



Conference of Radiation Control Program Directors, Inc.

Office of Executive Director ❖ 1030 Burlington Lane, Suite 4B ❖ Frankfort, KY 40601

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

46

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November 23, 2010

DOCKETED
USNRC

November 23, 2010 (3:45pm)

Secretary

U.S. Nuclear Regulatory Commission

Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Docket ID NRC-2008-0120

The Conference of Radiation Control Program Directors (CRCPD) appreciates the opportunity to comment on the proposed 10 CFR Part 37, Physical Protection of Byproduct Material. One of the goals of CRCPD is to promote consistent, high-quality standards in radiation protection. We believe that replacing the Increased Controls and Fingerprinting Orders with rulemaking represents a better, more transparent approach to security regulation.

We recognize that states were engaged early and often in the development of the rule and its guidance. In fact, there were four state representatives that participated on the Steering Committee for the rule (two as members and two as alternates). State working group representatives were provided the opportunity to present their views to the Committee in areas of disagreement. States were also provided the opportunity to comment on the draft proposed rule, and CRCPD provided comments to the rule in our letter dated May 28, 2009. Although there were changes made to the draft as a result of the comments, a number of state comments were not adopted and we will discuss these remaining issues in the comments enclosed with this letter. Moreover, as the number of non-Agreement States continues to decrease, it is becoming increasingly evident that the experiences of the Agreement States are even more essential to the development of realistic risk-informed regulations and guidance in the materials arena.

The Commission should consider, in cases where differences between NRC staff and the states cannot be resolved in the initial development of regulations and guidance, that the CRCPD and the Organization of Agreement States (OAS), our sister organization, be invited to meet with the Commission before the rules are published for public comment. While, of course, the states, CRCPD and OAS have the opportunity to comment along with the general public, the Commission should consider how central is the role of the states in implementing regulations and guidance and how the states' views should carry additional weight as co-regulators.

A Partnership Dedicated to Radiation Protection

Template = SECY-067

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Secretary
U.S. Nuclear Regulatory Commission
November 23, 2010

In closing, the CRCPD Board of Directors thanks the Commission for the opportunity to provide input on these rules that have great significance to state radiation control programs. We look forward to continuing our participation in the rulemaking process.

Sincerely,



Alice Rogers, P.E.
Interim Chairperson

Enclosure

cc: Robert Lewis, NRC/FSME
CRCPD Board of Directors

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CRCPD Comments
Proposed 10 CFR Part 37
Docket ID NRC-2008-0120

General Comments

In general, CRCPD continues to believe that the regulations should reflect the Orders, and any expansion should be based on evidence where the Orders were ineffective. The OAS shares this position and presented it in its letter to the NRC dated July 8, 2010. 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. These comments reflect the results of a CRCPD poll that was completed by 29 states in August 2010 and presented at the OAS 2010 Annual Meeting in Portland, Oregon.

Specific Comments

10 CFR 37.23 Access authorization program requirements

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. While 62 percent of the responding states in the CRCPD poll favored a requirement that the Reviewing Official be fingerprinted, 69 percent of the responding states disagreed with the new requirement in the proposed Part 37 that the Reviewing Official be approved by the regulator. This regulatory approval would be based only on the results of the fingerprints for a criminal history records check. The remaining 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. In our 2010 poll, 69 percent of the responding states indicated that they do not have the necessary authority to conduct reviews of the nominated individual's criminal history record. This was an issue when the Orders were being developed. It should be noted that the NRC needed the Congress to pass the Energy Policy Act of 2005 to grant the NRC the authority to require fingerprinting at all. Is it reasonable to expect that every single Agreement State would have this authority without any legislative action in those states?
3. The Reviewing Official will have unescorted access to Category 1 and Category 2 quantities of radioactive materials (RAM). For some licensees, this means that an individual who may not have the required radiation safety training, such as licensee's

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Human Resources department representative who does routine employment background checks, cannot serve as a Reviewing Official because these individuals do not have unescorted access to Category 1 and Category 2 quantities of RAM. It is clearly not acceptable to grant these individuals access to licensed material, with an implicit understanding they won't actually use this access, solely to have a basis to require their fingerprinting. This "workaround" is an inappropriate approach to requiring fingerprinting for these individuals. This is not how the NRC regulates, nor is it how the Agreement States regulate. While it may be thought that most Reviewing Officials may require unescorted access as part of their routine duties, this addition to the rule would not be necessary if that were the case for all Reviewing Officials. It is only because there are a certain number of Reviewing Officials who work for Human Resources or in other positions that don't provide them with the qualifications for unescorted access to RAM that this change to the regulations is being proposed. It would be better for the NRC to complete the process of obtaining from the Congress the authority to fingerprint all Reviewing Officials.

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 background investigations required by the Orders were determined to be inadequate from a performance standpoint. In the CRCPD poll, 69% of the responding states did not agree that Part 37 should include a credit history evaluation as part of the determination of trustworthiness and reliability.
2. There is little 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. Furthermore, the guidance that was recently published by the NRC for comment suggests that "examples of considerations pertinent to an individual's trustworthiness and reliability should include, but need not be limited to...loss of a license to drive...repeated high-speed traffic or other violations...a recent bankruptcy...repeated non-payment of alimony". These "criteria" raise privacy concerns with little apparent connection to the basis for this rule, the prevention of the use of radioactive materials in a malevolent attack.
3. In the CRCPD poll, 70 percent of the responding states indicated that they do not have the authority to require a credit history check as part of the background investigation.

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10 CFR 37.45 LLEA coordination and notification

The existing Increased Control Orders 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. In this Order, 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 unclear expectation regarding LLEA coordination and any associated notification requirements. There can also be overlapping and/or redundant LLEA 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 any 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. The coordination of security plans and notification requirements of work at temporary jobsites is an extra burden to both the licensee and LLEA. Requiring the licensee to make these contacts with LLEA without any possible response from LLEA accomplishes nothing but aggravation and frustration for the licensee and LLEA.
3. Emergency repairs can last one day or they can last weeks. The 3 day notification to the licensing authority is waived if the licensee claims that the call is an emergency. In reality, they are usually called out with only one day notice for most kinds of jobs. If something breaks in a plant, it has to be fixed immediately. So a radiography licensee is dispatched. The problem is not only that the licensee has to notify the LLEA at the temporary job site, the problem is also defining the LLEA. In many states, law enforcement may include city police, a county or parish sheriff, and the State Troopers. Who will respond to the call?
4. There is often no way of knowing how long a job will last until it is assessed. Furthermore, if the temporary job site is at a plant or refinery, there is usually an armed guard presence at the plant. If the licensee does know that the job, perhaps a pipeline, is going to last a month, and that it encompasses several parishes/counties, do they notify the LLEA in the first parish/county, the last parish/county, or all of the parishes? Does

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each parish/county have an LLEA or do some of them overlap coverage by one or the other of the parish/county sheriffs' office or do the State Police cover what might be an unincorporated area? It will be very burdensome, if even possible, for a licensee, perhaps located a thousand miles away, to identify and notify every applicable LLEA.

5. In the CRCPD poll, 62 percent of the responding states disagreed with adding a new 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 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 an LLEA under these circumstances to be expected to notify its local radiographer or blood bank that its armed response capability may have become degraded. In addition, it is unlikely that any LLEA would want anyone to know that their response capabilities have become degraded as this information could compromise more than the security of radioactive materials. The 2010 CRCPD poll of the states indicated that 70 percent of the responding states did not agree with the proposed 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.

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 percent of the nation's radioactive materials licensees are located in agreement states. The impact of changes in regulation on state programs should be considered. A compelling technical position for enhancement from the original orders is needed to justify the added financial and regulatory burden to our licensees.

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Rulemaking Comments

From: Sue Smith [ssmith@crcpd.org]
Sent: Tuesday, November 23, 2010 3:09 PM
To: Rulemaking Comments
Cc: Lewis, Robert; Adela Salame-Alfie; Alice Rogers; Fisher-Tyler Frieda (DHSS); Fordham, Earl W (DOH); John Winston; Mary Ann Spohrer (maryann.spohrer@illinois.gov); Ruth McBurney; Sue Smith; Terry Frazee
Subject: CRCPD: Re: Docket ID NRC-2008-0120
Attachments: Part 37 comment letter.pdf

On behalf of the Conference of Radiation Control Program Directors, Inc., please find attached comments on the proposed 10 CFR Part 37, Physical Protection of Byproduct Material.

Thank you,

Sue
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Subject: CRCPD: Re: Docket ID NRC-2008-0120

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X-Note: Mail Class: ALLOWEDSENDER
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