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

(FSME-08-047, June, Program, 10 CFR 34)

June 16, 2008

ALL AGREEMENT STATES, MICHIGAN, NEW JERSEY, VIRGINIA

RESULTS OF THE ORGANIZATION OF AGREEMENT STATES, INC. (OAS) PETITION FOR RULEMAKING (PRM 34-06) 10 CFR 34 AND CONTINUED REVIEW OF IMPLEMENTATION UNDER THE INTEGRATED MATERIALS PERFORMANCE EVALUATION PROGRAM (IMPEP) (FSME-08- 047)

Purpose: To provide the Agreement States with the May 14, 2008 *Federal Register Notice* on the results of the United States Nuclear Regulatory Commission's (NRC) evaluation of the Petition for Rulemaking PRM 34-06 from the Organization of Agreement States, Inc., (OAS) and the continued review of implementation under the Integrated Materials Performance Evaluation Program (IMPEP).

Contents: May 14, 2008 *Federal Register Notice,* 73 FR 27771

Background: As noted in the Office of State and Tribal Programs (STP) Letter 05-025, dated March 25, 2005, the NRC agreed that, until OAS filed a petition for rulemaking in accordance with 10 CFR 2.802 to revise Section 10 CFR 34.41(a) and the final decision is made on the petition for rulemaking, the staff would defer compatibility findings on the implementation of the surveillance component of the Two-Person Rule in Texas and any other State that is implementing 10 CFR 34.41 (a) in a similar way.

On December 28, 2005 (70 FR 76724), the NRC published a notice of receipt of a petition for rulemaking filed by the OAS. The petitioner requested that the NRC amend its regulations to require that an individual receive at least 40 hours of radiation safety training before using sources of radiation for industrial radiography, by clarifying the requirements for at least two individuals to be present at a temporary job site, and by clarifying how many individuals are required to meet surveillance requirements. The petitioner also requested that NUREG-1 556, Volume 2, be revised to reflect the performance-based changes in the proposed amendments.

The NRC has completed the evaluation of PRM-34-06 and has decided to close the petition, in so far as the issues and concerns raised in the petition merit further NRC consideration and inclusion in a future rulemaking.

Discussion: The NRC will continue to hold compatibility determinations in this area in abeyance until the final rule is published and the Agreement State implementation date becomes effective. As noted in STP Letter 05-025, NRC staff will continue to defer compatibility findings on the implementation of the surveillance component of the Two-Person Rule in Texas and any other State that is implementing 10 CFR 34.41 (a) in a similar way.

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Enclosure:
May 14, 2008 *Federal Register Notice,* 73 FR 27771

Proposed Rules

Federal Register
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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 34

[Docket No. PRM–34–06; NRC–2005–0019]

Organization of Agreement States, Inc., Consideration of Petition in Rulemaking Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: Resolution and closure of petition docket.

SUMMARY: The Nuclear Regulatory Commission (NRC) will consider the issues raised in a petition for rulemaking (PRM–34–06) submitted by Barbara Hamrick, Chair, Organization of Agreement States, Inc. (OAS) in the NRC's rulemaking process. The petitioner requested that the NRC amend its regulations to require that an individual receive at least 40 hours of radiation safety training before using sources of radiation for industrial radiography, to revise the requirements for at least two qualified individuals to be present at a temporary job site, and to clarify how many individuals are required to meet surveillance requirements. The petitioner also requested that NUREG–1556, Volume 2, be revised to reflect the proposed amendments. The NRC has determined that this petition will be considered through NRC's rulemaking process.

DATES: The docket for the petition for rulemaking PRM–34–06 is closed on May 14, 2008.

ADDRESSES: Further NRC action on the issues raised by this petition will be accessible at the Federal rulemaking portal, *http://www.regulations.gov*, by searching on rulemaking Docket ID: NRC–2008–0173. The NRC also tracks all rulemaking actions in the ''NRC Regulatory Agenda: Semiannual Report (NUREG–0936).''

You can access publicly available documents related to this petition for rulemaking using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID: NRC–2005–0019.

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agency Wide Document Access and Management System (ADAMS): 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 PDR reference staff at 1–899–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Thomas Young, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–5795, e-mail: *Thomas.Young@nrc.gov*.

SUPPLEMENTARY INFORMATION:

The Petition

On December 28, 2005 (70 FR 76724), the NRC published a notice of receipt of a petition for rulemaking filed by the OAS. The petitioner requested that 10 CFR 34.41, ''Conducting industrial radiographic operations,'' paragraph (a) be amended to remove the requirement that the additional qualified individual shall observe the operations and be capable of providing immediate assistance to prevent unauthorized entry. The petitioner requested that 10 CFR 34.43, ''Training,'' be amended to limit a licensee from permitting an individual to act as a radiographer or a radiographer's assistant until the individual has successfully completed an accepted course of at least 40 hours on the applicable subjects listed in paragraph (g), *e.g.*, concerning fundamentals of radiation safety, radiation detection instrumentation, and equipment. The petitioner requested that 10 CFR 34.51, ''Surveillance,'' be amended to clarify that only the radiographer is required to ensure direct visual surveillance of the operation to protect against unauthorized entrance into a high radiation area. The petitioner also requested that NUREG–1556, Volume 2, be revised to reflect the performance-based changes in the proposed amendments.

The petitioner considers 10 CFR 34.41(a) to be an important safety requirement, but believes the surveillance component of that rule is more appropriately implemented and enforced as a performance-based requirement, rather than the NRC's prescriptive interpretation of the rule. The petitioner stated that at least six Agreement States are currently implementing this component differently than the NRC. The petitioner believes that a shift in the NRC's focus to a performance-based implementation of the final rule, based on its acceptance of the expertise in this arena derived from the States, would foster a regulatory partnership that benefits the licensed community by minimizing confusion for those licensees who operate in multiple jurisdictions.

The petitioner stated that when 10 CFR 34.41(a) was developed, there was strong and sustained support from the States, licensees, and industry for the concept of having at least two qualified individuals present whenever radiography is performed at temporary job sites. The petitioner stated that Texas has had a requirement for a two-person crew since 1986, which was adopted at that time along with specific training requirements. The petitioner stated that by the effective date of the NRC final rule, seven States were already nationally recognized as having comparable industrial radiography program components and were issuing industrial radiographer certifications. The Texas program did not require two people to observe operations. The petitioner provided information to support their conclusion that there was no evidence of negative performance regarding the Texas program that warranted a different surveillance strategy.

The petitioner stated that NRC's regulations require, ''The additional qualified individual shall observe the operations and be capable of providing immediate assistance to prevent

unauthorized entry.'' The petitioner believes that the expectation of the two-person rule, as expressed in the May 28, 1997, final rule, is that at a temporary job site the second qualified individual would be able to secure the restricted area and the source, and provide aid as needed. The petitioner stated that in the final rule, the Commission stressed that having a second qualified individual is particularly important when radiography is performed where a radiographer alone may not be able to control access to the restricted area. The petitioner also stated that, additionally, the second person should be trained to provide a safe working environment for radiography personnel, workers, and other members of the public at a temporary job site.

The petitioner stated that safety was the basis for having two individuals at a job site. The petitioner believes that requiring a trainee/assistant to have more extensive training (e.g., completion of a 40-hour radiation safety training course) before handling radiographic equipment increases the probability that he or she would be able to observe the area and provide assistance if needed. The petitioner stated that while there were many comments on the desirability of the trainer/trainee or radiographer/assistant crew combination as opposed to the two radiographer crew, and an acceptance of the requirement that the trainee/assistant be under the direct supervision of the trainer/radiographer, the issue regarding whether both individuals of a two radiographer crew had to be physically present during actual exposures was never addressed by the NRC. The petitioner stated that in several States, if a two-person crew consists of two radiographers, one may be in the darkroom while the other is exposing film, provided the surveillance requirement is met.

The petitioner stated that the apparent inconsistency in the surveillance component of §§ 34.41(a) and 34.51, along with the conflicting guidance found in NUREG–1556, Volume 2, raise substantial doubts as to whether the NRC's current interpretation of the rule is, in terms of safety, the most desired approach. The petitioner stated that the recommended language that amends § 34.51 puts the access control responsibility with a radiographer, but allows the radiographer the latitude to use additional personnel to control radiographic operations if needed. The petitioner believes that additional personnel may include persons not qualified as a radiographer or a radiographer's assistant, but capable of providing needed support to control access to the restricted area while remaining at the perimeter of the restricted area. The petitioner believes that, as the rule recommends, the rule does not require two persons to constantly monitor operations, nor does it limit it to two persons. The petitioner believes that the rule allows the radiographer in charge to make that decision.

The petitioner stated that the final rulemaking has been interpreted in guidance document NUREG–1556, Volume 2, to mean, ''Both individuals must maintain constant surveillance of the operations and be capable of providing immediate assistance to prevent unauthorized entry to the restricted area.'' The petitioner stated that if the temporary job site presents a situation in which the surveillance requirement of § 34.51 is met, the NRC interpretation means that even if a two-person crew consists of two certified radiographers, both must be with the camera. If one of the members is in the darkroom, then radiography cannot be performed. The petitioner believes that the impact of this interpretation on the industry is that companies must employ a third person to develop film in the darkroom while two individuals are exposing film and preventing unauthorized entry, regardless of what the situation warrants. The petitioner also believes that the licensee must use additional time at a job site to expose film and then develop it. Either situation results in added, unnecessary cost to the industry. The petitioner contends that in a temporary job site situation in which the crew consists of two qualified radiographers and the surveillance requirement can be met, the second individual is available to provide immediate assistance, whether in the darkroom or performing other job-related duties nearby. The petitioner stated there is no justification for imposing additional costs and negative impact on an industry that has not demonstrated performance that would warrant this cost and impact.

Public Comments on the Petition

The notice of receipt of the petition for rulemaking invited interested persons to submit comments. The comment period closed on March 13, 2006. NRC received two comment letters; one from the Conference of Radiation Control Program Directors, Inc., and one from the Texas Department of State Health Services. These organizations approved the petitioner's request. The main reasons cited by these commenters were that the proposed changes would help to: (1) Facilitate a better understanding of industrial radiography operational requirements, (2) promote a safer work environment, and (3) encourage the collaborative partnership with NRC and OAS for the development and implementation of uniform and consistent regulations that support public health and safety.

The industrial radiography community did not comment on the petitioner's request. In the past, the industry strongly supported the two person requirement at 10 CFR 34.41(a) and indicated that the additional cost of safety would be borne by the customers, not necessarily by the licensees. The industry had not supported a requirement to specify the number of hours for radiation safety training that is required in 10 CFR 34.43.

On August 15, 2007 (72 FR 35203), the NRC held an open meeting via a teleconference with the petitioner and members of the public. The meeting transcript is available in ADAMS (Accession No. ML080370403). The purpose of the meeting was to ensure full understanding of two specific issues, training and economic impact, which the NRC identified during evaluation of the petitioner's request. The meeting was attended by two members of the OAS Executive Board who represented the petitioner, three individuals from three Agreement State programs, and two members of the public who were consultants for industrial radiography licensees. Regarding the training issue, the petitioner indicated that a trainee in Texas is required to complete an approved, 40-hour course in basic radiation safety before the trainee would obtain on-the-job experience under the supervision of a certified trainer. Eventually a trainee may take an approved certification exam and become a certified radiographer if a passing score is obtained on the exam. The petitioner explained how the two person rule is implemented in the State of Texas to allow one radiographer to observe the area in certain situations. Regarding the issue of economic impact, the petitioner indicated there was no apparent economic impact from the two person rule in Texas since 1986 when the requirement was first implemented. However, since 10 CFR 34.41(a) was effective in 1997, assigning radiography personnel to jobs becomes more complicated for Texas licensees that operate in a non-Agreement State. For example, a licensee from Texas who has a job site in a non-Agreement State would most likely have to send additional radiography personnel or allow additional time to complete a job that could have been done by a team

comprised of two certified radiographers if the job site had been in Texas. Of the State personnel in attendance, one of the three individuals assisted with the petitioner's presentation, the second individual was neutral and did not indicate approval of, or opposition to the petitioner's request, and the third individual indicated that the inspection program in their State should be more aggressive. The two consultants opposed the petition. The main reasons cited by the consultants were: (1) An approved, 40-hour requirement should not be prescribed because various ways and means exist for a licensee to provide instructions to workers as required in 10 CFR 19.12; (2) a 40-hour basic radiation safety training requirement for a radiographer's assistant would be a major economic impact on a licensee due to frequent and unexpected personnel turnover; (3) the duration of basic radiation safety training need not be specified in the regulations because an individual's understanding of essential information can be readily determined during a performance-based safety inspection completed by a radiation safety officer or a regulatory agency; (4) resources would be better spent to increase the number of performance-based safety inspections at temporary job sites and enforce the current requirements than to expend resources to revise the regulations as per the petitioner's request; (5) the two person rule is necessarily prescriptive to require an additional qualified individual to observe operations during radiography because an individual radiographer working alone with an unshielded gamma radiation source of high energy and activity is unsafe even at a remote field site where the entire area is unobstructed; (6) both the radiographer and the additional qualified individual must work together and be checking on each other to ensure safety during operations; and (7) under the approach proposed by the petitioner even a certified radiographer will have problems at times because a second qualified individual is not checking against the radiographer in certain cases.

Reasons for Closure

The NRC is closing the petition because we have determined that issues and concerns raised in the petition merit further NRC consideration and inclusion in a future rulemaking. The NRC's rationale for closing the petition is based on the following points:

- The Texas program has been in place for a number of years and appears to successfully regulate industrial radiography licensees. To date, there is no significant evidence that reveals the Texas regulations have failed to protect public health and safety. There is no apparent difference in the performance outcomes of the Texas approach or the NRC approach.
- The NRC used the previous experience from Texas and other Agreement State programs and NRC and Agreement State licensees when it developed 10 CFR part 34.
- The NRC analyzed the Agreement States' requirements equivalent to 10 CFR 34.41(a) and compared those regulations not compatible with a Compatibility Category B to the compatibility requirements for a Compatibility Category C and a Compatibility Category H & S. The NRC determined that a compatibility change to a Compatibility Category C would not resolve all the issues for the Agreement States that are non-compatible with Compatibility Category B.
- Enforcement outcomes differ between the NRC and Texas. The NRC's Enforcement Policy indicates a violation of 10 CFR 34.41(a) as an example of a Severity Level III violation that would result in escalated enforcement action. Under the Texas approach, no violation would be cited if one radiographer is observing operations in the area and the additional radiography personnel is in the dark room and aware of operations in the area.
- The Regulatory Flexibility Act (RFA) has a requirement for Federal agencies to review regulations every 10 years that affect small businesses. As an independent regulatory agency, the NRC has voluntarily complied with some RFA provisions and the NRC believes it is reasonable to review 10 CFR part 34 because it affects small businesses.
- The NRC could use an enhanced public participatory process to evaluate whether to revise 10 CFR part 34 into a more performance based regulation.
- During the time and development of the rulemaking process, NRC could continue the Integrated Materials Performance Evaluation Program reviews and if an Agreement State's regulations are found to be noncompliant for 10 CFR 34.41(a) then the finding(s) would be held in abeyance as indicated previously in the All Agreement States Letter dated March 25, 2005 (STP–05–025).

The NRC will consider the issues raised by the petition in the rulemaking process; however, the petitioner's concerns may not be addressed exactly as the petitioner has requested. During the rulemaking process the NRC will solicit comments from the public and will consider all comments before finalizing the rule. Future actions for PRM–34–06 will be reported in NUREG–0936, ''NRC Regulatory Agenda'' which is publicly available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0936/*. The regulatory agenda is a semiannual compilation of all rules on which the NRC has recently completed action, or has proposed action, or is considering action, and of all petitions for rulemaking that the NRC is working to resolve. Further information on this petition may also be tracked through *http://www.Regulations.gov* under Docket I.D. NRC–2008–0173.

Existing NRC regulations provide the basis for reasonable assurance that the common defense and security and public health and safety are adequately protected.

For the reasons cited in this document, the NRC closes this docket PRM–34–06.

Dated at Rockville, Maryland, this 24th day of April 2008.

For the Nuclear Regulatory Commission.

Luis A. Reyes,

Executive Director for Operations.

[FR Doc. E8–10819 Filed 5–13–08; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 35

[PRM–35–20; NRC–2006–0020]

E. Russell Ritenour, PhD; Consideration of Petition Rulemaking Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Resolution of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) will consider the issues raised in the petition for rulemaking submitted by E. Russell Ritenour, PhD, on behalf of the American Association of Physicists in Medicine (AAPM), in the rulemaking process. The petitioner requested that the NRC amend its regulations that address training requirements for experienced Radiation Safety Officers (RSOs) and Authorized Medical Physicists (AMPs). In its review and resolution of the petition, the NRC concluded that revisions made to the regulations in 2005 may have inadvertently affected a group of board certified professionals.

DATES: The docket for the petition for rulemaking PRM–35–20 is closed on May 14, 2008.