds with the text of the actual rule which goes on to specifically prescribe what must be in the plan.

The proposed rule also requires training and refresher training on the proposed security plan. Per our plan, only those with a need to know are aware of it and these personnel are familiar with it. We do not think there is a need for this training unless or until something specific within the program changes. We believe that 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.

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The following is quoted directly from Texas DSHS:

" The concept of security zones are included in the proposed rule and are required to be used by the 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. This is much like the concept of a controlled area, which Texas chose not to adopt because it was confusing and unnecessary. Again, this is a concept that was discussed during the working group process. The concept of security zones was not incorporated in the orders. 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. This also has the appearance of an attempt to incorporate into rule a concept that did not have consensus and was not incorporated after going through the working group process. To require implementation of such an abstract concept and require additional resources be committed to it unnecessary and burdensome with no resulting added benefit."

STMC agrees completely with position that Texas DSHS has take. The industrial use of radioactive materials when used at our facility, is essentially a security zone in the fact that facility access is restricted due to ITAR requirements. When used in the field, we set up restricted areas based on the radiation level and are monitored until the material is secured in storage. We feel that this should be sufficiently secure.

STMC presents the following in regards to questions about Physical Protection Requirements:

- 1. Do the Agreement States have adequate authority to impose information protection requirements per this rule?** DSHS believes that they have and we certainly hope that is true. The general public does not need to know any thing about I/C other than fact that it exists.
- 2. Is the proposed rule adequate to protect the IC licensee's security plan and implementing procedures from unauthorized disclosure, are additional or different provisions necessary.** We believe that the current provisions for protecting information that is in place in accordance with the IC and fingerprinting orders are sufficient.
- 3. Should other information beyond the security plan and the implementing procedures be protected under this requirement?** We disagree with the idea of formalizing what is already in place and calling it a security plan.
- 4. Should the background investigation elements that determine whether an Individual is T & R for access to the security information be the same as determining access to radioactive materials in quantities of concern (with the exception of fingerprinting) ?** Yes they should.

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Additional Requirement Concerning LLE Notifications:

In our (*STMC*) opinion, none of the proposed new notifications to Local Law Enforcement Agencies (LLEA) are workable ideas. These seem to be based on the perception regarding LLEA coordination. We cannot imagine an instance in which the LLEA would ever notify a licensee that their response capabilities were under par. Conversely, if their capabilities are degraded, the LLEA probably not have the capability to start calling the licensees. In the Houston area there are probably a dozen or more industrial licensees alone, not to mention all the medical licensees. This requirement is pretty much unrealistic and unenforceable.

The proposed requirement that the IC licensee notify if LLEA declines to participate in coordination activities is a non starter. This creates another burden on the already over loaded regulatory agencies, that now will required to notify the Department of Homeland Security or contact the LLEA directly to explain the importance of cooperating. " **DSHS suggests that if the NRC believes this is truly a critical issue, the NRC should coordinate with the federal Department of Homeland Security's Nuclear Sector Government Coordination Council to engage law enforcement from a broader perspective.**" I think this sums up what the rest of us feel.

In regards to the various proposed advanced notifications: **Think 911**. In the Houston area there so many LLEA jurisdictions, it virtually impossible to know what jurisdiction you are in at any given point in time.

For example:

Local Police Departments- from the giant City of Houston to tiny little Village of Piney Point- perhaps a dozen or so city police departments.

Local County Sheriffs Department- Harris County, Montgomery County, Fort Bend County, Chambers County, Brazoria County, Galveston County, Liberty County, just to name those that come to mind.

Plus the many small jurisdictions such as Constables, Marshals, ect.

These various advanced notification proposals reflect a definite perception that the NRC lacks a true understanding of the nature the temporary job site work that is done in industrial radiography (category 2 sources in particular) or the concept of using the 911 system in the event that law enforcement is needed.

STMC presents the following on proposed special requirements for mobile sources:

1. There should be relief from vehicle disabling requirements. Temporary jobsite work is often performed in dangerous environments, where life and death decisions come before I/C requirements.

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2. There have already been conflicts with facility safety requirements and the I/C disabling requirements.
3. There should be written into the regulations an exemption for over riding safety concerns. To have to request an exemption for every special circumstance would increase the work load of the I/C licensee and the regulators who are already burdened by excessive regulation.
4. Any exemption should be broad based and written to address risk and resulting safety issues.
5. The disabling provision appears to conflict with Occupational Safety and Health Administration requirements and some state regulations. It could also have unintended consequences to LLEA.

STMC offers the following questions posed on the reporting aspect:

1. These appear to be the appropriate items and thresholds to be reported to LLEA.
2. These appear to be the appropriate items and thresholds to be reported to the USNRC.
3. Suspicious activities should be reported.
4. The time frame for reporting should be workable.

In regards to the question posed about transportation security, *STMC* would like to quote Texas DSHS from a letter written to the USNRC in October, 2009. We could not say it better

- 1. Should there be 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 wait and phone verification in the interim is also acceptable to DSHS.**
- 2. We are interested in how address verification might work for shipments to temporary job sites and the abilities 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 records systems? DSHS would not be able to accommodate such a requirement, nor do we feel it is necessary. 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 jobs are identified by directions or GPS coordinates. Realistically, our current system should have the ability to accommodate requests.**

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However, depending on the type of requests and the frequency of them, an additional workload burden may result. NRC's concurrent implementation of the web-based licensing system (WBS) and the license verification system (LVS) should address the situations posed by these questions.

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.? See above response.

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 The material? See the above response.

The new draft proposed Part 37 will bring the manufacturer and distributor and irradiator licensees under purview of public health and safety and they will no longer be under common defense and security orders. This means that all IC licensees will be regulated under public health and safety and that compliance will be performance based. However, at the same time that the proposed rule is bringing all IC licensees under a performance-based public health and safety regulatory scheme, it is incorporating additional prescriptive items in rule. DSHS believes this is contradictory and that the current requirements under the orders have not shown to be deficient. The only exception is that the NRC should consider an exemption from the vehicle disabling provision in certain circumstances.

DSHS has consistently been active in providing volunteers to serve on the multiple OAS/NRC/CRCPD working groups and steering committees, especially with regard to increased controls and fingerprinting orders and implementation. We believe the working group/steering committee structure is valuable in furthering our partnership and creating a cohesive regulatory framework nationwide. Therefore, we are disappointed and concerned that many concepts that were discussed at length during the development of the increased controls and fingerprinting orders and rejected by the working groups/steering committees now appear in this proposed rule. These concepts are identified in our comments above. They appear in the proposed rule with 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 be incurred."

We at *STMC* concur whole heartedly with the position that Texas DSHS has taken above. The I / C and fingerprint orders were probably a necessary evil because of the world that we as Americans are now forced to live in. Taking them from orders to rules is a good step. Let us keep a common sense approach to materials security. The more onerous these rules become, the harder and more expensive it becomes to stay in compliance. It becomes more difficult to justify from an economic sense the costs of staying in a business that is very competitive and not a high margin industry to begin with.

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Industrial radiography is not the core business at *STMC* in Houston, it is an important part of what we do as a testing lab, but not the reason for being. Significant increases in the cost of compliance issues, which these proposed rules certainly have the potential for, will impact our ability to acquire funding for new safer technology and in the long run, our jobs.

We greatly appreciate the opportunity to comment on the proposed rule. If you have any questions about our comments and concerns, please contact us.

Respectfully submitted,



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