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

(FSME-07-006, February, Other, Energy Policy Act)

February 1, 2007

ALL AGREEMENT AND NON-AGREEMENT STATES
STATE LIAISON OFFICERS

**FINAL RULE IMPLEMENTING ENERGY POLICY ACT SECTION 656 (FSME-07-006)**

**Purpose:** To inform all States that the Final Rule implementing Energy Policy Act Section 656 has been published in the *Federal Register,* and to advise the Agreement States that no action is required by this rule of the Agreement States or their licensees.

**Background:** The United States Nuclear Regulatory Commission (NRC) has published a final rule adopting 10 CFR 73.28 to codify exceptions from the requirements of Section 170I of the Atomic Energy Act (AEA), as amended, consistent with Section 656 of the Energy Policy Act of 2005. Under the final rule, those licensees that did not receive NRC Orders for both fingerprinting and background checks are excepted from the security background check requirements of AEA Section 170I. The exceptions are consistent with the system of Orders, issued to certain licensees, that NRC has instituted for protection of the common defense and security.

**Discussion:** A draft of the rule was made available to the States for early comment. The proposed rule, addressing State early comments, was issued for public comment on August 30, 2006. Two comment letters were received, including one from the Organization of Agreement States. No changes to the proposed rule were required to address the comments. The final rule (same text as the proposed rule) was published on January 24, 2007 (72FR3025). The compatibility category of the final rule remains "NRC."

Since the rule is compatibility category "NRC," Agreement States do not need to take any action with respect to this final rule. Since Agreement State licensees subject to the security background check requirements of AEA Section 170I were also issued the NRC Orders, the Agreement State licensees that did not receive the Orders are excepted from the Section 170I requirements by this rule. Thus, no action is required of Agreement State licensees with respect to this final rule.

If you have any questions on this correspondence, please contact me at (301) 415-2325 or the individual named below.

POINT OF CONTACT: Frank Cardile
TELEPHONE: (301) 415-6185
INTERNET: FPC@NRC.GOV
FAX: (301) 415-5369

/RA/
Dennis K. Rathbun, Director
Division of Intergovernmental and Rulemaking
Office of Federal and State Materials
and Environmental Management Programs

Enclosure: PDF Copy of FRN

# Rules and Regulations

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 73

**RIN: 3150–AH90**

### Secure Transfer of Nuclear Materials

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations to implement requirements for secure transfer of nuclear materials as required by Section 656 of the Energy Policy Act of 2005 (EPAct), signed into law on August 8, 2005. The final rule implements Section 656 by specifically excepting certain licensees from provisions of Section 170I of the Atomic Energy Act (AEA) of 1954, as amended.

**DATES:** *Effective Date:* The final rule is effective on February 23, 2007.

**ADDRESSES:** Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), Room O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents can be viewed and downloaded electronically via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov*.

Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/NRC/reading-rm/adams.html*. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (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 Public Document Room (PDR) Reference staff at (800) 397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Frank Cardile, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6185, e-mail: *fpc@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

*The Energy Policy Act of 2005*

On August 8, 2005, the President signed into law the EPAct of 2005 Pub. L. No. 109–58,119 Stat. 594 (2005). Section 656 of the EPAct added Section 170I to the AEA, as amended, 42 U.S.C. 2210i, and requires that: (a) A system be established by the Commission to ensure that materials transferred or received in the United States, by any party, pursuant to an import or export license issued by NRC, are accompanied by a manifest describing the type and amount of materials; (b) each individual receiving or accompanying the transfer of materials shall be subject to a security background check conducted by appropriate Federal entities; and (c) the Commission issue regulations, within one year after enactment of the EPAct, identifying radioactive materials or classes of individuals that, consistent with the protection of the public health and safety and the common defense and security, are appropriate exceptions to the requirements in Section 170I of the AEA.

*Rulemaking Considerations Related to Proposed Rule To Implement Section 656 of the EPAct*

In preparing the proposed rule to implement Section 656 (71 FR 51534; August 30, 2006), the NRC determined that, based on existing requirements for shipping papers for radioactive materials already in place in Department of Transportation regulations and incorporated by reference in NRC regulations in 10 CFR part 71, an appropriate system is already established to ensure that shipments of radioactive materials, that would be affected by Section 656, are accompanied by papers (*i.e.*, a manifest) appropriately describing the materials being shipped. Thus, NRC did not include any additional requirements for manifesting of radioactive material shipments in the proposed rule.

In addition, the NRC determined that the most appropriate and comprehensive approach for establishing requirements for security background checks is as part of the broader considerations of NRC's rulemaking to implement Section 652 of the EPAct. Section 652 mandates the Commission to require fingerprinting and criminal history record checks for any individual who is permitted unescorted access to risk-significant radioactive material. The individuals referred to under Section 656 are a subgroup (*i.e.*, those transferring radioactive material pursuant to an export or import license) of the larger group of individuals at a licensed facility, with unescorted access to radioactive material, and will be covered by the comprehensive Section 652 rulemaking. The Section 652 proposed rule is currently in preparation and its schedule calls for issuance of a proposed rule in the Fall of 2007 and a final rule in the Fall of 2008.

While the Section 652 rulemaking is being conducted, NRC has a regulatory framework for security background checks through an extensive system of Orders issued during 2002–2006 that includes requirements for background checks, including fingerprinting for criminal history checks, for unescorted access to radioactive material for certain facilities which it licenses. NRC has also issued Orders to licensees for shipment of radioactive material in quantities of concern (RAMQC). The purpose of these Orders has been to impose certain security measures to supplement existing regulations at 10 CFR part 20, and equivalent Agreement State regulations, for securing licensed materials from unauthorized access, with the intent of providing the NRC with reasonable assurance that the common defense and security is protected. The Orders note that conditions for unescorted access to risk-significant sources of radioactive material are governed by an appropriate need-to-know and by background checks as input to a determination concerning the trustworthiness and reliability of individuals who have access to the material. Most recently, in October 2006, NRC issued Orders to pool-type irradiator licensees,

manufacturing and distribution (M&D) licensees, and licensees making shipments of RAMQC, to specifically require fingerprinting and criminal history checks for unescorted access to the risk-significant sources of radioactive material at their facilities.

*Issuance of Proposed Rule*

Consistent with Section 656(b) of the EPAct, the Commission proposed to amend NRC's regulations to except from the security background check requirements of Section 170I of the AEA, as amended, licensees who have *not* received NRC Orders containing requirements for background checks for trustworthiness and reliability, that include fingerprinting and criminal history record checks, as a prerequisite for unescorted access to risk-significant radioactive materials. As noted above, Orders restricting access based on fingerprinting and criminal history record checks have been issued for pool-type irradiator licensees, M&D licensees, and licensees who make shipments of RAMQC. These licensees can use the provisions of their existing Orders (or new or amended Orders) to comply with Section 170I. Also, if additional Orders for fingerprinting and criminal history checks for unescorted access to radioactive material are issued to licensees other than those noted here, licensees who receive any such new Orders would no longer be excepted from the security background check requirements of Section 170I.

The rationale for the exceptions is that it is consistent with the system of Orders, issued to certain licensees, that the NRC has instituted for protection of the common defense and security. The materials possessed and transferred by the licensees who have received Orders have been deemed, during the process of issuance of the Orders, to be appropriate for immediately requiring certain security measures for unescorted access based on potential higher risk resulting from malevolent use of those materials.

The proposed rule was published in the **Federal Register** on August 30, 2006 (71 FR 51534) as a proposed new § 73.28 in 10 CFR part 73.

## II. Discussion

*Summary of Public Comments on the Proposed Rule*

The public comment period closed on September 29, 2006. In response to the request for comments, NRC received two comment responses, one from the Organization of Agreement States (OAS) and one from the Nuclear Energy Institute (NEI).

The comment response from the OAS summarized the content of the NRC's proposed rulemaking and its effect on Agreement States, including that the proposed Agreement State Compatibility Category of the proposed rule would be ''NRC.'' The comment response from the OAS concluded by stating that the NRC approach in the rulemaking seemed reasonable to the OAS Executive Board.

The comment response letter from NEI stated that NEI supports the proposed rule as drafted. However, NEI also stated that there were two areas of confusion regarding the applicability of the rulemaking. In particular, NEI noted that there are a number of power reactor licensees that were not issued additional orders, but that have personnel who come in contact with radioactive materials in transit and who are not covered by existing rules in 10 CFR 73.57. Particularly noted were personnel in shipping and receiving operations located outside of the protected area who are considered outside of the nuclear power facility and do not require access to Safeguards Information. The second area of confusion related to a NEI concern as to where this Section 656 rulemaking will end and where the referenced Section 652 rulemaking, due for issuance in late 2007, will start.

With regard to the first point raised by NEI, the Supplementary Information in the **Federal Register** Notice, issuing the proposed rule, stated that this Section 656 rulemaking is relying upon the framework of the existing system of NRC Orders, either in place or to be put into place, as the basis for codifying exceptions. This allows for a consistent approach for radioactive materials which NRC considers appropriate, at this time, for exception from the requirements of Section 170I of the AEA as amended by the EPAct. The materials possessed and transferred by licensees who have received Orders have been deemed, during the process of issuance of the Orders, to be appropriate for immediately requiring certain security measures for unescorted access based on potential higher risk resulting from malevolent use of those materials. Orders for fingerprinting and criminal history checks for persons at licensed facilities shipping RAMQC were issued in October 2006. As noted previously, the Section 652 rulemaking will take a more comprehensive approach in establishing requirements for security background checks for licensees, and for licensee employees, for unescorted access to radioactive material. To the extent that personnel at a nuclear power plant handle risk-significant material and are not currently covered by regulation and/or order with regard to background checks and fingerprinting, consideration can be given to including such licensee personnel in NRC's framework of orders. If such additional Orders are issued, those licensees who have not previously received any such Orders would no longer be excepted from the security background check requirements of Section 170I, under the provisions of this final rule.

With regard to the second point raised by NEI, the Supplementary Information in the proposed rule notes that the NRC intends to address background checks and fingerprinting for criminal history record checks for licensees in a more comprehensive manner under the rulemaking to implement Section 652 of the EPAct. One of the elements of that rulemaking, as mandated by Section 652(B)(i)(ll), will be determining requirements for access to quantities of radioactive material, subject to regulation by the Commission, that the Commission determines to be of such significance to the public health and safety or to the common defense and security as to warrant fingerprinting and background checks. The requirements for exceptions in this Section 656 rulemaking were issued as part of a mandate of Section 656 of the EPAct for a limited subset of licensee employees. If necessary, the requirements now codified at 10 CFR 73.28 will be revisited, and may be amended and/or superseded by the more comprehensive Section 652 rulemaking.

*Summary of Revisions to Proposed Rule*

After review of the public comments, the NRC has decided to make final the approach in the August 30, 2006, proposed rule (i.e., to amend NRC's regulations to except from the security background check requirements of Section 170I those licensees that have *not* received NRC Orders restricting unescorted access to radioactive materials to individuals who have undergone background checks, for trustworthiness and reliability, that include fingerprinting and criminal history record checks). As of October 2006, Orders for fingerprinting and criminal history checks for unescorted access to radioactive materials have been issued to pool-type irradiator licensees, M&D licensees, and licensees who make shipments of RAMQC. Under the provisions of the final rule, if additional Orders for fingerprinting and criminal history checks for unescorted access to radioactive material are issued to licensees other than those noted above, licensees who receive any such new Orders would no longer be

excepted from the security background check requirements of Section 170I of the AEA.

### III. Section by Section Analysis of Final Rule

New § 73.28 has not been revised from the wording in the proposed rule and continues to except licensees from the security background check provisions of Section 170I of the AEA if they have not received Orders from the NRC containing requirements for background checks for trustworthiness and reliability that include fingerprinting and criminal history checks as a prerequisite for unescorted access to radioactive materials. Licensees subject to Orders are not excepted from the security background check provisions, and would use the requirements in their existing Orders to comply with Section 170I of the AEA.

### IV. 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 the use of such a standard is inconsistent with applicable law or otherwise impractical. In this final rule, NRC is indicating specific exceptions to the requirements of Section 656 of the EPAct. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

### V. Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs,'' which became effective on September 3, 1997 (62 FR 46517), NRC program elements (including regulations) are placed into four compatibility categories (Compatibility Category A through D). In addition, NRC program elements also can be identified as having particular health and safety significance or as being reserved solely to NRC.

The amendment to 10 CFR part 73 is a program element designated ''NRC'' based on implementation of the procedure in NRC's Management Directive 5.9, ''Adequacy and Compatibility of Agreement States.'' The requirements in this amendment are limited to providing exceptions to requirements in Section 170I of the AEA and are based on a system of Orders that were developed under NRC's authority to protect the common defense and security which are areas of exclusive NRC regulatory authority and cannot be relinquished to the Agreement States. Therefore, the requirements of this amendment should not be adopted by the Agreement States.

### VI. Environmental Impact: Categorical Exclusion

NRC has determined that this final rule is the type of action described in 10 CFR 51.22(c)(3)(ii) as a categorical exclusion. Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

### VII. Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Existing requirements were approved by the Office of Management and Budget, approval number 3150–0002.

### VIII. 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 Office of Management and Budget control number.

### IX. Regulatory Analysis

A regulatory analysis has not been prepared for this regulation because it relieves restrictions and does not impose any additional burdens on licensees.

### X. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The amendment does not impose any additional burdens on licensees.

### XI. Backfit Analysis

NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this final rule because this amendment does not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

### XII. Congressional Review Act

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

### 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 AEA, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; NRC is adopting the following amendment 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, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 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).

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

■ 2. Section 73.28 is added to read as follows:

**§ 73.28 Security background checks for secure transfer of nuclear materials.**

Licensees are excepted from the security background check provisions in Section 170I of the AEA if they have not received Orders from the Nuclear Regulatory Commission containing requirements for background checks for trustworthiness and reliability that include fingerprinting and criminal history record checks as a prerequisite for unescorted access to radioactive materials.

Dated at Rockville, Maryland, this 18th day of January 2007.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

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