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USNRC

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Secretary
US Nuclear Regulatory Commission
Washington DC 20555-0001
Attn: Rulemakings and Adjudications Staff
Sent by email: rulemaking.comments@nrc.gov

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Subject: RIN 3150-A112
Docket: NRC-2008-0120
Comments on 10 CFR Parts 30, 32, 33, et al., Physical Protection of Byproduct
Material; Proposed Rule

Dear Sir/Madam:

The University of Cincinnati appreciates this opportunity to provide comments on the above-referenced proposed rules. The following comments are respectfully submitted.

Justification for new requirements above the Increased Control Orders

The Increased Control (IC) Orders issued by the NRC were intended to assure the safety and security of Category 1 and Category 2 radioactive material. The proposed rules add substantial requirements to those of the current IC Orders. A summary of the major differences that would most likely impact licensees like the University of Cincinnati are attached. The University of Cincinnati requests the justification for the new requirements and questions whether the proposed rules follow the NRC's policy of risk-based regulations.

The University of Cincinnati recognizes that a primary mission of the NRC is to ensure adequate protection of public health and safety, common defense and security, and the environment, while enabling the use of radioactive materials for beneficial civilian purposes. Since the late 1990s, the NRC has repetitively stated that, in meeting its mission, its regulations, inspection practices and enforcement actions would be risk-based. For example, the NRC website states the "NRC's approach to physical protection is graded based on the significance of the material or facilities being protected." The University of Cincinnati questions how "risk-based" and "graded" the proposed rules are since, for the most part, they appear to be one size fits all for all licensees who are licensed to possess Category 1 or Category 2 radioactivity. The background section to the proposed rules (75 Fed. Reg. 33903) indicates that the NRC performed a vulnerability assessment prior to implementing the initial IC Orders. The background also indicates that the fingerprinting requirements were enacted because of the Energy Policy Act of 2005 (EPA) (75 Fed. Reg. 33903). Nowhere in the Federal Register notice does the NRC state that the IC Orders were ineffective and/or provide any justification for the imposition of significant new

requirements. In fact, under the question “why doesn’t the NRC just keep the orders in effect?” (75 Fed. Reg. 33905) the NRC limits its response to an explanation that regulations are the most appropriate method for imposing long-term requirements, without addressing the significant substantive differences between the IC Orders and the proposed new regulations.

Recordkeeping requirements

Proposed 10 CFR 37.23(h) (1) and (2) would make the recordkeeping requirements five years as opposed to three years, as listed in the IC Orders and identified as a standard time period for record retention throughout 10 CFR (e.g., 10 CFR 20 subpart L and 10 CFR 35 subpart L). The University of Cincinnati requests the justification for this increase in record retention requirements. During the September 1, 2010 meeting in Austin Texas, the NRC indicated the reason for the change was to coincide with the minimum inspection frequency. The University of Cincinnati believes that a five year inspection schedule is too infrequent. In the September 2, 2010 *Audit of NRC’s Oversight of Irradiator Security*, the Office of Inspector General stated “without a risk-informed approach to the security inspection program, radioactive material could be at an increased vulnerability to theft or sabotage.” Based on this report the University of Cincinnati hopes the NRC changes the inspection frequency to coincide more closely with the risk. We recommend that the NRC increase the inspection frequency and change all record retention associated with the proposed 10 CFR 37 from five years to “three years or next inspection, whichever is less frequent.”

Proposed 10 CFR 37.23(h)(2) requires the licensee to retain a list of persons approved for unescorted access for five years after the list is superseded. Using the word “list” implies a written document. The University of Cincinnati asks if the “list” may include database records that include unescorted access approval and removal dates and thus would allow discarding printed copies that are no longer useful. Other NRC regulations (e.g., 10 CFR 20.2110 and 10 CFR 37.51) allow records to “be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.” For many Universities, large blood centers and research facilities where turn over is frequent, if a printed record is required there could be tens to hundreds of printed documents generated each year. Because of the constant turn over of personnel, it is common for official records regarding who has unescorted access to be computerized and any printed reports are routinely destroyed when their usefulness has passed. The University of Cincinnati recommends changing the wording to add similar wording as in other NRC regulations making it clear that the “lists” do not need to be printed copies.

Background checks

The University of Cincinnati requests that the NRC investigate alternative methods for determining if an individual is trustworthy and reliable.

The University of Cincinnati requests that the NRC consider having the NRC perform all trustworthy and reliability reviews. The Center for Disease Control (CDC) and United States Department of Agriculture (USDA) programs for select agents, and the Department of Transportation (DOT) system for issuing hazardous material (HAZMAT) certifications for Commercial Driver’s Licenses (CDL) all have the reviews performed and approval granted by the applicable federal government agency. This approach would provide consistency in the

conduct of the reviews and would best assure that all needed information is collected and reviewed by a well trained and experienced individual.

A second alternative would be to implement a “graded” approach to reviews. Under proposed 10 CFR 37.25, before an individual may be granted unescorted access to devices containing Category 1 and Category 2 levels of radioactivity multiple elements of their work, professional and personal information must be collected and reviewed to determine if they are trustworthy and reliable. Under the proposed rules, the same data must be collected and reviewed for all individuals, regardless of whether an individual has unescorted access to a Category 1 or to a Category 2 source, whether the radioactive material is readily moveable, whether the radioactivity is contained in one or multiple sources (e.g., a Gammacell 3000 irradiator versus a gamma knife), whatever the level of physical protection for the source or device is, whatever the average response time of security personnel or LLEA (e.g., onsite police force versus the county sheriff), whatever the security mechanisms and/or number of layers of protection added by the security zone, or whether the area where the source is stored or handled is routinely occupied by other individuals or not. The University of Cincinnati recommends that the NRC consider allowing licensees to use a graded approach to determine if an individual is trustworthy and reliable which takes into consideration multiple variables, such as whether the activity is Category 1 or Category 2, the desirability of the source, the physical security present, how quickly the radioactivity could be removed from the device, readily dispersed or used to cause serious harm, the mobility of the source device, and the frequency of physical inspection/observation by more than one individual.

In regards to specific elements of the background check, the University of Cincinnati requests the NRC eliminate any requirement that may not be cost effective, whose value may be questionable or that may constitute duplication of effort. In regards to this, the University of Cincinnati requests the NRC perform a cost benefit analysis and ensure any retained additional requirements will actually increase security.

The University of Cincinnati requests the NRC how state laws that prohibiting “discrimination” against employees due to credit history affect this NRC requirement. A Google search indicates that states that have and/or are considering laws covering this issue include Connecticut, Wisconsin, Hawaii, Illinois, Missouri, New York, Oregon, Washington, and Texas.

The University of Cincinnati requests the NRC review the visa process and if any the current requirements could be replaced with a verification of visa since foreign nationals must go through a Homeland Security review before a visa is issued.

Proposed 10 CFR 37.29 provides relief from the fingerprinting, identification and criminal background checks and other elements of the background investigations for designated categories of individuals permitted unescorted access. For these individuals the University of Cincinnati requests information regarding the background checks each category of individual goes through.

LLEA requirements

Like the University of Cincinnati, many licensees have their own internal law enforcement group. These law enforcement groups routinely have all the powers of a state or local government police officer; however, the internal police force may or may not be a part of a government entity (e.g., a hospital security force). As currently defined in 10 CFR 37.5, the Local Law Enforcement Agency "LLEA" must be a "government entity". The University of Cincinnati recommends broadening the definition to include private security forces that possess the authority to carry firearms and make arrests.

The proposed 10 CFR 37.45(a)(v) would require the LLEA to enter into a written agreement with the licensee regarding response. The University of Cincinnati questions the need for a specific written agreement for response and requests clarification on what must be included in such an agreement.

The University of Cincinnati is concerned with the probable costs associated with the security training requirements indicated in proposed 10 CFR 37.43(a)(iv). The rule requires initial, ongoing and annual refresher training for all individuals who may have unescorted access to a Category 1 or Category 2 radiation sources, all supervisors/managers overseeing the use of a Category 1 or Category 2 radiation sources, all onsite security personnel, and all LLEA who may respond, the training requirements. The rule also requires the licensee to assure the individuals are not only knowledgeable but have the skills and abilities to carry assigned duties. When large numbers of diverse every changing set of individuals are involved, such as at a university, keeping up could easily require the need for an additional staff member assigned to the task full-time. The University of Cincinnati the NRC to provide cost estimates specific to the proposed rule's training requirement.

License verification

Proposed 10 CFR 37.71 states that prior to a transfer of a Category 1 or Category 2 quantity of licensed material the licensee transferring the material would be required to verify the delivery address using either the NRC license verification system or through the licensing authority. This requirement for verification of the delivery address may create problems. Broad scope licenses frequently list campuses or primary addresses and not individual building addresses. In addition, for a large building it is not uncommon for the delivery (or dock) address to be different from the official building address, which would be the address listed on the license. Therefore, the University of Cincinnati recommends that the requirement also allow for verification of the delivery address through the receiving license's Radiation Safety Officer or another individual specifically identified on the license.

Thank you for consideration of these comments. If you have any questions do not hesitate to contact me.

Sincerely,

Victoria Morris, MS, CHP
University of Cincinnati
Radiation Safety Officer

**NRC 10 CFR Part 37, Physical Protection of Radioactive Material
Summary of Changes with Increased Controls (Excluding Transportation)**

Proposed 10 CFR 37	Increased Control Orders
Reviewing Official (RO) <ul style="list-style-type: none"> • Fingerprinting for criminal background check submitted to NRC • Nominated to and approved by NRC 	T&R Official <ul style="list-style-type: none"> • Background check not required if T&R official does not need access to sources • Formally named by licensee and name submitted to NRC
Signed informed consent to conduct background check <ul style="list-style-type: none"> • Individuals may withdraw consent, but forfeit access (any information collected be destroyed) 	Not required
Background investigations <ul style="list-style-type: none"> • Fingerprinting, an FBI identification and criminal background review • Verification/review of employment history and education going back 10 years (domestic and foreign) • Reference check • Verification of identity by RO • Military service verification • Full credit history going back 7 years (domestic and foreign) • “Local” criminal background check going back 10 years (domestic and foreign) 	Background investigations <ul style="list-style-type: none"> • Fingerprinting, an FBI identification and criminal background review • Verification/review of employment history and education (no time period or foreign check specified) • Reference check
Reinvestigations <ul style="list-style-type: none"> • Every individual with access must be reinvestigated every 10 years • Current individuals with access will need reinvestigation in 10 years, but not immediately • Reinstatement requires FBI and “local” criminal background check for the previous 10 years 	Not required
Remove individual’s access approval as soon as access is no longer needed	Remove individual’s access approval once they are no longer a radiation worker
Security plan training <ul style="list-style-type: none"> • Initial training on access and responsibilities • Annual refresher training 	Non-specific training

<p>Security zones</p> <ul style="list-style-type: none"> • Establish access control at security zones 	Not required
<p>Annual reviews</p> <ul style="list-style-type: none"> • Access authorization program • Security program 	None specified
<p>Monitoring</p> <ul style="list-style-type: none"> • Cat 1 sources – continuous • Cat 2 sources – weekly check 	None specified
<p>Maintenance, testing and calibration of monitoring equipment</p> <ul style="list-style-type: none"> • Quarterly 	Non-specified
<p>Relief from fingerprinting and background check</p> <ul style="list-style-type: none"> • Extensive specific list that is similar to prior • Adds members of congress and IAEA safeguard inspectors • Adds emergency responders responding to source emergency 	<p>Relief from fingerprinting and background check</p> <ul style="list-style-type: none"> • NRC and state inspectors, law enforcement and individuals with approval by equivalent federal government check
<p>Security response plan</p> <ul style="list-style-type: none"> • Formal LLEA requests required <ul style="list-style-type: none"> ✓ Information about LLEA's capability to provide a timely armed response ✓ To establish a written agreement for response ✓ To establish a means of direct communication with an LLEA point of contact ✓ LLEA to notify when contact information changes ✓ LLEA notify licensee if/when response capability degrade ✓ Information about willingness to participate in drills • Notify NRC within 3 business days if the LLEA has not responded to requests in 60 days or if LLEA declines to participate • Must document all correspondence and meetings with LLEA • Must coordinate with LLEA annually 	<p>Security response plan</p> <ul style="list-style-type: none"> • Non-specified agreement/arrangements with LLEA
Retain documentation 5 years	Retain documentation 3 years. If T&R for

	deactivated person must destroy
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Rulemaking Comments

From: Morris, Victoria (morrisvr) [MORRISVR@UCMAIL.UC.EDU]
Sent: Tuesday, November 30, 2010 10:58 AM
To: Rulemaking Comments
Subject: FW: Docket ID: NRC-2008-0120
Attachments: ltr- 10 CFR 37 comments.doc

I did not receive an acknowledgement of receipt for this item or a miss-sent.

Vicki

From: Morris, Victoria (morrisvr)
Sent: Thursday, November 18, 2010 8:45 AM
To: 'rulemakeing.comments@nrc.gov'
Subject: Docket ID: NRC-2008-0120

Attached are the University of Cincinnati's comments regarding the NRC's proposed rule on 10 CFR 30, 32, 33, et al., Physical Protection of Byproduct Material; Proposed Rule.

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From: "Morris, Victoria (morrisvr)" <MORRISVR@UCMAIL.UC.EDU>

To: "rulemaking.comments@nrc.gov" <rulemaking.comments@nrc.gov>

Date: Tue, 30 Nov 2010 10:58:24 -0500

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