Mendiola, Doris

From: Mary Shepherd [sales@jlshepherd.com]
Sent: Monday, January 17, 2011 3:55 PM
To: Rulemaking Comments
Subject: 75 FR 33902, Docket Number 2008-0120
Attachments: 75 FR 33902.pdf

Please find attached the J.L. Shepherd and Associates comments on the Request for Public Comment on the Physical P{rotection of Byproduct Material Proposed Rule, 75 FR 33902, Docket # 2008-0120

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January 17, 2011

Ms. Cindy F. Bladely
Chief, Rules Announcements and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Reference: Request for Public Comment on "Physical Protection of Byproduct Material; Proposed Rule" (75FR33902 and Draft Guidance Document (75FR40756); Docket Number NRC 2008-0120. J. L. Shepherd and Associates 1/17/2011 comments

Dear Ms. Bladely:

J.L. Shepherd and Associates would like to thank the U.S. Nuclear Regulatory Commission for the opportunity to provide comments on the proposed rule and implementation, as referenced above, for the physical protection requirements for Category 1 and 2 radioactive materials. Previously, the proposed rule was implemented by various security orders, so J.L. Shepherd and Associates believes that the consolidation or codification of these orders will lead to more cohesive compliance. However; it is J.L. Shepherd and Associates opinion that that the proposed rules should only address existing orders and that there be additional stakeholder involvement in the areas of the proposed rule which go beyond current security orders, based upon further risk assessment, as not all licensees fit the same criteria.

The basis for the proposed enhancements seems uncertain, as it does not seem that additional vulnerability assessments have been performed and that there has been a significant threat level change to require these additional enhancements. It does not appear that there is a "graded approach" to these enhancements, which would be excessively rigid for the variety of licensees who would be subject to this proposed rule; which is we would ask that areas beyond existing orders be subject to additional stakeholder involvement.

We believe that some areas are as follows.

36.23 Reviewing Official.

The proposed rule requires that the reviewing official must have access to radioactive materials and go through a fingerprinting and criminal history records check by the FBI, to be reviewed by the responsible regulatory agency. In many instances, the reviewing official is a person in human resources, who does not need access to radioactive materials.

As a fingerprint check is the basis for a regulatory official revue, it may not contain sufficient information for reviewing official approval. J.L. Shepherd and Associates would like to suggest that a the NRC consider working with the FBI to develop a program modeled after the present Centers for Disease Control (CDC), where the federal government conducts background checks for individuals with access to select agents. The requirement that reviewing officials cannot approve other reviewing officials, but can approve access to radioactive materials seems to be contraindicative. If the intent is for a list of reviewing officials, then the CDC model would be effective. There is no information on what determines "disqualifying" information, so this should be defined or removed.

37.5 Definitions "Safe Haven" during transportation.

The "Safe Haven" provision is not implemental. J.L. Shepherd and Associates has had discussions with military and other federal institutions which could be considered "Safe Havens", which would not permit radioactive materials shipments to be diverted to them under any circumstance. It is our suggestion that "Safe Havens" be contacted, confirmed and identified in advance before the final rule is issued.

37.45 LLEA coordination and notification.

The proposed rule adds interactions between licensees and LLEA's. It places the licensee in a responsible position for actions it cannot control. For example, there would seem to be local and federal legal implications for either a local police department of local FBI to notify a licensee that their response capabilities are degraded. It also seems that the NRC is imposing regulatory requirements on law enforcement, local or federal, to comply with licensee requirements, which for liability reasons; many LLEA's may not be willing or able to comply with. Regarding advanced notifications to LLEA's, until such time as a comprehensive and real time updated list is available to licensees, this requirement is unworkable for the licensee, as many jurisdictions have multiple LLEA's. If the job site is a licensee, they have already made contact with their LLEA's and should remain the primary LLEA contact. If the jobsite is not a licensee a call to 911 in the event of emergency should be sufficient. The Department of Transportation has an outreach training program for local LLEA's for transportation incident response and it seems as if a federal outreach training program to LLEA's for incident response for radioactive materials incident response would be appropriate.

37.25 Background Investigations.

This rule substantively expands the existing background checks, with an increased cost burden to licensees without apparent benefit. It adds the verification of true identity, military history, local criminal history and credit check. Employers already perform an I-9 or E-verify for employees, but not in the case of students at Universities. Military history verification can be a lengthy and sometimes a difficult process, dependent upon the quality and availability of records from the Department of Veteran's Affairs (which is more difficult for Korean and Viet Nam era veterans), and licensee compliance would be based upon cooperation from another federal agency. Credit checks are dependent upon which credit agency is contacted, and can be either contradictory or inaccurate in this age of identity theft. In this present economic climate of high unemployment rates and home foreclosures, many individual's credit histories have been negatively impacted, without this person becoming security compromised. It should be noted that many individuals with access to sensitive information, whether regulatory, legislative or law enforcement can lose their homes, but do not lose access to information, and are not considered security risks, so the addition of a credit check for access to radioactive materials as a security measure is unclear. Concerning local criminal history checks, if a person is subjected to a national criminal history check through the FBI, a local criminal history check seems redundant. Additional guidance is needed as an individual may reside within multiple local agencies; i.e. state, city, or county.

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37.51 Maintenance, testing and calibration.

This section needs amplification; it is not clear what is expected for compliance.

37.47 Security Zones.

It is unclear where a NRC security zone at a licensee site and a DOT security zone for transport takes effect for shipment leaving a facility. Preplanning and coordination of shipment of Category 1 or Category 2 quantities of radioactive material.

37.71 Physical Protection in Transit

The proposed rule to verify physical addresses prior to shipment could be difficult for shipment to broad scope licensees who may not have individual building addresses on their licenses, resulting in compliance issues.

37.75 Preplanning and coordination

Preplanning and coordination of a Category 1 shipment with a governor's office would complicate shipping and has the potential to run afoul of federal interstate regulation, should a shipment be denied. Additionally, per current orders, the first responder coordinators for the State are already notified for Category 1 and 2 shipments, who would notify the Governor's office in case of transportation incident. If the Governor or designee requires advanced notification of a shipment, this could be accomplished through the NRC's operations center. Concerning State logging into a carrier's tracking system for a Category 1 shipment, there are multiple tracking systems in existence and denial of a shipment through a state due to tracking system incompatibility, could result in incompatibility with federal interstate transportation laws/

37.75 "No Later Than Arrival Time" or N-L-T.

J.L. Shepherd and Associates believes that a N-L-T should permit a 24 hour maximum time to account for normal transit delays and that the N-L-T should be adjustable for weather conditions, vehicle breakdowns or re-routing or shipment delay due to security concerns enroute.

Additional comments.

Benefits not justified by costs.

The NRC estimated in the Draft Regulatory Analysis for the proposed rule seems to indicate that "there are no quantifiable values (i.e. benefits) associated with the rule" and that benefits are essentially identical to the regulations in place. In J.L. Shepherd and Associates opinion, there are very significant additional costs to be borne by the licensees (perhaps more than annual license fees) with these proposed additional requirements, without a quantitative risk assessment. These additional costs would be passed on to end consumers and have a direct effect on the costs to public health and safety; especially in the medial research and health care areas. The additional cost burden can cause some licensees to remove their irradiators from service; J.L. Shepherd and Associates has been involved in the removal of over a dozen irradiators in 2010, caused in part for these additional cost burdens for compliance.

Reporting Suspicious Activities.

The reports of suspicious activities to LLEA and/or the NRC is being reported; however due to the subjective nature of this type reporting, the enforceability in regulations of records retention is unduly burdensome on the licensee. Due to the clandestine nature of reporting suspicious activities to LLEA's, the licensee may not have LLEA's or NRC's fluid responses to these reports, for security reasons. Also due to the clandestine nature regarding the reporting of suspicious activities, ongoing investigations can encompass years, so the recordkeeping requirement is inconsistent, and can be inconsistent with other recordkeeping requirements depending on the incident nature of the reporting.

Sincerely yours,

Mary F. Shepherd

Mary F. Shepherd
Vice President
J.L. Shepherd and Associates