



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 22, 2010

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0045

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

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 22, 2010.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in cursive script, reading "Andrew L. Bates".

Andrew L. Bates
Acting Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-10-0045

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	PARTICIP	NOT COMMENTS	DATE
CHRM. JACZKO	X					5/14/10
COMR. SVINICKI	X				X	6/15/10
COMR. APOSTOLAKIS	X					5/26/10
COMR. MAGWOOD	X					6/13/10
COMR. OSTENDORFF	X				X	6/10/10

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and Commissioners Svinicki and Ostendorff provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on June 22, 2010.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Chairman Jaczko
SUBJECT: SECY-10-0045 – PROPOSED RULE: REQUIREMENTS FOR FINGERPRINT-BASED CRIMINAL HISTORY RECORDS CHECKS FOR INDIVIDUALS SEEKING UNESCORTED ACCESS TO RESEARCH OR TEST REACTORS (RIN 3150-A125)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached None X



SIGNATURE

5/14/10

DATE

Entered on "STARS" Yes x No

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-10-0045 – PROPOSED RULE: REQUIREMENTS FOR FINGERPRINT-BASED CRIMINAL HISTORY RECORDS CHECKS FOR INDIVIDUALS SEEKING UNESCORTED ACCESS TO RESEARCH OR TEST REACTORS (RIN 3150-A125)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___



SIGNATURE

06/15/10

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on SECY-10-0045
Proposed Rule: Requirements for Fingerprint-Based Criminal History Records Checks
for Individuals Seeking Unescorted Access to Research or Test Reactors
(RIN 3150-A125)

I approve publication in the *Federal Register* of the proposed amendments to 10 CFR 73.57, as edited in the attached. Staff should submit to the Commission, with the draft final rule package, its plan to sunset the existing research and test reactor (RTR) fingerprinting orders. Although I believe the staff's proposal to issue additional background investigation requirements is likely inconsistent with the NRC's obligation under Section 104c of the Atomic Energy Act to put in place the minimum requirements for RTR licensees, I approve the solicitation of stakeholder feedback on this topic. Should such new requirements be proposed in the draft final rule, however, I will scrutinize the requirements and all public comment on them, closely. Further, with such requirements, the proposed effective date (of 120 days after issuance of the final rule) is likely to be grossly inadequate.



Kristine L. Svinicki 06/15/10

Global: criminal history records checks

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150-AI25

[NRC-2008-0619]

Requirements for Fingerprint-Based Criminal History Records Checks
For Individuals Seeking Unescorted Access to Research or Test Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to require research and test reactor (RTR) licensees (also called nonpower reactor licensees) to obtain a fingerprint-based criminal history records check before granting any individual unescorted access to their facilities. This action is necessary to comply with the requirements of Section 652 of the Energy Policy Act of 2005 (EPA[^]ct) which amended Section 149 of the Atomic Energy Act of 1954, as amended (AEA), to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and a criminal history records check of any person who is permitted unescorted access to a utilization facility. X

DATES: Submit comments on the rule by **[INSERT DATE 75 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Submit comments on the information collection aspects of this rule by **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Comments received after the above dates will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after these dates.

ADDRESSES: Please include Docket ID NRC-2008-0619 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see Section I, "Submitting Comments and Accessing Information" in the SUPPLEMENTARY

Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, or 301-415-4737, or by e-mail to PDR.Resource@nrc.gov.

Federal Rulemaking Web Site: Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2008-0619.

Document	PDR	ADAMS	Web
EA-07-074, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors, issued April 30, 2007 (72 FR 25337; May 4, 2007)	x	ML070750140	x
EA-07-098, Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics Research and Test Reactors, issued August 1, 2007 (72 FR 44590; August 8, 2007)	x	ML072050494	x
Advance Notice of Proposed Rulemaking, published on April 14, 2009 (74 FR 17115)	x	ML090920147	x
Regulatory Analysis	x	ML100610022	x
Regulatory Analysis Appendix		ML100610020	
Proposed Rule Information Collection Analysis	x	ML100610010	x

II. Background

Before the terrorist actions of September 11, 2001, NRC regulations in 10 CFR 73.60 and ^{extra space} 10 CFR 73.67 imposed physical protection requirements on RTRs that included measures for storing and using special nuclear material in controlled access areas, monitoring the controlled access areas for unauthorized activities, and ensuring a response to all unauthorized activities to protect special nuclear material from theft or diversion. Additionally, 10 CFR 73.60(f) implemented the Commission's authority to impose alternative or additional security measures

for the protection against radiological sabotage for RTRs licensed to operate at power levels at or above two megawatts thermal (MWt). Under this provision, several RTRs have implemented such additional measures. Subsequent to September 11, 2001, the NRC evaluated the adequacy of security at RTRs and considered whether additional actions should be taken to help ensure the trustworthiness and reliability of individuals with unescorted access. RTRs were advised to consider taking immediate additional precautions, including observation of activities within their facility. The NRC evaluated these additional measures at each facility during the remainder of 2001.

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

Section 652 of the EPA Act, enacted on August 8, 2005, amended Section 149 of the AEA to require fingerprinting and FBI identification and criminal history records checks for individuals requesting unescorted access to any utilization facility, including RTRs, or radioactive material or other property subject to regulation by the NRC that the NRC determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks. Although the NRC had previously taken several steps to provide additional regulatory oversight for unescorted access to RTRs, the EPA Act granted the NRC additional authority to impose FBI identification and criminal history records checks based

on fingerprints of any person permitted unescorted access to various NRC-regulated facilities, including RTRs.

In SECY-05-0201, "Implementation of the Energy Policy Act of 2005," dated October 31, 2005, the NRC staff informed the Commission of its plan for implementing the NRC's responsibilities under the EAct and requested Commission approval of the staff's funding recommendation for fiscal year 2006. The Commission approved the staff's recommendations in Staff Requirements Memorandum (SRM) dated January 5, 2006, and directed the staff to recommend appropriate interim regulatory actions that the NRC should implement while it developed the generic requirements for granting unescorted access, including the provisions in Section 652 of the EAct pertaining to fingerprinting.

X In SECY-07-001, "Interim Implementation of Fingerprinting Requirements in section 652 of the Energy Policy Act of 2005," dated January 12, 2007, the NRC staff provided information and recommendations to the Commission on its EAct interim implementation plan. In ^{an} SRM dated ₁ March 12, 2007, the Commission directed the NRC staff to issue orders to RTRs to require fingerprint-based criminal history records checks for individuals requesting unescorted access to these facilities. The NRC staff was directed to issue orders to RTR licensees to require fingerprinting only for individuals with unescorted access to risk-significant areas or materials within the facilities. The Commission also directed the NRC staff to proceed with a rulemaking to determine if fingerprint-based criminal history records checks should be required for additional personnel.

X The security of RTRs is regulated through requirements located in Part 73 of the Commission's regulations. The specific security measures that are required vary depending on several factors, which include the quantity and type of special nuclear material possessed by the licensee, as well as the power level at which the licensee is authorized to operate. In response to the Commission's ^{March} ~~January~~ 12, 2007, directive, the NRC imposed fingerprinting requirements

(SGL) order (Order EA-06-203, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access to Safeguards Information," dated September 29, 2006; ADAMS Accession No. ML061510049) that implemented the EAct fingerprinting and criminal history records check requirements for individuals who seek access to SGL. The order provided that an NRC-approved reviewing official was the only individual who could make the unescorted access determination.

which order?
the unescorted access order?

Advance Notice of Proposed Rulemaking (ANPR)

X On April 14, 2009 (74 FR 17115), the NRC published an ANPR to obtain stakeholder views on the issues associated with the proposal to require a fingerprint-based criminal ^{history} records check for individuals granted unescorted access to RTRs. The ANPR indicated that the NRC was beginning the process of establishing generic requirements for RTR licensees to obtain a fingerprint-based criminal history records check on any individual having unescorted access to their facilities. The ANPR was intended to inform external stakeholders of the options that the NRC is considering for implementing the fingerprinting requirements (as a rulemaking) for RTR licensees. The ANPR provided interested stakeholders an opportunity to comment on the options under consideration by the NRC. The NRC developed this proposed rulemaking based on the feedback received on the ANPR (discussed in Section III of this document).

III. Public Comment on ANPR and Public Workshop

On June 4, 2009, the NRC held a public workshop to answer stakeholder questions about the ANPR and to obtain stakeholder input on the follow-on rulemaking to require fingerprinting for unescorted access at RTR facilities. In addition to the comments received during the public workshop, the NRC received seven comment letters from interested parties: four from RTR licensees, one from the Nuclear Energy Institute, one from the National Organization of Test, Research and Training Reactors, and one from an individual.

“beyond our control.” This commenter suggests that the codification should state that “the licensee shall have a program, process or procedure that provides guidance...”

NRC Response: As a general principal, the NRC prefers to construct performance-based regulation (rather than explicit, prescriptive regulation) where possible. Where practical and necessary, procedural implementation of proposed requirements is addressed in supporting guidance. In this circumstance, the “procedures” that are referred to are in § 73.57 and generally address the requirements in that section for handling and processing of fingerprints. Section 73.57 contains specific fingerprinting requirements that ensure fingerprint submissions are handled in a manner consistent with other licensees and in accordance with AEA requirements to provide the fingerprints to FBI. As such, the NRC is proposing to add the RTR licensee fingerprint provisions to § 73.57[^] thereby ensuring that RTR licensee fingerprints are handled properly. With regard to the implementation of the fingerprint requirements in RTR licensee procedures and security plans, the NRC recognizes that flexibility should be provided. Each RTR licensee’s security plan or procedures as applicable would include a description of how the RTR licensee intends to comply with the requirements pertaining to fingerprinting. If, as the comment implies, a third party (i.e., law enforcement or other agency) might be employed to obtain the fingerprints of individuals seeking unescorted access to nonpower reactor facilities, then the process used to obtain those fingerprints from third parties would be described in the licensee’s security plan or procedures, as applicable, documenting that the RTR licensee complies with the requirements of § 73.57. X

Comment: One commenter stated that “identifying areas of significance” should not be adopted. The commenter indicated that the reason access to certain SNM was identified early on as the implementing criterion, and included in the unescorted access orders was that it was much easier and appropriate to identify who can get to the SNM. Because of the unique nature

X of these facilities, where in some case^S the facility is buried inside an existing academic building, the commenter indicated that it is very difficult to identify unescorted access by area. The commenter stated that this is exclusively true only for working hours. After normal hours, the commenter believes it is appropriate to identify those areas that fall under the security system. A facility should fingerprint everyone who has the ability to deactivate the security system.

NRC Response: The NRC understands the concern, and recognizes that there may be challenges associated with these requirements. The NRC also recognizes that RTR licensees may have unique challenges due to the location of these RTR facilities within academic surroundings. The provisions in this proposed rule are constructed to provide flexibility, providing both an "area" criterion (unescorted access to vital areas) and a "material" criterion (unescorted access to SNM). The NRC recognizes that RTR licensees may need to be ^{flexible?} ~~creative~~ in how they implement these proposed requirements, and this may, in some case, require RTR licensees to take simpler, more bounding approaches to implementation of the requirements (either restricting unescorted access, providing escorts, or fingerprinting more personnel) for more complex situations. X

Comment: One commenter stated that there must be great care in defining SNM as used in the proposed rule. If small amounts of SNM under the reactor license or a source are relocated to a laboratory for an experiment, and do not present a hazard to the health or safety of the public, then the SNM should not cause a redefinition of a new "area of significance" and must remain exempt from the requirements of any proposed rule for control or direct supervision.

NRC Response: The NRC has developed the proposed rule provisions to be consistent with the requirements in the previously issued NRC orders and with the standard definition of SNM. Additionally, for the purposes of determining which individuals must be fingerprinted, an individual must (beyond simply seeking unescorted access) possess the capability and

Comment: Three written comments addressed this question. One commenter stated that identifying "areas of significance" should not be adopted because the unique nature of RTR facilities makes it difficult to grant unescorted access by area. Another commenter stated that only option (2) would be reasonable because "areas of significance" are specific to the facility and may "flex" as the facility is changed or materials are relocated for research purposes. Two commenters noted that identifying "areas of significance" based on security reviews (option (2)) would not present a major imposition, but recognized that it would be problematic and would require some flexibility for some research reactors with less well defined areas of demarcation. The current criteria focusing on individuals who have access to SNM or who could control SNM, appear to be a better generic approach. Finally, a participant at NRC's public workshop stated that the original focus of the NRC orders had been on the individual rather than a defined area and sought the rationale for departing from that philosophy.

NRC Response: The NRC appreciates the stakeholder feedback and agrees with the need (implied by stakeholder comments) for requirements that are sufficiently flexible to address the range of situations that can exist at RTR facilities. Accordingly, the proposed provisions in this document use two criteria for unescorted access; the first pertains to an "area" and the second pertains to the "material." With regard to the "area" criterion, the proposed rule would use the term "vital area." Vital area is defined in § 73.2 as "any area which contains vital equipment," and vital equipment is in turn defined in § 73.2 as "any equipment, system, device, or material, the failure, destruction, or release of which could directly or indirectly endanger the public health and safety by exposure to radiation." Equipment or systems which would be required to protect public health and safety following such failure, destruction, or releases are also considered to be vital.⁶² These definitions apply

X
impacts the number of individuals requiring fingerprint-based criminal history records checks for unescorted access. The proposed rule would use "vital area" which falls within the AEA definition of "utilization facility" as discussed above in response to the Question 1 comment. The NRC expects that these proposed revisions would result in a similar group of people requiring fingerprinting when compared to the NRC orders previously issued to RTR licensees. The NRC believes that the proposed rule would properly implement Section 149 of the AEA, and reflect the minimum requirements necessary for RTR licensees.

Question 3: What is the estimated cost or impact of performing security plan or procedure revisions, and of providing the necessary administrative controls and training to implement fingerprint requirements for individuals permitted unescorted access to "areas of significance" such as those described in Question 1?

Comment: One commenter stated that the cost of fingerprinting individuals outside the vital area would be a significant burden. In addition to the \$37 for the cost of the actual fingerprint processing, the time and effort necessary to obtain the fingerprinting would require his university to hire an employee to only process fingerprinting and background check information. While one commenter estimated that implementing increased fingerprinting or escorts would result in a productivity loss of approximately 0.25 persons or \$25,000, two commenters stated that any change to the language in the security orders would place an undue burden on licensees to make revisions to their security plans. One university representative estimated that the additional time required to administer this requirement would cost approximately \$10,000 because that institution had already expanded the definition of individuals requiring fingerprinting beyond the requirement in the security orders.

X
NRC Response: The NRC appreciates the information provided and will give it consideration when estimating the costs associated with implementing the fingerprinting requirements of Section 149 of the AEA. The NRC is required to implement the provisions of the AEA so this burden can not be eliminated in its entirety, but if more efficient and less-burdensome approaches are identified, the agency will attempt to construct requirements that impose the least burden while complying with Section 149 of the AEA.

Question 4: Is the proposed definition of "individuals with unescorted access" reasonable and sufficient? If not, why? For example, should persons granted unescorted access to "areas of significance" be permitted access to the facility when no supervision or oversight is present (e.g., evenings or weekends)? Should the NRC require access controls such as maintaining records of the time and duration of persons accessing an "area of significance" without escorts?

Comment: One commenter stated that unescorted access should permit individuals access to areas and equipment without supervision. Another commenter stated that the ANPR's definition of "unescorted access" as "any individual who has the ability to access licensee-designated 'areas of significance' without continuous direct supervision or monitoring by an authorized individual," is not workable. This commenter states that inherent in the current definition is the concept of an individual with capability and knowledge to exercise control over or remove SNM without detection and/or response by the protection system. According to this commenter maintenance employees are given training and access to areas of significance during normal working hours, but do not have the knowledge or capability to exercise control over the SNM without detection. This commenter's facility limits the capability and knowledge to control or move the strategic nuclear material to a very small group of individuals who have authority to access "areas of

significance" during non-business hours, and even these individuals cannot access the system without the knowledge of the security forces. Another commenter's facility defines persons authorized "unescorted containment access" and those authorized "unescorted laboratory access." The second definition would need to be changed if unescorted access is to refer to persons having access to "areas of significance."

With respect to the question regarding permitting access to the facility when there is no supervision or oversight, one commenter stated that if the new definition of unescorted access is to be used (i.e., access to areas of significance) his university may define a new class of individuals with "limited unescorted access" to encompass workers who are allowed in to do limited duties, but would not allow this class of individuals access after hours because those areas would be such that informed individuals could exercise control over procedures or damage equipment and/or materials.

With respect to the proposal to require records of times and areas that persons have had access to "areas of significance," one commenter opposed this requirement. These records may be part of the security layer at some facilities, however they do not deter an insider with access and intent to remove or damage equipment.

NRC Response: The NRC understands the concerns expressed by the commenters. The proposed rule language does not include the term "areas of significance." To ensure compliance with Section 149 of the AEA (to fingerprint any individual permitted access to a utilization facility), the proposed rule does include a criterion to require fingerprinting for individuals who wish to have access to a "vital area." As discussed in a previous response, the NRC concludes that vital equipment as defined in § 73.2 falls within the AEA definition of utilization facility and so it is appropriate to fingerprint individuals who wish to have access to vital areas (containing vital equipment). Additionally, the proposed rule would incorporate language denying unescorted access to individuals, who possess (the) X

X ← the capability and knowledge to make unauthorized use of, or remove, SNM until they have submitted fingerprints for an FBI criminal history records check. These provisions are both consistent with the previous orders on unescorted access and provide an appropriate level of flexibility.

Question 5: What has worked well, what has not, and why?

Comment: Some commenters stated that an early concern had been the additional amount of time required for the fingerprinting, but the actual processing time has been short and that the orders appear to be working effectively. One commenter stated that repeated and excessive fingerprinting has been burdensome and expressed frustration because of a lack of a clear method to share clearance information between facilities and government agencies. This commenter did not explain why fingerprinting needed to be repeated in some circumstances. Another commenter suggested that the NRC permit the licensee to work directly with the FBI without having to process the fingerprints through the NRC.

X **NRC Response:** The NRC agrees with the commenter regarding the lack of a clear method to share clearance information between facilities and government agencies. The proposed rule would incorporate RTR licensees into § 73.57(b)(5) which provides RTR licensees the flexibility of using reciprocity. The NRC does not have the authority to allow RTR licensees to submit fingerprints directly to the FBI instead of submitting them through the NRC. Section 149 of the AEA states that, "all fingerprints obtained by an individual or entity as required [in this section] be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check." The FBI has strictly interpreted this provision and will not accept fingerprints except through the NRC.

Question 6: What requirements were found to be the most burdensome? Are there less burdensome alternatives that would accomplish the same level of protection?

Comment: Several commenters stated that the fingerprinting requirement has not been particularly burdensome because the number of individuals affected is manageable. The continual use of paper and ink required to maintain paper copies of fingerprints was cited by three commenters as being burdensome. The industry-wide and federal use of "LiveScan" fingerprinting was cited as being less burdensome and having the benefit of enhancing the industry's and NRC's ability to share information.

NRC Response: The NRC agrees with the commenters. The NRC has developed the proposed rule to contain generically-applicable requirements that implement Section 149 of the AEA, are consistent with previous requirements in NRC issued orders, and reflect the minimum requirements necessary for RTR licensees consistent with Section 104c of the AEA. The proposed provisions in this document use two criteria for unescorted access; the first pertains to an "area" and the second pertains to the "material." With regard to the "area" criterion, the proposed rule would use the term "vital area" (as defined in Part 73) which the NRC concludes (as discussed above in previous responses) falls within the AEA definition of "utilization facility." Additionally, the proposed rule would incorporate a "material" criterion (i.e., special nuclear material) which the NRC recognizes is a more useful criterion for many RTR situations. The proposed rule would incorporate RTR licensees into § 73.57 and thereby afford RTR licensees the flexibility provided to other licensees such as the use of reciprocity.

Question 7: Are there requirements in the orders that appear to contribute little to the security of the facility? Could the same resources be used more effectively in other ways?

X pertaining to the granting of unescorted access. The proposed amendments would implement the requirement in Section 149(a)(1)(B)(~~(i)~~) of the AEA that the Commission require to be fingerprinted any individual who is permitted unescorted access to a utilization facility.

As previously noted, Section 149 of the AEA 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 EPAct amended Section 149, the NRC required fingerprinting for unescorted access to facilities licensed under Sections 103 and 104b of the AEA. Because the amendment, which eliminated the references to Section 103 and 104b, utilization facilities licensed under Section 104c (as discussed in more detail below) of the AEA, which were not previously subject to these requirements, are now subject to these fingerprint requirements, and it is this specific expansion that is the subject of this proposed rule (i.e., extension of these fingerprint-based FBI criminal history records check requirements to nonpower reactors including RTR licensees).

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

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

conditions. These actions may involve the use of a liaison with the various offsite response organizations.

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

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

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

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

C. Section 73.57(c) Prohibitions.

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

SNM can be considered to be "vital equipment" under the material portion of the § 73.2 vital equipment definition. The NRC expects that the SNM criterion would, in most situations, determine whether an individual is required to be fingerprinted in accordance with the proposed provisions.

For both proposed § 73.57(g)(2)(i) and (ii), for the purposes of determining which individuals must be fingerprinted, an individual must additionally (beyond simply seeking unescorted access) possess the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower reactor. This constraint in the proposed requirement may limit the requirement for application of fingerprint-based criminal history records checks. In some cases, more than simple physical access to special nuclear material or specified areas is necessary to require licensees to obtain fingerprint-based criminal history records checks under § 73.57(g)(2)(i) and (ii). To determine which individuals should be fingerprinted for unescorted access, RTR licensees would need to evaluate their current security plans and procedures considering the definition of vital area (in 10 CFR Part 73) and the requirements of § 73.57(g)(2)(i) and (ii), as well as any other security assessment information that might be available. For example, an RTR licensee may decide for practical reasons to fingerprint individuals who wish to have unescorted access within the controlled access area.

In most cases, the provisions of § 73.57(g) would use ^{the} RTR licensee's procedures similar to those used to implement the previous unescorted access and SGI access fingerprinting orders, and more importantly, it would follow the regulatory processing and handling requirements already incorporated into § 73.57. X

When a licensee submits fingerprints to the NRC under the proposed provisions, the licensee would receive a criminal history review, provided in federal records, since the individual's eighteenth birthday. The licensee's reviewing official would evaluate the criminal history record information pertaining to the individual as required by proposed § 73.57(g). The

criminal history records check would be used in the determination of whether the individual has a record of criminal activity that indicates that the individual should not have unescorted access at the nonpower reactor facility. Each determination of unescorted access would include a review of the fingerprint-based criminal history information and should include the licensee's documentation of the basis for the decision.

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

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

V. Request for Stakeholder Feedback on Additional Topics

A. Implementation

The NRC is proposing to make the final § 73.57 fingerprinting provisions effective 120 days following the date the final rule is published in the *Federal Register*. The NRC believes that this is sufficient time to allow RTR licensees to develop or revise procedures and programs associated with the granting of unescorted access at their facilities because the majority of procedure and plan changes should be in place as a result of the previously issued unescorted access order. Additionally, the NRC believes this provides sufficient time for additional individuals to be fingerprinted and approved by the reviewing official.

1. Is 120 days sufficient time to implement the new provisions, including revising or developing fingerprinting programs or procedures?

2. Are there any other newly issued NRC requirements or impositions (aggregate impacts)

that you expect could adversely impact your ability to implement the proposed provisions?

3. If there are other potential aggregate impacts, is there a time when you expect that these impacts will become insignificant in terms of your capability to implement the new proposed revisions?

B. Background Investigation Requirements

The NRC is interested in obtaining stakeholder feedback on additional background investigation requirements. These additional elements are not part of the proposed provisions in § 73.57 that implement the mandated AEA Section 149 fingerprinting requirements for RTR licensees. However, during the development of these proposed fingerprinting provisions, the NRC concluded that soliciting stakeholder feedback on additional background investigation requirements would be worthwhile to gain stakeholder's views on whether these requirements would provide greater confidence and validity to the unescorted access determinations. The NRC recognizes its obligation under Section 104c of the AEA to put in place the minimum requirements for RTR licensees and accordingly has not incorporated proposed rule language in this document for these additional background investigation provisions. However, with the stakeholder input, the NRC may elect to further revise the unescorted access requirements for RTR licensees in a future rulemaking.

1. The newly revised Safeguards Information requirements in §§ 73.21, 73.22, and 73.23 (issued in October 2008 and effective February 2009) are supported by background checks which require the reviewing official to determine trustworthiness and reliability. Specifically, § 73.22 (b)(2) requires that a person to be granted access to SGI must be trustworthy and reliable based on a background check or other means approved by the Commission.

Background check is a term defined in § 73.2 to include FBI fingerprint-based criminal history

records
checks.
(?)

X

X

X

For RTR licensees, should the NRC require that background checks for unescorted access and SGI access be consistent, and address the same elements that are identified in the § 73.2 definition beyond the FBI fingerprint-based criminal history records check?

2. While an FBI fingerprint-based criminal history records check will identify criminal activity for individuals over 18 that have a criminal history in the United States, would this information be sufficient for RTR licensees to make a meaningful trustworthiness and reliability determination for unescorted access? If more is needed, what could be added to increase the validity of these determinations?

X 3. Assuming that a background check (containing the additional requirements identified in § 73.2) were to be conducted, what time ^{period} should the investigation cover (i.e., 5 years, 10 years etc.)?

4. Are RTR licensees aware of any conflicting Federal and state requirements concerning the privacy of students and staff? If so, what is the nature of the conflict?

5. Do RTR licensees know the number of people that seek unescorted access and already have been granted access to SGI (i.e., these individuals would already have been fingerprinted and subjected to background checks to receive SGI access)?

To provide stakeholders with a better idea of the type of rule language that might be considered for a future rulemaking, and thereby support more informed feedback on the above questions, the NRC is providing the following example of potential requirements that could be considered.

Before granting an individual unescorted access, licensees shall complete a background investigation of the individual seeking unescorted access authorization. The scope of the investigation must encompass at least the past [x] years. The background investigation must include at a minimum:

- Verification of true identity. Licensees shall verify the true identity of an individual who is

X
X
~~The Presidential memorandum "Plain Language in Government Writing" published on~~
June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the ADDRESSES heading of this document.

VIII. Voluntary Consensus Standards

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

IX. Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A, "National Environmental Policy Act; Regulations Implementing Section 102(2)," of 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The determination of this environmental assessment is that there will be no significant offsite impact to the public from this action. However, the general public should note that the NRC is seeking public participation on this environmental assessment. Comments on this environmental assessment may be submitted to the NRC as indicated under the ADDRESSES heading of this document.

The NRC has sent a copy of this environmental assessment and this proposed rule to

every State Liaison Officer and requested their comments on the environmental assessment.

X. Paperwork Reduction Act Statement

This proposed rule contains new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq*). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

Type of submission, new or revision: Revision

The title of the information collection: 10 CFR Part 73, "Fingerprint Based Criminal History Records Checks for Unescorted Access to Research or Test Reactors (RTR)"

The form number if applicable: Form FD-258

How often the collection is required: As needed, due to staff turnover.

Who will be required or asked to report: RTR licensees

An estimate of the number of annual responses: 132 (100 responses plus 32 recordkeepers)

The estimated number of annual respondents: 32

An estimate of the total number of hours needed annually to complete the requirement or request: 690 hours (450 reporting plus 240 recordkeeping). However, NRC has previously accounted for the hours for these requirements, issued under Orders, using the Agency's clearance for 10 CFR 73. Therefore, the hours do not represent additional burden to licensees.

Abstract: The NRC is proposing to amend its regulations to require fingerprint-based criminal history record checks for RTR licensees to grant individuals unescorted access to their facilities. This action is necessary to comply with the requirements of Section 652 of the EAct of 2005 which amended Section 149 of the AEA, to require fingerprinting and an FBI identification and criminal history record check of any person who is permitted unescorted access to a utilization facility. As a result of this action, RTR

Budget, Washington, DC 20503. Comments on the proposed information collections may also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>, Docket # NRC-2008-0619. Comments received after this date will be considered if it is practical to do so, but

assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to Christine.Kymn@omb.eop.gov or comment by telephone at (202) 395-4638.

Public Protection Notification

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

XI. Regulatory Analysis: Availability

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The Commission requests public comments on the draft regulatory analysis. Availability of the regulatory analysis is indicated in Section VII of this document. Comments on the draft analysis may be submitted to the NRC as indicated under the ADDRESSES heading.

XII. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of non-power reactors. Only one of the companies and universities that own and operate these facilities falls within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810), and the economic impact on this entity is judged to be small.

XIII. Backfit Analysis

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

List of Subjects in 10 CFR Part 73

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

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

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

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

Section 73.1 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat.

provided the individual who is seeking or permitted unescorted access possesses the capability and knowledge to make unauthorized use of the special nuclear material in the nonpower

+ (reactor facility or to remove the special nuclear material from the nonpower reactor in an unauthorized manner.

Dated at Rockville, Maryland, this ___ day of _____, 2010.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission.

**Regulatory Analysis for Proposed Rulemaking:
Requirements for Fingerprint Based Criminal History Record
Checks for Individuals Seeking Unescorted Access to
Research or Test Reactors**

*Global: History
Records*

U.S. Nuclear Regulatory Commission
Office of Nuclear Reactor Regulation



1. Introduction

This document presents a regulatory analysis of a proposed rule that would establish new requirements for research or test reactors (RTRs, also referred to as nonpower reactors) as set forth by the U.S. Nuclear Regulatory Commission (NRC) in Title 10, Part 73, of the Code of Federal Regulations (10 CFR Part 73). This introduction is divided into three sections. Section 1.1 states the problem and the reasons for the proposed rulemaking, Section 1.2 provides other background information, and Section 1.3 discusses regulatory objectives.

1.1 Statement of the Problem and Reasons for the Rulemaking

Section 652 of the Energy Policy Act of 2005 (EPAAct), enacted on August 8, 2005, amended the fingerprinting requirements of the Atomic Energy Act of 1954, as amended (AEA). Specifically, the EPAAct amended Section 149 of the AEA to require fingerprinting and Federal Bureau of Investigation (FBI) identification and criminal history records checks before an individual may have unescorted access to any utilization facility, including RTRs, or radioactive material or other property subject to regulation by the NRC, or to Safeguards Information (SGI).

Although the NRC had previously taken several steps to provide additional regulatory oversight for unescorted access to RTRs, the EPAAct granted the NRC further authority to impose FBI identification and criminal history records checks based on fingerprints of any person permitted unescorted access to various NRC-regulated facilities, including RTRs.

1.2 Background

1.2.1 Current Regulations Governing Fingerprint Based Background Checks at RTRs

NRC regulations currently do not address fingerprinting and criminal history record checks for RTR licensees, although they do address fingerprinting and criminal history records checks of individuals seeking access to SGI (including by RTR licensees), as well as unescorted access to nuclear power reactors. These regulations are located in 10 CFR § 73.57.

1.2.2 Commission Orders

To address the EPAAct amendments regarding fingerprinting and criminal history record checks for unescorted access at nonpower reactors, the NRC imposed two orders:

- EA-07-074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors," dated April 30, 2007 (72 FR 25337; May 4, 2007); and
 - EA-07-098, "Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to the General Atomics' Research and Test Reactors," dated August 1, 2007 (72 FR 44590; August 8, 2007).
-

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Apostolakis
SUBJECT: SECY-10-0045 – PROPOSED RULE: REQUIREMENTS FOR FINGERPRINT-BASED CRIMINAL HISTORY RECORDS CHECKS FOR INDIVIDUALS SEEKING UNESCORTED ACCESS TO RESEARCH OR TEST REACTORS (RIN 3150-A125)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached None X



SIGNATURE

5/26/10

DATE

Entered on "STARS" Yes X No

NOTATION VOTE

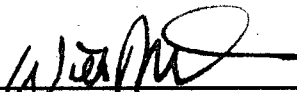
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MAGWOOD
SUBJECT: SECY-10-0045 – PROPOSED RULE: REQUIREMENTS
FOR FINGERPRINT-BASED CRIMINAL HISTORY
RECORDS CHECKS FOR INDIVIDUALS SEEKING
UNESCORTED ACCESS TO RESEARCH OR TEST
REACTORS (RIN 3150-A125)

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached _____ None



SIGNATURE

13 June 2010

DATE

Entered on "STARS" Yes No _____

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER OSTENDORFF

SUBJECT: SECY-10-0045 – PROPOSED RULE: REQUIREMENTS FOR FINGERPRINT-BASED CRIMINAL HISTORY RECORDS CHECKS FOR INDIVIDUALS SEEKING UNESCORTED ACCESS TO RESEARCH OR TEST REACTORS (RIN 3150-A125)

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached None _____



SIGNATURE

6/10/10

DATE

Entered on "STARS" Yes _____ No _____

Commissioner Ostendorff's Comments on SECY 10-0045

In proposing this rule, I commend the staff for its comprehensive and careful considerations of the NRC's statutory obligations to provide the minimum amount of necessary regulations for research and test reactors (RTRs) licensees to satisfy the Atomic Energy Act. Because the RTR community comprises small enterprises that would potentially bear the regulatory burdens associated with using the proposed 10 CFR Part 73 framework (e.g., use of the vital area definition provisions) and due to the variability in the RTR facility designs, I believe it is good regulatory communication practice for the staff to conduct additional outreach efforts to solicit feedback from stakeholders who have not routinely participated in regulatory workshops or forums. I understand that some RTR licensees may infrequently participate in regulatory initiatives because of limited available resources. Therefore, the staff should actively seek feedback from these licensees in a more direct manner to supplement traditional stakeholder outreach efforts. Secondly, the staff should update the NRC's public website to provide real-time information of ongoing NRC activities, including rulemakings and guidance, affecting the RTR community.

IRA/ 6/10/10
William C. Ostendorff Date