

Mendiola, Doris

From: Taylor, Barbaraj [Barbaraj.Taylor@dshs.state.tx.us]
Sent: Friday, January 14, 2011 5:07 PM
To: Rulemaking Comments
Subject: Comments on Part 37 Proposed Guidance 1-14-11
Attachments: NRC Comments on Part 37 Proposed Guidance 1-14-11.doc

Barbara J. Taylor, Manager
Radiation Group
Policy, Standards & Quality Assurance
Regulatory Services
Department of State Health Services
512 834-6770 x2010
512 834-6708 fax

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TEXAS DEPARTMENT OF STATE HEALTH SERVICES

DAVID L. LAKEY, M.D.
COMMISSIONER

P.O. Box 149347
Austin, Texas 78714-9347
1-888-963-7111
TTY: 1-800-735-2989
www.dshs.state.tx.us

January 14, 2011

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, D.C. 20555

Re: Docket ID NRC-2008-0120 Opportunity to Comment on Proposed Rule to Amend 10 CFR Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71 and 73 - Physical Protection of Byproduct Material (FSME-10-048)

EXTENSION OF COMMENT PERIOD ON PROPOSED RULE TO AMEND 10 CFR PARTS 30, 32, 33, 34, 35, 36, 37, 39, 51, 71, and 73 – PHYSICAL PROTECTION OF BYPRODUCT MATERIAL (FSME-10-086)

Dear Ms. Piccone:

Below are comments regarding the proposed implementing guidance.

Subpart B Page 18

Q5: Can the access authorization program requirements be avoided if there are alternative physical controls or alternative administrative controls and training?

A5: No. The Part 37 requirements are designed to provide a defense in depth strategy for the security of radioactive material in quantities of concern. No single measure can provide the same level of protection as all security measures, in total. Therefore, each of the Part 37 requirements must be implemented.

This will affect the gauge licensees who bypassed ICs by not co-locating. Seems this may require them to have an access authorization program. Question 5 seems to reiterate that non-co-location is not sufficient anymore. See also comment to Subpart C, Q2 page 103.

Subpart B Page 27

Q5: How does a licensee name an individual to be a reviewing official?

A5: Licensees need to nominate one or more individuals to be a reviewing official and submit their fingerprints to the NRC. Reviewing officials must be permitted either access to safeguards information or unescorted access to category 1 or category 2 quantities of radioactive material. The fingerprints of the nominated individual(s) need to be taken by either a law enforcement agency, a Federal or State agency that provides fingerprinting services to the public, or a commercial fingerprinting service authorized by a State to take fingerprints. Before sending the nominated individual's fingerprints to the NRC, the licensee needs to conduct the rest of the elements of the background investigation. The licensee should submit one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ) for the individual nominated to be the reviewing official and who requires unescorted access to radioactive materials. The fingerprint card should be submitted to the NRC at...

The background investigation and approval as a Reviewing Official would certainly allow the individual unescorted access, but why must the licensee be required to GRANT them unescorted access. Couldn't company procedure be used to limit access as necessary for those with a need? While HR could perform all the functions of a Reviewing Official, they would not necessarily have a need for unescorted access even though they could be allowed based on all the requirements being met. This answer seems to imply that the NRC is requiring them to be granted unescorted access which counter to ALARA.

Subpart B Page 28 & 29

Q8: Why must reviewing officials have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information?

A8 The NRC believes that it is important that the individual who is making the final determination of trustworthiness and reliability for others be trustworthy and reliable themselves and have undergone the same background investigation as individuals who would be granted unescorted access, including fingerprinting and the FBI criminal records check. If the reviewing official is not fingerprinted, a gap could be created in the security program that could potentially be exploited. The NRC's Atomic Energy Act authority to collect fingerprints only applies to individuals that have unescorted access to radioactive material or access to SGI. The reviewing official must therefore have access to radioactive material or SGI for the NRC or the Agreement State to be able to require the collection of their fingerprints for submittal to NRC for processing.

This argument is based on circular thinking, just because someone has been required to undergo all the requirements doesn't mean they have to be granted access. Company policy should be allowed to provide for the access based on need. NRC's approval includes unescorted access per their legislative requirements, but nothing in legislation prevents the company from practicing ALARA or choosing the most appropriate individuals to nominate as ROs.

Subpart B Page 30

Q1: When can a reviewing official make trustworthiness and reliability determinations to permit unescorted access by employees?

A1: Only after the reviewing official has been approved by NRC or an Agreement State can he or she make trustworthiness and reliability determinations for any employee who requires unescorted access.

So there will be a period of time when normal operations will be rendered inoperable while waiting for NRC/Agreement State to approve the RO even though there is a record of safe and secure operations during the TRO era?

Subpart B Page 38

Q10: Does the denial of unescorted access create legal liability for the licensee?

A10: A denial of unescorted access authorization is not a denial of employment. The applicant may still work in areas of the facility outside of security zones, or perform escorted work within the facility. A denial only prevents the employee from having unescorted access to Category 1 and Category 2 quantities of material.

This is a specious argument, if an individual was hired to perform a particular job which included unescorted access, few companies would be able to keep someone on staff if they could not perform the job for which they had been hired. The answer really ought to include information useful to the licensees. If this question is to be included it really ought to contain some information to licensees regarding suggestions on how to legally hire or offer employment predicated on successfully completing the T&R process.

Subpart B Page 39

Q14: Are there any other sources of information that a licensee should check before making a final determination on an individual?

A14: The licensee should check the NRC's list of escalated enforcement actions issued to individuals. The list includes individuals that are prohibited from working with radioactive materials. This listing can be found on the NRC's website at: <http://www.nrc.gov/readingrm/doc-collections/enforcement/actions/individuals/>.

If this is a requirement, why is it not in the regulation?

Subpart B Page 53

Q1: What is the purpose of the credit history evaluation?

A1: The full credit history evaluation reflects the NRC's intent that all financial information available through credit reporting agencies must be obtained and evaluated as part of the trustworthiness and reliability evaluation. The credit history report provides insight into the financial stability of an individual. An individual with a poor credit history may be coerced into participating in a malicious act.

Define "poor credit history" and how a licensee may use this to see a potential for a security issue.

Subpart C Page 103

Q2: What must a licensee's security plan address?

A2: "... For those licensees that don't have aggregated quantities, the security plan should indicate how the licensee will ensure that the material remains unaggregated..."

This statement makes it appear that licensees who fall under Increased Controls only when their sources are aggregated (co-located) are actually required to follow the requirements when they do not actually meet the criteria of the requirements. This appears to be in conflict with the answer to question 1 under 37.43(b)..."A licensee only needs to develop security procedures if it is implementing the security program because it has aggregated quantities that meet or exceed the category 2 threshold.

Subpart C Page 130

EXPLANATION:

Each licensee must coordinate with the LLEA ~~on~~, at a minimum, every 12 months.

Subpart C Page 133

A3 "...In such cases, if the licensee's local client cannot identify the appropriate LLEA with certainty, and a 911 number is not available at the temporary job site, the licensee should seek the advice of the state police. Where there are several agencies with overlapping jurisdictions, such as state police and state or federal park rangers, the licensee should seek to coordinate with the LLEA that can provide an armed response in the shortest time.

As per comments to 37.45, 3 day notification to the LLEA for all temporary job site activities may not be practical. Many job sites (e.g. pipeline work) cross multiple law enforcement jurisdictions, work efforts may be planned "on the fly" due to other work efforts, emergencies or coordination issues. Informing "state police" of every industrial radiography field site activity is not practical or the best use of time for the "state police".

A4: The licensee would be required to notify only those LLEAs in jurisdictions within which the licensee will be operating more than 7 consecutive calendar days. Thus, if the licensee spent one day in each of seven LLEA jurisdictions, for example, the licensee would not be required to notify any of them.

As noted previously determining when/where LLEA jurisdictions change can take more time than will be allowed in order to respond to the need to do the work plus the additional 3 day notice. A job planned to take 5 days ended up taking 10, 3 days notice is impossible. Practicality and the need to maintain work flow must be considered when discussing a business and the effects on the economic viability of a commercial entity.

Josephine Piccone, Director

January 14, 2011

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Subpart C Page 145

Q3: What is an escort's responsibility?

A3: There are no specific requirements other than maintaining line-of-sight surveillance of the escorted individual(s)...

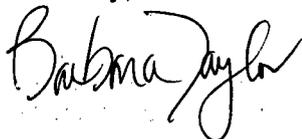
Q5: Can we assume that patients can be granted unescorted access during patient treatments?

A5: No. Patients who are being treated with devices containing category 1 or category 2 quantities of radioactive material are usually escorted, monitored, or frequently observed by an approved individual.

The answers to Q5 and Q3 appear to be in conflict. How can "escorted, monitored, or frequently observed" be considered the same as "line-of-sight surveillance?"

We appreciate the opportunity to comment on the proposed rule and guidance. If you have questions about our comments and concerns, contact Barbara Taylor at BarbaraJ.Taylor@dshs.state.tx.us or 512-834-6770, ext. 2010.

Sincerely,



Barbara Taylor, Manager
Radiation Policy, Standards and Quality Assurance Group
Division of Regulatory Services