Proposed Rules

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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 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 (EPAct), 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.

DATES: Submit comments on the rule by October 4, 2010. Submit comments on the information collection aspects of this rule by September 20, 2010. 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 INFORMATION** section of this document. You may submit comments by any one of the following methods.

Federal Rulemaking Web Site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2008–0619. Address questions about NRC dockets to Carol Gallagher, telephone 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301–415–1677).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

You may submit comments on the information collections by the methods indicated in the Paperwork Reduction Act Statement in Section XI of this document.

FOR FURTHER INFORMATION CONTACT: Timothy A. Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1462, e-mail *Timothy.Reed@nrc.gov;* or S. Elizabeth Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–2130, e-mail *Elizabeth.Reed@nrc.gov*.

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I. Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov*. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document, including the following documents, using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents 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'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	ML101670084	X
Regulatory Analysis Appendix		ML100610020	
Proposed Rule Information Collection Analysis	X	ML101670110	X

II. Background

Before the terrorist actions of September 11, 2001, NRC regulations in 10 CFR 73.60 and 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 records checks, while checks at other RTRs include provisions for local or State law enforcement fingerprint-based criminal history records 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 EPAct, 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 EPAct 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 EPAct 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 EPAct pertaining to fingerprinting.

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 EPAct interim implementation plan. In an SRM dated 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.

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 12, 2007, directive, the NRC imposed fingerprinting requirements for unescorted access to special nuclear material on the applicable RTR licensees by order (Order EA–07–074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors," (72 FR 25337; May 4, 2007) and Order 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" (72 FR 44590; August 8, 2007), ADAMS Accession Nos. ML070750140 and ML072050494, respectively). Specifically, the orders state that:

> An individual who is granted 'unescorted access' could exercise physical control over the special nuclear material possessed by the licensee, which would be of significance to the common defense and security or would adversely affect the health and safety of the public, such that the special nuclear material could be used or removed in an unauthorized manner without detection, assessment, or response by systems or persons designated to detect, assess or respond to such unauthorized use or removal.

In implementing the requirement of the EPAct on an interim basis, the

orders were issued requiring fingerprinting only for individuals with unescorted access to risk-significant materials (*i.e.,* fuel), within the research and test reactor facilities. Licensees were required to submit fingerprints of individuals who were seeking or currently had unescorted access. Individuals who had previously been subjected to fingerprinting that would satisfy the requirements for unescorted access (*e.g.,* access to Safeguards Information) did not need to be fingerprinted again. These orders required that a reviewing official consider the results of the FBI criminal history records check in conjunction with other applicable requirements to determine whether an individual may be granted or allowed continued unescorted access. The reviewing official was allowed to be the same official previously approved by NRC for the Safeguards Information (SGI) 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 EPAct fingerprinting and criminal history records check requirements for individuals who seek access to SGI. The unescorted access order provided that an NRC-approved reviewing official was the only individual who could make the unescorted access determination.

Advance Notice of Proposed Rulemaking (ANPR)

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 Advance Notice of Proposed Rulemaking 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.

A. General Comments

Comment: One commenter stated that he had no issue with the proposal and would not be affected. Five commenters and several of those participating in the public workshop expressed the view that the NRC should codify the NRC imposed unescorted access orders (EA–07–074 and EA–07–098) and not impose any additional requirements. Several commenters stated that the regulation should be identical to the orders and that expanding the requirement beyond the orders is neither justifiable nor effective, and that it would cause an undue burden on the affected licensees. One commenter indicated that any change in requirements beyond those in the orders should be based on solving specific problems to reduce burden on facilities, or solve implementation issues that allow a poor practice to exist.

NRC Response: The NRC understands the concerns of the stakeholders and recognizes its obligation under Section 104c of the AEA to impose only the minimum amount of regulation needed for RTR licensees. It is the NRC's intent in this proposed rulemaking to implement the statutory requirements in Section 149 of the AEA, which the NRC is required to implement, while at the same time complying with the constraints of Section 104c of the AEA. The NRC believes that the proposed rulemaking would provide the minimum fingerprint-based FBI criminal history records checks requirements mandated by Section 149 of the AEA for unescorted access at RTR facilities.

Comment: One commenter pointed out that in addition to NRC Order EA–07–074, the NRC issued NRC Order 06–023, which addresses fingerprint-based criminal history records checks for access to SGI at RTRs, and that the NRC should consider including access to SGI in this rulemaking.

NRC Response: The NRC notes that § 73.57 was amended October 24, 2008 (73 FR 63546) to require each licensee authorized to engage in an activity subject to regulation by the Commission, including RTR licensees, to comply with the requirements of § 73.57. Section 73.57 contains the fingerprinting requirements for access to SGI. As a result, the NRC's regulations in § 73.57 already address access to SGI for RTR licensees and, as such, inclusion of additional provisions for access to SGI in this rulemaking would be duplicative and are unnecessary.

Comment: One commenter stated that the NRC should consider how it can create a system that can address fingerprint-based criminal history records checks "for other sources" besides the reactor, such as NRC Agreement State licensed sources which would also require fingerprint-based criminal history records checks.

NRC Response. Although the commenter does not clarify the meaning of "other sources," the NRC interprets this comment to mean sources beyond SNM within a utilization facility. The NRC has decided to restrict the scope of this rulemaking to the implementation of only the requirements in Section 149 of the AEA for RTR licensees (fingerprint-based criminal history records check for unescorted access to RTR facilities), although the proposed rule does recognize that if the RTR licensee has conducted fingerprinting in accordance with the NRC's regulations for other access purposes (*e.g.,* access to SGI), the licensee would not be required to re-fingerprint. With regard to security requirements, including fingerprinting requirements, for other sources, the NRC has a rulemaking underway that would address the Agreement State licensed byproduct material sources (SECY–09–0181).

Comment: One commenter stated that wording suggested in the ANPR such as "specific procedures for the conduct of fingerprinting" codifies the need for multiple procedures that provide specific guidance to law enforcement or other agencies that perform fingerprinting that is "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.

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 of these facilities, where in some cases 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 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.

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 knowledge to make unauthorized use of the SNM in the nonpower reactor or to remove the SNM from the nonpower reactor facility without authorization or detection. 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 SNM or specified areas is necessary to require licensees to obtain fingerprint-based criminal history records checks under the proposed provisions.

Comment: A workshop participant questioned if "monitoring" necessarily meant "visual options."

NRC Response: The NRC notes that "monitoring" is an element of physical security, and in the broader security sense monitoring can typically involve "visual options." More importantly the scope of this rulemaking is fingerprint-based criminal history records checks for individuals seeking unescorted access at nonpower reactor facilities. Therefore, questions pertaining to monitoring (from a general security standpoint) do not directly pertain to the proposed rulemaking.

Comment: Several workshop participants questioned the viability of the reciprocity of fingerprint information between facilities. They stated that some facilities have students go through LiveScan FBI checks, and that it would be less burdensome if fingerprints could be transmitted electronically.

NRC Response: The NRC understands these concerns. The proposed provisions would provide some RTR licensees with the flexibility for using reciprocity by incorporating RTR licensees into the provisions of § 73.57(b)(5). The proposed revision to § 73.57(b)(5) would permit RTR licensees some discretion in determining whether to fingerprint an individual that is employed by, and has been granted access to, a nuclear power facility or a nonpower reactor facility or access to SGI by another licensee. The NRC recognizes that individual circumstances would determine whether this flexibility can be used. The NRC will accept electronic fingerprint submissions via LiveScan, however such electronic submission must come from the RTR licensee and not from a third party.

Comment: To reduce the burden on some of the small facilities, a workshop participant questioned whether it is appropriate to have an exemption in the regulation to waive the fee for fingerprint checks. The exemption would be based on the same reasoning as to why universities don't pay the annual licensing fees.

NRC Response: The NRC understands the concern. However, the requirements of Section 149 of the AEA explicitly require that the costs of an identification or records check be paid by the individual or entity required to conduct the fingerprinting. Therefore, the NRC does not have the authority to waive the fee.

B. Comments Responding to NRC Posed Questions

Question 1: Which of the definitions of areas of significance should be adopted by the NRC?

(1) Controlled access areas (CAAs) as defined in 10 CFR 73.2;

(2) Areas of the facility determined in each licensee's security assessment;

(3) Prescriptive locations such as the reactor (regardless of type), spent fuel storage areas, fresh fuel storage areas, *etc.,* or;

(4) Others?

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." These definitions apply to all the provisions within 10 CFR Part 73, and accordingly apply to RTR licensees whose security requirements are governed by 10 CFR Part 73. The equipment, systems, devices, and material that fall within the § 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 (which contain vital equipment) is ensuring that individuals permitted access to the "utilization facility" as defined in the AEA, is properly implemented in the NRC's regulations. 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, and which is consistent with the unescorted access orders.

Question 2: What would be the approximate number of additional personnel that must be fingerprinted for unescorted access based on the "areas of significance" as defined in Question 1, and are there categories of persons that should be exempted?

Comment: One university commenter stated that no additional individuals would require fingerprinting if the "area of significance" is defined as the vital area defined in its Physical Security Plan. The commenter also stated that if the area of significance is expanded beyond the vital area, an additional 200 students and faculty would require fingerprint-based criminal history records checks, with an additional 25 to 50 individuals each academic term. Two university representatives indicated that they expected no increase in the number of persons to be fingerprinted; one stated that an unspecified number of additional escorts would be required. With respect to categories of persons to be exempted, one commenter agreed that exemptions should be granted for unusual instances such as known foreign nationals or gifted students.

NRC Response: The NRC agrees with this commenter and the observation of other commenters making similar remarks that the size of the area defined by the rule directly 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.

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 cannot 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 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.

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?

Comment: None of the comments received addressed this question.

NRC Response: None

Question 8: Are there other enhancements that could be made?

Comment: None of the comments identified other enhancements that could be made.

NRC Response: None.

Question 9: Has the implementation of the orders identified any new issues that should be addressed through rulemaking?

Comment: None of the comments received identified addressed this question.

NRC Response: None.

Question 10: Regarding alternatives to fingerprinting foreign nationals and/or minors in connection with a trustworthiness and reliability determination.

(1) Do foreign nationals and/or minors require unescorted access to "areas of significance?"

(2) Are there alternative methods to obtain information upon which a licensee could base a trustworthiness and reliability determination for these individuals?

Comment: One commenter stated that criminal history records checks for minors should be considered valid even though the opportunity for criminal

behavior has been limited. However, foreign nationals should be vetted through other Federal agencies because fingerprint checks would not be as effective for these individuals. One commenter stated that neither foreign nationals nor minors would be permitted access without escorts. Another commenter stated that any proposed rule should provide a mechanism for exempting individuals based on "unusual instances," such as exempting foreign national researchers or students, or gifted minors. Such an exemption should include a temporary waiver to allow work while the process is in progress based on an evaluation by management. Another commenter stated that foreign nationals require unescorted access to "areas of significance" but minors do not, and that there are alternative ways to obtain information upon which to base a trustworthiness and reliability determination but the validity of information from some sources could be problematic. Another individual commented that both foreign nationals and minors require unescorted access to "areas of significance."

NRC Response: The NRC agrees with the commenters that fingerprints may not be as effective in determining the trustworthiness and reliability of a foreign national or of a minor, and agrees that there may be alternative ways to obtain information upon which to base a trustworthiness and/or reliability determination. The scope of this proposed rulemaking is fingerprint-based FBI criminal history records checks. However, the NRC is considering whether other background investigation elements should also be required for the purpose of a trustworthiness and reliability determination. These requirements would be addressed in a follow-on rulemaking should the Commission decide that the requirements are necessary.

Question 11: Is there any additional information that the NRC should consider in preparing the proposed rule?

Comment: None of the comments received specifically addressed this question.

NRC Response: None.

IV. Discussion

The proposed amendments would establish, for RTR licensees, generically applicable fingerprinting requirements similar to those previously imposed by the Commission's orders 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.

The AEA definition provides discretion to the Commission with regard to how this term might be implemented. In this regard the Commission defined "utilization facility" in 10 CFR 50.2 as any nuclear reactor other than one designed or used primarily for the formation of plutonium or U–233.

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

> The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under the Act to promote common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

The proposed revisions discussed in this document are constructed in accordance with the requirements of Section 149 of the AEA and within the constraints of 104c of the AEA. The NRC recognizes that there may be future nonpower utilization facilities (none of which are currently licensed) that could be licensed under Section 103 of the AEA (*e.g.,* medical isotope production facilities are one possible facility). The NRC concludes that the proposed provisions would establish adequate minimum fingerprinting requirements for unescorted access at these Class 103 nonpower reactor facilities. If the NRC determines that these fingerprinting requirements need to be supplemented in the future, the NRC intends to supplement these minimum requirements as necessary during the licensing process using license conditions.

V. Section-by-Section Analysis

A. Section 73.57(a) General

Paragraphs (a)(1) and (a)(2) would be simplified because the first portion of the current rule language, which includes current power reactors licensed under Part 50 and applicants for power reactor licenses, is encompassed by the second portion of the rule provision that requires licensees that engage, or intend to engage in any regulated activity to be subject to the provisions of § 73.57.

Paragraph (a)(3) would be revised to add nonpower reactors (which includes RTR licensees) into the scope of licensees subject to § 73.57 fingerprint provisions. Nonpower reactor licensees would be added to § 73.57 to make use of the current fingerprint requirement provisions that are being successfully used for other licensees subject to FBI fingerprint-based criminal history records checks. This would ensure that RTR licensee fingerprints are handled in a manner that is both consistent with the process used for other licensees, and that ensures NRC meets it obligations under the AEA for the handling and processing of fingerprints with the FBI.

B. Section 73.57(b) General Performance Objective and Requirements

Paragraph (b)(1) would be revised to include nonpower reactor licensees in the scope of the general performance and objective requirements of § 73.57. The paragraph would point to new paragraph (g) where the specific

unescorted access provisions for RTR licensees would be described.

Paragraph (b)(2)(i) would be revised to add nonpower reactor facilities, relieving RTR licensees from being required to fingerprint the designated entities, consistent with the exceptions allowed for other licensees. Paragraph (b)(2)(i) would be further revised to list "offsite response organizations responding to a nonpower reactor facility" as one of the categories that would not require fingerprinting under the revised § 73.57 provisions. To implement this proposed requirement, RTR licensees would need to develop or revise predetermined actions that accommodate offsite response organizations during emergency 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 not to fingerprint individuals for which a fingerprint-based criminal history records 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.

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.

D. Section 73.57(d) Procedures for Processing of Fingerprint Checks

Paragraph (d)(1) would be revised to include nonpower reactor facilities so that the established fingerprint provisions and forms that NRC currently uses for other licensees can be used by RTR licensees.

Paragraph (d)(3)(ii) would be revised to apply the application fee provisions to all licensees (including RTR licensees) subject to the section 73.57 fingerprinting requirements.

E. Section 73.57(f) Protection Information

Paragraph (f)(2) would be revised to add nonpower reactor licensees to ensure that the personal information disclosure restrictions are applied to RTR licensees.

Paragraph (f)(5) would be revised to add nonpower reactors and thereby provide records retention requirements for the fingerprints and criminal history records checks generated through compliance with proposed § 73.57.

F. Section 73.57(g) Fingerprinting Requirements for Nonpower Reactor Licensees

This paragraph would be added to provide the new proposed fingerprint-based criminal history records checks requirements required by Section 149 of the AEA. The scope of the proposed requirements is consistent with orders on unescorted access issued by the NRC on April 30, 2007 and August 1, 2007 (EA–07–074 and EA–07–098 respectively). These orders require RTR licensees to conduct FBI identification and fingerprint-based criminal history records checks based on fingerprints for individuals granted unescorted access to SNM at these facilities (*i.e.,* individuals having the knowledge and capability to remove the SNM and use it in a way inimical to the public health and safety or common defense and security). The orders were issued as interim measures until the NRC could formulate generically applicable requirements for incorporation into the NRC's regulations.

Section 73.57(g)(1) would establish requirements that prohibit any person from having unescorted access to a nonpower reactor facility unless that person has been determined by the licensee to be trustworthy and reliable based on a fingerprint-based FBI criminal history records check. This determination would be made by an NRC-approved reviewing official. The reviewing official is required to have unescorted access in accordance with the requirements of proposed § 73.57, or access to SGI. The licensee's NRC-approved reviewing official would evaluate the criminal history records check information to determine whether the individual has a record of criminal activity that indicates that the individual should be denied unescorted access. For each determination of unescorted access, which would include a review of criminal history information, the NRC would expect RTR licensees to document the basis for the decision. 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 would be considered, and actions would be taken based on these findings. The NRC would expect these findings to be documented. A criminal history record containing a pattern of behaviors which could be expected to recur or continue, or recent behaviors which cast questions on whether an individual should have unescorted access in accordance with proposed § 73.57(g) would be carefully evaluated before unescorted access is granted to the individual.

Section 73.57(g)(2)(i) would establish requirements for RTR licensees to obtain fingerprints for criminal history records checks for each individual who is seeking or permitted unescorted access to vital areas of the nonpower reactor facility. 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." These definitions apply to all the provisions within 10 CFR Part 73, and accordingly apply to RTR licensees whose security requirements are governed by 10 CFR Part 73. The equipment, systems, devices, and material that fall within the § 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.

At higher powered RTRs, the vital area criterion may increase the scope of personnel required to obtain fingerprinting beyond the SNM criterion proposed in § 73.57(g)(2)(ii), in order to accommodate individuals wishing to have access to equipment that can mitigate the impact of sabotage. The NRC notes that RTR licensees have associated "vital area" with the storage of unirradiated highly enriched uranium, as the historic principal security concern for most RTR facilities has been theft and diversion of highly enriched uranium. However, as discussed above, the NRC would be using "vital area" in this proposed provision as defined in § 73.2. A vital area at a particular RTR will vary as a function of the facility design. Security assessments have been performed for a number of licensees that can provide the licensees insight into what constitutes a vital area. Given that implementation of this proposed revision may involve a significant amount of interpretation on the part of RTR licensees, the NRC expects that RTR licensees would have clear documentation to support their decisions.

Paragraph (g)(2)(ii) would establish requirements for RTR licensees to obtain fingerprints for a criminal history records check for each individual who is seeking or granted unescorted access to SNM in the nonpower reactor facility. This provision is consistent with the criteria used in the unescorted access order. The Commission notes that there may be significant overlap between the two criteria (*i.e.,* SNM and vital area) of proposed § 73.57(g)(2). As an example, 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 an 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.

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 records 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.

1. When negative information is discovered that was not provided by the individual, or that 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.

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

VI. 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 stakeholders 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; employment history; education; and personal references.

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?

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 applying for unescorted access authorization to ensure that the applicant is who they claim to be. A licensee shall review official identification documents (*e.g.,* driver's license, passport, government identification, State, province, or country of birth issued certificate of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification, or maintain a photocopy of identifying documents on file. Licensees shall certify and affirm in writing that the identification was properly reviewed and maintain the certification and all related documents for review upon inspection.

• *Employment history evaluation.* Licensees shall complete an employment history evaluation. Licensees shall verify the individual's employment with each previous employer for the most recent [x] years before the date of application.

• *Verification of education.* Licensees shall verify that the individual participated in the education process during the claimed period.

• *Criminal history review.* Reviewing officials shall obtain from local criminal justice resources the criminal history records of an individual who is applying for unescorted access authorization and evaluate the information to determine whether the individual has a record of local criminal activity that may adversely impact his or her trustworthiness and reliability. The scope of the applicant's local criminal history review must cover all residences of record for the [x] year period preceding the date of the application for unescorted access authorization.

• *Character and reputation determination.* Licensees shall complete reference checks to determine the character and reputation of an individual who has applied for unescorted access authorization. Reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to, the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under this subpart must be limited to whether the individual has been and continues to be trustworthy and reliable.

• The licensee shall also, to the extent possible, obtain independent information to corroborate the information provided by the individual (*e.g.,* seek references not supplied by the individual).

• If a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee but at least [x] business days of the request, the licensee shall:

—Document the refusal, unwillingness, or inability in the record of investigation; and

—Obtain a confirmation of employment, educational enrollment and attendance, or other form of engagement claimed by the individual from at least one alternate source that has not been previously used.

VII. Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement States Programs," approved by the Commission on June 20, 1997, and published in the **Federal Register** (62 FR 46517; September 3, 1997), this rule is classified as compatibility "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the "EA or the provisions of this chapter. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements by a mechanism that is consistent with the particular State's administrative procedure laws. Category "NRC" regulations do not confer regulatory authority on the State.

VIII. Plain Language

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.

IX. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 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.

X. 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.

XI. 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 part 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 records 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 EPAct of 2005, which amended Section 149 of the AEA, to require fingerprinting and an FBI identification and criminal history records check of any person who is permitted unescorted access to a utilization facility. As a result of this action, RTR licensees would be subject to the fingerprinting and criminal history records check requirements specified in the NRC's regulations instead of NRC issued Orders EA–07–074 and EA–07–098 pertaining to this matter.

The NRC is seeking public comment on the potential impact of the information collections contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Estimate of burden?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

A copy of the OMB clearance package may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1F21, Rockville, MD 20852. Availability of the OMB clearance package is indicated in Section I of this document. The OMB clearance package and rule are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html* for 60 days after the signature date of this notice.

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by September 20, 2010 to the Information Services Branch (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by e-mail to *INFOCOLLECTS.RESOURCE@NRC.GOV* and to the Desk Officer, Ms. Christine Kymn, Office of Information and Regulatory Affairs, NEOB–10202 (3150–0011), Office of Management and 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.

XII. 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 I of this document. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading.

XIII. 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.

XIV. Backfit Analysis

The NRC's backfit provisions are found in the regulations at §§ 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 §§ 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. 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. In § 73.57, the heading and paragraphs (a), (b)(1), and (b)(2)(i) are revised; paragraph (b)(2)(v) is added; the introductory text of paragraph (b)(4), paragraphs (b)(4)(i), (b)(5), (b)(8), the introductory text of paragraph (c)(1), paragraphs (d)(1), (d)(3)(ii), (f)(2) and (f)(5) are revised; and paragraph (g) is added to read as follows:

§ 73.57 Requirements for criminal history records checks of individuals granted unescorted access to a nuclear power facility, a non-power reactor, or access to Safeguards Information

(a) *General.* (1) Each licensee who is authorized to engage in an activity subject to regulation by the Commission shall comply with the requirements of this section.

(2) Each applicant for a license to engage in an activity subject to regulation by the Commission, as well as each entity who has provided written notice to the Commission of intent to file an application for licensing, certification, permitting, or approval of a product subject to regulation by the Commission shall submit fingerprints for those individuals who will have access to Safeguards Information.

(3) Before receiving its operating license under 10 CFR part 50 or before the Commission makes its finding under § 52.103(g), each applicant for a license to operate a nuclear power reactor (including an applicant for a combined license) or a nonpower reactor may submit fingerprints for those individuals who will require unescorted access to the nuclear power facility or nonpower reactor facility.

(b) * * *

(1) Except those listed in paragraph (b)(2) of this section, each licensee subject to the provisions of this section shall fingerprint each individual who is permitted unescorted access to the nuclear power facility, the nonpower reactor facility in accordance with paragraph (g) of this section, or access to Safeguards Information. The licensee will then review and use the information received from the Federal Bureau of Investigation (FBI), and based on the provisions contained in this section, determine either to continue to grant or to deny further unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information for that individual. Individuals who do not have unescorted access or access to Safeguards Information shall be fingerprinted by the licensee and the results of the criminal history records check shall be used before making a determination for granting unescorted access to the nuclear power facility, nonpower reactor facility, or to Safeguards Information.

(2) * * *

(i) 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);

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(v) Individuals who have a valid unescorted access authorization to a nonpower reactor facility on [effective date of the rule] are not required to undergo a new fingerprint-based criminal history records check pursuant to paragraph (g) of this section, until such time that the existing authorization expires, is terminated, or is otherwise to be renewed.

* * * * *

(4) Fingerprinting is not required if the licensee is reinstating the unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information granted an individual if:

(i) The individual returns to the same nuclear power utility or nonpower reactor facility that granted access and such access has not been interrupted for a continuous period of more than 365 days; and

* * * * *

(5) Fingerprints need not be taken, in the discretion of the licensee, if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to a nuclear power facility, a nonpower reactor facility, or to Safeguards Information by another licensee, based in part on a criminal history records check under this section. The criminal history records check file may be transferred to the gaining licensee in accordance with the provisions of paragraph (f)(3) of this section.

* * * * *

(8) A licensee shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access to the nuclear power facility, the

nonpower reactor facility, or access to Safeguards Information.

(c) * * *

(1) A licensee may not base a final determination to deny an individual unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information solely on the basis of information received from the FBI involving:

* * * * *

(d) * * *

(1) For the purpose of complying with this section, licensees shall, using an appropriate method listed in § 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual requiring unescorted access to the nuclear power facility, the nonpower reactor facility, or access to Safeguards Information, to the Director of the NRC's Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling 301- 415–7232, or by e-mail to *FORMS.Resource@nrc.gov.* Guidance on what alternative formats might be practicable is referenced in § 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

* * * * *

(3) * * *

(ii) The application fee is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an administrative processing fee assessed by the NRC. The NRC processing fee covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission publishes the amount of the fingerprint records check application fee on the NRC public Web site. (To find the current fee amount, go to the Electronic Submittals page at *http://www.nrc.gov/site-help/e-submittals.html* and select the link for the Criminal History Program.) The Commission will directly notify licensees who are subject to this regulation of any fee changes.

* * * * *

(f) * * *

(2) The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to the nuclear power facility, the nonpower reactor or access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need to know.

* * * * *

(5) The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, on an individual (including data indicating no record) for one year after termination or denial of unescorted access to the nuclear power facility, the nonpower reactor, or access to Safeguards Information.

* * * * *

(g) *Fingerprinting Requirements for Unescorted Access for Nonpower Reactor Licensees.* (1) No person shall be permitted unescorted access to a nonpower reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on the results of an FBI fingerprint-based criminal history records check obtained in accordance with this paragraph. The reviewing official is required to have unescorted access in accordance with this section or access to Safeguards Information.

(2) Each nonpower reactor licensee subject to the requirements of this section shall obtain the fingerprints for a criminal history records check for each individual who is seeking or permitted:

(i) Unescorted access to vital areas of the nonpower reactor facility; or

(ii) Unescorted access to special nuclear material in the nonpower reactor facility 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 14th day of July, 2010.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–17635 Filed 7–19–10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0616; Airspace Docket No. 10–ANM–6]

Proposed Amendment of Class E Airspace; Pendleton, OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace at Pendleton, OR. Decommissioning of the Foris Non-Directional Radio Beacon (NDB) at Eastern Oregon Regional Airport at Pendleton has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also would reflect the new name of the airport.

DATES: Comments must be received on or before September 3, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2010–0616; Airspace Docket No. 10–ANM–6, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2010–0616 and Airspace Docket No. 10–ANM–6) and be submitted in triplicate