

POLICY ISSUE
(NOTATION VOTE)

April 17, 2008

SECY-08-0050

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

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SUBJECT: FIREARMS GUIDELINES IMPLEMENTING SECTION 161A. OF THE
ATOMIC ENERGY ACT OF 1954 AND ASSOCIATED POLICY ISSUES

PURPOSE:

The purpose of this paper is to obtain Commission approval of the firearms guidelines implementing Section 161A. of the Atomic Energy Act of 1954, as amended (AEA), and to receive Commission direction on rulemaking and policy issues regarding the implementation of the firearms guidelines.

SUMMARY:

The staff is providing the enclosed firearms guidelines (Enclosure 1) to the Commission for its review and approval. The firearms guidelines were developed by the U.S. Nuclear Regulatory Commission (NRC) staff and the U.S. Department of Justice (DOJ) staff and will implement the authority of new section 161A. of the AEA, "Use of Firearms by Security Personnel." That statutory provision confers upon the Commission the authority to authorize a licensee's or certificate holder's security personnel to possess and use enhanced weapons (e.g., machine guns) and to allow this statutory provision to preempt State law after the firearms guidelines are published. Following Commission approval to issue the firearms guidelines, the General Counsel will forward the guidelines to the U.S. Attorney General (AG) for his approval and the staff will publish them in the *Federal Register*.

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SECY NOTE: THIS SECY PAPER TO BE MADE PUBLICLY AVAILABLE AFTER
PUBLICATION OF THE FIREARMS GUIDELINES IN THE FEDERAL REGISTER.

In addition to issuance of the firearms guidelines, the NRC needs to promulgate implementing regulations that will make the provisions of the guidelines legal requirements, and specify in greater detail what licensees and certificate holders must do to obtain the necessary authorizations from the NRC. The staff is recommending that the Commission approve publishing a direct final rule and companion proposed rule to be signed by the Executive Director for Operations (EDO) which is consistent with the final version of the approved firearms guidelines. A summary of the changes required for consistency with the final version of the firearms guidelines is enclosed (Enclosure 2).

The rulemaking pertaining to the firearms guidelines would be placed on a separate track from the power reactor security rulemaking and would consist of a direct final rule and companion proposed rule. The remainder of the power reactor security rule will be contained in a final rule that the staff will provide to the Commission in early July of this year. Additionally, the staff is also recommending that a separate rulemaking (from the direct final rule) be developed to designate additional appropriate classes of facilities and radioactive material for section 161A authority (Enclosure 3).

The staff has developed a summary of projected timelines and tasks to implement section 161A authority (Enclosure 4). The staff has also developed a draft letter to the Governors of States, Commonwealths, and Territories, and the Mayor of the District of Columbia informing them of the issuance of the firearms guidelines (Enclosure 5).

BACKGROUND:

Firearms Guidelines

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (EPAAct), Pub. L. 109-58, (119 Stat 811). Section 653 of the EPAAct amended the AEA by adding new section 161A. (42 U.S.C. § 2201a). Pursuant to the provisions of subsection d, section 161A. takes effect when the Commission issues firearms guidelines, with the approval of the AG. The DOJ has advised the NRC that the AG's responsibility cannot be delegated to a lower-level official.

Direct Final Rule and Companion Proposed Rule

While the firearms guidelines were under development, the NRC staff also developed proposed implementing regulations. These implementing regulations were based upon the September 2006 version of the firearms guidelines and were included as a small part of the much larger proposed power reactor security rule that was provided to the Commission in SECY-06-0126.¹⁺² However, the final version of the firearms guidelines contain a number of changes which are significant enough to warrant additional notice and opportunity for public comment in a proposed

¹ SECY-06-0126, "Proposed Rulemaking - Power Reactor Security Requirements (RIN 3150-AG63)," Agencywide Document Administration and Management System (ADAMS) No. ML00830634, dated May 31, 2006. Approved by SRM-SECY-06-0126, ADAMS No. ML061840301, dated June 30, 2006. Proposed rule published for comment in the *Federal Register* on October 26, 2006, (71 FR 62663).

² To implement the firearms guidelines the proposed rule would have added new sections 10 CFR 73.18 and 73.19 to Part 73 and made conforming changes to existing sections 10 CFR 73.2, 73.8, 73.71, and Appendix G to Part 73.

rule. The differences between the original proposed rule and the final version of the firearms guidelines are described in Enclosure 2.

Application of the Firearms Guidelines and Enhanced Weapons Authority to Additional Classes of Facilities, Radioactive Material, and Other Property

Section 161A. authorizes the Commission to designate classes of facilities, radioactive material, or other property for which it considers the exercise of the authority provided by this section to be appropriate. The Commission may accomplish this through the promulgation of regulations or through the issuance of orders. The October 2006 proposed power reactor security rule would have applied section 161A. authority to only two classes of NRC-licensed facilities (i.e., power reactor facilities and Category I facilities possessing formula quantities of strategic special nuclear material (SSNM)). The NRC had indicated that additional classes of facilities and radioactive material would be considered in a future rulemaking.

DISCUSSION:

Firearms Guidelines

Section 161A. provides new statutory authority to the Commission to enhance security at designated facilities of NRC licensees and certificate holders, and to enhance security with respect to designated radioactive material or other property owned or possessed by an NRC licensee or certificate holder, or being transported to or from a facility owned or operated by a licensee or certificate holder. This authority is divided into two components. First, the section permits the Commission to authorize licensees and certificate holders to obtain enhanced weapons that they were not previously permitted to own or possess under previous Commission authority, e.g., machineguns. This is referred to hereinafter as “enhanced weapons authority.”

Second, the section permits the Commission to authorize security personnel of licensees and certificate holders to possess such weapons, devices, ammunition, or other firearms, notwithstanding State, local, and certain Federal firearms laws (including regulations) that prohibit the transfer, receipt, possession, transport, import, or use of certain weapons, devices, and ammunition. This is referred to hereinafter as “preemption authority.” The staff notes that while the language of section 161A. could be construed to mean that Congress already has preempted State, local, and certain Federal firearms laws, the DOJ has taken the position that licensees and certificate holders must apply to the NRC and receive approval for this authority before State, local, or Federal law is preempted. DOJ’s interpretation is incorporated into the firearms guidelines.

Prior to the enactment of section 161A., with limited exceptions, only Federal, State, or local law-enforcement agencies could lawfully possess “machineguns.” Section 161A. authority, however, allows security personnel of Commission licensees and certificate holders, who obtain the necessary authorization from the NRC, to lawfully possess machineguns that they previously were not authorized to possess. Commission licensees and certificate holders who receive such authorization from the NRC are also required to comply with applicable Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) requirements. However, section 161A. does not authorize licensees and certificate holders to obtain or possess destructive devices (e.g., explosive devices such as grenades or weapons with a bore diameter greater than 12.7 mm (0.5 inches or 50-caliber)).

Following enactment of the EPAAct, NRC staff (Office of the General Counsel, Office of Nuclear Security and Incident Response, Office of Administration, and Office of Information Services) began discussions with DOJ staff (Office of Legal Counsel, Office of Legal Policy, Criminal Division, Federal Bureau of Investigation (FBI), and ATF) to develop the firearms guidelines in Enclosure 1. Development of the firearms guidelines (and the implementing regulations in 10 CFR Part 73) raised many complex and novel policy, technical, and legal issues for NRC and DOJ staffs. In addition to policy discussions, NRC staff also met with operational staff from the FBI and ATF to discuss implementation issues (e.g., the processes for accomplishing the firearms background checks and for transferring enhanced weapons from ATF federal firearms license (FFL) holders to NRC licensees and certificate holders).

NRC, DOJ, FBI, and ATF staffs developed the enclosed firearms guidelines with several specific features, including:

- Providing for authority under section 161A. for both enhanced weapons authority and preemption authority, or for preemption authority alone.
- Requiring licensees and certificate holders who apply to the NRC for enhanced weapons authority to also apply to the NRC for preemption authority. Such applications may be concurrent.
- Requiring licensees and certificate holders to apply for section 161A. authority in order to obtain the section 161A. benefits. However, applying for such authority is voluntary. Absent such an application, the proposed regulations would not apply to a licensee or certificate holder (including those licensees who may have obtained enhanced weapons under some other authority).
- Requiring licensees and certificate holders who apply to the NRC for enhanced weapons authority to receive NRC prior review and approval of revised security plans and safety assessment describing the specific enhanced weapons the licensee or certificate holder intends to deploy. Such prior review and approval must occur before the new authority is effective and any enhanced weapons are transferred to the licensee or certificate holder.
- Requiring security personnel of licensees and certificate holders who apply for this authority to complete a satisfactory firearms background check for such personnel, before they have access to any weapons. Periodic firearms background checks would also be required.
- Providing current licensees and certificate holders who apply for this authority with a transition period to complete the firearms background checks for existing security personnel. The transition period would provide for a case-by-case approach to avoid staffing and fatigue impacts on security forces while the firearms background checks are being completed.
- Requiring licensees and certificate holders to keep records relating to the receipt, transfer, and transportation of enhanced weapons.
- Requiring licensees and certificate holders to complete periodic inventories of enhanced weapons and to report any stolen or lost enhanced weapons to the NRC and to local law enforcement authorities. Licensees and certificate holders possessing enhanced weapons have an independent obligation under ATF's regulations to immediately report any stolen or lost enhanced weapons to ATF.

The benefits that would accrue to a licensee's or certificate holder's obtaining enhanced weapons are largely self evident. They would increase their defensive capabilities (firepower). The benefits that would accrue to a licensee or certificate holder obtaining preemption authority are primarily related to protection from prosecution from violation of State, local, and certain Federal firearms laws (e.g., obviating a State's restrictions on semi-automatic assault weapons or large capacity ammunition magazines). Consequently, these benefits may depend more on the physical location of the licensee or certificate holder, rather than on their specific security program. Since licensees and certificate holders obtaining section 161A. authority is voluntary, each licensee or certificate holder will independently determine if this greater defensive capability or regulatory flexibility is to their advantage.

The staff recommends that the Commission approve the firearms guidelines and *Federal Register* notice contained in Enclosure 1. After the Commission approves the firearms guidelines and *Federal Register* notice, the General Counsel will forward the firearms guidelines and the notice to the AG for his approval. After the AG has approved the firearms guidelines and *Federal Register* notice, the staff will publish the firearms guidelines in the *Federal Register*. Section 161A. of the AEA will then take effect. At the request of the DOJ, the firearms guidelines have not been shared with any external stakeholders.

Because of the implications of the statute's preemption language, the staff has developed the enclosed letter (Enclosure 5) to the Governors of States, Commonwealths, and Territories and the Mayor of the District of Columbia to inform them of the expected publication of the firearms guidelines. The staff recommends that the Chairman sign these letters on behalf of the Commission. These letters would be signed and issued subsequent to the AG's approval of the firearms guidelines, but before the guidelines are published in the *Federal Register*. A copy of the *Federal Register* notice would be enclosed with each letter.

Direct Final Rule and Companion Proposed Rule

With respect to implementing the firearms guidelines, the proposed power reactor security rule addressed a number of issues, including (1) identifying two specific classes of licensed facilities who are eligible to apply for the new authority, (2) proposing a process for these licensees to apply to the NRC for both enhanced weapons authority and preemption authority or for preemption authority alone, (3) proposing a process for firearms background checks for licensee's security personnel who have access to covered weapons (i.e., any firearms), (4) proposing controls on the removal and transfer of enhanced weapons from a licensee's facility, and (5) proposing requirements to notify the NRC upon the theft or loss of enhanced weapons. The staff notes that while the firearms guidelines apply to both licensees and certificate holders, the scope of the October 2006 proposed rule and this direct final rule and companion proposed rule will only apply to power reactor and Category I SSNM facilities. Application of this authority to facilities owned or operated by certificate holders is addressed below.

Subsequent to the publication of the October 2006 proposed power reactor security rule, the DOJ required multiple changes to the firearms guidelines. NRC staff agreed to these changes and developed language to provide the Commission with flexibility in effectively implementing the firearms guidelines. The staff has identified 11 substantive technical differences between the draft and the final versions of the firearms guidelines that would impact the final rule's implementing text. During development of the proposed regulations to implement the firearms guidelines, the staff recognized that the language of the final version of the firearms guidelines

might differ significantly from the September 2006 version of the firearms guidelines used to develop the proposed rule. Therefore, changes might be required in the final rulemaking to ensure that the final rule text is consistent with the final version of the firearms guidelines. The NRC had noted this possibility in the proposed rule *Federal Register* notice (at 71 FR 62666) and had indicated that any changes necessary to reconcile the final version of the firearms guidelines and the final rule might be significant enough to warrant the issuance of a supplemental proposed rule to resolve these differences, rather than addressing these changes in a final rule. The final rule must be consistent with the approved firearms guidelines. The staff has also identified two administrative changes that would improve regulatory clarity in the final rule's implementing text. A discussion of the technical differences, the administrative issues, and the staff's proposed solutions are provided in Enclosure 2.

In light of the number and nature of the changes in the final version of the firearms guidelines, the staff's view is that additional opportunity for public comment on the implementing regulations is appropriate. Some of these changes might not have been reasonably foreseen by the public. Therefore, the public might not have been reasonably expected to comment on some of the issues raised by the revised approaches now recommended by the staff in Enclosure 2. Accordingly, the staff recommends that a direct final rule and companion proposed rule be published to provide stakeholders with public notice and opportunity to comment on these new and revised proposed requirements. The use of a direct final rule and companion proposed rule, rather than issuing a supplemental proposed rule, would both expeditiously implement the firearms guidelines and allow further opportunity for stakeholder comment on these changed provisions. The direct final rule and companion proposed rule would be consistent with staff's proposed solutions resolving the technical differences and administrative issues listed in Enclosure 2. Additionally, the staff would also address the relevant comments received on the firearms guidelines and event notification provisions in the October 2006 proposed rule.

Consistent with the general practice for direct final rules, the direct final rule would state that if the NRC did not receive significant adverse comments on the companion proposed rule, the rule would become effective after the NRC had received the necessary approval from the Office of Management and Budget (OMB) on the information collection requirements associated with the rule and proposed NRC Form 754,³ but no earlier than 90 days after publication of the direct final rule. The companion proposed rule would provide for the standard 30-day public comment period.⁴ The staff would subsequently publish a *Federal Register* notice confirming the effective date of the rule if no significant adverse comments were received and OMB approval has been obtained. If significant adverse comments are received on the companion proposed rule (which

³ NRC Form 754, "Armed Security Personnel Background Check."

⁴ The NRC uses the "direct final rule procedure" to issue rules that it does not expect to be controversial. At the same time the direct final rule is published in the *Federal Register* the NRC publishes an identical companion proposed rule. If the NRC receives no significant adverse comments on the companion proposed rule, the direct final rule goes into effect on the date specified in the *Federal Register* notice. If the NRC does receive a significant adverse comment, then the NRC must, before the effective date of the direct final rule, publish a *Federal Register* notice that withdraws the direct final rule. These significant adverse comments would then be considered and addressed as comments on the proposed rule and the agency then must issue a final rule before the provisions become effective. Here, the NRC did not receive any significant adverse comments on the firearms guidelines provisions in the original proposed rule. However, a number of adverse and clarification comments were received on the original proposed rule and they will be addressed in the direct final rule and companion proposed rule. Therefore, the staff does not expect to receive significant adverse comments on the direct final rule. Thus, the staff expects a clear benefit to proceeding with this approach, especially since it is likely the fastest means to issuing final regulations implementing the firearms guidelines.

is published at the same time), the staff would publish a notice withdrawing the direct final rule. The staff would then prepare a final rule for the Commission's review that would address the public comments on the companion proposed rule. The staff would submit such a final rule to the Commission within 150 days of the publication of the companion proposed rule.

The direct final rule and companion proposed rule would substantively revise the proposed 10 CFR 73.18 and 73.19 and would include conforming changes to the proposed 10 CFR 73.2, 73.8, and 73.71. No change would be required to the event notification requirements of Appendix G, "Reportable Safeguards Events," to Part 73. However, Appendix G would be included in the direct final rule and companion proposed rule, because the changes required for Appendix G and 10 CFR 73.71 are intertwined and must be made in the same final rule. The staff would also prepare a final regulatory analysis and environmental assessment of the direct final rule and companion proposed rule.

The staff is recommending that the Commission delegate to the EDO the authority to sign the direct final rule and companion proposed rule to expedite their issuance. The staff would also submit to OMB the necessary documentation to receive approval of the information collection burden for the rule and proposed NRC Form 754. The staff would publish the direct final rule and companion proposed rule as soon as possible following the publication of the firearms guidelines in the *Federal Register*. As recently directed by the Commission in SRM-SECY-07-0134,⁵ the staff's normal goal would be to issue the draft regulatory guidance associated with the implementing regulations (DG-5020)⁶ in conjunction with the publication of the direct final rule and companion proposed rule. However, because of the abbreviated comment period and prior opportunity to comment on the original proposed rule, the staff would not delay the publication of the direct final rule and companion proposed rule to simultaneously publish this draft regulatory guide, but would publish the draft guidance as soon as possible.

Bifurcation of Power Reactor Security and Firearms Guidelines Final Rules

The staff's current goal is to complete a final power reactor security rule and deliver it to the Commission in early July 2008. However, the amount of time that would be necessary to publish a revised proposed rule on the firearms guidelines, receive any comments, and incorporate them into the final power reactor security rule—all subsequent to the publication of the firearms guidelines—would not meet the staff's goal of early July 2008. Therefore, the staff recommends bifurcating the final rule containing provisions for power reactor security and firearms guidelines into two separate rules (i.e., one direct final rule addressing the implementation of the firearms guidelines and event notification requirements, and the other final rule addressing all of the remaining provisions of the October 2006 proposed power reactor security rule).

Potential Issuance of Orders to Expedite Implementation of the Firearms Guidelines

In crafting the firearms guidelines, the staff included flexibility for the agency to permit the application of section 161A. authority by designating approved classes of facilities or radioactive material through the promulgation of regulations or by designating individual licensees through

⁵ Staff Requirements Memorandum SRM-SECY-07-0134, "Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan," ADAMS No. ML072980427, dated October 25, 2007.

⁶ DG-5020, "Applying for Enhanced Weapons Authority and Accomplishing Firearms Background Checks."

the issuance of orders. The staff is cognizant that by proceeding with issuance of a direct final rule and companion proposed rule, there is a possibility that before the direct final rule takes effect or before a final rule is published and takes effect (assuming a significant adverse comment has been received and the direct final rule is withdrawn), some licensees, on the basis of the publication of the firearms guidelines and the provisions of the companion proposed rule may have already applied to the NRC for section 161A. authority. In such cases, in the absence of a final rule and the staff required reviews being completed, the staff would be prepared to issue confirmatory orders, with the Commission's review and approval, which would permit licensees who have applied to proceed with procuring the enhanced weaponry and commencing security personnel training. The staff has developed a potential timeline for licensee implementation of the firearms guidelines via the direct final rulemaking process. Additionally, the staff has identified the steps that would be necessary for licensees to be issued confirmatory orders. This is discussed in Enclosure 4.

Application of the Firearms Guidelines to Additional Classes of Facilities, Radioactive Material, and Other Property

The October 2006 proposed power reactor security rule would only authorize power reactor and Category I SSNM classes of licensees to obtain section 161A. authority. However, the NRC had indicated in the October 2006 proposed rule that additional classes of licensed facilities and radioactive material would be appropriate candidates for section 161A. authority in a future rulemaking. The staff recommended this approach due to restrictions on the scope of the original proposed rule and the delivery schedule.

Enclosure 3 provides the Commission with screening criteria and recommendations for applying section 161A. authority to additional classes of NRC-regulated facilities and classes of radioactive material and other property being transported to or from such facilities. The staff has developed five screening criteria and applied these criteria against the spectrum of NRC-regulated facilities and radioactive material and identified whether enhanced weapons authority and preemption authority, preemption authority alone, or neither authority is appropriate. The staff has taken this approach to consolidate the Commission's consideration of the policy issues involved here into a single paper, because consideration for these various issues overlaps.

The staff is recommending that the Commission approve the screening criteria and the application of section 161A. authority to the additional classes of facilities and radioactive material described in Enclosure 3. The staff is not recommending applying section 161A. authority to any "other property." In developing Enclosure 3, the staff has analyzed the potential classes of licensed facilities that could potentially be regulated by the NRC under the AEA, irrespective of whether such facilities currently exist. Furthermore, the staff notes that because of the potential for changes in the perceived threat, the staff may recommend the Commission revisit the recommendations of Enclosure 3, as warranted.

Because stakeholders have not had an opportunity to view or comment on the staff's proposed criteria, a rulemaking implementing these criteria would have an increased potential for adverse comment. Therefore, the staff is recommending that the incorporation of these additional classes of facilities and radioactive material into 10 CFR 73.18 be accomplished in a rulemaking separate from the direct final rule and companion proposed rule discussed above. Given the level of information provided in Enclosure 3, the staff would not develop a rulemaking plan. Given the lower priority for implementing these provisions for the additional classes of facilities

and radioactive material and the currently constrained rulemaking resources, the staff would integrate this rulemaking into the staff's Fiscal Year (FY) 2008 rulemaking common prioritization list as a medium priority rulemaking with initiation of the rulemaking in FY 2010 or later.

Memoranda of Understanding

The staff's perspective is that implementation of the firearms guidelines, supporting regulations, and the NRC inspection program will require increased coordination with and support from both the FBI and ATF. Accordingly, the staff has begun initial discussions with FBI and ATF staffs exploring the development of a Memorandum of Understanding (MOU) with each of these agencies. The staff's goal is to develop and publish these two MOUs subsequent to the promulgation of a final rule. The staff would provide these two MOUs to the Commission for its information prior to their publication. These MOUs would focus on the following issues:

- The NRC/FBI MOU would address issues associated with implementation of the firearms background checks (e.g., timeliness goals for completing checks and appeals, status reports and performance metrics, and development of an information brochures on the appeal rights of security personnel to the FBI of an adverse firearms background check, etc.).
- The NRC/ATF MOU would address issues associated with ATF inspector access to NRC-regulated facilities that obtain enhanced weapons. Under the National Firearms Act (NFA), ATF inspectors have access to review the registration records for weapons registered under the NFA, e.g., machineguns (see 26 U.S.C. § 5841(e)).

The MOU with ATF will facilitate appropriate ATF inspector access to NRC-regulated facilities and will provide for the timely communication of inspection and enforcement information between the NRC and ATF.

Technical Workshop

To facilitate stakeholder understanding of the new regulations implementing the firearms guidelines, the staff intends to conduct a technical workshop subsequent to the close of the comment period on the companion proposed rule. The staff has discussed the concept of conducting such a workshop (on regulatory and licensing issues) with FBI and ATF staffs and the U.S. Army Corps of Engineers (USACE) staff (on the weapons safety assessment process and associated guidance documents). These agencies were supportive of the staff's concept. The workshop would be open to public attendance, except for discussions of Official-Use-Only information (e.g., the weapons safety assessment guidance documents).

Delayed Release of this Commission Paper

Subsequent to the publication of the approved firearms guidelines in the *Federal Register*, the staff is recommending that the Commission make this paper and its enclosures publicly available, since the firearms guidelines have not yet been approved by the AG.

COMMITMENTS:

As discussed in this paper, the staff is identifying the following commitments:

1. The General Counsel will forward the firearms guidelines to the AG upon the Commission's direction.
2. Publish the firearms guidelines in the *Federal Register* following the AG's approval.
3. Develop a direct final rule with a companion proposed rule for the EDO's signature addressing the solutions described in Enclosure 2. The companion proposed rule would provide for a 30-day comment period. The direct final rule would take effect no sooner than 90 days from the date of publication and would also be contingent upon receipt of OMB approval of the information collection requirements associated with the rulemaking and proposed NRC Form 754. The direct final rule and companion proposed rule would be published as soon as possible following the publication of the firearms guidelines in the *Federal Register*, consistent with the staff's timelines contained in Enclosure 4.
4. If significant adverse comments are received on the direct final rule and companion proposed rule, provide a draft final rule to the Commission for its approval within 150 days of the publication of the companion proposed rule.
5. Issue draft regulatory guidance on the firearms guidelines (DG 5020) and final regulatory guidance on event notifications (DG 5019) subsequent to the publication of the direct final rule and companion proposed rule.
6. Develop two MOUs (an MOU with the FBI and with ATF) to support implementation of the firearms guidelines.
7. Conduct a technical workshop with support from FBI, ATF, and USACE for stakeholders on the implementation of the firearms guidelines. The technical workshop would be held subsequent to the close of the comment period on the companion proposed rule.
8. Develop a separate rulemaking incorporating the additional classes of facilities and radioactive material specified in Enclosure 3. Provide the proposed rule to the Commission on a schedule developed in the staff's rulemaking common prioritization list. No rulemaking plan would be provided.

RESOURCES:

The staff completed development of the firearms guidelines in FY 2007; therefore, assuming Commission and AG approval, no additional resources are required to develop the firearms guidelines. The resources required to develop and publish a direct final rule and companion proposed rule, evaluate any comments received on the companion proposed rule, and develop a final rule (if significant adverse comments are received) in FY 2008 are 0.4 FTE (NRR - 0.1 FTE, NSIR - 0.2 FTE, and OGC - 0.1 FTE) and in FY 2009 are 0.4 FTE (NRR - 0.2 FTE, NSIR - 0.1 FTE, and OGC - 0.1 FTE). These resources are contained within existing rulemaking budgets. The NMSS resources supporting this rulemaking are less than 0.1 FTE and therefore are not specifically budgeted. Resources required to develop the proposed and final rules adding the additional classes of facilities and radioactive material described in Enclosure 3 in FY 2010 or later years will be specified in the staff's rulemaking common prioritization list for FY 2009 and 2010 which is under development.

The additional resources required by the Office of Administration (ADM) to administer and implement the firearms background check program in FY 2008 are 0.5 FTE (the first year of implementation) and in FY 2009 and each subsequent year are 0.2 FTE. However, since this is

a cost-reimbursable program there is no impact on budgeted FTE for ADM. The resources required to develop the two MOUs in FY 2008 are 0.2 FTE (NSIR – 0.1 FTE and OGC – 0.1 FTE). These resources are contained within existing regulatory improvement and legal support budgets, respectively.

RECOMMENDATIONS:

That the Commission:

1. Approve issuing the firearms guidelines and notice in Enclosure 1, after obtaining the AG's approval, and publishing them in the *Federal Register*.
2. Approve separating the firearms guidelines and power reactor security regulations into two separate rulemakings.
3. Delegate to the EDO the authority to publish a direct final rule and companion proposed rule implementing the firearms guidelines and the solutions specified in Enclosure 2. The rules will be signed by the EDO and provide for a 30 day comment period. If no significant adverse comments are received, the direct final rule would take effect no sooner than 90 days from the date of publication, contingent upon receipt of OMB approval on the information collection burden. If significant adverse comments are received, a draft final rule will be provided to the Commission for its review and approval within 150 days of the publication of the companion proposed rule.
4. Approve issuing the letters in Enclosure 5 prior to the publication of the approved firearms guidelines in the *Federal Register*.
5. Authorize the staff to develop a separate rulemaking expanding section 161A. authority to the additional classes of facilities and radioactive material specified in Enclosure 3.
6. Approve SECY publicly releasing this paper and its enclosures following the publication of the approved firearms guidelines in the *Federal Register*.

Note:

- a. Office of Congressional Affairs will inform the appropriate Congressional committees of the issuance of the approved firearms guidelines and of the issuance of the direct final rule and companion proposed rule.
- b. Office of Management and Budget (OMB) review is required of the direct final rule and proposed NRC Form 754. OMB approval must be obtained before the direct final rule takes effect.
- c. Office of Public Affairs will issue a press release in conjunction with the publication of the approved firearms guidelines and with the publication of the direct final rule and companion proposed rule.
- d. It is staff's belief that the Commission has the option to provide staff direction on this topic in two or more partial SRMs. This would allow the staff to develop the direct final rule and companion proposed rule to occur as expeditiously as possible and to effectively use the parallel processing time required for the AG's review of the firearms guidelines on recommendations 1 through 4 and also allow the Commission's review of recommendations 5 and 6 and the issuance of a final SRM to occur in parallel with the AG's review of the firearms guidelines.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection.

/RA/

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/RA Martin J. Virgilio for/

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Enclosures:

1. *Federal Register* Notice and Firearms Guidelines
2. Analysis of Firearms Guideline Changes and Impacts on the Proposed Rule
3. Additional Classes of Facilities and Radioactive Material
4. Implementation Timelines and Tasks
5. Letter to Governors

Analysis of Firearms Guidelines Changes and Impacts on the October 2006 Proposed Power Reactor Security Rule

BACKGROUND:

The NRC published a proposed power reactor security rule in October 2006 which included provisions implementing the firearms guidelines mandated by section 161A. of the Atomic Energy Act of 1954, as amended (AEA).¹ The staff used the version of the firearms guidelines existing in September 2006 to develop the proposed rule language. The text of the proposed rule was consistent with that version of firearms guidelines. Two new sections were created and two existing sections and an appendix in Title 10 to the *Code of Federal Regulations* (10 CFR) Part 73 were modified in the proposed rule to implement this new authority.²

However, subsequent to the publication of the proposed rule, the U.S. Department of Justice (DOJ) requested significant changes to the firearms guidelines. The staff agreed to these changes and developed the necessary wording to provide the Commission with flexibility to implement the firearms guidelines effectively. The staff has evaluated the final version of the firearms guidelines (see Enclosure 1) against the version that existed in September 2006 which was used to develop the proposed rule that the public commented on. The staff has identified 11 substantive technical differences between the final version of the firearms guidelines and the October 2006 proposed rule text that would impact the language of a final rule. The staff has also identified two administrative changes that would improve the regulatory clarity of a final rule.

DISCUSSION:

The staff had recognized that the language of the final version of the firearms guidelines might differ significantly from the version of the firearms guidelines under consideration in September 2006. Therefore, changes from the proposed rule text might be required to ensure that the final rule text is consistent with the final version of the firearms guidelines. The NRC had noted this possibility in the proposed rule *Federal Register* notice (at 71 FR 62666) and had indicated that it would take appropriate actions to ensure the language of the final rule conforms with the final version of the firearms guidelines while being mindful of the NRC's obligation to provide stakeholders notice and opportunity to comment on proposed regulations.

The staff has identified 11 substantive technical differences between the September 2006 version and the final version of the firearms guidelines that would impact the language of a final rule. The staff has also identified two administrative changes that would improve the regulatory clarity of a final rule. A discussion of these 11 differences and the staff's proposal to address 10 of these differences and to address the 2 administrative issues are provided below. The staff is not recommending any changes for issue number 4. Ultimately, the text of the final rule implementing the firearms guidelines must be consistent with the language of the final firearms guidelines. Note: the section numbers mentioned in this list are from the firearms guidelines and are provided as an aid to the reader.

¹ 10 CFR Parts 50, 72, and 73, "Power Reactor Security Requirements; Proposed Rule," (RIN 3150-AG63) published in the *Federal Register* on October 26, 2006 (71 FR 62663).

² See sections 10 CFR 73.2, 73.8, 73.18, and 73.19 and Appendix G, "Reportable Safeguards Events," to Part 73.

Summary of Differences and Recommended Solutions

1. In Section 5, an exemption process was added, for existing licensees and certificate holders that currently possess machineguns, when a “delayed” response is received to a firearms background check (i.e., a check under the Federal Bureau of Investigation’s [FBI’s] National Instant Criminal Background Check System [NICS]). This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would provide an exemption process for existing licensees and certificate holders currently possessing machineguns.
2. In Section 5, a new requirement for periodic firearms background checks was added. The firearms guidelines require a recurring firearms background check at least every five (5) years. This requirement is in conflict with the proposed language for 10 CFR 73.18(b)(2) which stated that no further firearms background checks are required subsequent to the initial firearms background check. Additionally, no Office of Management and Budget (OMB) recordkeeping or reporting burdens were identified for these recurring checks. **Solution:** The direct final rule and companion proposed rule would require recurring firearms background checks to be completed every three (3) years. This would permit the fingerprints submitted for the firearms background check to be synchronized with the fingerprint checks for the access authorization program requirements for critical group personnel contained elsewhere in Part 73, and thereby minimize licensee and certificate holder costs. A new OMB information collection analysis of these revised recordkeeping and reporting requirements would be developed and OMB approval sought.
3. In Section 5, a new restriction on untimely submission by an individual of his (her) appeal information to the FBI would lead to barring or abandonment of an individual’s appeal of an adverse firearms background check. This provision is in conflict with the proposed new 10 CFR 73.18(p). In addition, the new requirement for a licensee or certificate holder to resubmit a proposed NRC Form 754, “Armed Security Personnel Firearms Background Check,” for further consideration of a new firearms background check also was not addressed in proposed rule. **Solution:** The direct final rule and companion proposed rule would address the consequences to an individual of untimely submission of information on appeal. The rule would also provide for the ability of a licensee or certificate holder to resubmit an individual for a background check, thereby preventing an unintended, untimely submission of information by an individual from becoming a permanent debarment of the individual.
4. In Section 6, the firearms guidelines permits the Commission to specify additional permissible reasons to remove enhanced weapons from a facility authorized to possess such weapons (i.e., for reasons other than for training or for escorting shipments of radioactive material or other property). This provision was not addressed in the proposed rule. **Solution:** The staff is not recommending adding any additional permissible reasons at the present time, since no additional removal needs have been identified. Therefore, no additional rulemaking is required to address this issue. However, this authority is available to the Commission if needed in the future.
5. In Section 6, a new requirement to conduct periodic accountability (i.e., inventory) requirements for enhanced weapons was added. A requirement to complete these

inventories at least annually was added. These provisions were not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would require two types of periodic inventories of any enhanced weapons possessed by a licensee or certificate holder. The first inventory would be conducted monthly and would verify the number of enhanced weapons present at the licensee's or certificate holder's facility (i.e., a "piece-count" inventory). The licensee or certificate holder may use electronic technology (e.g., bar codes on weapons) to conduct this inventory. The monthly inventories would not include weapons that are stored in locked containers which are sealed with a high-integrity, tamper-indicating device (TID) (e.g., "ready-service" in-plant storage containers). The second type of inventory would be conducted every six (6) months and would verify the serial number of all enhanced weapons. The six-month inventory would include any weapons stored in locked and TID-sealed storage containers. Both types of inventories would be conducted by teams of two individuals to prevent a single individual from manipulating the inventory results.

6. In Section 6, the firearms guidelines provide that the issuance of an enhanced weapon to a security officer [to accomplish their official duties] is not considered a transfer of an enhanced weapon under Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations. ATF regulations require that all transfers of enhanced weapons (i.e., weapons registered with ATF under the National Firearms Act (NFA)) be reviewed and approved by ATF in advance (see 26 U.S.C. 5812). The ATF review process can take a month or more in normal circumstances. Consequently, NRC, DOJ, and ATF staffs agreed this standard approach would be impractical for enhanced weapons issued to a security officer on a routine basis. Security officers are typically issued their weapons from the licensee's armory at the beginning of their duty shift and the security officer then returns the weapons to the licensee's armory at the end of their duty shift. A transfer would also trigger tax implications. This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would clarify that the issuance of an enhanced weapon [by an authorized licensee or certificate holder] to an individual security officer is not considered a "transfer" of an NFA-registered weapon. Therefore, ATF's transfer requirements under 27 CFR Part 479, "Machine Guns, Destructive Devices, and Certain Other Firearms," would not apply to this situation.
7. In Section 6, the firearms guidelines provide that a licensee or certificate holder possessing enhanced weapons must notify the NRC and local authorities of the theft or loss of an enhanced weapon registered under the NFA (see 26 U.S.C. 5841). Independent of NRC requirements, licensees and certificate holders who possessed enhanced weapons are required under 27 CFR 479.141 to immediately notify ATF of any stolen or lost weapons registered under the NFA. **Solution:** The direct final rule and companion proposed rule would require licensees and certificate holders to notify local law enforcement authorities within four (4) hours of notifying ATF of such a theft or loss. The rule would also require the licensee or certificate holder to notify the NRC of any such theft or loss within either: (i) four (4) hours of notifying ATF for a weapon that was stolen or lost outside their protected area, or (ii) one (1) hour of discovery for a weapon that was stolen or lost inside their protected area. The shorter notification time would be required when the theft or loss of an enhanced weapon occurred inside the facility's protected area and thus would have a greater likelihood of affecting the security of a

facility. These event notification requirements would be consolidated in a single paragraph in 10 CFR 73.71. No changes would be required to Appendix G, "Reportable Safeguards Events," to Part 73.

8. In Section 6, the firearms guidelines provide requirements on the transport of weapons (i.e., when not in use to escort shipments, they must be unloaded and locked in a secure container). This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would clarify that weapons being transported to or from the licensee's or certificate holder's facility must be unloaded and locked in a secure container. In contrast, weapons being used while escorting a shipment of radioactive material or other property must be maintained in a state of loaded readiness and be accessible (i.e., ready for use). Weapons and their ammunition may be transported in the same secure container.
9. In Section 7, the firearms guidelines provide provisions for the termination, modification, suspension, or revocation of a licensee's or certificate holder's authority under section 161A. A requirement for the NRC to notify ATF of any such actions does not exist. Furthermore, a process for re-application following such actions also does not exist. **Solution:** The direct final rule and companion proposed rule would require the NRC to notify ATF of the termination, modification, suspension, or revocation of a licensee's or certificate holder's Section 161A. authority. A process for a licensee's or certificate holder's re-application for this authority following termination, suspension, or revocation (of such authority) would also be specified.
10. In Section 8, some of the definitions in the firearms guidelines are not consistent with the proposed definitions in 10 CFR 73.2 (e.g., the definition for *enhanced weapons*). Additionally, new definitions were not included in the proposed 10 CFR 73.2 for the terms: *firearms background check*, *NICS check*, *NICS response*, and *satisfactory firearms background check* which are defined in the firearms guidelines. **Solution:** The direct final rule and companion proposed rule would revise the definitions in 10 CFR 73.2 to match the definitions contained in the firearms guidelines.
11. In Section 8, the firearms guidelines provide cross references for weapons terms and NICS terms from current ATF and FBI regulations, rather than replicating these terms in the firearms guidelines. This provision was not addressed in the proposed rule. **Solution:** The direct final rule and companion proposed rule would add cross references to the appropriate ATF and FBI regulations in 10 CFR 73.2, rather than fully replicating these ATF and FBI definitions in 10 CFR 73.2.

In addition to these 11 technical issues, the staff would address 2 administrative issues in the supplemental proposed rule, as follows:

12. In the information collection requirements of 10 CFR 73.8 of the proposed rule, a place holder was added for the OMB control number for Paperwork Reduction Act purposes for the FBI's current fingerprint form (Form FD-258) and proposed NRC Form 754. The FBI recently received the OMB control number for this form and provided this information to the staff. **Solution:** The direct final rule and companion proposed rule would list the new OMB control number for the FBI's fingerprint form FD-258 and refer to

10 CFR 73.19 as one of the sections of Part 73 where this burden is required (see also issue 13 below). The OMB control number would also be specified for NRC Form 754.

13. As originally developed by the staff, the order of presentation of the new regulations implementing the firearms guidelines first set forth the requirements on firearms background checks and then identified the classes of licensee or certificate holders to whom these provisions and the provisions for obtaining enhanced weapons and preemption authority or preemption authority alone would apply. Based upon discussions with staff and industry representatives, the staff now views this structure as not being logical and recognizes that this may cause confusion for both industry and the public. **Solution:** The staff would add regulatory clarity to the structure by switching the order of presentation of the implementing regulations in the direct final rule and companion proposed rule. Specifically, the staff would switch the content of 10 CFR 73.18 and 73.19 (i.e., 10 CFR 73.18 would describe the classes of licensees and certificate holders covered by section 161A. authority and 10 CFR 73.19 would then describe the firearms background check requirements for such classes of facilities and radioactive material).

Conclusion

The staff considered whether these necessary changes to the implementing language could be made in a final rule or whether further public notice and opportunity for comment would be appropriate. Given the number of technical differences, their substantive nature, and that some could not have been foreseen by commenters, the staff is recommending that the Commission 1) approve the staff solutions to the identified issues; 2) that the staff issue a direct final and companion proposed rule to provide additional opportunity for stakeholders comments and expeditious implementation of the new Authority of 161A.; and 3) that the Commission delegate to the Executive Director for Operations the authority to sign the direct final rule and companion proposed rule to expedite their issuance. The revised implementing text would be consistent with how the staff proposes to address issues 1 thru 3 and 5 thru 13. No further action is required on issue 4.

RECOMMENDATION

The staff will develop a direct final rule, accompanied by a companion proposed rule, which incorporates the solutions for issues 1 thru 3 and 5 thru 13. This rule will revise 10 CFR 73.2, 73.8, 73.18, 73.19, and 73.71. No changes are required to Appendix G to Part 73 to address the final version of the firearms guidelines.

Proposed Application of Section 161A. Authority to Various Classes of NRC-Regulated Facilities and Activities

ISSUE:

Should the Commission designate additional classes of facilities, radioactive material, or other property as appropriate for section 161A. authority?

BACKGROUND:

The firearms guidelines contained in Enclosure 1 (which are mandated by section 161A. of the Atomic Energy Act of 1954, as amended), require the Commission to promulgate regulations or issue orders designating certain classes of licensed facilities, radioactive material, and other property as appropriate for the application of enhanced weapons authority and preemption authority or for preemption authority alone. The Commission previously approved the staff's recommendation to designate the classes of facilities for power reactors and Category I strategic special nuclear material (SSNM) as appropriate for enhanced weapons authority and preemption authority. This was accomplished in the language for the proposed new section 10 CFR 73.19 under the proposed power reactor security rule.¹

DISCUSSION:

This enclosure provides the staff's recommendations for applying enhanced weapons authority and preemption authority, preemption authority alone, or neither authority across the spectrum of classes of NRC-regulated facilities owned or possessed by NRC licensees and certificate holders and classes of radioactive material and other property being transported to or from a facility owned or operated by an NRC licensee or certificate holder.

The proposed power reactor security rule only authorized this authority for two classes of licensed facilities, power reactors and Category I SSNM licensees. The staff recommended this approach due to restrictions on the scope of the proposed power reactor security rule and the delivery schedule. The staff's view during development of the proposed rule was that additional classes of licensed facilities and radioactive material transport (who are currently required by NRC regulations or orders to use armed security personnel as part of their physical protection strategy) would be appropriate candidates for section 161A. authority in some future rulemakings. Examples of such classes of facilities would include: conversion, gaseous diffusion, and independent spent fuel storage installations. Examples of such classes of radioactive material undergoing transport would include: Category I SSNM and spent fuel. The staff has not identified any classes of "other property" whose transport would be appropriate for section 161A. authority. The only other property potentially identified by the staff for consideration would be the transport of classified enrichment technology.

¹ See proposed new 10 CFR 73.19, "Authorization for preemption of firearms laws and use of enhanced weapons," in the "Proposed Power Reactor Security Rule," published in the *Federal Register* on October 26, 2006, (71 FR 62663) at pages 71 FR 62849 and 62850.

The staff's recommendations are summarized in Table 3-1 below for applying section 161A authority. If the Commission approves Table 3-1, the staff would use this direction and develop a proposed rule that would be sent to the Commission for its review. The staff notes that the Commission's approval of Table 3-1 does not preclude future changes to this weapons policy, if necessitated by changes to the current threat environment or by changes to NRC security requirements.

The staff has included for completeness in Table 3-1 the power reactor and Category I SSNM classes of facilities, but as noted above, the Commission has already approved these two classes of facilities for section 161A authority (thus no additional Commission approval is needed for these two classes of facilities). The staff has also included for completeness in Table 3-1 other classes of licensed facilities—which the NRC is authorized to regulate under the AEA and for whom such authority would be appropriate—even though no such NRC licensees or certificate holders currently exist or are contemplated (e.g., production reactors or plutonium separation facilities).

The staff used the following screening criteria in developing Table 3-1 and binning the various classes of facilities, radioactive material, and other property:

1. Preemption authority alone is appropriate for NRC-regulated facilities and activities for which the NRC requires by regulation or order the use of armed security personnel as part of a licensee's or certificate holder's protective strategy. This would permit such licensees and certificate holders to more effectively and efficiently implement their security programs and/or increase their defensive capabilities.
2. Preemption authority alone is appropriate for NRC-regulated facilities and activities for which the NRC has approved a security plan that requires the use of armed security personnel as part of a licensee's or certificate holder's protective strategy, even though the use of armed personnel is not otherwise required by regulation or order. This would permit such licensees and certificate holders to more effectively and efficiently implement their security programs and/or increase their defensive capabilities.
3. Preemption authority alone is appropriate for licensees and certificate holders where the potential exists for the theft of Secret-Restricted Data information, material, or components which could compromise proliferation-sensitive, high-efficiency uranium enrichment technology. This would permit such licensees and certificate holders to more effectively and efficiently implement their security programs' anti-proliferation components.
4. Enhanced weapons authority and preemption authority is appropriate for NRC-regulated facilities and activities for which a successful malevolent act results in radiological sabotage or a chemical release that could have a significant adverse effect on public health and safety or the common defense and security. This would permit such licensees and certificate holders to increase their defensive capabilities to prevent such events.

5. Enhanced weapons authority and preemption authority is appropriate for NRC-regulated facilities and activities for which a successful malevolent act results in the theft or diversion of SNM that could have an unacceptable likelihood of an adversary gaining sufficient SNM to successfully develop an improvised nuclear device or a nuclear weapon. This would permit such licensees and certificate holders to increase their defensive capabilities to prevent such events.

Although there would be advantages, including efficiency and timeliness, to incorporating the additional classes of facilities and radioactive material specified in Table 3-1 into the direct final rule and companion proposed rule implementing the firearms guidelines, the staff's preferred approach would be to include the list of designated classes of facilities and radioactive material specified in Table 3-1 as appropriate for section 161A. authority in a separate proposed and final rulemaking amending 10 CFR 73.18.

The agency's top priority in implementing this new authority from a security perspective should be to permit power reactor licensees and Category I fuel cycle facilities to take advantage of section 161A. authority as soon as possible. The fastest means to allow this to occur is through the use of a direct final rule and accompanying companion proposed rule. Expanding the scope of the *Federal Register* notices for the direct final rule and companion proposed rule to add additional classes of facilities and radioactive material would slow down the publication of those rules, because staff would need to devote additional time to preparing the regulatory analyses, environmental assessment, and the information collection burden analysis. Moreover, by expanding the scope of the enhanced weapons provisions beyond that of the October 26, 2006, proposed rule, the staff's view is that the NRC would be far more likely to receive significant adverse comments on the direct final rule and companion proposed rule, negating the opportunity of expeditiously implementing the guidelines through promulgation of a direct final rule.

RECOMMENDATIONS:

The staff recommends that the Commission authorize the staff to develop a separate proposed and final rulemaking amending 10 CFR 73.18 for the Commission's review. This rulemaking would expand the application of section 161A. authority to include the classes of facilities and radioactive material specified in Table 3-1. The staff also recommends the Commission not designate the transportation of any "other property" as appropriate for section 161A. authority.

**Table 3-1
Proposed Application of Enhanced Weapons Authority and Preemption Authority**

Enhanced Weapons and Preemption Authority	Preemption Authority Only	Neither
Reactor Facilities		
power reactors - operating and decommissioning - light water, heavy water, sodium, air, graphite, and helium cooling/moderation test reactors [Criteria 1 and 4] SNM production, breeder, and fast burner reactors [Criteria 1, 4, and 5]	research reactors [Criteria 1 and 2]	
Uranium Milling and Conversion Facilities		
UF ₆ conversion UF ₆ deconversion [Criteria 1 and 4]		milling
Uranium Enrichment Facilities		
gaseous diffusion technology gas centrifuge technology laser excitation technology [Criteria 4]	gaseous diffusion technology gas centrifuge technology laser excitation technology [Criteria 1, 2, and 3 only]	

Enhanced Weapons and Preemption Authority	Preemption Authority Only	Neither
Fuel Fabrication Facilities		
category I quantities of HEU, U ²³³ SSNM category II quantities of HEU and U ²³³ SNM [Criteria 1 and 5] category I quantities of Pu SSNM category II quantities of Pu SNM mixed oxide (MOX) [Criteria 1, 4, and 5]	category II quantities of LEU SNM category III quantities of SNM [Criteria 2]	
Waste Facilities		
independent spent fuel storage installation monitored retrievable storage installation spent fuel hot cells meeting 10 CFR 73.50 [Criteria 4] geologic repository operations area plutonium separation facilities [Criteria 4 and 5]		Low-level waste disposal
Byproduct Material Facilities		
		Irradiators (panoramic, teletherapy, and blood) manufactures and distributors well loggers radiographers radiopharmacies research facilities

Enhanced Weapons and Preemption Authority	Preemption Authority Only	Neither
Transportation Activities		
category I quantities of HEU and U ²³³ SSNM category II quantities of HEU and U ²³³ SNM [Criteria 1 and 5] category I quantities of Pu SSNM category II quantities of Pu SNM mixed oxide (MOX) spent nuclear fuel high-level radioactive waste [Criteria 1, 4, and 5]		low level waste depleted, natural, and low enriched UF ₆ quantities of concern (RAMQC) category II quantities of LEU SNM category III quantities of SNM classified matter (no radioactive material present) other property

Glossary of Terms

- HEU – high enriched uranium (≥ 20 % weight enriched in U²³⁵)
- LEU – low enriched uranium (< 20 % weight enriched in U²³⁵)
- MOX – mixed oxide (uranium and plutonium)
- MW(t) – megawatts thermal
- Pu – plutonium
- RAMQC – radioactive material quantities of concern
- SNM – special nuclear material
- SSNM – strategic special nuclear material
- UF₆ – uranium hexafluoride

Screening Criteria

The following screening criteria are referenced for the various classes of facilities, radioactive material, and other property described in Table 3-1.

1. Preemption authority alone is appropriate for NRC-regulated facilities and activities for which the NRC requires by regulation or order the use of armed security personnel as part of a licensee's or certificate holder's protective strategy.
2. Preemption authority alone is appropriate for NRC-regulated facilities and activities for which the NRC has approved a security plan that requires the use of armed security personnel as part of a licensee's or certificate holder's protective strategy, even though the use of armed personnel is not otherwise required by regulation or order.
3. Preemption authority alone is appropriate for licensees and certificate holders where the potential exists for the theft of Secret-Restricted Data information, material, or components which could compromise proliferation-sensitive, high-efficiency uranium enrichment technology.
4. Enhanced weapons authority and preemption authority is appropriate for NRC-regulated facilities and activities for which a successful malevolent act results in radiological sabotage or a chemical release that could have a significant adverse effect on public health and safety or the common defense and security.
5. Enhanced weapons authority and preemption authority is appropriate for NRC-regulated facilities and activities for which a successful malevolent act results in the theft or diversion of SNM that could have an unacceptable likelihood of an adversary gaining sufficient SNM to successfully develop an improvised nuclear device or a nuclear weapon.

Implementation Timelines and Tasks

BACKGROUND:

In developing the firearms guidelines, the staff included language providing the Commission the flexibility to authorize application of section 161A. authority to licensees and certificate holders by the promulgation of rules or by the issuance of orders. The staff had recognized that implementation of this authority by order in individual cases might be faster than the standard rulemaking process, and would thus provide the Commission increased flexibility in implementing this statute. As described in the accompanying paper, section 161A. provides new authority in two ways. The staff is using the phrase “preemption authority alone” to describe the first and “enhanced weapons authority and preemption authority” to describe the second. Licensees and certificate holders wishing to apply for “enhanced weapons authority” must also apply for “preemption authority”; however, licensees and certificate holders may apply for “preemption authority” alone

The staff would use the following example to illustrate how a licensee or certificate holder might benefit from preemption authority. State “A” passed legislation that established a state restriction on large capacity ammunition feeding devices (magazines), mirroring Federal statutory restrictions. However, Federal restrictions on large capacity ammunition magazines have been sunset. Thus, a licensee or certificate holder could use this authority notwithstanding State “A’s” existing statute and thereby increase its defensive firepower. In contrast, the advantages of enhanced weapons authority are much more straightforward, i.e., it would permit a licensee or certificate holder to obtain machine guns or other restricted weapons and thereby increase their defensive capabilities.

DISCUSSION:

The staff’s estimate of the time required by a licensee or certificate holder to deploy enhanced weapons is approximately 16 to 24 months after a licensee or certificate holder begins evaluating their need for specific weapons against the enhanced weapons requirements. The licensee must submit the necessary documents to the NRC (including revised security plans and a weapons safety assessment), and then obtain the required NRC and ATF approvals. The staff did not obtain industry input in developing these time estimates. Fundamentally, the length of time necessary to complete the process cannot be shortened, except through experience. However, some activities could be accomplished in parallel to reduce the overall amount of time needed to deploy enhanced weapons. An additional constraint is the availability of staff resources. Review of a licensee’s revised security plan, training and qualification plan, and weapons safety assessment necessary to deploy enhanced weapons would be required under both approaches and is expected to require a substantial amount of time (staff estimates 0.3 to 0.4 FTE per application). Additionally, the Nuclear Energy Institute has approached the staff about conducting a pilot program on implementing this new process. The staff supports this concept to work out any challenges with a single licensee and thereby make the overall process more efficient.

Also impacting the length of the staff’s review is the specific caliber (or increase in caliber) of the weaponry the licensee or certificate holder is requesting. For example, a licensee currently deploying 5.56 x 45 mm AR-15 semi-automatic rifles in its security plan who wants to obtain 5.56 x 45 mm M-16 automatic rifles would not require the same depth of review as if the licensee also wanted to deploy 7.62 x 51 mm M-240 machine guns. A further complexity might

be introduced if, instead of the M-240, the licensee wants to deploy the 5.56 x 45 mm M-249 squad automatic weapon (i.e., the same caliber round as its current AR-15 rifles, but a much higher rate and quantity of fire for these automatic weapons). The staff's estimate is that this second potential submittal would require a somewhat lesser depth of review than would be necessary to deploy a larger caliber (i.e., more powerful) weapon such as the M-240, due to the greater range and penetrating power of the 7.62 x 51 mm round versus the 5.56 x 45 mm round.

The staff has developed the following timelines to provide the Commission information on implementation issues and resource prioritization. However, the staff notes that significant uncertainty exists with the Phase 1 estimates, specifically the amount of time required for the Attorney General to approve the firearms guidelines. Uncertainty also exists for the Phase 3 timeline with regard to the staff's reviews of the weapons safety assessments, license response to any requests for additional information (RAIs), or ATF's approval to transfer the enhanced weapons to the licensee.

The total number of eligible licensees who would actually apply for section 161A. authority is unknown. Also unknown is the timing of such submittals, due to significant uncertainties on how long it will take a licensee or certificate holder to (1) assess the advantages and disadvantages of deploying enhanced weapons for its protective strategy; (2) select the specific enhanced weapons to be deployed; (3) revise its security plans, training and qualification plans, and complete the weapons safety assessment for the specific weapons; and (4) submit their application and these plans to the NRC for review and approval.

PHASE 1 – FIREARMS GUIDELINES ISSUANCE	SCHEDULE
SECY paper delivered to Commission	+0
Commission issues a partial SRM approving the firearms guidelines and staff forwards the firearms guidelines to the Attorney General (AG)	+4 w
AG approves firearms guidelines	+10 w
Staff publishes firearms guidelines in <i>Federal Register</i> and issues letters to governors. Section 161A. takes effect.	+11 w

Although the estimates in the Phase 2 timeline for completing a direct final rule are consistent with the staff's standard direct final rule schedule, the staff will attempt to shorten the actual time to issue this direct final rule by (1) beginning this work in parallel with the Commission's review of this paper and (2) by aggressively completing the longest duration item (development and office concurrence on the direct final and companion proposed rules) as soon as possible.

PHASE 2 – DIRECT FINAL RULE ISSUANCE	SCHEDULE
Staff begins development of direct final rule, companion proposed rule, OMB information collection burden, and guidance documents	+0
Commission issues a final SRM approving use of a direct final rule and delegating signing to the EDO	+4 w
Staff delivers direct final rule, companion proposed rule, and supporting documents to the EDO	+28 w
EDO review of the rulemaking package, coordination with Commission (per Management Directive 6.3), and publication of direct final rule and companion proposed rule for comment	+32 w

PHASE 2 – DIRECT FINAL RULE ISSUANCE	SCHEDULE
Staff publication of supporting regulatory guidance for comment on enhanced weapons (DG-5020) and final guidance on event notifications (DG-5019)	+32 w
30–day public comment period on companion proposed rule closes	+36 w
Staff review of comments to determine whether there are any significant adverse comments	+39 w
Publication of notice confirming effective date of direct final rule before the 90-day effective date. No significant adverse comments were received and OMB approval of the information collection burden has been received.	+40 w
Direct final rule takes effect 90 days after publication. Supporting final regulatory guidance will be issued subsequently	+42 w

The Phase 2a timeline begins with the close of the comment period on the companion proposed rule and assumes that significant adverse comments have been received and that a separate final rule will be developed and provided to the Commission for its review and approval.

PHASE 2a – SIGNIFICANT ADVERSE COMMENTS RECEIVED	SCHEDULE
30–day public comment period on companion proposed rule closes	+36 w
Staff review of comments on companion proposed rule and evaluation against the significant adverse comment criteria.	+39 w
Significant adverse comments are received and the staff publishes a notice withdrawing direct final rule (before the 90-day nominal effective date)	+41 w
Staff develops a final rule responding to comments and provides the rule to EDO to forward to the Commission	+48 w
Commission issues SRM approving final rule	+54 w
Staff publishes final rule in the <i>Federal Register</i> and supporting final regulatory guidance will be issued subsequently	+60 w

The Phase 3 timeline begins with the publication of the firearms guidelines in the *Federal Register*. This is based upon the assumption that licensees will not begin their planning efforts until they can review the firearms guidelines and this paper (specifically Enclosure 2) following its public release. Moreover, this timeline also assumes that licensees will begin their planning and development efforts before the direct final rule and companion proposed rule are published and industry can review the new implementing language (necessary to develop their plans). To ameliorate the impact from this uncertainty, the staff will evaluate posting preliminary draft companion proposed rule language to the Federal rulemaking Web site at www.regulations.gov as soon as possible.

The 11 week completion point from Phase 1 above was used as the starting point in developing this timeline. Additionally, this timeline assumes that one round of RAIs will be required for the staff to complete its review of the revised security plans, training and qualification plan, contingency response plan, and weapons safety assessment. The creation of the RAIs, the licensee’s evaluation and response to the RAIs and any plan changes, and the staff’s review of these revised documents is estimated to take 21 weeks. Consequently, if RAIs are not required, then the Phase 3 timeline could be shortened by an estimated 21 weeks.

PHASE 3 – LICENSEE IMPLEMENTATION	SCHEDULE
Firearms guidelines published in the <i>Federal Register</i> and section 161A. takes effect.	+11 w
Licensees begin analysis of potential choices of enhanced weapons and evaluate implementation information in the SECY paper and Enclosure 2. SECY paper will be released with the publication of the firearms guidelines.	+11 w
Licensee applies to the NRC for preemption authority and begins firearms background checks	+12 w
Licensee determines that a sufficient number of firearms background checks have been satisfactorily completed and notifies the NRC.	+20 w
NRC approves preemption authority for licensee after the direct final rule takes effect	+42 w
Licensee develops revised security plan, revised training and qualification plan, revised contingency response plan, and weapons safety assessment and applies to the NRC for enhanced weapons authority	+23 w
Staff reviews licensee's plans and weapons safety assessment and develops draft SER and any RAIs (if required)	+39 w
If no RAIs are required, then NRC issues letter approving the licensee's application for enhanced weapons after the direct final rule takes effect	+42 w
If RAIs are required, they are issued to the licensee	+39 w
Licensee develops response to RAIs and submits them to the NRC	+51 w
Staff evaluates responses to RAIs and develops final SER	+55 w
NRC issues letter approving the licensee's application for enhanced weapons	+57 w
Licensee forwards copy of NRC approval letter to the ATF federal firearms licensee (manufacturer or importer) supplying the enhanced weapons	+59 w
Federal firearms licensee forwards transfer paperwork to ATF, National Firearms Act Branch for ATF review and approval	+60 w
ATF approves transfer of enhanced weapons to NRC licensee	+68 w
Manufacturer or importer delivers enhanced weapons to NRC licensee	+76 w
Licensee trains security offices on the enhanced weapons	+88 w
Licensee deploys the enhanced weapons	+89 w

Confirmatory Orders

As discussed above, the firearms guidelines provide the Commission with flexibility to implement the new authority of section 161A. through the promulgation of regulations or through the issuance of orders. While the promulgation of regulations to implement section 161A. remains the staff's preferred approach, the staff's has analyzed the steps a licensee would need to complete to permit the NRC to issue confirmatory orders and additional security measures (ASMs) implementing section 161A. authority.

The staff notes that the following steps refer to actions taken by a licensee. However, if the Commission approves the staff's recommendations in Enclosure 3, then certificate holders (for gaseous diffusion plants) would also be able to apply for section 161A. authority using this process.

Implementation of preemption authority under confirmatory orders would occur as follows:

- The licensee submits a letter to the NRC applying for preemption authority.
- The licensee can then begin submitting an NRC Form 754, "Armed Security Personnel Firearms Background Check," and fingerprints for each of their security personnel to the NRC for forwarding to the Federal Bureau of Investigation (FBI). The FBI will accomplish the firearms background check under the National Instant Criminal Background Check System (NICS).
- The FBI will return the results of the firearms background checks to the NRC and they will be forwarded to the submitting licensee.
- The licensee receives a sufficient number of satisfactory responses (i.e., a "proceed" response) to the firearms background checks for their security personnel to ensure that sufficient security personnel are available to meet fatigue and overtime requirements. The licensee then submits a second letter to the NRC indicating it is able to comply with the preemption authority ASMs.
- The NRC issues a confirmatory order and ASMs approving the licensee's application for preemption authority.

The staff notes that submission of firearms background check information to the NRC under the proposed NRC Form 754 cannot begin until Office of Management and Budget (OMB) approval is received on the information collection burden for the proposed NRC Form 754. OMB approval is required under the Paperwork Reduction Act of 1995. The staff is currently working on obtaining OMB approval for this new form.

Secondly, implementation of enhanced weapons authority under confirmatory orders would occur as follows:

- The licensee evaluates the enhanced weapons it would like to deploy, completes a weapons safety assessment on these specific weapons, and develops changes to its security plan and training and qualification plan.
- Unless they have already done so, the licensee submits a letter to the NRC applying for preemption authority.
- The licensee also submits a letter to the NRC applying for enhanced weapons authority. The application would include information on the enhanced weapons it wants to obtain (e.g., numbers of weapons, model, caliber), the weapons safety assessment, a revised security plan (to employ the weapons), and a revised training and qualification plan. Note: the licensee's application for enhanced weapons authority may be made in conjunction with its application for preemption authority, or it may be made separately.
- The NRC reviews the licensee's application, develops any requests for additional information, and prepares a security evaluation report approving the licensee's application.
- The NRC issues a confirmatory order and ASMs to the licensee approving their application for section 161A. enhanced weapons authority.
- The letter transmitting the order to the licensee will also include information on the specific numbers of weapons, model, and caliber approved for the licensee or certificate holder.
- The licensee provides a copy of the NRC's approval letter to the ATF federal firearms license (FFL) holder supplying the enhanced weapons.

- The FFL holder submits the necessary ATF paperwork and a copy of the NRC approval letter to ATF and requests approval to transfer the enhanced weapons to the NRC licensee.
- The ATF grants approval to the FFL holder to transfer the enhanced weapons to the licensee. The FFL holder transfers the weapons to the licensee.
- The licensee completes the training for their security personnel on the enhanced weapons as specified under the licensee's approved training and qualification plan.
- The licensee deploys the enhanced weapons.