

RULEMAKING ISSUE (Affirmation)

August 4, 2011

SECY -11-0107

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: FINAL RULE: REQUIREMENTS FOR FINGERPRINT-BASED
CRIMINAL HISTORY RECORDS CHECKS FOR INDIVIDUALS
SEEKING UNESCORTED ACCESS TO NONPOWER
REACTORS (RESEARCH OR TEST REACTORS)
(RIN 3150-AI25)

PURPOSE:

To obtain the Commission's approval to publish a final rule in the *Federal Register* that would amend Title 10 of the *Code of Federal Regulations* (10 CFR) 73.57, "Requirements for Criminal History Records Checks of Individuals Granted Unescorted Access to a Nuclear Power Facility or Access to Safeguards Information." This amendment adds nonpower reactor (NPR) licensees to the scope of those subject to fingerprinting requirements for unescorted access.¹

SUMMARY:

The final rule amends 10 CFR 73.57 to require NPR licensees to fingerprint individuals who seek unescorted access at their facilities. This action is necessary to comply with the requirements of Section 652 of the Energy Policy Act of 2005 (EPAct), which amended

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¹ 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 50.2, and include utilization facilities licensed under the Atomic Energy Act (AEA), sections 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.

Section 149 of the Atomic Energy Act of 1954, as amended (AEA), to require a Federal Bureau of Investigation (FBI) fingerprint-based criminal history records checks of any person who is granted unescorted access to a utilization facility.

BACKGROUND:

Section 652 of the EAct, enacted on August 8, 2005, amended the AEA fingerprinting requirements. Specifically, the EAct amended Section 149 of the AEA by enlarging the scope of individuals who require fingerprinting and criminal history records checks before permitted unescorted access to a *utilization facility* (including NPRs).

In SECY-05-0201, "Implementation of the Energy Policy Act," dated October 31, 2005, the NRC staff informed the Commission of the staff's plan for implementing the NRC's responsibilities under the EAct and requested Commission approval. The Commission approved the staff's recommendations and directed the staff to identify appropriate interim regulatory actions that the NRC should implement while it developed the generic requirements for granting unescorted access, including those in Section 652 of the EAct on fingerprinting.

In SECY-07-0011, "Interim Implementation of Fingerprinting Requirements in section 652 of Energy Policy Act 2005," dated January 12, 2007, the NRC staff provided information and recommendations to the Commission on its EAct interim implementation plan. In a Staff Requirements Memorandum (SRM), "Staff Requirements – SECY-07-0011 – Interim Implementation of Fingerprinting Requirements in Section 652 of Energy Policy Act 2005," dated March 12, 2007, the Commission directed the NRC staff to issue orders to NPRs that require fingerprint-based criminal history records checks for individuals requesting unescorted access to risk-significant areas or materials within these facilities. The Commission also directed the NRC staff to proceed with a rulemaking and, as part of that rulemaking, to determine whether to require fingerprint-based criminal history records checks for additional personnel beyond those specified in the orders.

The NRC imposed fingerprinting requirements for unescorted access on the applicable NPR licensees by order (Order EA-07-074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Checks Requirements for Unescorted Access to Research and Test Reactors," dated April 30, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML070750140), and Order EA-07-098, "Order Imposing Fingerprinting and Criminal History Records Checks Requirements for Unescorted Access to the General Atomics' Research and Test Reactors," dated August 1, 2007 (ADAMS Accession No. ML072050494)). The NRC required licensees to submit the fingerprints of individuals who were seeking or who currently had unescorted access. Individuals who had previously undergone 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 an NRC-approved reviewing official consider the results of the FBI criminal history records checks in conjunction with other applicable requirements to determine whether an individual may be granted or allowed continued unescorted access. The reviewing official could be the same official that the NRC previously approved for the SGI order (Order EA-06-203, "Issuance of Order Imposing Fingerprinting and Criminal History Records Checks Requirements for Access to Safeguards Information," dated September 29, 2006 (ADAMS Accession No. ML061510049)).

Advance Notice of Proposed Rulemaking

In the SRM for SECY-08-0196, the Commission approved publication of an advanced notice of proposed rulemaking (ANPR), and on April 14, 2009, the NRC published the ANPR (74 FR 17115) to obtain stakeholder views on the issues associated with the proposal to require fingerprint-based criminal history records checks for individuals granted unescorted access to NPRs. The ANPR indicated that the NRC was beginning the process of establishing generic requirements for NPR licensees to obtain fingerprint-based criminal history records checks on individuals having unescorted access to their facilities. The ANPR was intended to inform external stakeholders of the options that the NRC was considering for implementing the fingerprinting requirements (as a rulemaking) for NPR licensees and to provide interested stakeholders an opportunity to comment. The NRC received seven comment letters. In addition, the staff considered comments received during a public workshop held on June 4, 2009. Most of the commenters expressed the view that the NRC should codify the previously imposed orders and should not include any additional requirements. Several NRC licensees stated that the regulation should be “identical” to the orders and that expanding the requirement beyond the orders is “neither justifiable nor effective” and would cause an “undue burden on the affected licensees.”

Proposed Rulemaking

In the SRM for SECY-10-0045, the Commission approved publication of a proposed rule, and on July 20, 2010, the NRC published a proposed rule (75 FR 42000) that would require FBI fingerprint-based criminal history records checks for individuals granted unescorted access to nonpower reactors. The Federal Register Notice (FRN) for the proposed rule included a detailed analysis of the public comments on the ANPR and their resolution.

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 comment period and eleven comment letters during the reopened public comment period. Several commenters stated that the proposed rule would add additional requirements for security at NPR facilities that would further limit student, faculty, and research access and divert additional resources from educational and research missions without due consideration of risk or commensurate security threats. Based on the feedback received on the proposed rule and Commission direction, the NRC staff developed the enclosed final rulemaking FRN.

DISCUSSION:

This final rule establishes generically applicable fingerprinting requirements for NPR licensees similar to those previously imposed by the Commission orders for the granting of unescorted access. Specifically, the amendments implement the requirements in Section 149(a)(1)(B)(i)(I) of the AEA which states, “The Commission shall require to be fingerprinted any individual who is permitted unescorted access to...a utilization facility.” Section 149 of the AEA grants the NRC the authority to impose FBI fingerprint-based identification and criminal history records checks for individuals seeking unescorted access at a broader range of NRC licensees and regulated

facilities. Before the EAct amended Section 149, the NRC required fingerprinting for unescorted access to facilities licensed under Sections 103 and 104b of the AEA. Because of the amendment, which eliminated the references to Sections 103 and 104b, utilization facilities which were not previously subject to these requirements are now required to meet these fingerprint requirements. The primary focus of this final rulemaking is this specific expansion.

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

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.

Accordingly, the staff developed the provisions in the enclosed final rule FRN in accordance with the requirements of Section 149 of the AEA and consistent with Section 104 of the AEA. The NRC staff recognizes that future NPRs could be licensed under Section 103 of the AEA (e.g., molybdenum-99 medical isotope production facilities). The NRC staff concludes that the provisions of the final rule establish an adequate set of minimum fingerprinting requirements for unescorted access at these Class 103 NPR facilities, but since such facilities do not currently exist, the NRC staff cannot contemplate at this time the specific challenges that these facilities may present.² If the Commission decides that these fingerprinting requirements need supplementation for hypothetical Class 103 NPRs, the NRC staff recommends that the Commission supplement these minimum requirements as necessary during the licensing process through the use of license conditions.

NRC-Approved Reviewing Official

The provisions contained in the enclosed FRN include a requirement that no person shall be permitted unescorted access to an NPR facility unless an NRC-approved reviewing official has determined that person to be trustworthy and reliable based on the results of an FBI fingerprint-based criminal history records checks. This provision was also included in the orders previously issued by the NRC. The staff included this provision to require an NRC-approved reviewing official because it is essential that the person(s) making the decision to grant unescorted access (the reviewing official) be trustworthy and reliable. Otherwise, the entire process is fundamentally undermined and presents an undue risk to the common defense and security. Consequently, the staff concludes that a trustworthy and reliable reviewing official is required to adequately implement the fingerprinting provisions of Section 149 of the AEA. One way to achieve this is to require NRC approval for the reviewing official, a process that the staff believes is the simplest and most straightforward. The amendment does not impose new requirements on current NPR licensees since they are free to continue using the currently approved reviewing officials (i.e., approved as a result of the previous orders—either the unescorted access order or the SGI access order). It should be noted,

² Reference 10 CFR 50.22, 50.21, and 50.23 for description of Class 103 and 104 licensees.

however, that because Section 149 of the AEA only allows the collection of fingerprints from persons with either unescorted access to the NPR or access to SGI, the final rule includes a provision that requires the reviewing official have either unescorted access to the NPR or access to SGI.

This final rule requires that the reviewing official be approved by the NRC, consistent with the proposed Part 37 rulemaking. However, upon re-evaluation, NSIR has revised its original position regarding the requirements of having an NRC-approved reviewing official. NSIR believes that the NRC should remain an independent regulator and not be involved in a licensee's staffing decision. In the final Part 37 rulemaking, NSIR has proposed that the requirement of having an NRC approved reviewing official be revised to require a licensee approved reviewing official. The licensee's determination should be based on a complete background investigation that includes the fingerprinting and FBI criminal history records check. NSIR recommends that the reviewing official requirements in Part 37 and 10 CFR 73.57 be consistent. If the Commission approves the changes to Part 37, the requirement for an NRC-approved reviewing official, in 10 CFR 73.57, could be changed in a future rulemaking.

Vital Area

The Commission directed the staff to consider whether this rulemaking should expand the scope of fingerprinting for unescorted access to NPRs beyond that of the previously issued fingerprinting orders. The provisions are largely consistent with the previous unescorted access orders, so in general the staff does not believe that a significant shift in the scope of persons fingerprinted is necessary. However, in constructing the provisions of the rule, the staff elected to modify some terminology from that used in the unescorted access order. The staff designed the provisions to use two different criteria: one focused on material (special nuclear material (SNM)) and one focused on an area (the vital area).

The staff acknowledges the challenge in establishing generic rule language that works for the wide variety of current NPR licensees and situations, as well as future NPR licensees. In the six-year development of this rulemaking, the NRC staff conducted extensive outreach and considered valuable input from varied stakeholders including a letter from the Organization of Test, Research, and Training Reactors dated December 15, 2006 (ADAMS Accession No. ML070100490) that specifically recommended the use of this term, *vital area*. Although not all NPRs use the terminology, it is generically-applicable for all *utilization facilities* and defined in 10 CFR Part 73.

The staff notes that the two criteria may overlap significantly, and that in large measure, the SNM criterion (which is consistent with the previous unescorted access order) would, in most situations, determine whether an individual is required to be fingerprinted in accordance with the provisions. The staff also notes that historically, NPR licensees have usually associated the vital area with the storage of unirradiated highly enriched uranium, and that the principal security concern for most NPR facilities has been the theft and diversion of highly enriched uranium. However, the staff is using *vital area* in the enclosed provisions as defined in 10 CFR 73.2, *Definitions*. A vital area at a particular NPR will vary as a function of the facility design. Security assessments performed for a number of licensees can provide the licensees with insight into what constitutes a vital area.

Fingerprinting Requirements

In order to employ current fingerprint requirement provisions which are in place for other licensees subject to a FBI fingerprint-based criminal history records checks, NPR licensees are incorporated in the scope of 10 CFR 73.57. This ensures that NPR licensee fingerprints are handled consistently with the process used for other licensees, and that the NRC meets its obligations under the AEA to utilize FBI records checks. Additionally, the inclusion of NPR licensees into 10 CFR 73.57 provides NPR licensees the same regulatory reliefs afforded to other licensees subject to fingerprinting requirements.

The NRC is adding 10 CFR 73.57(g) to provide new fingerprint-based criminal history records checks requirements for NPR licensees. The scope of the requirements is consistent with the NRC's previously issued orders. Orders EA-07-074 and EA-07-098 require NPR licensees to conduct FBI fingerprint-based identification and criminal history records checks for individuals granted unescorted access to SNM at these facilities. The NRC issued the orders as interim measures until the agency could formulate generically applicable requirements for incorporation into the CFR. The NRC staff will issue a memorandum letter to all affected licensees describing the process of relaxing the 2007 NRC security orders as their compliance with this final rule is documented. The staff expects that NPR licensees will evaluate their current security plans and procedures, considering the definitions of vital area (in 10 CFR 73.2) and unescorted access in the new 10 CFR 73.57(g), as well as any other security assessment information that might be available, to determine which individuals should be fingerprinted for unescorted access.

The staff notes that the final fingerprint provisions attached to this paper do not include additional background investigation requirements for which the NRC solicited stakeholder feedback. Stakeholders were opposed to an expansion of the scope of this rulemaking to include background investigations. The staff agrees with stakeholders that the implementation of AEA Section 149 fingerprint requirements does not necessitate an expansion of the scope of this rulemaking to include the imposition of additional background investigation requirements.

Implementation

The staff recommends that the final rule provisions be effective 180 days after publication in the *Federal Register*. In response to public comments, this compliance period is 60 days longer than the 120 days originally proposed. 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 staff believes that the majority of procedure and plan changes are currently in place as a result of the previously issued unescorted access order.

The NRC solicited input in the proposed rule, asking if there were any known aggregate impacts that could impede implementation of the proposed provisions. In response, stakeholders stated that the proposed 10 CFR Part 37 rulemaking, "Physical Protection of Byproduct Material" (75 FR 33902; June 15, 2010) could adversely impact their capability to implement the unescorted access fingerprint rulemaking. In response to these concerns, the NRC staff held a Category 3 public meeting on June 23, 2011 (ADAMS Accession No. ML111460100 and ML111821113) consistent with the Cumulative Effects of Regulation initiatives discussed in SECY-11-0032. 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. An NRC staff member from the Part 37 rulemaking was present to address these concerns. Additionally, the staff intends to offer an informed series of site-specific implementation meetings for each licensee.

COMMITMENTS:

Implementation planning meetings as described in enclosed communication plan. This action includes no other new commitments other than routine rule-related items.

RECOMMENDATIONS:

The staff recommends that the Commission take the following actions:

1. Approve for publication in the *Federal Register* the amendment to 10 CFR 73.57 (Enclosure 1).
2. Certify that this rule, if promulgated, will not have a significant impact on a substantial number of small entities. This certification is included in the enclosed FRN and satisfies the requirement of the Regulatory Flexibility Act (5 U.S.C. 605(b)).
3. Note the following:
 - a. The staff prepared a regulatory analysis for this rulemaking (Enclosure 2).
 - c. The staff will inform the appropriate congressional committees of this action.
 - d. The NRC Office of Public Affairs will issue a press release when the final rulemaking is filed with the Office of the Federal Register.
 - e. An Office of Management and Budget (OMB) review is required, and the staff has forward a clearance package to the OMB desk officer for approval.

RESOURCES:

The resources required to complete this final rule have been budgeted for Fiscal Year (FY) 2011. No additional resources are requested.

Business Line	Offices	Product Line	Product	FY 2011 Resources
Operating Reactors	OIS	Rulemaking	Rulemaking	0.1
Operating Reactors	NRR	Rulemaking	Rulemaking	\$50K and 0.8 FTE
Operating Reactors	NSIR	Rulemaking	Rulemaking	
Operating Reactors	OGC	Rulemaking	Rulemaking	
Operating Reactors	FSME	Rulemaking	Rulemaking	
Operating Reactors	ADM	Rulemaking	Rulemaking	
				\$50K and 1.4 FTE

COORDINATION:

OGC has no legal objection to the final rulemaking. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections.

The rule suggests changes in information collection requirements that have been submitted to OMB for approval prior to the date the final rule is forwarded to the Office of the Federal Register for publication.

/RA by Martin J. Virgilio for/

R. W. Borchardt
Executive Director
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Enclosures:

1. *Federal Register* Notice
2. Regulatory Analysis
3. Regulatory Analysis Appendix

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1. *Federal Register* Notice
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