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January 7, 2011

Ms. 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, DC 20555

DOCKETED
USNRC
January 7, 2011 (4:24pm)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Opportunity to Comment on Proposed Rule (75 FR 33902)

Dear Ms. Piccone:

The Commonwealth of Pennsylvania appreciates the opportunity to comment on the proposed rule regarding the Physical Protection of Byproduct Material. Overall, we believe that replacing the Increased Controls and Fingerprinting Orders with rulemaking presents a better, more transparent approach to security regulation. In addition to our enclosed comments, the Commonwealth of Pennsylvania also supports the comments made by the Conference of Radiation Control Program Directors dated November 23, 2010 and the Organization of Agreement States dated July 8, 2010, regarding this proposed rulemaking.

If you need additional information or need further clarification, please do not hesitate to contact David Allard, Director of the Bureau of Radiation Protection, by e-mail at djallard@state.pa.us or by telephone at 717.787.2480. Thank you for the opportunity to comment on these important concerns related to public health and safety.

Sincerely,

John Hanger
Secretary

Enclosure

Template = SECY-067

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Pennsylvania Department of Environmental Protection
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Comments on the U.S. NRC (NRC) proposed amendment to physical protection of byproduct
material regulations (75 FR 33902)

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. 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.

Requiring a Reviewing Official to have access to radioactive material simply to establish a nexus to fingerprint them is a workaround that is inappropriate. For some licensees this would mean an individual who does not have any radiation safety training, such as a human resources representative, could find themselves at risk for exposure to radioactive material. A separate and distinct fingerprint requirement should be established for Reviewing Officials regardless of their level of access to material, even if it means obtaining the authority from Congress.

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, fingerprinting and the review of an FBI identification and criminal history records check. The rule adds that the licensee will be required to perform and verify true identity, military history verification, credit history evaluation, and criminal history review (from local criminal justice resources) to complete the background investigation.

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. There is little guidance available that would assist the licensee to know what might be an acceptable background check. 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 at 75 FR 40756 states 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, which is the prevention of the use of radioactive materials in a malevolent attack.

10 CFR 37.45 LLEA coordination and notification

The existing Increased Control Order already requires licensees to have a pre-arranged plan with LLEA for assistance in response to an actual or attempted theft, sabotage, or diversion of such

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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 optimum response.

There appears to be an unrealistic expectation regarding LLEA coordination and any associated notification requirements. There is no practical means for licensees to identify every LLEA in the United States. It may even be that NRC staff is not aware of each of these LLEA's. 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 identify the local law enforcement authority. Also in many 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 job sites 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.

The requirement that a licensee request the LLEA to notify it of degraded capabilities seems unnecessary and clearly unenforceable. Point thirteen at 75 FR 33915 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 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.

Pennsylvania Responses to Specific Requests for Comment in the Federal Register

75 FR 33909: The NRC is specifically requesting comment on this aspect of the proposed access authorization program. In developing comments on this issue, consider the following questions:

(1) Does the reviewing official need to be fingerprinted and have a FBI criminal records check conducted?

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We agree that the reviewing 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.

(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?

Only that this review should continue to be done by the licensee, *not* the regulator.

(4) Does the requirement to fingerprint the reviewing official place too large of a burden on the licensee?

No.

(5) Do Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history record?

Yes, for Pennsylvania. Pennsylvania agencies may consider an applicant's criminal history when determining eligibility for licensing, although the conviction shall not preclude the issuance of the license. 18 Pa.C.S. § 9124(a). Note that the convictions shall not be considered unless such convictions relate to the applicant's suitability for the license. 18 Pa.C.S. § 9124(b)(5). Although not directly on point, Commonwealth Court case law supports the finding of a reasonable relationship between a background check and licensing to work with sensitive materials. *ATM Corp. of America v. Unemployment Compensation Bd. Of Rev.*, 892 A.2d 859 (Pa. Commw. 2006).

75 FR 33910: The NRC is specifically inviting comment on the elements of the background investigation. Please consider the following questions in developing comments:

(1) Is a local criminal history review necessary in light of the requirement for an 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.

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(2) Does a credit history check provide valuable information for the determination of trustworthiness and reliability?

This is an unnecessary extension of the current process in the IC and Fingerprinting Orders for background investigations.

(3) Do the Agreement States have the authority to require a credit history check as part of the background investigation?

Yes, for Pennsylvania. A consumer reporting agency may furnish a consumer report if that agency has reason to believe that the requester intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status. 15 USCS § 1681(b). The NRC's proposed regulation would satisfy this statute.

(4) What are the appropriate elements of a background investigation and why are any suggested elements appropriate?

The elements of the background investigation currently required by the IC and Fingerprinting Orders have worked well and do not need to be extended unnecessarily.

(5) Are the elements of the background investigation too subjective to be effective?

The elements of the background investigation currently required by the IC and Fingerprinting Orders are already somewhat subjective; however, they have worked well enough. Extending them unnecessarily further by adding credit history and other elements will only add to the subjectivity and make the process less effective.

(6) How much time does a licensee typically spend on conducting the background investigation for an individual?

Unknown, and we assume that there is much variability from licensee to licensee.

75 FR 33914: The NRC is specifically inviting comment on the requirement to protect security-related information. Please consider the following questions in developing comments:

(1) Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?

Yes, for Pennsylvania. We do not see any legal impediment to the imposition of the information protection requirements. However, since the basis for this rule is now

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“public health and safety,” rather than “common defense and security,” there is no continued need for any of the security information to be considered to be SGI or SGI-M.

(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?

Yes, for Pennsylvania. The Pennsylvania Right-to-Know law provides exceptions under which this agency could refuse information requests regarding background checks and other information under the proposed rule, especially if the protection of such information is required by law (i.e. protected under the final version of 10 CFR 37).

(3) Is the proposed rule adequate to protect the licensees’ security plan and implementing procedures from unauthorized disclosure, are additional or different provisions necessary, or are the proposed requirements unnecessarily strict?

The rule is adequate with the understanding that since the basis for this rule is now “public health and safety,” rather than “common defense and security,” there is no continued need for any of the security information to be considered to be SGI or SGI-M.

(4) Should other information beyond the security plan and implementing procedures be protected under this proposed requirement?

No.

(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)?

Yes, but these elements should be limited to those currently included in the requirements of the IC and Fingerprinting Orders.

75 FR 33916: The NRC is specifically inviting comment on the requirement to contact the LLEA for work at a temporary jobsite. Please consider the following questions in developing comments:

(1) Is there any benefit in requiring that the LLEA be notified of work at a temporary jobsite?

No. In fact, it could be a very time-consuming process for a licensee to know what LLEA may have jurisdiction in some locations in the Commonwealth.

(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?

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The requirement to contact the LLEA for work at a temporary job site should be deleted in its entirety.

(3) If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?

No. A much longer threshold would be more appropriate - perhaps 60 days.

(4) Will licensees be able to easily identify the LLEA with jurisdiction for temporary jobsites or does this impose an undue burden?

As noted above, this may be a nearly impossible task in some situations and does impose an undue burden.

(5) Are LLEAs interested in receiving these notifications?

Unknown. No Comment.

75 FR 33917: The NRC recognizes the need to balance security measures against health and safety concerns and is willing to consider some form of relief from the proposed vehicle disabling requirements. The NRC is specifically requesting comment on this issue. Please consider the following questions when developing comments on this issue:

(1) Should relief from the vehicle disabling provisions be provided?

Yes.

(2) Have licensees experienced any problems in implementing this aspect of the Increased Controls?

Not known.

(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?

The basis for an exemption would be case-specific and would be difficult to write into the regulations. Requesting an exemption on a case-by-case basis would allow the regulator to review whether the exemption was warranted.

(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?

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It should be a blanket exemption carefully crafted to be limited to situations where
disabling a vehicle creates a real safety issue.

(5) Does the disabling provision conflict with any Occupational Safety and Health
Administration requirements or any State requirements?

Not known.

75 FR 33917: A licensee would be required to report any actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material as soon as possible after initiating a response, which includes notification of the LLEA. The licensee would be required to submit a written report to the NRC within 30 days after the initial notification. A licensee would also be required to report any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material to both the LLEA and the NRC. The NRC is specifically requesting comment on the reporting requirements. Please consider the following questions when developing comments on this issue.

(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?

Suspicious activities should be reported. The licensee is the best judge of what type of activities would be considered suspicious at its facility.

(4) Is the timeframe for reporting appropriate?

Yes.

75 FR 33918: We are specifically inviting public comment on several aspects of license and address verification. In developing comments on this aspect, consider 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?

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The current system of license verification is acceptable until the system being developed is ready for implementation.

(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 systems?

The current system of license verification, as opposed to address verification, is acceptable for shipments to temporary job sites.

(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?

When the NRC's license verification system is fully implemented, it would be appropriate to verify each transfer. Until then, this verification need only be done once as long as the recipient's license has not expired.

(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?

This issue will be resolved when the NRC's license verification system is fully implemented.

(5) Is preplanning and coordination of the shipments necessary?

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

Rulemaking Comments

From: Seiber, Benjamin [bseiber@state.pa.us]
Sent: Friday, January 07, 2011 4:08 PM
To: Piccone, Josephine
Cc: Allard, David; Horn, Merri; Rulemaking Comments
Subject: PA comments on NRC-2008-0120 (75 FR 33902)
Attachments: NRC-2008-0120_PA_Response_Final.pdf

Importance: High

Ms. Piccone,
Attached you will find comments from the Pennsylvania Department of Environmental Protection on the proposed rule regarding the physical protection of byproduct material (75 FR 33902). The original hard copy of this letter will follow via USPS. Thank you.

Ben Seiber | Program Analyst
Department of Environmental Protection
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400 Market Street | Harrisburg, PA 17101
Phone: 717.783.7702 | Fax: 717.783.8965

Received: from mail2.nrc.gov (148.184.176.43) by TWMS01.nrc.gov
(148.184.200.145) with Microsoft SMTP Server id 8.2.247.2; Fri, 7 Jan 2011
16:08:28 -0500

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X-SBRS: 5.3

X-MID: 32246981

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Received: from unknown (HELO Mail01.state.pa.us) ([172.19.222.35]) by
ENCTCAPP273.state.pa.us with ESMTP/TLS/RC4-MD5; 07 Jan 2011 16:08:25 -0500

Received: from ENHBGHTS02.PA.LCL (206.224.21.43) by ENCTCAPP221.PA.LCL
(172.19.222.35) with Microsoft SMTP Server (TLS) id 8.2.254.0; Fri, 7 Jan
2011 16:08:25 -0500

Received: from ENHBGMBX09.PA.LCL ([206.224.21.4]) by ENHBGHTS02.PA.LCL
([206.224.21.43]) with mapi; Fri, 7 Jan 2011 16:08:25 -0500

From: "Seiber, Benjamin" <bseiber@state.pa.us>

To: "josephine.piccone@nrc.gov" <josephine.piccone@nrc.gov>

CC: "Allard, David" <djallard@state.pa.us>, "merri.horn@nrc.gov"
<merri.horn@nrc.gov>, "Rulemaking.Comments@nrc.gov"
<Rulemaking.Comments@nrc.gov>

Importance: high

X-Priority: 1

Disposition-Notification-To: "Seiber, Benjamin" <bseiber@state.pa.us>

Return-Receipt-To: <bseiber@state.pa.us>

Date: Fri, 7 Jan 2011 16:08:23 -0500

Subject: PA comments on NRC-2008-0120 (75 FR 33902)

Thread-Topic: PA comments on NRC-2008-0120 (75 FR 33902)

Thread-Index: AcuurwUEzasYOcrfSM6tUqQ2QHlpyw==

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Accept-Language: en-US

Content-Language: en-US

X-MS-Has-Attach: yes

X-MS-TNEF-Correlator:

acceptlanguage: en-US

Content-Type: multipart/mixed;

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