

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150–AI25

[NRC-2008-0619]

Requirements for Fingerprint-Based Criminal History Records Checks

for Individuals Seeking Unescorted Access to Nonpower Reactors (Research or Test Reactors)

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to require nonpower reactor (NPR)<sup>1</sup> licensees to obtain fingerprint-based criminal history records checks before granting any individual unescorted access to their facilities. This action complies with the requirements of Section 652 of the Energy Policy Act of 2005 (EPAAct) which amended Section 149 of the Atomic Energy Act of 1954, as amended (AEA), to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records checks of individuals permitted unescorted access to a utilization facility.

**DATES:** This rule is effective **[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You can access publicly available documents related to this rulemaking using

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<sup>1</sup> Note: All currently licensed research and test reactors (RTR) are nonpower reactors. NRC regulations consider all RTRs a subset of nonpower reactors (NPRs). NPRs are defined in 10 CFR Part 50.2 and include utilization facilities licensed under Atomic Energy Act (AEA) Section 103 and 104. The use of the term NPR in place of RTR properly incorporates all Class 103 and Class 104 licensees defined in §§ 50.21, and 50.22 as utilization facilities, although there are currently no NPR licensees that are not RTRs. Therefore, the use of the term NPRs includes RTRs in this and all related rulemaking documents.

the following methods:

- **NRC's Public Document Room (PDR):** The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are electronically online at the NRC's library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov).
- **Federal rulemaking Web site:** Public comments and supporting materials related to this final rule can be found at <http://www.regulations.gov> by searching on Docket ID: **NRC-2008-0619**. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668; e-mail: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

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### **I. Background**

Before the terrorist actions of September 11, 2001, the NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 73.60, and 10 CFR 73.67 imposed physical protection requirements on NPRs that included measures for storing and using special nuclear material in controlled access areas, monitoring the controlled access areas for unauthorized activities, and ensuring a response to all unauthorized activities to protect special nuclear material (SNM) from theft or diversion. Subsequent to September 11, 2001, the NRC evaluated

the adequacy of security at NPRs and considered whether additional actions should be taken to help ensure the trustworthiness and reliability of individuals with unescorted access to licensees' facilities. The NPRs were advised to consider taking immediate additional precautions, including observation of activities within their facility. Several NPRs have implemented additional security measures. The NRC evaluated these additional measures at each facility during the remainder of 2001.

From 2002 through 2004, the NPRs voluntarily implemented compensatory measures that included site-specific background investigations for individuals granted unescorted access to their facility. Depending on local restrictions, such as university rules, some of these background investigations included provisions for FBI fingerprint-based criminal history records checks, while checks at other NPRs include provisions for local or State law enforcement fingerprint-based criminal history records checks. Investigations at some NPRs did not include any fingerprinting. The NRC has also conducted security assessments at certain NPRs which helped to identify risk-significant areas and materials.

Section 652 of the EPAAct, enacted on August 8, 2005, amended Section 149 of the AEA to require fingerprinting and FBI identification and criminal history records checks for individuals "permitted unescorted access to a utilization facility." NPRs are included within the definition of what constitutes a utilization facility. Therefore, consistent with the requirement set forth in Section 149 of the AEA, any person granted unescorted access to an NPR must be fingerprinted and have those fingerprints submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check.

In SECY-05-0201, "Implementation of the Energy Policy Act of 2005," dated October 31, 2005, the NRC staff informed the Commission of its plan for implementing the NRC's responsibilities under the EPAAct. The Commission approved the staff's

recommendations in a Staff Requirements Memorandum (SRM) dated January 5, 2006, and directed the staff to recommend appropriate interim regulatory actions that the NRC should implement while it developed the generic requirements for granting unescorted access, including the provisions in Section 652 of the EAct pertaining to fingerprinting.

In SECY-07-0011, “Interim Implementation of Fingerprinting Requirements in Section 652 of the Energy Policy Act of 2005,” dated January 12, 2007, the NRC staff provided information and recommendations to the Commission on its EAct interim implementation plan. In an SRM dated March 12, 2007, the Commission directed the NRC staff to expeditiously develop a definition of “unescorted access” that would apply to NPR licensees and issue orders to NPR licensees requiring fingerprinting for individuals that fall within this definition. In order to ensure compliance with Section 104c of the AEA, the NRC staff was directed to impose only the minimum amount of regulation needed for NPR licensees. The Commission also directed the NRC staff to proceed with a rulemaking to determine if additional personnel should be fingerprinted.

In response to the Commission’s January 12, 2007, directive, the NRC imposed fingerprinting requirements for unescorted access to special nuclear material on the applicable NPR licensees by order (Order EA-07-074, “Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors” (72 FR 25337; May 4, 2007), and Order EA-07-098, “Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics’ Research and Test Reactors” (72 FR 44590; August 8, 2007)). The ADAMS Accession Numbers for these documents are ML070750140 and ML072050494, respectively. Specifically, the orders state that:

An individual who is granted “unescorted access” could exercise physical control over the special nuclear material possessed by the licensee, which would be of significance to the common defense and security or would adversely affect the health and safety of the public, such that the special nuclear material could be used or removed in an unauthorized manner without detection, assessment, or response by systems or persons designated to detect, assess or respond to such unauthorized use or removal.

In implementing the requirement of the EPAAct on an interim basis, the orders were issued requiring fingerprinting only for individuals with unescorted access to risk-significant materials (e.g., fuel), within the research and test reactor facilities. Licensees were required to submit fingerprints of individuals who were seeking or currently had unescorted access. Individuals who had previously been subjected to fingerprinting that would satisfy the requirements for unescorted access (e.g., access to safeguards information (SGI)) did not need to be fingerprinted again. These orders required that a reviewing official consider the information received from the FBI in conjunction with the other requirements for unescorted access to determine whether an individual may be granted or allowed continued unescorted access. The reviewing official was allowed to be the same official previously approved by the NRC for the SGI order (Order EA-06-203, “Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access to Safeguards Information,” dated September 29, 2006; ADAMS Accession No. ML061510049) that implemented the EPAAct fingerprinting and criminal history records check requirements for individuals who seek access to SGI.<sup>2</sup> The order provided that an NRC-approved reviewing official was the only individual who could make the unescorted access determination.

### **Advance Notice of Proposed Rulemaking (ANPR) and Proposed Rule**

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<sup>2</sup> The Safeguards Information orders were incorporated into 10 CFR Part 73 on Oct 24, 2008 (73 FR 63546).

On April 14, 2009 (74 FR 17115), the NRC published an ANPR to obtain stakeholder views on the issues associated with the proposal to require fingerprinting for criminal history records checks of individuals permitted unescorted access to NPRs. The ANPR indicated that the NRC was beginning the process of establishing generic requirements for NPR licensees to obtain fingerprints for criminal history records checks of individuals granted unescorted access to their facilities. The ANPR was intended to inform external stakeholders of the options the NRC was considering for implementing the fingerprinting requirements for NPR licensees as a proposed rule. The ANPR provided interested stakeholders an opportunity to comment on the options under consideration by the NRC. The NRC developed a proposed rule based on the feedback received on the ANPR and published the proposed rule on July 20, 2010 (75 FR 42000).

## **II. Public Comments on Proposed Rule**

The public comment period for the proposed rule closed on October 4, 2010. In response to a stakeholder's request, the Commission directed the staff to reopen the public comment period. On December 20, 2010, the public comment period reopened (75 FR 79312) and subsequently closed on January 31, 2011. The NRC received six comment letters in response to its solicitation during the first period and eleven comment letters during the reopened comment period. Many of the comments in these letters raised similar issues. A total of seventeen issues were identified, the majority of which were regarding differences from the 2007 NRC-issued orders, material criteria requirements, and area criteria requirements. The following is a summary of the public comments received and the NRC responses.

### ***General Comments Received During First Public Comment Period***

*Comment:* Several commenters expressed the view that existing NRC security orders as implemented and inspected at their facilities are workable and acceptable to codify. They stated that the wording of the proposed rule meets the principle of codifying the existing orders. However, these commenters further stated that the proposed wording goes beyond the scope of the existing orders without adequate justification. According to the commenters, “The proposed rule does not adequately justify the expansion of requirements based on risk (risk informed) or performance issues (performance based) and, therefore, does not meet the staff’s publicly stated basis for expanding regulatory requirements.”

The commenter further stated the expansion of the requirements in the proposed rule is counter to previously issued NRC documents assessing the risk and security of NPRs operated under the existing security orders and the cited Section 104c of the AEA provision on minimum regulation. “By stated policy and statute the NRC seeks, wherever possible, to establish ‘risk-informed regulation’ and to ‘impose only such minimum amount of regulation.’ This new regulation does not seem in keeping with those goals.”

Of particular concern to the commenters is the removal of “public health and safety” and “common defense and security” significance from the requirements for protection of SNM. They stated that the original orders implemented security enhancements (fingerprinting and background checks) to protect SNM of “significance to the common defense and security” or that would “adversely affect the health and safety of the public.” The comment reiterated a previous comment made in response to NRC’s Advance Notice of Proposed Rulemaking (74 FR 17115, April 14, 2009), that the existing security orders as implemented and inspected at NPR facilities were adequate and acceptable. Any codification should reflect the existing orders and should not impose new requirements or definitions.

*NRC Response:* The NRC agrees that the wording of the final rule does not capture the wording of the NRC security orders verbatim. However, the NRC does not agree that failure to capture the wording of the orders verbatim constitutes an expansion of the orders' requirements. The NRC believes that the language of the final rule captures both the intent and the requirements of the security orders and does not constitute an expansion of the requirements with respect to SNM. "SNM," as used in the final rule language, maintains the same functional effect of the existing security orders' language and should be understood to be of such quantity and/or enrichment to be significant to the public health and safety and to the common defense and security.

Furthermore, the NRC does not agree that the requirements imposed by the final rule are inconsistent with previously issued NRC documents assessing the risk and security of NPRs or with Section 104c of the AEA. The NRC recognizes that the radiological risk posed by NPRs is relatively low and that this low risk informs the physical security requirements at NPRs. The NRC believes that the final rule presents a framework that minimizes the impact on NPR licensees, consistent with the "minimal regulation" requirement of the AEA by identifying specific, risk-significant areas within NPR facilities that satisfy the statutory requirement to fingerprint all persons seeking unescorted access to utilization facilities. The final rule fingerprints as few people as possible while still fulfilling the statutory requirement set forth in Section 149 of the AEA.

No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that the original orders implemented security enhancements (fingerprinting and background checks) to prevent unauthorized use or removal of significant SNM "without detection, assessment, or response by systems or persons." The

proposed rule removes this detection and response concept and requires fingerprinting and background checks for individuals who are granted access to an “area,” regardless of whether such access would allow unauthorized use or removal without detection, assessment, or response. The removal of the “detection, assessment, or response” language is not consistent with the background discussion of the issue in the proposed rule (75 FR 42003) which states the rule would make use of this clause and flexibility.

*NRC Response:* The NRC agrees that the “detection, assessment, or response” language is not in the final rule. The purpose of this rulemaking is to establish requirements for fingerprinting those individuals seeking unescorted access to NPRs. The NRC believes that any individuals with unescorted access to SNM of such quantity and/or enrichment to be significant to the public health and safety and to the common defense and security or with unescorted access to vital areas at an NPR should be fingerprinted. The NRC believes this requirement to fingerprint for unescorted access to NPRs should be independent from the licensees’ ability to “detect, assess, or respond” to an unauthorized removal of SNM. Furthermore, the NRC notes that there are existing detection, assessment, and response requirements set forth in 10 CFR 73.60 and 73.67. Elimination of the “detection, assess, and respond” language in the final rule does not mean that licensees are no longer required to comply with existing detection, assessment, or response requirement. No changes to the rule language were made as a result of this comment.

*Comment:* Another commenter observed that the statements of consideration for the proposed rule states, “...the provisions in this proposed rule are constructed to provide flexibility, providing both an ‘area’ criterion (unescorted access to vital areas) and a ‘material’ criterion (unescorted access to SNM).” However, the proposed rule could be interpreted such

that licensees would have to satisfy fingerprinting requirements for any personnel that would have access to vital areas or to materials. This could have the unintended result that licensees would have to meet both area and material criteria, which is at odds with the stated intention of providing flexibility. The commenter believes that the original 2007 NRC-issued security order wording should be used in Section 73.57(g)(2)(ii).

*NRC Response:* The NRC agrees that the final rule will require licensees to comply with both vital area and SNM criteria when determining who needs to be fingerprinted when granted unescorted access to an NPR. The intent of the 2007 NRC-issued security orders was to enhance security at NPRs. The 2007 security orders limited fingerprinting for unescorted access at NPRs to a material criterion, with the understanding that the rulemaking process would evaluate additional fingerprinting requirements, including consideration of risk-significant areas. The NRC believes that inclusion of a vital area criterion in the final rule language is necessary to ensure adequate protection at NPRs.

However, the NRC believes that few NPRs will be affected by the vital area criterion because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because those licensee personnel requiring unescorted access to vital areas will also likely require unescorted access to SNM or access to SGI (both of which already require fingerprinting).

The NRC believes that licensees will have flexibility in implementing the vital area criterion of this rule. Licensees are responsible for determining which equipment and areas within their facilities, if any, are vital, provided that licensees clearly document how they arrive at that determination, using the definitions of vital area and vital equipment in Section 73.2. No changes to rule language were made in response to this comment.

*Comment:* Several commenters were concerned with the addition of the term *vital area*. They stated that Section 73.57(g)(2)(i) of the proposed rule, “adds a new requirement to establish, define and control unescorted access to *vital areas* defined per Section 73.2. The need for this additional regulation was not adequately justified in the proposed rule basis when it stated the new rule uses definitions that already apply to all provisions within 10 CFR Part 73 and accordingly apply to RTR [NPR] licensees whose security requirements are governed by 10 CFR Part 73...”

The commenter asserts that just because Section 149 of the AEA provides the Commission authority to establish regulation (for fingerprinting and criminal history checks), that does not in itself justify the need for specific regulatory expansion. The recommendation is to remove the requirement for NPRs to evaluate for *vital areas* as currently defined in Section 73.2 for power reactors. The commenters stated that current definitions for unescorted access placed by the NRC security order and defended by the staff as acceptable should be maintained or adequate justification through analysis should be provided supporting the need for additional regulation of *vital areas*.

*NRC Response:* The NRC agrees that the term “vital area” did not appear in the 2007 NRC-issued orders. However, the NRC disagrees that the inclusion of the vital area in the final rule language is a new requirement in itself. The term “vital area” is defined in Section 73.2 as “any area which contains vital equipment.” “Vital equipment,” in turn, is defined in Section 73.2 as “any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation. Equipment or systems which would be required to protect public health and safety following such failure, destruction, or releases are also considered to be vital.”

The vital area concept is applicable to all utilization facilities, including NPRs. NPRs that have a vital area are required to protect them in accordance with the requirements set for in Part 73. The only new requirement that the final rule imposes on NPR licensees that have a vital area, is to fingerprint those individuals seeking unescorted access to these areas. This is consistent with the statutory requirement set forth in Section 149 of the AEA to fingerprint those individual granted unescorted access to a utilization facility.

The NRC disagrees with the comment that the amended Section 149 of the AEA does not in itself justify the need for specific regulatory expansion. However, the NRC believes that the impact of the vital area criterion will be minimal because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because few licensee personnel will require unescorted access to vital areas that do not require unescorted access to SNM or to SGI. In the development of this rulemaking, the NRC re-evaluated whether an area criterion, as applied to the requirements of fingerprinting individuals seeking unescorted access to the facility, is required to ensure that the fingerprinting requirements in Section 149 of the AEA are properly and completely implemented for NPRs. The rule bifurcates the fingerprint requirement for “access to a utilization facility” into two criteria which the rule terms “SNM” and “vital area” – both of which licensees must comply with by the implementation date of this rule. The NRC made an affirmative determination that both a material criterion and an area criterion are required to implement the statutory requirements of Section 149 of the AEA for NPR facilities.

*Comment:* One commenter stated, “...the [statements of consideration] for the section [Section73.57(g)(2)(i)] indicates a significant burden for licensees when it states,

'...implementation of this proposed revision may involve a significant amount of interpretation on the part of [NPR] licensees, the NRC expects that [NPR] licensees would have clear documentation to support their decisions. (75 FR 42008)'"

*NRC Response:* The NRC disagrees with the comment that a significant burden will be placed on licensees. The NRC believes that the final rule language is clear and will not require significant interpretation beyond that provided in the statements of consideration. The purpose of including well-defined area and material criteria is to lessen the need for licensees to interpret when fingerprinting is required. Furthermore, the NRC does not believe that requiring licensees to document their access authorization determinations poses an undue burden.

*Comment:* Another commenter referenced the NRC's assertion in the proposed rule which stated, "The equipment, systems, devices, and material that fall within Section 73.2 vital equipment definition meet the utilization facility definition in Section 11.cc of the AEA. Hence, fingerprinting individuals who wish to have unescorted access to vital areas is ensuring that individuals permitted access to the 'utilization facility,' as defined in the AEA, is properly implemented in the NRC's regulations." The commenter expressed the view that this statement implies every piece of equipment and all materials within a "utilization facility" (i.e. a 10 CFR 50 licensed nuclear reactor facility) are considered vital rather than specific areas or equipment. The commenter stated that this statement is "grossly incorrect" and; therefore, any subsequent conclusions that this statement intended to support should be considered questionable. The Section 73.2 definition of vital equipment applied at the National Institute of Standards and Technology Center of Neutron Research bounds the limiting Maximum Hypothetical Accident (MHA) to protect the health and safety of the general public and the protection of SNM in quantities significant to the common defense and security. Vital equipment or areas have been

defined and explained in the NRC-approved Physical Security Plan and reviewed for adequacy and correctness within NRC-sponsored Physical Security Assessments for the National Bureau of Standards Reactor. The definition of vital area and vital equipment as applied has been reviewed under the current threat environment by the NRC so there should be no requirement or expectation for NPR licensees to provide additional “clear documentation to support their decisions” under the proposed rule.

*NRC Response:* The NRC agrees that not every piece of equipment within a NPR meets the definition of vital equipment contained within a vital area. As noted above, the terms “vital equipment” and “vital area” have specific definitions within Part 73. The NRC established the vital area and SNM criteria for this rule as a means to define the specific areas for which individuals must be fingerprinted when seeking unescorted access to a NPR. Many NPR facilities are located within classroom or laboratory buildings with no clear demarcation between the reactor facility and unrelated areas. Therefore, many persons pass through the buildings housing NPR facilities who are not affiliated with the reactor itself. Instead of requiring fingerprinting for every person entering the building that houses the reactor facility, the NRC believes that the use of the vital area and SNM criteria to determine which personnel must get fingerprinted fulfills the statutory requirement of Section 149 of the AEA. No changes to the rule language were made as a result of this comment.

*Comment:* Another commenter expressed the view that phrasing of the proposed language in Section 73.57(g)(1) that states: “No person shall be permitted unescorted access to a nonpower reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on...” could result in the misinterpretation that fingerprinting requirements must be met for access to any part of a nonpower reactor

facility, which is not the stated intention of the proposed rule. Such a misinterpretation might be avoided by stating that: “No person shall be permitted unescorted access *at* a nonpower reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on...”

*NRC Response:* The NRC disagrees with this comment. Paragraph g(2) of the rule identifies specific areas within the NPR facility, unescorted access to which requires a FBI fingerprint-based criminal history records check. The NRC believes that the inclusion of area and material criteria makes it clear when licensees must fingerprint individuals seeking unescorted access to the NPR. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter recommended that in addition to specifying the requirements in accordance with NRC order EA-07-074, the rule could state: “...licensees *may* specify vital areas for which fingerprinting requirements must be met to ensure that those without unescorted access could not exercise physical control over materials.”

*NRC Response:* The NRC disagrees with this comment. The NRC believes requiring fingerprint-based criminal history records checks for those seeking unescorted access to vital areas, as defined in 10 CFR 73.2, is critical in fulfilling the statutory requirements of Section 149 of the AEA. Use of the phrase recommended by the commenter does not convey the appropriate obligation of licensees to implement the requirements of the final rule. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters expressed the view that Section 73.57(b)(2)(i) appears subordinate and redundant to 10 CFR 73.61. They believe that 10 CFR 73.61 should be updated and referenced as opposed to adding new exceptions in Section 73.57.

*NRC Response:* The NRC disagrees with the comment. The Commission previously addressed this topic on February 2, 2007 (72 FR 4948), in the 10 CFR 73.61 rulemaking, "Relief From Fingerprinting and Criminal History Records Checks." Although similar, Section 73.61 provides relief from fingerprinting requirements for certain categories of individuals considered trustworthy and reliable to permit unescorted access to radioactive material or other property. Paragraph(b)(2)(i) of Section 73.57 offers similar relief for unescorted access to utilization facilities or SGI. This rule is specific to nonpower reactors and is best contained in a single section of Part 73 (i.e., Section 73.57). No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that in public meetings, stakeholders have requested relief from the requirement that the only basis for unescorted access is fingerprints submitted through the NRC to the Attorney General; instead of allowing for other mechanisms to achieve the same end of providing criminal history check from the FBI. The NRC has previously stated that this is required by Section 149 of the AEA. While Section 149a does mandate this mechanism, Section 149b states: "The Commission, by rule, may relieve persons from the obligations imposed by this section, under specified terms, conditions, and periods, if the Commission finds that such action is consistent with its obligations to promote the common defense and security and to protect the health and safety of the public." The NRC has made use of this exception in the proposed Section 73.57(b)(2)(i) and in existing Section 73.61. Therefore, the mechanism for relief is within the statute, with the basis that the action

(fingerprint and criminal history checks by other mechanisms) is equivalent to Section 149a and therefore “consistent with its (the NRC's) obligations to promote the common defense and security and to protect the health and safety of the public.”

*NRC Response:* The NRC disagrees with the comment suggestion to the extent that it is asking for alternative methods to those that are set forth in Section 149 of the AEA. The NRC notes that Section 149 requires the Commission to fingerprint any person granted unescorted access to a utilization facility. Section 149.a.(2) of the AEA requires that these fingerprints be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check. The Commission does not have discretion to deviate from this statutory requirement.

The commenter correctly notes that Section 149.b of the AEA allows the Commission to relieve by rule persons from the obligations imposed by Section 149.a of the AEA. The exemptions listed in Section 73.57(b)(2)(i) and in existing Section 73.61 include persons who are considered trustworthy and reliable by virtue of their occupational status and have either already undergone a background or criminal history records checks as a condition of their employment, or are subject to direct oversight by government authorities in their day-to-day job functions. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters expressed the view that the NRC has the authority to waive the fees it charges to process fingerprints and criminal history records checks. They disagreed with a previous NRC response that Section 149 of the AEA “explicitly requires” fees be collected and “the NRC does not have authority to waive the fee” (75 FR 42003). The commenters assert that Section 149e of the AEA states, “The Commission *may* establish and collect fees to process fingerprints and criminal history records under this section,” but it does not require it.

The commenters conclude by stating, “The AEA Chapter 4 also directs the Commission ‘to exercise its powers in a manner to ... insure the continued conduct of ... activities at support research facilities...’ Therefore, waiver of any additional NRC administrative cost in 10 CFR 57(d)(3)(ii) for NPR institutions will promote both the implementation of the proposed rule and the intent of AEA Chapter 4.”

*NRC Response:* The NRC is sensitive to the costs involved in regulation. The fees charged to NPR facilities for fingerprinting are the direct costs incurred from the Department of Justice for fingerprint processing. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that the readability of 10 CFR Part 73 is problematic and gave various suggestions. They stated that 10 CFR Part 73 is a complicated part with many facets that dictate stringent requirements on nuclear power plants. Portions of the regulation are applicable to NPRs. It is a difficult part to navigate and determine applicability. Adding more sections to this rule, using the definitions section of the part and using legalistic language does not meet the intent of Presidential Direction on “Plain Language in Government Writing” or assist the Commission in meeting the AEA direction on minimal regulation of NPRs. Some improvements that could easily be incorporated include: (1) a clear applicability statement (Section 73.57(a)(1)) (this section currently says (in essence) that Section 73.57 is applicable to all licensees engaged in any activity subject to Commission regulation; this does not seem correct and does not promote ease of use of the regulation), (2) clear applicability for each paragraph section, (3) shorter sentences and/or bulleted lists to simplify paragraphs, and (4) less use of references to other sections and/or short description of the section (example Section 73.2 (Definitions) or Section 73.61 (Relief from Fingerprinting)).

*NRC Response:* The NRC agrees with the comment that 10 CFR Part 73 is complicated, and acknowledges that those unfamiliar with the regulations may have some difficulty understanding them. The NRC is willing to provide outreach and education to assist licensees in understanding the final rule. The NRC decided to use Section 73.57 for processing fingerprints so that NPR licensees and future nonpower reactor licensees will have their fingerprints taken, handled, and processed in a manner consistent with other fingerprinting requirements including the NPR fingerprinting orders and the SGI fingerprinting regulations.

From a regulatory standpoint, putting another set of fingerprinting requirements somewhere else in the regulations would be redundant and would further complicate the readability of Part 73. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter supported the rulemaking as written, but expressed that any further regulations in regard to any additional background investigation requirements above and beyond fingerprinting should be left to the individual NPR licensees. The commenter felt that the NPR licensee is in the best position to decide what additional, if any, information is necessary to determine the trustworthiness and reliability of an individual seeking unescorted access and that this is consistent with the NRC's obligation under Section 104c of the AEA to put in place the minimum requirements for NPR licensees.

*NRC Response:* The NRC agrees with this comment. Licensees are responsible for determining the trustworthiness and reliability of persons granted unescorted access to their facilities in accordance with the requirements set forth in NRC regulations. The NRC does not anticipate adding any additional requirements beyond the fingerprinting requirement to NPR licensees at this time. Licensees may decide to review additional information beyond that required by NRC regulations, consistent with applicable Federal and State laws, if the licensee

determines that such information is necessary to make an adequate trustworthiness and reliability determination. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter stated that the NPR facilities did not have a clear understanding of the consequences of the rule and requested that the NRC extend the comment period to coincide with the expiration of the proposed rule for 10 CFR 37 on January 31, 2011.

*NRC Response:* The NRC understands the comment and reopened the public comment period on December 20, 2010 (75 FR 79312). The extended comment period remained open until January 31, 2011.

*Comment:* Several commenters expressed the view that employees who are not NRC employees but are employed by State or Federal Governments are subject to fingerprint/background checks as a condition of employment and for obtaining security clearances. Equivalence needs to be established to reduce the burden and expense associated with clearing the same individual multiple times.

*NRC Response:* The NRC agrees with this comment. The final rule language is modified to include State and Federal non-NRC employees to those exempt from additional fingerprinting in Section 73(b)(2)(i).

*Comment:* One commenter stated that the use of fingerprints to perform domestic criminal history checks does not provide sufficient background information on foreign individuals seeking unescorted access and gives the illusion of a thorough check, when only a fraction of the individual's criminal history may be covered by U.S. records. The commenter recommended the

criminal history check include a foreign individuals' home country or international police cooperation to perform a criminal record check in their previous nation of residence, and to include a check against the terrorist watch list.

*NRC Response:* The NRC agrees that FBI fingerprint checks are likely only to give information about domestic criminal history. Fingerprinting has long been a trusted method of verifying an applicant's identity, and it serves as an accepted method of searching existing U.S. records for domestic criminal history. The scope of this proposed rulemaking is to develop regulations implementing the fingerprint requirements set forth in Section 149 of the AEA. Section 149.a.(2) of the AEA requires that, "All fingerprints obtained by an individual or entity...be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check," for those seeking or permitted unescorted access to utilization facilities. The NRC recognizes that an FBI criminal history records check may be only one aspect of a licensee's determination to grant an individual unescorted access to an NPR. Many licensees undertake more extensive background investigations as they deem necessary. No changes to the rule language were made as a result of this comment.

### ***General Comments Received During Reopened Public Comment Period***

All eleven comments received during the second public comment period referred to the proposed rule and previously submitted public comments provided by other facilities and the National Organization of Test, Research, and Training Reactors (TRTR). All eleven comments supported TRTR's comments submitted on October 3, 2010 (NRC-2008-0619-0019), which are addressed previously in this document under, "General Comments Received During First Public Comment Period." The sentiments stated that the proposed rule adds additional requirements for security at NPR facilities that will further limit student, faculty, and research access and divert

additional resources from educational and research missions. The following are additional comments received during the reopened public comment period

*Comment:* Several commenters expressed the view that there is no clear evidence these additional requirements will provide a commensurate improvement in the protection of public health and safety. They stated that after the events of September 11, 2001, the NRC required compensatory measures that were implemented by all NPR facilities via the Confirmatory Action Letter process. Several years later, the NRC issued order EA-07-074, requiring fingerprinting and criminal history records checks for individuals with unescorted access as defined by the order. In the decade since September 11, 2001, there have been no credible threats to security at NPRs. The measures and order implemented since then have provided more than adequate additional protections given the implications of that historic occurrence. With no indications of an increased probability of threat against NPRs, there can be no justification for further prescribed additional security requirements which heretofore have been adequate.

*NRC Response:* The NRC agrees that there is no current, specific, credible threat to the security of NPRs. Furthermore, the NRC agrees that NPR security requirements, including regulations, NRC-issued security orders, and compensatory measures have provided adequate protection at NPRs to date. However, the NRC is required under Section 149 of the AEA to implement the requirement to fingerprint all persons seeking unescorted access to utilization facilities, including NPRs. Since 2007, the NRC has relied on security orders to fulfill this statutory requirement, but the NRC prefers to regulate by rulemaking vice regulating by orders. The rulemaking process allows deliberate processes and extensive stakeholder involvement that orders do not. The 2007 NRC-issued security orders have provided adequate protection and allowed a shorter implementation time, but this final rule has been shaped by lessons

learned from the orders, rulemaking process best practices, and engagement from the NPR community.

*Comment:* Two commenters stated similarly that they believed the proposed rule would begin limiting the educational opportunities at many facilities without further advancing the security of these facilities. The proposed rule adds additional requirements for security at NPR facilities that will very likely limit student, faculty, and researcher access and divert additional resources from their educational and research missions. They note that in difficult budget times, resources are very tight and funding support at the State level is already limited. Additional requirements would likely further reduce the educational and research capabilities of some facilities to the point where they may be closed and cease to contribute to these missions and the nuclear education in our country. They have no problem with the need to provide a secure and safe environment, but feel that current procedures are more than adequate so that the proposed additional requirements add extremely little to that environment (if anything) while diverting both attention and resources from more important matters.

*NRC Response:* The NRC is sensitive to the costs of regulation. The only requirement in this final rule that is additional to the 2007 NRC-issued security orders is to fingerprint those persons seeking unescorted access to vital areas. As stated above, the NRC believes the impact of the vital area criterion will be minimal because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because few licensee personnel will require unescorted access to vital areas that do not require unescorted access to SNM or to SGI. In the development of this rulemaking, the NRC re-evaluated whether an area criterion, as applied to the requirements of fingerprinting

individuals seeking unescorted access to the facility, is required to ensure that the fingerprinting requirements in Section 149 of the AEA – the regulatory basis by which this rulemaking was initiated – are properly and completely implemented for NPRs. The rule bifurcates the fingerprint requirement for “access to a utilization facility” into two criteria which the rule terms “SNM” and “vital area” – both of which licensees must comply with by the implementation date of this rule. The NRC made an affirmative determination that both a material criterion and an area criterion are required to implement the statutory requirements in Section 149 of the AEA for NPR facilities.

*Comment:* Another commenter was concerned that the proposed rule would further discourage utilization of research reactor facilities by individuals who pose essentially no security risk. The commenter stated that many reactors today already face the prospect of diminished utilization and anything that would further discourage potential users will have a detrimental impact on the viability of these facilities. The commenter concluded that any regulations proposed by the NRC should have an adequately demonstrated basis in terms of information available in the public record. The commenter was unaware of any serious security incidents, such as attempted theft of SNM or sabotage of reactor facilities, by persons without fingerprinting checks. The commenter recommended that cognizant Federal agencies should use caution in broadly applying new rules, particularly without taking into account the added paperwork burdens and costs associated with such rulemaking. This impact can be particularly devastating for smaller research reactor facilities that are already under considerable budgetary pressure from their host institutions.

*NRC Response:* The NRC does not intend to discourage utilization of research reactor facilities in any way. However, the principle focus of this rule is to implement Section 149 of the

AEA as amended, which requires fingerprinting of all individuals given unescorted access to an NPR. The NRC believes that this requirement presents a minimal burden to NPRs as the differences between this final rule and the 2007 NRC-issued security orders are minimal. In order to ensure complete and proper implementation of the statute's requirements for both current NPR licensees and future NPRs, this rulemaking incorporates an additional area criterion beyond the SNM criterion invoked by the order. The area criterion is to ensure that individuals seeking unescorted access to areas that contain vital equipment are fingerprinted and thereby receive FBI fingerprint-based criminal history records checks.

### ***Comments Responding to NRC-Posed Questions***

In the proposed rule FRN dated July 20, 2010 (75 FR 42008), the NRC requested stakeholder feedback on additional topics. The three questions presented were:

1. Is 120 days sufficient time to implement the new provisions, including revising or developing fingerprinting programs or procedures?
2. Are there any other newly issued NRC requirements or impositions (aggregate impacts) that you expect could adversely impact your ability to implement the proposed provisions?
3. If there are other potential aggregate impacts, is there a time when you expect that these impacts will become insignificant in terms of your capability to implement the new proposed revisions?

*Comment:* The NRC received 3 total responses to a question concerning the implementation of Section 73.57. Two commenters stated that the 120 days for implementation is sufficient time provided that individual licensees may request an extension based on other

activities and limited staff resources. One of the commenters stated that this time period was sufficient only if the rule was amended as they had requested.

*NRC Response:* The NRC understands the concern regarding the implementation period. Accordingly the NRC held a Category 3 public meeting on June 23, 2011, to better understand concerns associated with implementation. The effective date of the rule was extended to 180 days in response to these concerns to enable implementation planning meetings with all affected stakeholders. Given the NRC security orders already in place, the NRC will allow 180 days for full implementation of this rule to provide for a smooth transition in adoption of this regulation.

*Comment:* In response to an NRC question whether there are other newly issued NRC regulations that have an aggregate impact to implementing Section 73.57, several commenters stated that the proposed rule for 10 CFR Part 37, “Physical Protection of Byproduct Material” (75 FR 33902; June 15, 2010), will impact their ability to implement Section 73.57 as the same process and procedures are impacted by both rules. The actual impact of Part 37 (as with the final Section 73.57) is unknown as the rule is in draft.

One commenter continued by stating that they identified no specific aggregate impact, but if the proposed rule were implemented as worded, multiple areas will be declared *vital areas*, facility access will be further restricted, SNM of no significance will be removed from temporary storage areas and moved into the vital controlled access areas, research/education activities using these materials will be halted if necessary to comply with the regulation until suitable protections can be evaluated, and clear documentation established. This commenter requested that NRC ensures regulatory discretion remains for individual licensees when implementing the new rule.

Another commenter continued by stating that individual licensees may have aggregate impacts (such as ongoing licensing actions or relicensing) and also recommended that the NRC ensure regulatory discretion remains when implementing the new rule.

*NRC Response:* The NRC disagrees with the comments with regard to the implementation challenges. As noted in response to the comments above, the NRC extended the effective date of the rule to 180 days and NRC staff will meet with NPR licensees to support implementation. Regarding the relationship of proposed Part 37, “Physical Protection of Byproduct Material” (75 FR 33902; June 15, 2010), and this rulemaking, Part 37 would deal specifically with the use and transport of Category 1 and Category 2 quantities of radioactive material as defined in proposed Part 37. The changes to Section 73.57 presented in this final rule are written specifically to ensure proper fingerprinting for unescorted access to SNM and vital areas at NPRs. As such, this amendment to Section 73.57 is separate and distinct from the provisions that NRC may incorporate into Part 37 to address radioactive material.

The use of the vital area criterion expands a requirement to fingerprint individuals who wish to have unescorted access to areas in NPRs that may not contain SNM, but instead may contain *vital equipment* that is important from a radiological sabotage standpoint (i.e., if it is a vital area that is established to contain only SNM, then that is already captured in the SNM criterion). The term *vital area* is used in its definition found in Section 73.2. As such, only those NPR licensees who have *vital areas* as defined in Part 73 are likely subject to this added requirement. This *vital equipment* would likely exist only at the higher power NPRs, and the *vital areas* where they are contained can be identified by reference to the current security plans and informed by the security assessments. For most NPR facilities, the SNM criterion adequately ensures that individuals who wish to have unescorted access are fingerprinted. No

regulatory discretion is allowed for this rule; however, the NRC staff will work with NPR licensees to support proper interpretation and implementation of these criteria.

### **III. Discussion**

#### **A. General Discussion**

These amendments establish generically applicable fingerprinting requirements for nonpower reactor licensees similar to those previously imposed by the Commission's orders pertaining to the granting of unescorted access. The amendments implement the requirement in Section 149.a.(1)(B)(i)(I) of the AEA that the Commission require to be fingerprinted any individual who is permitted unescorted access to a utilization facility.

As previously noted, Section 149 of the AEA requires that the Commission fingerprint and conduct a criminal history records check of individuals seeking unescorted access at a broader range of NRC licensees and regulated facilities. Utilization facilities, including NPRs, which were not previously subject to these requirements, are now subject to these fingerprint requirements. It is this specific expansion in regulatory authority that is the subject of this proposed rule (i.e., extension of these fingerprint-based FBI criminal history records checks requirements to NPRs).

Section 149 of the AEA now requires fingerprinting for individuals seeking unescorted access to a "utilization facility." "Utilization facility" is a term that is defined in Section 11.cc. of the AEA as:

(1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any

important component part especially designed for such equipment or device as determined by the Commission.

The Commission has defined “utilization facility” in 10 CFR 50.2 as any nuclear reactor other than one designed or used primarily for the formation of plutonium or uranium-233.

In developing these proposed provisions, the NRC recognized that when constructing requirements for NPR licensees, it should be cognizant of the direction in Section 104c of the AEA which states, in part that:

The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under the Act to promote common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

The proposed revisions discussed in this document are constructed in accordance with the requirements of Section 149 of the AEA and within the constraints of Section 104c of the AEA.

## **B. Relaxing of Orders**

Section 73.57 as amended replaces, in whole, the interim requirements imposed by Order EA-07-074, “Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors,” (72 FR 25337; May 4, 2007) and Order EA-07-098, “Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics’ Research and Test Reactors” (72 FR 44590; August 8, 2007). The final rule amends Section 73.57 with similar requirements that ensure proper implementation of the requirements in Section 149 of the AEA. Accordingly, once current NPR licensees have implemented the requirements in

Section 73.57, the NRC will consider relaxing Order EA-07-074 and Order EA-07-098. All orders will remain in effect until the NRC takes specific action to relax them.

### **C. Implementation Plans**

The effective date of this rule is **[INSERT DATE THAT IS 180 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]** which will allow 180 days for implementation. This is 60 days more than the 120 originally proposed time period in response to public comments. The extended effective date of this final rule will provide time for licensees to develop or revise procedures and programs associated with the granting of unescorted access at their facilities to comply with the final 10 CFR 73.57(g) provisions. The NRC believes that the majority of procedure and plan changes are currently in place as a result of the previously issued unescorted access order. Additionally, the NRC believes this provides sufficient time for additional individuals to be fingerprinted and approved by the reviewing official.

The NRC held a Category 3 public meeting on June 23, 2011 (ADAMS Accession No. ML111460100 and ML111821113). The principal objective of this Category 3 public meeting was to continue outreach in support of openness and transparency and to facilitate communication that would enhance better understanding, interpretation, and implementation of this regulation. The NRC staff intends to offer an informed series of site-specific implementation meetings for each licensee. The intent of these meetings is to facilitate communication and provide the licensees an opportunity to discuss how they will ensure compliance with this rule.

## **IV. Section-by-Section Analysis**

### **A. Section 73.57(a) General**

Paragraphs (a)(1) and (a)(2) are simplified because the first portion of the current regulation which includes current power reactors licensed under 10 CFR Part 50 and applicants for power reactor licenses, is encompassed by the second portion of the provision that requires licensees that engage, or intend to engage in any regulated activity, be subject to the provisions of Section 73.57.

Paragraph (a)(3) is revised to add NPRs into the scope of licensees subject to Section 73.57 fingerprint provisions. Nonpower reactor licensees would be added to Section 73.57 to make use of the current fingerprint requirement provisions that are being successfully used for other licensees subject to FBI fingerprint-based criminal history records checks. This would ensure that NPR licensee fingerprints are handled in a manner that is both consistent with the process used for other licensees, and that ensures the NRC meets its obligations under the AEA for the handling and processing of fingerprints with the FBI.

#### **B. Section 73.57(b) General performance objective and requirements**

Paragraph (b)(1) is revised to include nonpower reactor licensees in the scope of the general performance and objective requirements of Section 73.57. The paragraph points to new Paragraph (g) where the specific unescorted access provisions for NPR licensees are described.

Paragraph (b)(2)(i) is revised to add nonpower reactor facilities. Paragraph (b)(2)(i) is further revised to list “offsite response organizations responding to a nonpower reactor facility” as one of the categories that does not require fingerprinting under the revised Section 73.57 provisions. Based on comments received in response to the proposed rule, Paragraph (b)(2)(i) is further revised to add “Federal” (non-NRC) employees who have had equivalent reviews of

FBI criminal history data to the list of individuals that licensees need not fingerprint in accordance with the requirements of this section.

Paragraph (b)(2)(v) is added to enable individuals who have a valid unescorted access authorization to a nonpower reactor facility on the effective date of the rule (granted in response to NRC Orders EA-07-074 and EA-07-098) to retain their access authorization and not be required to have a new fingerprint-based FBI criminal history records check under Section 73.57(g) until such time that the individual's existing authorization either expires, is terminated, or is otherwise required to be renewed.

Paragraph (b)(4) is revised to relieve NPR licensees from being required to fingerprint an individual if the licensee is reinstating the unescorted access to a granted individual when that individual returns to the same reactor facility, and the unescorted access has not been interrupted for a continuous period of more than 365 days.

Paragraph (b)(5) is revised to provide nonpower reactor licensees the discretion to not fingerprint individuals for which fingerprint-based criminal history records checks have been conducted, and for which the criminal history records checks can be transferred to the gaining licensee in accordance with Section 73.57(f)(3). This revision allows for reciprocity of fingerprint-based criminal history records checks and grants NPR licensees the same discretion that is currently granted to power reactor licensees.

Paragraph (b)(8) is revised to include NPR licensees to ensure that NPR licensees use the information obtained as part of the criminal history records checks solely for the purpose of determining an individual's suitability for unescorted access.

### **C. Section 73.57(c) Prohibitions**

Paragraph (c)(1) is revised to include NPR licensees so that the associated prohibitions are provided to individuals seeking unescorted access at nonpower reactors.

**D. Section 73.57(d) Procedures for processing of fingerprint checks**

Paragraph (d)(1) is revised to include nonpower reactor facilities so that the established fingerprint provisions and forms that the NRC currently uses for other licensees can be used by NPR licensees.

Paragraph (d)(3)(ii) is revised to apply the application fee provisions to all licensees (including NPR licensees) subject to the Section 73.57 fingerprinting requirements.

**E. Section 73.57(f) Protection information**

Paragraph (f)(2) is revised to add nonpower reactor licensees to ensure that the personal information disclosure restrictions are applied to NPR licensees.

Paragraph (f)(5) is revised to add nonpower reactors and thereby provide records retention requirements for the fingerprints and criminal history records checks generated through compliance with proposed Section 73.57.

**F. Section 73.57(g) Fingerprinting requirements for nonpower reactor licensees**

This paragraph is added to provide the new fingerprint-based criminal history records checks requirements required by Section 149 of the AEA. The scope of the proposed requirements is consistent with orders on unescorted access issued by the NRC on April 30, 2007, and August 1, 2007 (EA-07-074 and EA-07-098 respectively). These orders require NPR licensees to conduct FBI identification and fingerprint-based criminal history records checks based on fingerprints for individuals granted unescorted access to SNM at these

facilities (i.e., an individual who is granted *unescorted access* could exercise physical control over the special nuclear material possessed by the licensee, which would be of significance to the common defense and security or would adversely affect the health and safety of the public, such that the special nuclear material could be used or removed in an unauthorized manner without detection, assessment, or response by systems or persons designated to detect, assess or respond to such unauthorized use or removal. At NPRs, such individuals include those with the capability and knowledge to use the special nuclear material in the utilization facility or remove the special nuclear material from the utilization facility in an unauthorized manner without detection, assessment, and response by the physical protection system or related provisions or persons). The orders were issued as interim measures until the NRC could formulate generically applicable requirements for incorporation into NRC regulations.

Section 73.57(g)(1) establishes requirements that prohibit any person from having unescorted access to a nonpower reactor facility unless that person has been determined by the licensee to be trustworthy and reliable. This determination is made by an NRC-approved reviewing official who may undertake more extensive background investigations as they deem necessary in order to determine trustworthiness and reliability. The reviewing official is required to have unescorted access in accordance with the requirements of Section 73.57, or access to SGI. The licensee's NRC-approved reviewing official evaluates the criminal history records checks information to determine whether the individual has a record of criminal activity that indicates that the individual should be denied unescorted access. For each determination of unescorted access, which includes a review of criminal history information, the NRC expects NPR licensees to document the basis for the decision. When negative information is discovered that was not provided by the individual, or which is different in any material respect from the information provided by the individual, this information would be considered, and actions taken

based on these findings. The NRC expects these findings to be documented. A criminal history record containing a pattern of behaviors which could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have unescorted access in accordance with Section 73.57(g) should be carefully evaluated before unescorted access is granted to the individual.

Section 73.57(g)(2)(i) establishes requirements for NPR licensees to obtain fingerprints for criminal history records checks for each individual who is seeking or permitted unescorted access to “vital areas” of the nonpower reactor facility. “Vital area” is defined in Section 73.2 as “any area which contains vital equipment,” and vital equipment is in turn defined in Section 73.2 as “any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation. Equipment or systems which would be required to protect public health and safety following such failure, destruction, or releases are also considered to be vital.” The vital area criterion may increase the scope of personnel required to obtain fingerprinting beyond the SNM criterion proposed in Section 73.57(g)(2)(ii). The NRC notes that some NPR licensees have associated “vital areas” with areas that store unirradiated highly enriched uranium. A “vital area” at a particular NPR will vary as a function of the facility design. Security assessments have been performed by NRC for a number of licensees that can provide the licensees insight into what constitutes a “vital area.” In light of the NRC’s preliminary reevaluation of the security assessments in regards to what constitutes a vital area as defined in Section 73.2, the NRC predicts that implementation of this rule will be seamless for those licensees not having vital areas and who are already in proper compliance with the security orders.

Paragraph (g)(2)(ii) establishes requirements for NPR licensees to obtain fingerprints for a criminal history records checks for each individual who is seeking or granted unescorted

access to SNM in the nonpower reactor facility. This provision is consistent with the criteria used in the unescorted access order. The Commission notes that there may be significant overlap between the two criteria (i.e., SNM and vital area) of proposed Section 73.57(g)(2). As an example, SNM can be considered to be vital equipment under the material portion of the Section 73.2 vital equipment definition. The NRC expects that the SNM criterion would, in most situations, determine whether an individual is required to be fingerprinted in accordance with the proposed provisions.

It is not the intent of the SNM criterion to cause individuals to be fingerprinted without the consideration of the potential safety significance of the material. Instead, fingerprinting individuals for unescorted access to SNM should be limited to SNM which would be of significance to the common defense and security or could adversely affect the health and safety of the public. When determining what SNM meets this criterion, NPR licensees should consult their security plans and procedures and inform this decision with existing security assessments. Typically, SNM that meets this criterion would be strategic SNM, SNM of moderate strategic significance, or SNM of low strategic significance, as defined in Section 73.2. It is not the NRC's intent to fingerprint individuals who wish to have unescorted access to minute amounts of SNM and do not meet these criteria.

For both Section 73.57(g)(2)(i) and (ii), for the purposes of determining which individuals must be fingerprinted, an individual must additionally (beyond simply seeking unescorted access) possess the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower reactor. This constraint in the requirement may limit the requirement for application of fingerprint-based criminal history records checks. In some cases, more than simple physical access to special nuclear material or specified areas is necessary to require licensees to obtain fingerprint-based criminal history records checks under

Section 73.57(g)(2)(i) and (ii). To determine which individuals should be fingerprinted for unescorted access, NPR licensees need to evaluate their current security plans and procedures considering the definition of vital area (in 10 CFR Part 73) and the requirements of Section 73.57(g)(2)(i) and (ii), as well as any other security assessment information that might be available. For example, an NPR licensee may decide for practical reasons to fingerprint individuals who wish to have unescorted access within the controlled access area.

In most cases, the provisions of Section 73.57(g) use NPR licensee's procedures similar to those used to implement the previous unescorted access and SGI access fingerprinting orders and rulemaking (73 FR 63546, dated October 24, 2008). More importantly, these provisions of Section 73.57 follow the regulatory processing and handling requirements already incorporated into Section 73.57.

When a licensee submits fingerprints to the NRC under these provisions, the licensee will receive a criminal history review, provided in Federal records, since the individual's eighteenth birthday. The licensee's reviewing official shall evaluate the criminal history record information pertaining to the individual as required by proposed Section 73.57(g). The criminal history records checks shall be used in the determination of whether the individual has a record of criminal activity that indicates that the individual should not have unescorted access at the nonpower reactor facility. Each determination of unescorted access includes a review of the fingerprint-based criminal history information and shall include the licensee's documentation of the basis for the decision.

1. When negative information is discovered that was not provided by the individual, or which is different in any material respect from the information provided by the individual, this information shall be considered, and actions taken based on these findings should be documented.

2. A record containing a pattern of behaviors which indicates that the behaviors could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have unescorted access in accordance with the proposed provisions, would be carefully evaluated prior to any authorization of unescorted access.

#### V. Availability of Documents

Document	PDR	ADAMS	Web
EA-07-074, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors, issued April 30, 2007 (72 FR 25337; May 4, 2007)	X	ML070750140	X
EA-07-098, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics Research and Test Reactors, issued August 1, 2007 (72 FR 44590; August 8, 2007)	X	ML072050494	X
Advance Notice of Proposed Rulemaking, published on April 14, 2009 (74 FR 17115)	X	ML090920147	X
Proposed Rulemaking, published on July 20, 2010 (75 FR 42000)	X	ML100610314	X
Proposed Rule, reopening of public comment period published on December 20, 2010 (75 FR 79312)	X	ML103410299	X
Regulatory Analysis	X	ML111310119	X

Regulatory Analysis Appendix	X	ML111310122	X
Final Rule Information Collection Analysis	X	ML111310115	X

### **VI. Criminal Penalties**

For the purpose of Section 223 of the AEA, the Commission amends 10 CFR Part 73 under Sections 149 of the AEA. Willful violations of the rule will be subject to criminal enforcement.

### **VII. Agreement State Compatibility**

Under the Policy Statement on Adequacy and Compatibility of Agreement States Programs, approved by the Commission on June 20, 1997, and published in the *Federal Register* (62 FR 46517; September 3, 1997), this rule is classified as compatibility NRC. Compatibility is not required for Category NRC regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of this chapter. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements by a mechanism that is consistent with the particular State's administrative procedure laws. Category NRC regulations do not confer regulatory authority on the State.

### **VIII. Plain Language**

The Presidential memorandum "Plain Language in Government Writing" published on June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. An opportunity for public comment on the clarity and effectiveness of the

language used was published in the *Federal Register* on July 20, 2010 (73 FR 42000).

### **IX. Voluntary Consensus Standards**

The National Technology Transfer and Advancement Act of 1995, P. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. The NRC is not aware of any voluntary consensus standard that could be used instead of the Government-unique standards.

### **X. Finding of No Significant Environmental Impact: Availability**

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A, National Environmental Policy Act; Regulations Implementing Section 102(2), of 10 CFR Part 51, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions, that this rule is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The determination of this environmental assessment is that there will be no significant offsite impact to the public from this action.

### **XI. Paperwork Reduction Act Statement**

This final rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget (OMB), approval number 3150-0002. The burden to nonpower reactors for the information collections associated with unescorted access to vital areas is estimated to average 2.5 hours per response, including the time for

reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Send comments on any aspect of these information collections, including suggestions for reducing the burden, to the Information Services Branch (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to [INFOCOLLECTS.RESOURCE@NRC.GOV](mailto:INFOCOLLECTS.RESOURCE@NRC.GOV); and to the Desk Officer, Christine Kymn, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0002), Office of Management and Budget, Washington, DC 20503. You may also e-mail comments to [Christine\\_J.\\_Kymn@omb.eop.gov](mailto:Christine_J._Kymn@omb.eop.gov) or comment by telephone at (202) 395-4650.

## **XII. Public Protection Notification**

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

## **XIII. Regulatory Analysis: Availability**

The Commission has prepared a regulatory analysis on this final regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. An opportunity for public comment on the regulatory analysis was published in the *Federal Register* on July 20, 2010 (73 FR 42000). Availability of the regulatory analysis is indicated in the preamble of this final rule document within the Availability of Documents table in Section V of this document.

## **XIV. Regulatory Flexibility Certification**

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this

rule does not have a significant economic impact on a substantial number of small entities. This final rule affects only the licensing and operation of nonpower reactors. Only one of the companies and universities that own and operate these facilities falls within the scope of the definition of *small entities* set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810), and the economic impact on this entity is judged to be small.

#### **XV. Backfit Analysis**

The NRC's backfit provisions are found in the regulations at 10 CFR 50.109, 70.76, 72.62, 76.76, and in 10 CFR Part 52. Under Section 50.2, nonpower reactors are research or test reactors licensed in accordance with Sections 103 or 104c of the AEA and 10 CFR 50.21(c) or 50.22 for research and development. The NRC has determined that the backfit provision in Section 50.109 does not apply to test, research, or training reactors. The NRC has further determined that the amendments to Section 73.57 contained in this final rule do not involve any provisions that would impose backfits on nuclear power plant licensees or on licensees for special nuclear material, independent spent fuel storage installations or gaseous diffusion plants as defined in 10 CFR Chapter I. Therefore, a backfit analysis was not prepared for this final rule.

#### **XVI. Congressional Review Act**

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of the Office of Management and Budget.

## List of Subjects in 10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 73.

### **PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS**

1. The authority citation for Part 73 continues to read as follows:

**AUTHORITY:** Secs. 53, 161, 149, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2169, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, P. L. 109-58, 119 Stat. 594 (2005).

Section 73.1 also issued under secs. 135, 141, P. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, P. L. 96-295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, P. L. 99-399, 100 Stat. 876 (42 U.S.C. 2169).

2. In § 73.57, the title, paragraphs (a), (b)(1), (b)(2)(i), the introductory text of paragraph (b)(4), paragraphs (b)(4)(i), (b)(5), (b)(8), the introductory text of paragraph (c)(1), and paragraphs (d)(1), (d)(3)(ii), (f)(2), and (f)(5) are revised, and paragraphs (b)(2)(v) and (g) are added to read as follows:

**§ 73.57 Requirements for criminal history records checks of individuals granted unescorted access to a nuclear power facility, a nonpower reactor, or access to Safeguards Information**

(a) *General.*

(1) Each licensee who is authorized to engage in an activity subject to regulation by the Commission shall comply with the requirements of this section.

(2) Each applicant for a license to engage in an activity subject to regulation by the Commission, as well as each entity who has provided written notice to the Commission of intent to file an application for licensing, certification, permitting, or approval of a product subject to regulation by the Commission shall submit fingerprints for those individuals who will have access to Safeguards Information.

(3) Before receiving its operating license under 10 CFR Part 50 or before the Commission makes its finding under § 52.103(g) of this chapter, each applicant for a license to operate a nuclear power reactor (including an applicant for a combined license) or a nonpower reactor may submit fingerprints for those individuals who will require unescorted access to the nuclear power facility or nonpower reactor facility.

(b) \* \* \*

(1) Except those listed in paragraph (b)(2) of this section, each licensee subject to the provisions of this section shall fingerprint each individual who is permitted unescorted access to the nuclear power facility, the nonpower reactor facility in accordance with paragraph (g) of this section, or access to Safeguards Information. The licensee will then review and use the information received from the Federal Bureau of Investigation (FBI) and, based on the

provisions contained in this section, determine either to continue to grant or to deny further unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information for that individual. Individuals who do not have unescorted access or access to Safeguards Information shall be fingerprinted by the licensee and the results of the criminal history records check shall be used before making a determination for granting unescorted access to the nuclear power facility, nonpower reactor facility, or to Safeguards Information.

(2) \* \* \*

(i) For unescorted access to the nuclear power facility or the nonpower reactor facility (but must adhere to provisions contained in §§ 73.21 and 73.22): NRC employees and NRC contractors on official agency business; individuals responding to a site emergency in accordance with the provisions of § 73.55(a); offsite emergency response personnel who are responding to an emergency at a nonpower reactor facility; a representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement at designated facilities who has been certified by the NRC; law enforcement personnel acting in an official capacity; Federal, State or local government employees who have had equivalent reviews of FBI criminal history data; and individuals employed at a facility who possess “Q” or “L” clearances or possess another active government granted security clearance (i.e., Top Secret, Secret, or Confidential);

\* \* \* \* \*

(v) Individuals who have a valid unescorted access authorization to a nonpower reactor facility on **[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]** are not required to undergo a new fingerprint-based criminal history records check pursuant to paragraph (g) of this section, until such time that the existing authorization expires, is

terminated, or is otherwise to be renewed.

\* \* \* \* \*

(4) Fingerprinting is not required if the licensee is reinstating the unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information granted an individual if:

(i) The individual returns to the same nuclear power utility or nonpower reactor facility that granted access and such access has not been interrupted for a continuous period of more than 365 days; and

\* \* \* \* \*

(5) Fingerprints need not be taken, in the discretion of the licensee, if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to a nuclear power facility, a nonpower reactor facility, or to Safeguards Information by another licensee, based in part on a criminal history records check under this section. The criminal history records check file may be transferred to the gaining licensee in accordance with the provisions of paragraph (f)(3) of this section.

\* \* \* \* \*

(8) A licensee shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information.

(c) \* \* \*

(1) A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information solely on the basis of information received from the FBI involving:

\* \* \* \* \*

(d) \* \* \*

(1) For the purpose of complying with this section, licensees shall, using an appropriate method listed in § 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T-6E46, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual requiring unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information, to the Director of the NRC's Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling 301- 415-7232, or by e-mail to *FORMS.Resource@nrc.gov*. Guidance on what alternative formats might be practicable is referenced in § 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

\* \* \* \* \*

(3) \* \* \*

(ii) The application fee is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an administrative processing fee assessed by the NRC. The NRC processing fee covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission publishes the amount of the fingerprint records check application fee on the NRC public Web site. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and see the link for the Criminal History Program.) The Commission will directly notify licensees who are subject to this regulation of

any fee changes.

\* \* \* \* \*

(f) \* \* \*

(2) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to the nuclear power facility, the nonpower reactor facility or access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need to know.

\* \* \* \* \*

(5) The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, on an individual (including data indicating no record) for one year after termination or denial of unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information.

\* \* \* \* \*

(g) *Fingerprinting requirements for unescorted access for nonpower reactor licensees.*

(1) No person shall be permitted unescorted access to a nonpower reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on the results of an FBI fingerprint-based criminal history records check obtained in accordance with this paragraph. The reviewing official is required to have unescorted access in accordance with this section or access to Safeguards Information.

(2) Each nonpower reactor licensee subject to the requirements of this section shall obtain the fingerprints for a criminal history records check for each individual who is seeking or

permitted:

(i) Unescorted access to vital areas of the nonpower reactor facility; or

(ii) Unescorted access to special nuclear material in the nonpower reactor facility

provided the individual who is seeking or permitted unescorted access possesses the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower reactor facility or to remove the special nuclear material from the nonpower reactor in an unauthorized manner.

Dated at Rockville, Maryland, this \_\_\_\_ day of \_\_\_\_\_, 2011.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.