



MARK B HORTON, MD, MSPH
Director

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

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

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Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Rulemakings and Adjudications Staff

January 21, 2011 (11:30 am)

OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

Subject: Docket ID NRC-2008-0120

To Whom It May Concern:

The California Department of Public Health, Radiologic Health Branch (RHB) appreciates the opportunity to comment on the proposed rulemaking for the Physical Protection of Byproduct Material (75 FR 33902). Our comments on the proposed rulemaking are enclosed. RHB contributed to the comments provided by the Conference of Radiation Control Program Directors (CRCPD), and support the comments provided by CRCPD dated November 23, 2010, as well as the comments submitted by the Organization of Agreement States dated July 8, 2010.

We appreciate the Nuclear Regulatory Commission's efforts in developing regulations governing the use of radioactive materials that are protective of public health and safety. We hope our comments will be of assistance in those efforts. If you desire additional information or clarification of the enclosed comments, please feel free to contact me at 916-440-7942 or by e-mail at gary.butner@cdph.ca.gov, or Robert Greger of my staff at 714-270-0368 or by e-mail at robert.greger@cdph.ca.gov.

Sincerely,

Gary W. Butner, Chief
Radiologic Health Branch
California Department of Public Health

Enclosure:

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Sincerely,

Gary W. Butner, Chief
Radiologic Health Branch
California Department of Public Health

Enclosure:

California Department of Public Health, Radiologic Health Branch
Comments Concerning Proposed Rule for the Physical Protection of Byproduct Material
(75 FR 33902 – Docket ID NRC-2008-0120)

The California Department of Public Health, Radiologic Health Branch (CDPH/RHB) supports the comments made by the Conference of Radiation Control Directors (CRCPD) dated November 23, 2010 and the Organization of Agreement States (OAS) dated July 8, 2010. The following comments are submitted by CDPH/RHB in order to communicate our concerns regarding certain aspects of the proposed rules in augmentation of the comments provided by CRCPD and OAS.

10 CFR 37.23 Access authorization program requirements

We recognize the NRC dilemma concerning the proposed requirement for unescorted access to category 1 or 2 radioactive materials, or access to safeguards information, by reviewing officials in order to be able to require reviewing officials to undergo fingerprinting for FBI identity and criminal history records checks. While we fully support FBI identity and criminal history records checks for reviewing officials, we encourage NRC to explore other alternatives to the proposed regulatory language. If no reasonable alternative can be found, we strongly encourage NRC to zealously pursue the statutory change action referenced in 75 FR 33902, and to initiate appropriate regulatory language changes to address the problems identified in the CRCPD and OAS comments as soon as the statutory change action is successful.

A second troublesome aspect of this proposed regulatory section addresses the methodology for approval of reviewing officials. As we understand the methodology that is proposed, NRC would receive nominations and fingerprints of proposed reviewing officials from licensees after the licensee has performed the background investigations specified in 10 CFR 37.25(a)(2) through (a)(9), then NRC would submit the fingerprints to FBI, and finally NRC or the Agreement State with jurisdiction would review the FBI identification and criminal history records check information in order to determine if the nominated individual(s) will be approved by NRC (or the Agreement State) to perform the reviewing official duties. We were unable to identify any clear criteria in either 75 FR 33902 or in the proposed Implementation Guidance, on which the NRC or Agreement State would base their approval/disapproval. We were also unable to clearly understand how the licensee would comply with the requirement in 10 CFR 37.25(a)(1) to complete fingerprinting and an FBI identification and criminal history record check for reviewing officials before granting them unescorted access to category 1 or 2 quantities of radioactive material inasmuch as NRC (or the Agreement State) would have the responsibility of reviewing the FBI identification and criminal history records check information, in lieu of the licensee doing so.

We recommend that the FBI identification and criminal history information continue to be sent to licensees, as is currently done under the Fingerprinting Order, and that licensees evaluate that information in formulating their selection of their reviewing official(s), thereby complying with the requirement in proposed 19 CFR 37.25(a)(1). Then, either remove NRC and the Agreement

States from the approval process for the reviewing official, or if NRC and the Agreement States are to be required to approve reviewing officials, provide clear criteria for such approval. Without such clear approval criteria, CDPH/RHB would be legally prohibited from implementing this aspect of the proposed rule by California Government Code 11340.5 subsection (a).

California law does provide authority for CDPH to conduct reviews of nominated reviewing officials' criminal history records as long as the acceptance criteria to be used in such reviews are clearly articulated. California law also provides authority to require fingerprinting for the FBI identification and criminal records check, and to require a credit history check.

10 CFR 37.33 Access authorization program review

We note that there are significantly more criteria in the proposed rule for the annual security program review than exist in 10 CFR 20.1101 for the annual radiation protection program review. The differences could lead one to conclude that the annual security program review is more important than the annual radiation protection program review for the safe operation of licensee radioactive materials programs. We recommend that the regulatory wording for the two program annual reviews be more consistent.

10 CFR 37.43 General security program requirements

Subsection (d)(8) of 10 CFR 37.43 references the requirements of 10 CFR 73 pertaining to protection of safeguards information-modified for certain licensees impacted by the proposed rule, as does the proposed implementation guidance in Q&A #11. Under the Orders, NRC retained authority to regulate these licensees under NRC's common defense and security statutory authority, even though many of these licensees are located in Agreement States. However, inasmuch as the proposed rule is to be issued under NRC's public health and safety statutory authority, NRC would presumably relinquish its regulatory authority over these licensees to Agreement States for purposes of the proposed rule (except for research and test reactors).

This would create a new requirement on the part of Agreement States for additional security protection of information pertaining to these licensees, which would create significant administrative problems for CDPH/RHB. However, inasmuch as the proposed rule is being issued under NRC's public health and safety statutory authority, it may not be necessary to retain the safeguards information-modified security classification for information pertaining to these licensees.

We recommend that NRC re-visit the need to maintain the current safeguards information-modified designation and information protection requirements for the licensees defined in 10 CFR 73 over which NRC would relinquish regulatory authority to the Agreement States. If NRC decides to retain the safeguards information-modified designation and information protection

requirements for these licensees, we recommend that NRC retain regulatory jurisdiction over these licensees for purposes of the proposed rule.

California law does provide authority to impose the information protection requirements in the proposed rule, and also allows for the protection of relevant security information from disclosure in the event of a request under the California Public Records Act.

10 CFR 37.45 LLEA coordination and notification

Concerning the proposed 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 language in 75 FR 33902 and the proposed Implementing Guidance acknowledge the difficulties of licensee adherence to this proposed requirement in certain situations. We recommend that if the proposed rule is retained, that it be modified to require the notification be made within three business days subsequent to beginning work at such temporary job sites, in lieu of three business days prior to beginning work.

This modification should alleviate problems created by the advance notification requirement that have been acknowledged by NRC and are identified in the CRCPD and OAS submittals. It also more closely aligns, from a safety perspective, with the situation where the radioactive materials will not be used for more than seven consecutive calendar days. In the latter case no LLEA notification is required, even though the radioactive materials are used or stored at a temporary jobsite. If no LLEA notification is considered sufficiently safe in the latter case, then delaying the LLEA notification until after arrival at the temporary jobsite but sufficiently before the end of the seven-day period should not be any less safe.

Rulemaking Comments

From: Greger, Robert (CDPH-DFDRS-RHB) [Robert.Greger@cdph.ca.gov]
Sent: Friday, January 21, 2011 11:10 AM
To: Rulemaking Comments
Subject: FW: NRC Part 37 Comments Revised
Attachments: Part 37 Comments Jan 18 2011.doc; NRC Letter - FINAL.pdf

These are the re-formatted comments from the California (Agreement State) radiation control program. Please feel free to give me a call if there are any questions.

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From: "Greger, Robert (CDPH-DFDRS-RHB)" <Robert.Greger@cdph.ca.gov>

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