



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Flanigan Square 547 River Street Troy, New York 12180-2216

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

January 18, 2011

DOCKETED
USNRC

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

January 18, 2011 (4:30 pm)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Attn: Rulemakings and Adjudications Staff

Re: Comments on Docket ID NRC 2008-0120, Physical Protection of Byproduct Materials
Proposed Rule

The New York State Department of Health's comments on the proposed rule are attached.

Thank you for the opportunity to comment on proposed Part 37. If you need additional information please contact Robert Dansereau or me at (518) 402-7550 or:

New York State Department of Health
Bureau of Environmental Radiation Protection
Radioactive Materials Section
547 River Street, Room 530
Troy, New York 12180-2216

Sincerely,

Stephen M. Gavitt, CHP, Director
Bureau of Environmental Radiation Protection

Enclosure: As stated

Template=SECY-067

DS10

NYS Department of Health comments on Physical Protection of Byproduct Materials, Docket ID NRC-2008-0120.

Comments

37.23(b)(1). We believe that we would need to specify disqualifying criteria in regulation in order to review and make a determination based on the results of a criminal history check. NRC should either conduct reviews for all nominated reviewing officials or, in consultation with the FBI, Office of Homeland Security and other appropriate parties (federal and state) develop specific disqualifying criteria in order to ensure consistency and deny unescorted access for individuals who presents an unacceptable risk. Under the proposed rule there could be 38 different sets of criteria established (37 Agreement States and the Commission).

NYS believes that NRC should be responsible for reviewing the results of FBI criminal history checks for nominated reviewing officials and approving or disapproving individuals. This will ensure a consistent national standard.

37.23(b)(2) It is inappropriate to require a nominated reviewing official, who does not otherwise need unescorted access to a Category 2 or greater source(s), to have unescorted access for the sole purpose of subjecting that individual to fingerprinting and criminal history checks under the authority granted to the Commission by the Energy Policy Act. The Commission should table this aspect of the proposed rule until it is granted authority to require fingerprinting and criminal history checks for nominated reviewing officials.

37.25(a)(6) No evidence has been presented to indicate that a credit history check provides added value in determining if an individual is trustworthy and reliable as it relates to unescorted access to Category 1 or 2 sources. Without such evidence and criteria the burden and costs cannot be justified. This requirement should be removed from the proposed rule.

37.21(b). General performance objective. The Commission proposes to issue the rule under health and safety rather than under common defense and security. If adopted, the Agreement States would now have the regulatory authority for Category 1 sources. However the rule does not give Agreement States authority to regulate protection of safeguards information modified, thus splitting the regulatory authority between the Commission and Agreement States for licensees that possess a Category 1 quantity. The compatibility designation for safeguards information modified is "NRC". Compatibility category "NRC" are those program elements that address areas of regulation that cannot be relinquished to Agreement states under the AEA or provision of Title 10 of the Code of Federal Regulations. Either the entire authority to regulate all security related aspects of Category 1 sources should be relinquished to the states, or the Commission should continue to regulate these materials, as it now does, under common defense and security. Another consideration is that it appears that state staff would be subject to the Commission's requirements for handling safeguards information modified.

NYS DOH believes that the Commission should continue to regulate Category 1 licensees under common defense and security. It should be noted that NYS did not enter into a 274(i) agreement with the Commission. Under a 274(i) agreement the states receive funding to conduct security inspections of Category 1 licensees on behalf of the Commission. Under the proposed rule NYS would be responsible for these inspections but would not receive compensation from the Commission. NYS did not want the program when compensation was available, so it is even less desirable to NY without compensation from the Commission.

37.23(b)(5). The text states: Reviewing officials may not make any trustworthiness and reliability determination or permit any individual to have unescorted access until they have been approved as a reviewing official by the NRC. It appears that the text the word "nominated" should be placed before reviewing official, because an individual is not a reviewing official until he or she has been approved by the NRC or an Agreement State. Also, 37.23(b)(5) appears to be redundant, as 37.23(b)(4) conveys the same requirement.

37.45(a)(viii). It is not realistic to expect the LLEA to notify licensees for situations in which their capacity is diminished. It is more appropriate for the licensee to discuss this issue with LLEA during the coordination meetings. It is very likely that the LLEA has general plans in place to deal with these situations. For example, a village or town LLEA may have an arrangement with the county LLEA or the State Police to provide assistance in such situations.

35.5 Temporary job site is listed as a B designation. A designation of C is more appropriate as it would allow states to be more restrictive. NYS currently permits temporary storage for brief periods (5 days) and requires licensees to submit an amendment for longer-term storage locations.

37.5 Access control. The definition should be expanded to include persons with access to safeguards information modified handling. Such individuals are subject to the requirements in Subpart B, 37.21(c).

Responses to specific questions in the FRN.

B. 5. Background Investigations and Access Authorization Program

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

This is a good idea. However, it is inappropriate to essentially force the licensee to require a nominated reviewing official, who does not otherwise need access to a category 2 or greater quantity of material, to have such access for the purpose of being subject to fingerprinting and criminal history checks under the authority granted to the Commission by the Energy Policy Act. The commission should table this element of the proposed rule until it is granted proper authority to require fingerprinting and criminal history checks for nominated reviewing officials.

(2) Are the other aspects of the background investigation adequate to determine the trustworthiness and reliability of the reviewing official?

The proposed requirements appear to be excessive. Specifically, the credit check and local criminal history check should be removed. No evidence has been provided that would indicate that such checks have added value. Without such evidence and disqualifying criteria the burden, costs and invasion of privacy cannot be justified.

(3) Are there other methods that could be used to ensure that the reviewing official is trustworthy and reliable?

Unknown.

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

No, but it puts too large of a burden on the Agreement States.

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

We believe the answer is yes if specific disqualifying criteria are put into regulation. NYS believes that the Commission should review the criminal history checks for all nominated reviewing officials under common defense and security. Criminal history checks are aligned with common defense and security. A single agency, using consistent criteria, will ensure consistent and fair reviews. Although NRC does not propose to include disqualifying criteria in regulation, it is likely that all NRC Regions will use the same guidance or criteria, just as it does for license application reviews and performing inspections.

B. 8. What are the components of a background investigation?

(1) Is a local criminal history review necessary in light of the requirement for a FBI criminal history records check?

No. The intent of the EPAct was to require the federal criminal history check. No evidence has been presented to indicate that such checks are not adequate to meet the intent of the EPAct. Without evidence of the effectiveness of such a requirement it is not warranted.

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

No. No evidence has been presented to indicate that such checks would add value in the context of access to radioactive materials.

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

Unknown.

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

A ten-year period for the employment history check is excessive. Five years would be more reasonable and should be sufficient for the purpose. Reinvestigations should not be needed for long-term staff who have a satisfactory work history.

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

In the absence of disqualifying criteria set in regulation the elements are very subjective and less effective than they should be. In the situation of a small business, such as a family run business, the entire background investigation may be completely ineffective. It is difficult to believe that one family member would make a negative assessment of another family member. In these situations the nominated reviewing official should be approved by an outside objective entity, preferably the Commission.

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

Unknown.

C. 6. Would licensees be required to protect information concerning their security program?

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

We believe we can implement this requirement.

(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?

Unknown.

(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 requirements do not appear to be unnecessarily strict.

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

Unknown

(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)?

There could be situations in which an individual does not need to see the entire security plan, or may only need to see those aspects that are related to his/her job duties. Such individuals should not be subject to the T&R requirements. It might be prudent to require a background investigation for those who have full access to the security plans, unless they are exempt under the provisions of the proposed rule.

C. 15. What are the LLEA notification requirements for work at a temporary job site?

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

We believe that this question is best answered by law enforcement officials. Perhaps there is a benefit if material will be stored for a long term, i.e., beyond 30 days in a non-permanent situation.

(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?

Notification should not be required for situations where the licensee is there for less than thirty days.

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

It should be no less than 30 days.

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

This may prove to be difficult in rural areas. We believe that the licensee has several options such as contacting the client to find out which LLEA has jurisdiction or contact their State or County police department for the information. But the major issue is what will the LLEA do with such notifications? We believe that in general the LLEA will take any action based on notifications.

(5) Are LLEAs interested in receiving these notifications?

A few LLEAs have requested such notification for **any** duration (e.g. one-day) involving industrial radiography at a temporary jobsite. However the majority have not contacted the Department in this regard. Based on the initial experience with implementation of the increased controls we believe that a simple notification would not help a LLEA that is not familiar with issues and concerns related such sources or what would be expected from them. It may be more effective to require affected licensees to have pre-prepared information to furnish to the LLEA in the event of an attempted or actual diversion/theft of a source or sources. That information should include the device/source description, hazards, vehicle make, model, year, color, plate no., name of the driver, his/her contact information, licensing agency name and contact information including off-hours contact number. We don't believe, in general, it is reasonable to expect the LLEA to take any action based on a notification that a licensee will be at a temporary jobsite. An exception might be the use of an applicable source in the vicinity of a major public event.

What are the proposed special requirements for mobile sources?

(1) Should relief from the vehicle disabling provisions be provided?
Yes, in specific situations.

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

Unknown as there is only a limited number of licensees using Category 2 sources in mobile devices in hazardous settings in NY.

(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?

If exemptions are anticipated to be routine they should be in regulation. If it is anticipated that this will be needed in very few circumstances, and there is good guidance, then exemptions may be a better mechanism.

(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?

Exemptions should be very specific.

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

Unknown

C. 19. What events would a licensee need to report to the NRC?

(1) Are these the appropriate items and thresholds to be reported to the LLEA?

Yes although the issue of suspicious activity is too subjective. The licensee could discuss this during coordination activities with the LLEA to identify examples of suspicious activity. Please note that the New York State Terrorism Indicators Reference Card has specific examples including those for Surveillance Indicators. The Commission should develop guidance.

(2) Are these the appropriate items and thresholds to be reported to the NRC?

See response to C. 19 (1).

(3) Should suspicious activities be reported? If they are reported, what type of activities should be considered suspicious?

The licensee could discuss this during coordination activities with the LLEA to identify examples of suspicious activity that should be reported. Please note that the New York State Terrorism Indicators Reference Card has specific examples including those for Surveillance Indicators. The Commission should develop guidance.

(4) Is the timeframe for reporting appropriate?

Uncertain.

D. 4. Is verification of the transferee's license necessary?

(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?

Until such time that the license verification system is available, initial verification (before the first time the licensee plans to transfer licensed material to a specific entity, and at least annually thereafter and before the first shipment to a renewed license/licensee.

(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?

NYS DOH does not allow shipments to temporary job sites. Shipments can be made only to locations specifically listed on a NYS DOH radioactive materials license.

(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?

Until such time that the license verification system is available, initial verification (before the first time the licensee plans to transfer licensed material to a specific entity, and at least annually thereafter and before the first shipment to a renewed license/licensee.

(4) If an annual check is allowed, how would the transferring licensee know if the license has been modified since the last check and that the licensee is still authorized to receive the material?

In this situation the license would not know if the receiving entity's license had been modified.

(1) How could surveillance of the shipment be accomplished while in the classification yard?

Unknown. Being unfamiliar with the workings of a classification yard we are not in a position to comment.

(2) Would the classification yard allow an individual to accompany a shipment while the shipment is held in the classification yard?

Unknown. Being unfamiliar with the workings of a classification yard we are not in a position to comment.

(3) What precautions might be necessary from a personal safety standpoint?

Unknown. Being unfamiliar with the workings of a classification yard we are not in a position to comment.

Rulemaking Comments

From: Stephen M. Gavitt [smg03@health.state.ny.us]
Sent: Tuesday, January 18, 2011 4:21 PM
To: Rulemaking Comments
Cc: Robert E. Dansereau; Orendi, Monica
Subject: NYS DOH Comments -Part 37
Attachments: Comment to NRC - Part 37.doc; Cover letter - comments on Part 37.doc

Attached, please find our comments on the proposed Part 37 Rulemaking. If you have any questions, please contact Robert Dansereau, Assistant Bureau Director at: 518-402-7550.

Thank you,

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(See attached file: Comment to NRC - Part 37.doc)

(See attached file: Cover letter - comments on Part 37.doc)

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