



Illinois Emergency Management Agency

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

Pat Quinn, Governor

Joseph Klingler, Interim Director

January 6, 2011

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Mark R. Shaffer, Director
Division of Intergovernmental Liaison and Rulemaking
Office of Federal and State Material and Environmental Management Programs
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

DOCKETED
USNRC

January 14, 2011 (4:00 pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Attention: Rulemakings and Adjudications Staff

Subject: REQUEST FOR COMMENTS ON THE PROPOSED RULE TO AMEND 10 CFR PARTS
30, 32, 33, 34, 35, 36, Section 37, 39, 51, 71, AND 73 – PHYSICAL PROTECTION OF
BYPRODUCT MATERIAL (NRC-2008-0120) (FSME-10-048)

Dear Mr. Shaffer:

The Illinois Emergency Management Agency, Division of Nuclear Safety (Agency), hereby submits its comments on NRC-2008-0120/FSME-10-048 regarding the codification of security requirements currently found in orders issued by the U.S. Nuclear Regulatory Commission (NRC). The Agency encourages the NRC's pursuit towards including the existing security expectations into rulemaking for the very reasons mentioned in the proposed document. We understand the difficulties associated with bringing forth a rulemaking of this scope that includes the full range of radioactive materials identified and yet apply a reasonable balance of performance-based expectations which are readily enforceable and commensurate with the associated range of security/safety risks. Resources to implement and enforce a rulemaking of this magnitude must also be part of this discussion and are of serious concern to this Agency. We hope the following comments are useful.

1. In the current economy, NRC must understand that many Agreement States (States) are already suffering staffing shortages, as evidenced by IMPEP reviews, and cannot possibly bear the administrative and technical burden of this rulemaking. At the OAS meeting, we heard that NRC has doubled their staff to address security issues. This is not the case at the state level. NRC must determine if funding will be provided to states to increase staffing levels or if other health and safety programs should be cut (i.e., SSD evaluation, regulation promulgation, event investigations, routine inspections, etc.).
2. Under Supplementary Information Item II(A)(10), it states, "Although the NRC relinquishes authority to States for certain materials, under Section 274(m) of the AEA no such agreement will affect the authority of the Commission to take regulatory action to protect the common defense and security." Item 11 states, "The provisions put in place for the inspection of licensees in States received the orders issued under common defense and security would remain in place until the State implements the requirements. This contradicts Item 19 which states the NRC will not enter such agreement for common defense and security. The Agency still contends that Category 1 materials must be considered under the terms of common defense and security and should remain under NRC jurisdiction for security. The drafted document states "licensees who activities are covered under part 73 would be exempt from Part 37." Most of the irradiator requirements (SGI-M) are based in part 73. That would suggest that there are no Cat. 1 licensees that are subject to State purview. There are references to SGI-M in the drafted document, although States do not designate security information in such a way, which further leads to the



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need for clarification. In the same vein, the sections for Paperwork Reduction Act Statement and Regulatory Flexibility Certification do not appear to have included pool irradiator and manufacturer/distributor licensees with Cat. 1 quantities of radioactive material in their scope and will likely need to be augmented. In many other examples, the drafted document appears to be inconsistent in this regard. The issue of jurisdiction and responsibility for these licensees must be clearly made and the necessary inclusions and exclusions to the rules made accordingly.

3. Supplementary Information Item II (B)(5) indicates that, "Reviewing Officials must be permitted either access to safeguards information or unescorted access to category 1 or category 2 quantities of radioactive material ..." Section 37.23(b)(2) states, "Reviewing Officials must be required to have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information, if the licensee possesses safeguards information, as part of their job duties." B(5) requires access to safeguards information "or" access to radioactive material and Section 37.23 "requires access" to radioactive material. Many of the different Items in Discussion Items A-D do not reference access to SGI-M information. The requirements in this rule apply as well, and the inconsistencies need to be corrected.
4. In Supplementary Information Item II (B)(5), several questions are asked. The Agency has the following responses:
 - a. **Does the reviewing official need to be fingerprinted and have a FBI criminal records check conducted?** The Agency does NOT support the inclusion of the Reviewing Official as someone who must go through the fingerprinting process. There are an equal number of other important company executives and section heads that directly affect security at facilities where radioactive material in quantities of concern are possessed who aren't included for consideration who are better candidates. For example, the Head of Security, CEOs, other division heads with authority over assignment of resources, etc. are not included. Reviewing Officials, typically, are the head of human resource departments or the radiation safety officers themselves. Human resource heads by virtue of their position have been deemed trustworthy by their employer through the hiring process since their duties require routine access to sensitive employee information. A similar situation exists for the head of security for those companies large enough to justify the position as well, yet the NRC is not proposing those individuals by title be required to have their identification verified by the FBI or their criminal histories reviewed. In fact the Head of Security and the CEO may have even more influence and control than the Reviewing Official. Again none of those people may necessarily have unescorted access to the radioactive material which would otherwise obligate them to go through the process as required in the rule. Even the Reviewing Official is required to be investigated prior to submittal of the fingerprints to the NRC. Since you do not have an "approved person" to evaluate the Reviewing Official, where do you draw the line? The licensees should be able to approve their own Reviewing Official. To date, the Agency has had no issues with the Reviewing Officials (T/R) under the current approval methods.
 - b. **Are the other aspects of the background investigation adequate to determine the trustworthy and reliability of the reviewing official?** Are there other methods that could be used to ensure that the reviewing official is trustworthy and reliable? Current requirements for verifying employment history, education and personal references, are adequate.

- c. **Does the requirement to fingerprint the reviewing official place too large of a burden on the licensee?** Yes, especially if this person is to be treated as if they have unescorted access, NRC/States will require this person to be trained as an authorized user. Aside from the tremendous learning curve to do so, a human resources person should never be put in this position as it is a health and safety risk in itself to put an administrative person in such a technical position.
- d. **Do the Agreement States have the necessary authority to conduct reviews of the nominated individual's criminal history records?** The Illinois Emergency Management Agency does not have express authority in the Radiation Protection Act or the regulations promulgated there under to conduct a criminal history or a credit history check on radioactive materials licensees. IEMA has reserved the right, however, in Section 330.240(a)(2) of its administrative rules implementing the Radiation Protection Act, 32 Ill. Adm. Code 330.240(a)(2), to request further information at any time after the filing of an initial application, and before the expiration or termination of the license, from the applicant or licensee to enable the Agency to determine whether the application should be granted or denied, modified or revoked.
5. Supplementary Information Item II (B)(8), states that the licensee use their "best efforts" to obtain information required to conduct the background investigation to determine an individual's trustworthiness and reliability. Best efforts cannot be enforced and must be clearly defined. Similarly, the concepts of "dependable in judgment, character and performance" must be reduced to something quantifiable and enforceable and not subject to disparate interpretation. The description should also include the expectation that the review go back at least 10 years or to such time as the individual was a minor which ever is less.
6. Supplementary Information Item II (B)(13), asks about information to be used by the reviewing official to approve individuals. The final determination appears to be left up to the reviewing official regardless of FBI findings. More information must be provided on the basis for denials. There has also got to be a mechanism in place where NRC/FBI will intervene and not leave the decision up to the reviewing official for certain criminal histories.
7. In Supplementary Information Item II (B)(14), the Agency supports periodic re-evaluations of previously approved individuals. However, we believe those re-evaluations should include character and reputation determinations. Credit and criminal reviews are insufficient by themselves to provide a basis for initial determinations and likewise are insufficient for subsequent determinations. A change in a person's attitude or demeanor can indicate a change in circumstances that warrants restricting access whereas there may have been no change in a credit or criminal history. Language should also be included that states the licensee is not prohibited from revoking previously granted authorizations at any time.
8. In Supplementary Information Item II (B)(19), the NRC should specify those essential program elements for inclusion in the annual review of the authorization control program. The use of guidance in this instance would be inappropriate, not enforceable and a great disservice to licensees.
9. In Supplementary Information Item II (B)(21), the NRC is proposing to exempt emergency response personnel (i.e., fire/medical) from the background investigation requirements, and for just reason, which we support. In previous determinations the NRC has indicated that such

personnel should not be given access to facility information as the NRC believes it would adversely affect security. We are glad to see this change. In addition, several State employees listed by job duties are listed as being relieved from the background investigation requirements. Licensing staff are not listed and neither are the information technology or legal staff. These individuals may also have access to such information.

10. In Supplementary Information Item II(C)(1), the NRC is proposing 'fluctuating activation' of a previously developed security plan. From the description included in the draft, no details of the security plan would have been previously submitted for review, only that it needed to be maintained for inspection. The NRC indicates that the 90 day prior notification would be used to schedule the equivalent of a 'pre-licensing' inspection of the facility to ensure the security program had been properly implemented. No indication is given if the licensee makes an emergency notification, and the subsequent inspection shows violations after the transient situation has passed. What are the expected outcomes from the NRC? What if the licensee does not foresee the need to invoke the program again? If a 90-day notification is given that the program will be implemented on a periodic basis of short duration, would the individuals have to go through the FBI identity check and criminal history review? The security plan described indicates 'no'. Illinois is not in favor of this notification process for activation of security plans. The current inspection process for IC's/reciprocity is sufficient oversight to determine if licensees are appropriately activating their plan.
11. In Supplementary Information Item II(C)(6), the description should be modified to include the requirement that any one seeking this information where Cat. 1 quantities of material are involved must have also gone through the access authorization program including FBI criminal history review and finger print identification verification. This would be a practical threshold for states to have equivalent rules in place that mimic the NRC's SGI-M requirements in part 73.
12. In Supplementary Information Item II(C)(6), several questions are asked as follows:
 - a. **Do the Agreement States have adequate authority to impose the information protection requirements in this proposed rule?** Illinois has this authority.
 - b. **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?** Recent changes to the Illinois Freedom of Information Act no longer exempt licensing file documents from disclosure. However, there are exemptions to disclosure if disclosure is otherwise prohibited by State or Federal law. We are currently invoking this exemption to protect security related information from disclosure.
 - c. **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 proposal is adequate.
 - d. **Should other information beyond the security plan and implementing procedures be protected under this proposed requirement?** Names of individuals that are part of the security plan or approved under that plan (i.e., users, security personnel) should be protected.

- e. **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. This information has the potential to allow unabated access to radioactive material so it must be entrusted to only the most reliable individuals.
13. In Supplementary Information Item II(C)(7), the discussion of security zones potentially has serious operational and financial repercussions. A lot of what the NRC proposes is expensive overkill. Adding continuous barriers could be extremely expensive and may introduce scattered radiation into labs that have very specific operational requirements (see Item 60 below). In addition, isolating and controlling access does not appear to comply with the requirements for the physical barriers (C1) used to prevent aggregation of radioactive material and to prevent an adversary from gaining access by breaching a common physical barrier. The guidance suggests cables, locks, etc. are considered acceptable common physical barriers. Such locks, cables, etc. would not isolate the same radioactive material in a security zone as required. As individuals could frequent the security zones but still be separated from the radioactive material due to the lock. However, the proposed rule requires only authorized individuals have access to the security zones. These two concepts seem to conflict with each other and if the common physical barrier concept is not acceptable, then many more licensees will fall under these requirements due to the aggregation of radioactive material.
14. In Supplementary Information Item II(C)(13), we agree and support the NRC in that a coordinated response from an LLEA is necessary and such a response should have the capability of bringing armed force. However, we believe it is inappropriate for this requirement to be placed on a licensee because there is no way they can ensure such will be the response on any given notification (i.e., in the case of multiple events nationwide or in a region, can NRC promise a specific level of response?). We believe the extent of the response should be left to the discretion of the LLEA with whom the licensee has coordinated their response plan. To some extent it appears the NRC agrees with our opinion. However, we question the value of any 'written agreement' that describes the LLEA's commitments to provide a response. We believe this to be unenforceable and outside our jurisdiction. Likewise, requesting the LLEA notify the licensee when their response capabilities have become degraded is unreasonable and again unenforceable.
15. In Supplementary Information Item II(C)(14), we agree and support the NRC in that allowances need to be made to reflect a licensee's attempts which are made to establish relationships with LLEA's. However, we question what action the NRC will take when notified, as the proposed rule requires, of any particular LLEA's refusal to enter into an agreement or coordinate activities. In addition, the 3 day notification requirement for temporary jobsites is effectively unenforceable. This item also states that LLEA refusal to coordinate with a licensee would not by itself render a licensee's security plan inadequate. It also states that in an actual emergency, State and local government officials will respond to protect the health and safety of the public. The State does respond to emergencies for health and safety reasons (not armed interdiction), but could not respond in the same immediate fashion that a local LLEA would respond. What is the NRC's intent of the State's response to such events? It alludes that the State's response will be in lieu of LLEA's response. This Item also states that the NRC will notify the LLEA to ensure that the LLEA understands the importance of adequate coordination and that through these interactions, the NRC would obtain confidence that the LLEA would respond in the event of an actual

emergency. How would the NRC guarantee such confidence when the licensee was unable to do so? What if the NRC does not gain such confidence? Presumably, State Police or Federal authorities would then be notified.

16. In Supplementary Information Item II(C)(15), notifications for temporary jobsites is discussed and several questions asked as follows:
- a. **Is there any benefit in requiring that the LLEA be notified of work at a temporary jobsite?** No, we believe the requirement is unenforceable and problematic in its interpretation.
 - b. **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?** Interpretation of this requirement could vary. Jobs can run longer than expected potentially resulting in a longer than expected project with several reciprocity notifications. Also, jobs on pipelines can run through multiple locations/jurisdictions that might not be considered a single job. Thus, no notification may be made if working less than 7 days at any one location.
 - c. **If notifications are required, is 7 days the appropriate threshold for notification of the LLEA or should there be a different threshold?** This depends widely on what you are trying to accomplish. We believe notifications of LLEA at temporary jobsites will be burdensome and ineffective. However, if NRC is trying to stop random local thefts, it probably is not restrictive enough. Information about jobsites gets around small communities quite quickly. If NRC is attempting to stop a larger, well organized interdiction, 7 days can probably be stretched out to 14 days or more.
 - d. **Will licensees be able to easily identify the LLEA with jurisdiction for temporary jobsites or does this impose an undue burden?** Are LLEAs interested in receiving these notifications? No, licensees will not be able to easily identify LLEAs. Additionally, the States will likely get multiple inquiries from LLEA about the jobsite and the risks involved. Further, LLEA do not appear interested in receiving these notifications. It has been our experience that LLEAs usually turn these notifications over to Local Fire/Hazmat teams.
17. In Supplementary Information Item II(C)(17), mobile sources are discussed and questions asked as follows:
- a. **Should relief from the vehicle disabling provisions be provided?** Yes, the Agency supports an allowance for refinery operations where vehicle disabling jeopardizes the safety of licensee and site personnel.
 - b. **Have licensees experienced any problems in implementing this aspect of the Increased Controls?** We are aware of situations where licensees were essentially forced into conditions of non-compliance by leaving extra vehicle keys with site security personnel or using extra personnel who provided no revenue basis for their presence other than to meet the requirement for constant attendance while radiography shots were prepared.

- c. **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?** We support an allowance that would give an alternate pathway for an approval pursuant to an amendment request which describes an equivalent level of security for the materials to meet a controlled two barrier rule and the limited controlled/secured movement of a vehicle onto a guarded/controlled property.
 - d. **If an exemption is included in the regulations, should it be a blanket exemption or a specific exemption for the oil and gas industry?** We are only aware of the conflict in the oil and gas industry, but any jobsite that would require violation of local or federal requirements should be considered. States such as Texas, Oklahoma and Louisiana should be contacted directly for their input on this issue.
 - e. **Does the disabling provision conflict with any Occupational Safety and Health Administration requirements or any State requirements?** We are only aware of the conflict in the oil and gas industry, but any jobsite that would require violation of local or federal requirements should be considered.
18. In Supplementary Information Item II(C)(18), we agree that routine testing of the physical systems used to alert licensees to intrusion detection and the need for subsequent assessment of unauthorized access/unauthorized removal is necessary. We find that the comparison of such tests to those of survey instruments and transport and storage containers to be tenuous and unrelated and believe that statement should be removed. The Agency believes that intrusion alarms and communication systems for those alarms should be tested more frequently than quarterly to ensure that damage or tampering has not occurred. We further believe that any such testing should also include verification of the notification process to the responding individuals/entities identified in the plan on at least an annual basis. Activation should include the participation of the responding LLEA identified in the plan to the extent that resources allow. If actual site response during the test was deemed not possible, verification that the appropriate notification was received at the associated LLEA dispatching center would be an acceptable alternative.
19. In Supplementary Information Item II(C) (19), the NRC must identify in the regulation what essential elements are to be included in the required initial reports of compliance, event reporting and both annual security reviews. The use of guidance in this aspect is unacceptable. Specifying that licensees must submit "sufficient information" is unenforceable.
20. In Supplementary Information Item II(D)(4), transportation security is discussed and questions asked as follows:
- a. Is verification of the transferee's license necessary? Yes.
 - b. Should there be a requirement for verification of the license for transfers of category 2 quantities of radioactive material? The Agency supports the inclusion of Cat. 2 sources into the license verification process by the appropriate regulatory jurisdiction and is prepared to provide the necessary verification information when requested by validated distributors and manufacturers. We would propose that for Cat.1 material, verification should be on each occasion due to the inherent risks involved with those quantities.

- c. Would States be able to accommodate such requests with their current record systems for verification of shipments to temporary job sites? The notification process for shipments to temporary jobsites is an extremely difficult scenario. There is no current means to track these unless they involve reciprocity. For shipments within a given jurisdiction, the only way to track these would be to list the sites on the license (similar to mobile nuclear medicine) or to require and 'intrastate' reciprocity notification prior to the job. Either scenario is a tremendous administrative burden and could not be accommodated with current staffing levels.
 - d. Should a licensee be required to check with the licensing agency for every transfer or would an annual check be sufficient? We would propose that for Cat.1 material, verification should be on each occasion due to the inherent risks involved with those quantities. Semi-annual is probably acceptable for all other shipments.
 - e. 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? Distributors will be able to check the NSTS to see if the site is still active. Other transfers (i.e., between user licensees) are minimal in most jurisdictions and could be verified by contacting NRC/State agencies.
21. In Supplementary Information Item II (D)(17), for Cat. 1 materials shipped as HRCQ, the carriers already have training and certification requirements under USDOT. It appears that these requirements are more specific to response protocols in the event of an emergency or attempted diversion. Again, the Agency is not in favor of the licensee providing training to entities beyond his control such as railroad personnel.
22. In Supplementary Information Item II (D)(20), redundant communications systems are required. It is not clear if redundant position location or tracking systems are necessary as well.
23. In Supplementary Information Item II (D)(21), regarding rail classification monitoring, the proposed language suggests that an 'alternative tracking system reporting to the licensee' would be acceptable for monitoring Cat.1 quantities of materials shipped by rail. The Agency believes this would only be true if the system were equivalent to that described as required for highway shipments which provide 'continuous active tracking which reports to a movement center'. Such monitoring could be performed remotely by passive electronic security/radiation sensor on the packages involved throughout the transport process and not just while in the classification yard. Classification yards although guarded by railroad personnel have historically been extremely hazardous places to work and subject to habitation by various unauthorized personnel. Thus the need for remote monitoring of the package itself (not the railcar) is necessary. The Agency has commented extensively on this matter in the past with regards to the ASMs and reminds the NRC of those previously submitted comments and conversations with staff.

Comments on Proposed Rule Language

24. The title of the rule should include reference to the protection of information (SGI-M and SUNSI) as well. In addition, references to the protection of information need to be made more consistent throughout the rule as most sections and subsections only require implementation if individuals have access to category 1 and category 2 radioactive material. Those having access to

safeguarded or sensitive information also need to be included in the majority of the sections in the rule.

25. In Section 37.1, NRC should consider the inclusion of Part 73 among the list of provisions of parts affecting such licensees. This should be done in light of comments noted above regarding intent and consistency for States to be responsible for security programs at pool irradiators and manufacturers/distributors of Cat.1 materials.
26. In Section 37, the scope suggests it applies to any person who is authorized to possess or use at any site or contiguous sites subject to the control by the licensee category 1 or category 2 quantities of radioactive material. When radioactive material is used at temporary job sites, the licensee will be in control of the quantities of radioactive material but may not necessarily be in control of the sites (e.g., refineries, etc). Additionally, the scope does not indicate that this applies to persons who have access to SGI-M and implies it only applies to those authorized to possess radioactive material in quantities of concern.
27. In Section 37.5, clarification of certain definitions is required as follows:
 - Reviewing official - This definition should include a trustworthy and reliability determination of an individual who has access to SGI-M.
 - Sabotage - Define "security system" that is referenced in this definition.
 - Security Plan - We suggest consideration be given to defining 'security plan', at least to the extent that 'security plan' is meant to encompass a description of licensee's background investigation process, access control program and physical protection measures with those specific features as identified elsewhere in the Part.
 - Temporary jobsite - This definition does not meet the Agency's definition of temporary jobsite. This has a compatibility of Level B, which requires identical wording. The Agency's definition is much more restrictive in that it limits the amount of time radioactive material can be used at a temporary job site. The Agency should not be required to have two different definitions for the same word because they are listed in different parts of the regulations.
 - Trustworthiness and reliability - This should be modified to include characteristics required by individuals having access to SGI-M.
28. Section 37.21(a)(3)(4) requires existing licensees who are 'authorized to possess' radioactive material to comply with this part, but it requires implementation only for new licensees prior to 'actual possession' of radioactive material. This language discrepancy occurs throughout the rule and must be corrected.
29. In Section 37.21(c)(1)(iii), the licensee is required to ensure individuals are trustworthy and reliable who work in movement control centers. Licensees may not have direct oversight of these centers if they are monitored by LLEA or other security or emergency personnel and could make compliance with this section difficult or impossible. In accordance with Part Section 37.29(i) emergency personnel are only exempt from being deemed trustworthy and reliable if responding to an emergency. Movement control centers are not necessarily emergency situations.

30. Section 37.21 states “the licensee” is responsible ...- which licensee is responsible, the shipper or the carrier?
31. Section 37.23(b) requires nominated individuals for reviewing officials to undergo the background investigation prior to submittal of fingerprints and names to the NRC. Who does the review on the person approving the reviewing official? We disagree with this concept and believe the reviewing official does not need to be expressly approved by the NRC. Also, we would like guidance on steps for approving this individual and where to memorialize the name of the reviewing official. Initially, we intended to put this person on the license similar to an authorized user. This may not be acceptable for States where licenses are public documents. Other alternatives include ties downs or simply in a database as a contact.
32. Section 37.23(b)(2) requires reviewing officials to be treated as if they have access to radioactive material. This is totally unacceptable to the Agency. Many reviewing officials have absolutely no training or experience in radiation safety. They would also have to have authorized user training to meet this criteria. This not only is burdensome to the licensees to properly train such individuals as the training could be quite extensive, there is absolutely nothing to gain from this requirement. It actually is a health and safety risk to put a non-technical staff member in this position. A reviewing official who might be the Personnel Manager, does not have a need to know in regards to having access to security measures. The more individuals who have access to radioactive material, the higher the security risk. This requirement should be removed from the rule.
34. In Section 37.23(e)(2), specify who evaluates all of the information for the reviewing official since they are required to have the same information reviewed prior to submittal to the NRC.
35. In Section 37.23(e)(3), the list of persons approved for unescorted access authorization does not appear to be specified among the information described as having to be protected for unauthorized disclosure, only the procedure or criteria that forms the basis for making that determination. If these names became public, potentially they could be targeted to gain unabated access to sources.
36. Section 37.23(g)(2) specifies procedures the FBI will follow regarding a challenge to the criminal history. The licensee cannot act on the adverse ruling until FBI goes through their due process. Is FBI aware of and committed to this process? There should be a caveat that the licensee can make a final determination regardless if nothing is heard from FBI within 30 days.
37. In Section 37.25(a), student access to radioactive material in quantities of concern as part of graduate or advanced undergraduate education presents significant problems when attempting to meet a 10 year criteria for background checks. We understand that students are a source of concern for security. However, some type of relief for the time frame for background checks would make compliance with (a)(10)(i) more reasonably achieved for these readily understandable situations. Regarding (a)(8), we suggest a minimum number of references be specified. Traditionally, this has been set at 3.
38. Section 37.25(a)(6) requires licensees to perform a full credit history that includes but is not limited to “x”. Define “full credit history” if the topics listed do not constitute such. The licensee cannot comply with these open-ended requirements.

39. In Section 37.25(a)(9), remove “to the extent possible”. This phrase makes this subsection meaningless.
40. Section 37.25(c) requires section requires reinvestigations every 10 years. Does this include a reinvestigation of the Reviewing Official since they are required to have access to the category 1 and 2 radioactive material?
41. Section 37.27(a)(2) requires the licensee to notify individuals that their fingerprints will be used to secure a review of their criminal history record. Section 37.23(c)(1) requires individuals to sign an informed consent prior to the background investigation. Is this a different notification than that included in the informed consent?
42. Section 37.29 includes “...relief from checks/investigations of individuals permitted unescorted access to certain radioactive materials or other property.” Define “other property”.
43. Language needs to be included to allow access to SGI-M and other security related information identified in the part in addition to unescorted access privileges for Cat.1 and Cat.2 materials. It would also appear necessary to include the phrase 'unless otherwise suspended or revoked' to address those situations where such restrictive actions became necessary.
44. Section 37(a)(2) requires licensees who are authorized to possess category 1 or 2 quantities of radioactive material to develop a security program. Various licensees will be required to develop a program that they will never implement (i.e., if they never possess aggregate quantities). How extensive does this plan have to be for those who will never implement such a plan? What are the elements of such a plan? Do these licensees still have to approve a Reviewing Official to develop this plan?
45. Section 37.41(a)(1)(2) requires the licensee to implement its security program at least 90 days prior to aggregation of radioactive material that equals or exceeds the category 2 limit. Section 37.21(a)(4) does not specify the licensee must implement the program 90 days in advance, only that they must implement it prior to possession. Why the difference in these requirements and which one are they to follow? Additionally, not all of this subsection applies to those who are authorized to possess, but only for those who actually possess radioactive material. Licensees who are “authorized to possess” must only develop a plan, but not necessarily implement it. These issues are not consistent with the actual proposed rule.
46. Licensees must implement their security plan within 90 days of receipt of category 1 or 2 radioactive material. It also requires them to notify NRC that they have implemented the plan. It also requires the licensee to notify the NRC when they implement the plan again even if the quantities do not fluctuate. These notifications are overly burdensome for both the licensee and the NRC/States. Absolutely nothing is gained by these repeated notifications. The States will assume that the program is being implemented if they aggregate quantities of radioactive material because there is no requirement to notify the NRC when they discontinue the program, but only when they continue it. Notifications back and forth will most likely create circumstances where licensees will not be inspected because the States will not know if they have the material or not.

47. In Section 37.41(2), consideration should be given to placing notification into rule that the NRC or State may prohibit the transfer of radioactive material in quantities of concern should an evaluation of the security plan be found lacking until such corrective measures have been verified as having been implemented. This is particularly important even though the responsible regulatory agency may have previously authorized the possession of the material in a license. If the intent of the 90 day notification is to allow an on-site inspection by the NRC or State before material is received, provisions to address inadequacies should be incorporated by rule rather than having to address such actions through order and license suspension which may take longer than 90 days depending on a State's due process requirements.
48. In Section 37.41(d), why require licensees to notify agencies about the status of compliance? The normal terms of implementation for rulemaking is completely adequate especially since we already know who is subject to (and following) the current orders.
49. In Section 37.43, there is no mention that these requirements apply to individuals who have access to SGI-M.
50. In Section 37.43(a)(1)(i), the phrase 'measures and strategies' is meaningless and unenforceable even as a performance based goal. It should either be removed or the intent made clear by measurable, quantifiable or otherwise objective expectations.
51. Section 37.43(c)(3)(iii)(iv) require the licensee to report "relevant results" of NRC inspections and review of testing and maintenance. Define "relevant results".
52. In Section 37.43(d), additional language from the existing orders should be included which specifically address marking and transmission of security related documents. The NRC is doing a disservice to licensees if it wishes to claim that such items are implicit in (d) (2) of the section or would be more fully addressed in guidance.
53. In Section 37.43(d)(3)(iii), individuals that see the security plan need a background check but no fingerprinting. This seems inconsistent with requiring the reviewing official to be fingerprinted since access to the plan could potentially get someone unabated access to the sources. Please make the requirements for background checks/fingerprinting more consistent throughout this rule and include a table/flow diagram in guidance outlining when these apply.
54. Section 37.45(a)(iv) requires a licensee to request information about the LLEA's capabilities to provide a timely armed response. The licensee can request it, but the LLEA is unlikely to provide anyone with sensitive information that indicates they are incapable of responding.
55. Section 37.45(a)(v) requires the licensee to establish a written agreement with the LLEA describing their commitments to provide a response in accordance with Part Section 37. The licensee can request a written agreement, but the LLEA is not required to comply. Historically, these types of requests end up with local HAZMAT teams.

56. Section 37.45(a)(viii) requires the licensee to request that the LLEA notify the licensee when their capabilities become degraded and they are incapable of providing a timely armed response. The licensee can request such information, but the LLEA is unlikely to comply. It states that the licensee should notify the NRC (or presumably the State, when appropriate) that the LLEA is not cooperating. What is the State then required to do?
57. Section 37.45(a)(5) requires the licensee to notify the NRC after they become aware of a State or local requirement that an initial response to an emergency must be provided by other than armed LLEA personnel. What is the NRC or State then required to do after such notification?
58. Section 37.45(b)(1) requires licensees to notify the local LLEA when they are using/storing category 1 or 2 radioactive material at a temporary jobsite for more than seven consecutive calendar days. It will be very difficult for licensees to determine the LLEA jurisdictions. Additionally, when licensees work at sites such as pipelines they can cover multiple jurisdictions. The NRC should define these jurisdictional boundaries to clarify when the licensee must notify multiple jurisdictions. Are these boundaries, towns, villages, townships, counties, states, etc.? Additionally, if they cross into another town during the same job in less than seven days, then these notifications are not required at all? Weather may also increase a licensee's time spent in one jurisdiction without the licensee being able to pre-plan for such notification.
59. Section 37.45(b) (2) requires the licensee to notify LLEA for work using category 1 or 2 radioactive material at temporary jobsites. This section allows the licensee to notify the LLEA via email. Email is generally unsecured and unless encrypted or sent as password protected attachments, email should not be used. This is in accordance with the NRC REGULATORY ISSUE SUMMARY 2005-31. This section of the rules does not contain any of these restrictions.
60. The proposed Section 37.47 adds security zones that would require the use of continuous physical barriers for fixed facilities not under continuous control by personnel. The Agency (IEMA) mission includes operation of a secondary-level instrument calibration and testing facility using category 2 quantities of radioactive material. The capabilities of the facility are critical to the mission of the agency to protect the citizens of Illinois from adverse effects of radiation in normal use and to the Illinois Homeland Security programs for detection and response to weapons of mass destruction. Adding these barriers would require major reconstruction of the IEMA laboratory facility building. Any addition of barriers creates scatter radiation that must be characterized in all measurement locations in the laboratory before the laboratory can be used for calibration or testing. Those initial measurements took over a year to make and to incorporate into the facility computer codes, operating procedures and temporary modifications required for each type test or calibration conducted in the facility. The cost of such an effort would exceed \$200,000 if it can be done in the existing building. If it can't be done in the existing building then a custom design building would be required similar to those constructed over the last 15 years for DOE facilities at the cost of \$5 million dollars plus. These security zones will likely affect numerous facilities nationwide in a similar manner. The Agency proposes that if security zones are required, that licensees be allowed to propose measures to compensate for the lack of a continuous barrier when that barrier would obstruct the use of the radioactive material for its intended purpose and when there is no available alternative to using radioactive material.

61. Section 37.47(d) requires additional measures for security zones for category 1 radioactive material during maintenance, source receipt, etc. when security zones are compromised. Permanent security zones are required in Section 37.47(c) for both category 1 and 2 radioactive material. Why are there additional measures required only for category 1 radioactive material if the security zones are compromised during certain times? In addition, it appears that the isolation requirements for radiation protection under restricted, radiation, high radiation and very high radiation areas provide the same or better levels of security than those described (i.e., continuous physical barriers that allow access to the security zone only through established access control points; or licensees could exercise direct control of the security zone by approved individuals at all times). It does not appear that you need to have duplicate regulations that already apply to Cat.1 and 2 radioactive material.
62. Section 37.47(d) indicates that during those identified periods an approved individual must be provided to maintain continuous surveillance of the sources. The term 'approved individual' is not defined, so it is not clear what the NRC's intention is with regards to this person's background, knowledge or level of access authorization. Also depending on the design of the facility, multiple approved individuals may be necessary to adequately monitor activities throughout a site, which does not appear to be clearly required by the language.
63. For Section 37.49(a)(1), in the event of a power failure or tampering that affects the monitoring and detection system, the intent of the rule should be to provide (1) a reliable power back up or (2) prompt notification of the power failure/tampering such that the licensee will take immediate corrective action to restore the power and provide for alternate monitoring and detection that meets the requirements of the Part until the system is repaired.
64. Section 37.49(a) (2) (ii) refers to "nearby facility personnel". A more accurate description is warranted such as "...alert personnel within audible range of the alarm."
65. Section 37.49(a)(3)(ii) establishes a requirement for licensees to ensure the radioactive material is present. We believe this section should be deleted in favor of inclusion of Cat. 2 material with the Cat. 1 requirement for continuous surveillance. By establishing of the proposed section, the intent appears that it may be acceptable for a missing Cat. 2 quantity to go undetected for up to a week when this is clearly not the case.
66. Section 37.49(d) requires the licensee to immediately respond to any actual or attempted unauthorized access in addition to requesting an armed LLEA response. Presumably this means the alarm service will notify LLEA on behalf of the licensee. Requiring the licensee to physically respond could put them in harms way should the intruder be armed. What other actions should the licensee take (i.e., do surveys, inventory material, etc.)?
67. Section 37.51 requires the licensee to maintain, test, calibrate, etc. the intrusion systems used to detect unauthorized access. What is considered acceptable maintenance, testing and calibration of these systems? One might think that the line ping with the security company that is usually done daily would suffice. There is no indication in the rule that suggests otherwise. This rule needs to be modified to indicate to what extent these procedures need to be implemented. In addition to the quarterly tests of the intrusion monitoring system components for operability and performance, an annual requirement should be put in place that exercises the assessment and

response portions of the physical protection systems including an invitation to the LLEA to participate if reasonable to do so.

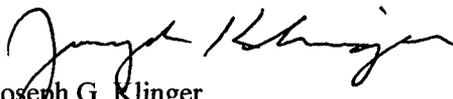
68. Section 37.55 could potentially be eliminated altogether and included under the annual Radiation Protection Program Review in Part 20.1101(c). We are all for eliminating duplicative regulation where it exists. In addition, the annual review should include a requirement for the licensee to summarize those occasions where an unauthorized access resulted in activation of the monitoring and detection systems but the licensee's assessment showed no actual or attempted theft or diversion of radioactive material as such alarms could be indicative of a 'probe' to test or evaluate a licensee's response by a potential intruder. Multiple 'probes' are noteworthy, particularly in advance of scheduled events or activities which would make inviting targets. Such inadvertent alarms events also serve to show if the licensee's detection and assessment capabilities are adequate.
69. Section 37.57 and 37.81 could similarly be included under Part 20 Subpart M for reporting of events to eliminate duplicative regulations. Additional language may be included which specifically indicates the information which must be included in such reports.
70. Section 37.71 states that licensee shall document verification of transferee licenses for 5 years. What should this documentation include (copy of license, name of contact, phone numbers, date, etc).
71. For Section 37.75(a)(2), alternate requirements should be added for those States who will not be providing law enforcement escorts for the licensee to identify the intended LLEA contacts it will use to summon an armed response should there be an actual or attempted theft or diversion of the shipment. Also, for Cat.2 quantities of radioactive material, its is not clear what the NRC's intent is for licensees that are consignee, shipper and consignor as is the case for movement of most industrial radiography sources used in the field. This common situation should be addressed for clarity either by inclusion or exclusion in the rule.
72. In 37.75(b), licensees are required to email or fax arrival times for shipments of cat. 2 materials. NRC REGULATORY ISSUE SUMMARY 2005-31 states that email must be encrypted and faxes must be to an awaiting, known entity. Licensees should be made aware of this restriction.
73. Section 37.79 requires licensees to use companies who use package tracking systems (for cat 2). This should be clarified in that the package should be accounted for and not simply the paperwork is being tracked.
74. Section 37.81 requires notifications regarding lost shipments of category 1 and 2 radioactive material. These notifications should be the same as Part 20 requirements. Notifications should be immediate after discovery, but after initially notifying the LLEA. Immediate notifications to LLEA should also be required for the theft, etc. of these materials and not "as soon as possible" as the rule allows.
75. In Section 37.81(g), routing of additional copies of reports to NSIR should not be the responsibility of the licensee but that of the NRC itself. In addition, the open-ended expectation that "...the report must include sufficient information for NRC analysis and evaluation" must be further explained. The NRC should be able to indicate in more specific terms those elements that are necessary for inclusion in the event report. The NRC is doing a disservice to licensees if it

wishes to claim that such items are difficult or impossible to predict for all cases or would be more fully addressed in guidance.

76. Section 37.81(h) requires licensees to report "additional substantive information" on loss or theft of radioactive material within 30 days to the NRC. Define "substantive information". Also, substantive would indicate a higher priority notification than 30 days.
77. Section 37.101 requires licensees to use authorized personnel to authenticate reproduced records. Specify who is authorized to do so. Is this only the Reviewing Official?

The Agency appreciates the opportunity to comment on this extensive rulemaking. We support NRC's efforts to include these requirements into a comprehensive regulation. However, we are generally disturbed that many of the current security provisions are being abandoned or altered with no observable benefit. Furthermore, there are a number of additional notifications to NRC/AS that, while they accomplish some measure of additional oversight (i.e., aggregation notification, LLEA refusals, temporary jobsites/reciprocity notifications, etc.), they also require an inordinate amount of administration by the licensee and the regulator. Most of these proposals cannot be accomplished at current staffing levels. There must be some real security value achieved for every resource expended. If we may be of any further assistance, feel free to contact Gibb Vinson of my staff at (217) 785-9947.

Sincerely,


Joseph G. Klinger
Interim Director

JGK:CGV:SMK