

PR 73
(75FR42000)



UNITED STATES DEPARTMENT OF COMMERCE
National Institute of Standards and Technology
Gaithersburg, Maryland 20899

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October 7, 2010

DOCKETED
USNRC

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemakings and Adjudication Staff

October 8, 2010 (8:58a.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Subject: NRC Proposed Rule on Background Checks

Ref: NRC Docket ID NRC-2008-0617

Sirs,

Thank you for the opportunity to comment on the proposed change to 10 CFR 73.57 concerning fingerprinting and criminal history checks at nonpower (Research and Test Reactors) facilities. The NIST Center of Neutron Research (NCNR) makes the following comments on the proposed rule.

Comment 1

Paragraph (b)(2)(i) in the proposed rule states the following:

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

All U.S. Government (USG) employees who are not NRC employees (e.g. NIST and USGS) are currently required to have at least a National Agency Check and Inquiries (NACI) which includes an FBI National Criminal History Fingerprinting Check and several other background investigations. It is the opinion of the NCNR that it serves no security purpose to perform additional (and lower level) background and criminal history investigations in accordance with § 73.57 of the proposed rule for USG employees. Further, the NRC/FBI criminal background check has an associated application fee to process the investigation (currently, \$26.00) and this is an unwise use of government resources if a NACI investigation has already been performed.

It is requested that Paragraph (b)(2)(i) be changed to the following:

"For unescorted access to the nuclear power facility or the nonpower reactor facility (but must adhere to provisions contained in §§ 73.21 and 73.22): NRC employees and ... Safeguards Agreement at designated facilities who has been certified by the NRC;

NIST

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law enforcement personnel action in an official capacity; State, **Federal** or local government employees who have had equivalent reviews of FBI criminal history data; ...”

The addition of the word “Federal” to the paragraph should exempt any USG employee who has had a NACI background check as a minimum. If this change cannot be made to the proposed rule then the effective date of implementation of the rule should be extended to longer than the 120 days (Federal Register Vol. 75. No. 138 FR42008) to allow sufficient time for facilities with a large number of employees needing unescorted access to comply with the revised regulation. A specific time period should not be dictated because it is unknown how much time would be required to process over 50 submittals at large RTR facilities.

Comment 2

Utilization facility as defined in Section 11.cc of the AEA is considered to be:

“(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.”

Utilization facility as defined in 10CFR50.2 is considered to be:

“... any nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233.”

On page FR42007 (third column) of the Section-by-Section Analysis of the Proposed Rule it is stated that

“The equipment, systems, devices, and material that fall within §73.2 vital equipment definition meet the utilization facility definition in Section 11.cc of the AEA. Hence, fingerprinting individuals who wish to have unescorted access to vital areas is ensuring that individuals permitted access to the “utilization facility,” as defined in the AEA, is properly implemented in the NRC’s regulations.”

This statement implies that every piece of equipment and all materials within a “utilization facility” (i.e. a 10CFR50 licensed nuclear reactor facility) are considered vital rather than specific areas or equipment. This statement is grossly incorrect and; therefore, any subsequent conclusions that this statement intended to support should be considered questionable. The §73.2 definition of vital equipment applied at the NCNR bounds the limiting Maximum Hypothetical Accident (MHA) to protect the health and safety of the general public and the protection of SNM in quantities significant to the common defense and security.

Vital equipment or areas have been defined and explained in the NRC-approved Physical Security Plan and reviewed *for adequacy and correctness* within NRC-sponsored Physical Security Assessments for the NBSR. The definition of vital area and vital equipment as applied has been reviewed under the current threat environment by the NRC so there should be no requirement or expectation for RTR licensees to provide additional “clear documentation to support their decisions (FR42008)” under the proposed rule.

Comment 3

Finally, the NCNR strongly feels that additional background investigation requirements above those already put in place by previous Federal regulations and NRC Orders are unnecessary and would impact access to Reactor and Test Reactors that is required for the facilities to perform their missions. Background investigations to determine trustworthiness and reliability beyond the minimum currently required should be at the discretion of the facility management. Specific questions posed in the proposed rule notice and answers are given below.

1. 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?

Answer: No, the NBSR is a significantly lower risk than nuclear power reactors and larger fuel cycle facilities. NIST has developed local procedures to determine trustworthiness and reliability based upon a reasonable balance between security risk and access that serve to protect public health and safety.

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?

Answer: Additional requirements for the determination of trustworthiness and reliability are not needed. Unescorted access control at RTRs is risk-based with some facilities limiting individual access for a predefined period of observation, verification that the student is enrolled in the university or a trustworthiness and reliability support letter from a supervisor or Professor. These procedures cannot be applied universally but only on a case-by-case as determined by the RTR management and the facility NRC approved Physical Security Plan. An FBI fingerprint-based criminal history records check is considered the minimum for unescorted access to vital areas as defined in current regulations and the NRC approved Physical Security Plans.

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.)?

Answer: This question should not be answered because additional background check requirements at RTRs should not be required or implemented. If additional requirements are established by the NRC then they would serve to stifle research, interfere with academic activities or promote the eventual closure of some RTRs by indicating to administrators that the facility security risk is much greater than previously determined by NRC threat assessments.

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?

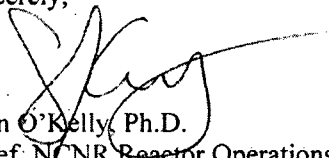
Answer: As a Federal facility, the NCNR is unable to comment on specific State requirements. Each State has different privacy laws and many universities have strict local policies on student and staff privacy. It can be expected that each RTR at a university is aware of State and local requirements and has developed security procedures that take these requirements into account.

5. Do RTR licensees know the number of people that seek unescorted access and already have been granted access to SGI?

Answer: Seeking unescorted access is not the same as having or granting unescorted access. The NCNR maintains records of all individuals with unescorted access to vital areas as defined in the current regulations and the NRC-approved Physical Security Plan. Equivalent records are maintained for individuals who need access to SGI.

Thank you again for the opportunity to comment on the proposed rule. Please contact me at 301-975-6260 if you desire additional information.

Sincerely,



Sean O'Kelly, Ph.D.
Chief, NCNR Reactor Operations and Engineering

xc: Rob Dimeo, NCNR Director
Steve Miller, TRTR Chairman
Timothy Reed, NRC
Beth Reed, NRC

Rulemaking Comments

From: O'Kelly, Sean [sean.okelly@nist.gov]
Sent: Friday, October 08, 2010 8:58 AM
To: Rulemaking Comments
Cc: Reed, Elizabeth; Reed, Timothy
Subject: Comments on fingerprint rule NRC Docket ID NRC-2008-0619
Attachments: NCNR Comments NRC 2008 0619.pdf

Attached is a scanned version of a comment letter going in the mail today. Thank you.

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-0400

From: "O'Kelly, Sean" <sean.okelly@nist.gov>

To: "Rulemaking.Comments@nrc.gov" <Rulemaking.Comments@nrc.gov>

CC: "Reed, Elizabeth" <Elizabeth.Reed@nrc.gov>, "Reed, Timothy"
<Timothy.Reed@nrc.gov>

Date: Fri, 8 Oct 2010 08:57:46 -0400

Subject: Comments on fingerprint rule NRC Docket ID NRC-2008-0619

Thread-Topic: Comments on fingerprint rule NRC Docket ID NRC-2008-0619

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