

**Public Comments on Requirements for Fingerprint-Based Criminal History Records Checks for Individuals Seeking Unescorted Access to Non-power Reactors (Research or Test Reactors) Proposed Rule**

The public comment period for the proposed rule closed on October 4, 2010. In response to a stakeholder's request, the Commission directed the staff to reopen the public comment period. On December 20, 2010, the public comment period reopened (75 FR 79312) and subsequently closed on January 31, 2011. The NRC received six comment letters in response to its solicitation during the initial comment period and eleven comment letters during the reopened comment period. Many of the comments in these letters raised similar issues. A total of seventeen issues were identified, the majority of which were regarding differences from the 2007 NRC-issued orders, material criteria requirements, and area criteria requirements. The following is a summary of the public comments received and the NRC responses.

***General Comments Received During Initial Public Comment Period***

*Comment:* Several commenters expressed the view that existing NRC security orders as implemented and inspected at their facilities are workable and acceptable to codify. They stated that the wording of the proposed rule meets the principle of codifying the existing orders. However, these commenters further stated that the proposed wording goes beyond the scope of the existing orders without adequate justification. According to the commenters, "The proposed rule does not adequately justify the expansion of requirements based on risk (risk informed) or performance issues (performance based) and, therefore, does not meet the staff's publicly stated basis for expanding regulatory requirements."

The commenters further stated the expansion of the requirements in the proposed rule is counter to previously issued NRC documents assessing the risk and security of NPRs operated under the existing security orders and the cited Section 104c of the AEA provision on minimum

regulation. “By stated policy and statute the NRC seeks, wherever possible, to establish ‘risk-informed regulation’ and to ‘impose only such minimum amount of regulation.’ This new regulation does not seem in keeping with those goals.”

Of particular concern to the commenters is the removal of “public health and safety” and “common defense and security” significance from the requirements for protection of SNM. They stated that the original orders implemented security enhancements (fingerprinting and background checks) to protect SNM of “significance to the common defense and security” or that would “adversely affect the health and safety of the public.” The comments reiterated a previous comment made in response to the NRC’s ANPR (74 FR 17115; April 14, 2009), that the existing security orders as implemented and inspected at NPR facilities were adequate and acceptable. Any codification should reflect the existing orders and should not impose new requirements or definitions.

*NRC Response:* The NRC agrees that the wording of the proposed rule does not capture the wording of the NRC security orders verbatim. However, the NRC does not agree that failure to capture the wording of the orders verbatim constitutes an expansion of the orders’ requirements. The NRC believes that the language of the final rule captures both the intent and the requirements of the security orders and does not constitute an expansion of the requirements with respect to SNM. The term, “SNM,” as used in the final rule language, maintains the same functional effect of the existing security orders’ language and should be understood to be of such quantity and/or enrichment to be significant to the public health and safety and to the common defense and security.

Furthermore, the NRC does not agree that the requirements imposed by the final rule are inconsistent with previously issued NRC documents assessing the risk and security of NPRs or with Section 104c of the AEA. The NRC recognizes that the radiological risk posed by NPRs is relatively low and that this low risk informs the physical security requirements at NPRs. The NRC believes that the final rule presents a framework that minimizes the impact on NPR

licensees, consistent with the “minimal regulation” requirement of the AEA by identifying specific, risk-significant areas within NPR facilities that satisfy the statutory requirement to fingerprint all persons seeking unescorted access to utilization facilities. The final rule fingerprints as few people as possible while still fulfilling the statutory requirement set forth in Section 149 of the AEA. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that the original orders implemented security enhancements (fingerprinting and background checks) to prevent unauthorized use or removal of significant SNM “without detection, assessment, or response by systems or persons.” The proposed rule would remove this detection and response concept and require fingerprinting and background checks for individuals who are granted access to an “area,” regardless of whether such access would allow unauthorized use or removal without detection, assessment, or response. The removal of the “detection, assessment, or response” language is not consistent with the background discussion of the issue in the proposed rule (75 FR 42003), which states the rule would make use of this clause and flexibility.

*NRC Response:* The NRC agrees that the “detection, assessment, or response” language is not in the final rule. The purpose of this rulemaking is to establish requirements for fingerprinting those individuals seeking unescorted access to NPRs. The NRC believes that any individuals with unescorted access to SNM of such quantity and/or enrichment to be significant to the public health and safety and to the common defense and security or with unescorted access to vital areas at an NPR should be fingerprinted. The NRC believes this requirement to fingerprint for unescorted access to NPRs should be independent from the licensees’ ability to “detect, assess, or respond” to an unauthorized removal of SNM. Furthermore, the NRC notes that there are existing detection, assessment, and response requirements set forth in §§ 73.60 and 73.67. Elimination of the “detection, assess, and

respond” language in the final rule does not mean that licensees are no longer required to comply with existing detection, assessment, or response requirement. No changes to the rule language were made as a result of this comment.

*Comment:* Another commenter observed that the statements of consideration for the proposed rule states, “...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).” However, the proposed rule could be interpreted such that licensees would have to satisfy fingerprinting requirements for any personnel that would have access to vital areas or to materials. This could have the unintended result that licensees would have to meet both area and material criteria, which is at odds with the stated intention of providing flexibility. The commenter believes that the original 2007 NRC-issued security order wording should be used in § 73.57(g)(2)(ii).

*NRC Response:* The NRC agrees that the final rule will require licensees to comply with both vital area and SNM criteria when determining who needs to be fingerprinted when granted unescorted access to an NPR. The intent of the 2007 NRC-issued security orders was to enhance security at NPRs. The 2007 security orders limited fingerprinting for unescorted access at NPRs to a material criterion, with the understanding that the rulemaking process would evaluate additional fingerprinting requirements, including consideration of risk-significant areas. The NRC believes that inclusion of a vital area criterion in the final rule language is necessary to ensure adequate protection at NPRs.

However, the NRC believes that few NPRs will be affected by the vital area criterion because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because those licensee personnel requiring unescorted access to vital areas will also likely require unescorted access to SNM or access to SGI (both of which already require fingerprinting).

The NRC believes that licensees will have flexibility in implementing the vital area criterion of this rule. Licensees are responsible for determining which equipment and areas within their facilities, if any, are vital, provided that licensees clearly document how they arrive at that determination, using the definitions of vital area and vital equipment in § 73.2. No changes to the rule language were made in response to this comment.

*Comment:* Several commenters were concerned with the addition of the term *vital area*. They stated that § 73.57(g)(2)(i) of the proposed rule, “adds a new requirement to establish, define and control unescorted access to *vital areas* defined per Section 73.2. The need for this additional regulation was not adequately justified in the proposed rule basis when it stated the new rule uses definitions that already apply to all provisions within 10 CFR Part 73 and accordingly apply to RTR [NPR] licensees whose security requirements are governed by 10 CFR Part 73...”

The commenters assert that just because Section 149 of the AEA provides the Commission authority to establish regulations (for fingerprinting and criminal history checks), that does not in itself justify the need for specific regulatory expansion. The recommendation is to remove the requirement for NPRs to evaluate for *vital areas* as currently defined in § 73.2 for power reactors. The commenters stated that current definitions for unescorted access placed by the NRC security order and defended by the staff as acceptable should be maintained or adequate justification through analysis should be provided supporting the need for additional regulation of *vital areas*.

*NRC Response:* The NRC agrees that the term “vital area” did not appear in the 2007 NRC-issued orders. However, the NRC disagrees that the inclusion of the vital area in the final rule language is a new requirement in itself. The term “vital area” is defined in § 73.2 as “any area which contains vital equipment.” “Vital equipment,” in turn, is 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.”

The vital area concept is applicable to all utilization facilities, including NPRs. The NPRs that have a vital area are required to protect them in accordance with the requirements set forth in 10 CFR part 73. The only new requirement that the final rule imposes on NPR licensees that have a vital area is to fingerprint those individuals seeking unescorted access to these areas. This is consistent with the statutory requirement set forth in Section 149 of the AEA to fingerprint those individual granted unescorted access to a utilization facility.

The NRC disagrees with the comment that the amended Section 149 of the AEA does not in itself justify the need for specific regulatory expansion. However, the NRC believes that the impact of the vital area criterion will be minimal because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because few licensee personnel will require unescorted access to vital areas that do not require unescorted access to SNM or to SGI. In the development of this rulemaking, the NRC re-evaluated whether an area criterion, as applied to the requirements of fingerprinting individuals seeking unescorted access to the facility, is required to ensure that the fingerprinting requirements in Section 149 of the AEA are properly and completely implemented for NPRs. The rule bifurcates the fingerprint requirement for “access to a utilization facility” into two criteria, which the rule terms “SNM” and “vital area” – both of which licensees must comply with by the implementation date of this rule. The NRC made an affirmative determination that both a material criterion and an area criterion are required to implement the statutory requirements of Section 149 of the AEA for NPR facilities.

*Comment:* One commenter stated, "...the [statements of consideration] for the section [73.57(g)(2)(i)] indicates a significant burden for licensees when it states, '...implementation of this proposed revision may involve a significant amount of interpretation on the part of [NPR] licensees, the NRC expects that [NPR] licensees would have clear documentation to support their decisions. (75 FR 42008)'"

*NRC Response:* The NRC disagrees with the comment that a significant burden will be placed on licensees. The NRC believes that the final rule language is clear and will not require significant interpretation beyond that provided in the statements of consideration. The purpose of including well-defined area and material criteria is to lessen the need for licensees to interpret when fingerprinting is required. Furthermore, the NRC does not believe that requiring licensees to document their access authorization determinations poses an undue burden.

*Comment:* Another commenter referenced the NRC's assertion in the proposed rule, which stated, "The equipment, systems, devices, and material that fall within Section 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." The commenter expressed the view that this statement implies every piece of equipment and all materials within a "utilization facility" (i.e. a 10 CFR part 50 licensed nuclear reactor facility) are considered vital rather than specific areas or equipment. The commenter stated that this statement is "grossly incorrect;" therefore, any subsequent conclusions that this statement intended to support should be considered questionable. The § 73.2 definition of vital equipment applied at the National Institute of Standards and Technology Center of Neutron Research bounds the limiting Maximum Hypothetical Accident (MHA) to protect the health and safety of the general public and the protection of SNM in quantities significant to the common defense and security. Vital equipment or areas have been defined

and explained in the NRC-approved Physical Security Plan and reviewed for adequacy and correctness within NRC-sponsored Physical Security Assessments for the National Bureau of Standards Reactor. The definition of vital area and vital equipment as applied has been reviewed under the current threat environment by the NRC so there should be no requirement or expectation for NPR licensees to provide additional “clear documentation to support their decisions” under the proposed rule.

*NRC Response:* The NRC agrees that not every piece of equipment within an NPR meets the definition of vital equipment contained within a vital area. As noted above, the terms “vital equipment” and “vital area” have specific definitions within 10 CFR part 73. The NRC established the vital area and SNM criteria for this rule as a means to define the specific areas for which individuals must be fingerprinted when seeking unescorted access to an NPR. Many NPR facilities are located within classroom or laboratory buildings with no clear demarcation between the reactor facility and unrelated areas. Therefore, many persons pass through the buildings housing NPR facilities who are not affiliated with the reactor itself. Instead of requiring fingerprinting for every person entering the building that houses the reactor facility, the NRC believes that the use of the vital area and SNM criteria to determine which personnel must get fingerprinted fulfills the statutory requirement of Section 149 of the AEA. No changes to the rule language were made as a result of this comment.

*Comment:* Another commenter expressed the view that the phrasing of the proposed language in § 73.57(g)(1) that states: “No person shall be permitted unescorted access to a non-power reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on...” could result in the misinterpretation that fingerprinting requirements must be met for access to any part of a non-power reactor facility, which is not the stated intention of the proposed rule. Such a misinterpretation might be avoided by stating that: “No person shall be permitted unescorted access at a non-power



reactor facility unless that person has been determined by an NRC-approved reviewing official to be trustworthy and reliable based on...”

*NRC Response:* The NRC disagrees with this comment. Paragraph g(2) of the rule identifies specific areas within the NPR facility, unescorted access to which requires an FBI fingerprint-based criminal history records check. The NRC believes that the inclusion of area and material criteria makes it clear when licensees must fingerprint individuals seeking unescorted access to the NPR. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter recommended that in addition to specifying the requirements in accordance with NRC order EA-07-074, the rule could state: “...licensees *may* specify vital areas for which fingerprinting requirements must be met to ensure that those without unescorted access could not exercise physical control over materials.”

*NRC Response:* The NRC disagrees with this comment. The NRC believes requiring fingerprint-based criminal history records checks for those seeking unescorted access to vital areas, as defined in § 73.2, is critical in fulfilling the statutory requirements of Section 149 of the AEA. Use of the phrase recommended by the commenter does not convey the appropriate obligation of licensees to implement the requirements of the final rule. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters expressed the view that § 73.57(b)(2)(i) appears subordinate and redundant to § 73.61. They believe that § 73.61 should be updated and referenced as opposed to adding new exceptions in § 73.57.

*NRC Response:* The NRC disagrees with the comment. The Commission previously addressed this topic on February 2, 2007 (72 FR 4948), in the § 73.61 rulemaking, “Relief from Fingerprinting and Criminal History Records Checks.” Although similar, § 73.61 provides relief

from fingerprinting requirements for certain categories of individuals considered trustworthy and reliable to permit unescorted access to radioactive material or other property. Paragraph (b)(2)(i) of § 73.57 offers similar relief for unescorted access to utilization facilities or SGI. This rule is specific to non-power reactors and is best contained in a single section of 10 CFR part 73 (i.e., § 73.57). No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that in public meetings, stakeholders have requested relief from the requirement that the only basis for unescorted access is fingerprints submitted through the NRC to the Attorney General; instead of allowing for other mechanisms to achieve the same end of providing criminal history records check from the FBI. The NRC has previously stated that this is required by Section 149 of the AEA. While Section 149a does mandate this mechanism, Section 149b states: “The Commission, by rule, may relieve persons from the obligations imposed by this section, under specified terms, conditions, and periods, if the Commission finds that such action is consistent with its obligations to promote the common defense and security and to protect the health and safety of the public.” The NRC has made use of this exception in the proposed § 73.57(b)(2)(i) and in existing § 73.61. Therefore, the mechanism for relief is within the statute, with the basis that the action (fingerprint and criminal history records checks by other mechanisms) is equivalent to Section 149a and therefore “consistent with its (the NRC's) obligations to promote the common defense and security and to protect the health and safety of the public.”

*NRC Response:* The NRC disagrees with the comment suggestion to the extent that it is asking for alternative methods to those that are set forth in Section 149 of the AEA. The NRC notes that Section 149 requires the Commission to fingerprint any person granted unescorted access to a utilization facility. Section 149.a.(2) of the AEA requires that these fingerprints be submitted to the Attorney General of the United States through the Commission for identification

and a criminal history records check. The Commission does not have discretion to deviate from this statutory requirement.

The commenter correctly notes that Section 149.b of the AEA allows the Commission, by rule, to relieve persons from the obligations imposed by Section 149.a of the AEA. The exemptions listed in § 73.57(b)(2)(i) and in existing § 73.61 include persons who are considered trustworthy and reliable by virtue of their occupational status and have either already undergone a background or criminal history records checks as a condition of their employment, or are subject to direct oversight by government authorities in their day-to-day job functions. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters expressed the view that the NRC has the authority to waive the fees it charges to process fingerprints and criminal history records checks. They disagreed with a previous NRC response that Section 149 of the AEA “explicitly requires” fees be collected and “the NRC does not have authority to waive the fee” (75 FR 42003). The commenters assert that Section 149.e of the AEA states, “The Commission *may* establish and collect fees to process fingerprints and criminal history records under this section,” but it does not require it. The commenters conclude by stating, “The AEA Chapter 4 also directs the Commission ‘to exercise its powers in a manner to ... insure the continued conduct of ... activities at support research facilities...’ Therefore, waiver of any additional NRC administrative cost in 10 CFR 57(d)(3)(ii) for NPR institutions will promote both the implementation of the proposed rule and the intent of AEA Chapter 4.”

*NRC Response:* The NRC is sensitive to the costs involved in regulation. The fees charged to NPR facilities for fingerprinting are the direct costs incurred from the U.S. Department of Justice for fingerprint processing. No changes to the rule language were made as a result of this comment.

*Comment:* Several commenters stated that the readability of 10 CFR part 73 is problematic and gave various suggestions. They stated that 10 CFR part 73 is a complicated part with many facets that dictate stringent requirements on nuclear power plants. Portions of the regulation are applicable to NPRs. It is a difficult part to navigate and determine applicability. Adding more sections to this rule, using the definitions section of the part and using legalistic language does not meet the intent of Presidential Direction on “Plain Language in Government Writing” or assist the Commission in meeting the AEA direction on minimal regulation of NPRs. Some improvements that could easily be incorporated include: 1) a clear applicability statement (§ 73.57(a)(1)) (this section currently says (in essence) that § 73.57 is applicable to all licensees engaged in any activity subject to Commission regulation; this does not seem correct and does not promote ease of use of the regulation); 2) clear applicability for each paragraph section; 3) shorter sentences and/or bulleted lists to simplify paragraphs; and 4) less use of references to other sections and/or short description of the section (example § 73.2 (Definitions) or § 73.61 (Relief from Fingerprinting)).

*NRC Response:* The NRC agrees with the comment that 10 CFR part 73 is complicated, and acknowledges that those unfamiliar with the regulations may have some difficulty understanding them. The NRC is willing to provide outreach and education to assist licensees in understanding the final rule. The NRC decided to use § 73.57 for processing fingerprints so that NPR licensees and future non-power reactor licensees will have their fingerprints taken, handled, and processed in a manner consistent with other fingerprinting requirements including the NPR fingerprinting orders and the SGI fingerprinting regulations.

From a regulatory standpoint, putting another set of fingerprinting requirements somewhere else in the regulations would be redundant and would further complicate the readability of 10 CFR part 73. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter supported the rulemaking as written, but expressed that any further regulations in regard to any additional background investigation requirements above and beyond fingerprinting should be left to the individual NPR licensees. The commenter felt that the NPR licensee is in the best position to decide what additional, if any, information is necessary to determine the trustworthiness and reliability of an individual seeking unescorted access and that this is consistent with the NRC's obligation under Section 104c of the AEA to put in place the minimum requirements for NPR licensees.

*NRC Response:* The NRC agrees with this comment. Licensees are responsible for determining the trustworthiness and reliability of persons granted unescorted access to their facilities in accordance with the requirements set forth in the NRC regulations. The NRC does not anticipate adding any additional requirements beyond the fingerprinting requirement to NPR licensees at this time. Licensees may decide to review additional information beyond that required by NRC regulations, consistent with applicable Federal and State laws, if the licensee determines that such information is necessary to make an adequate trustworthiness and reliability determination. No changes to the rule language were made as a result of this comment.

*Comment:* One commenter stated that the NPR facilities did not have a clear understanding of the consequences of the rule and requested that the NRC extend the comment period to coincide with the expiration of the proposed rule for 10 CFR part 37 on January 31, 2011.

*NRC Response:* The NRC understands the comment and reopened the public comment period on December 20, 2010 (75 FR 79312). The extended comment period remained open until January 31, 2011.

*Comment:* Several commenters expressed the view that employees who are not NRC employees but are employed by State or Federal Governments are subject to

fingerprint/background checks as a condition of employment and for obtaining security clearances. Equivalence needs to be established to reduce the burden and expense associated with clearing the same individual multiple times.

*NRC Response:* The NRC agrees with this comment. The final rule language is modified to include State and Federal non-NRC employees to those exempt from additional fingerprinting in § 73.57(b)(2)(i).

*Comment:* One commenter stated that the use of fingerprints to perform domestic criminal history records checks does not provide sufficient background information on foreign individuals seeking unescorted access and gives the illusion of a thorough check, when only a fraction of the individual's criminal history may be covered by U.S. records. The commenter recommended the criminal history records check include a foreign individuals' home country or international police cooperation to perform a criminal history records check in their previous nation of residence, and to include a check against the terrorist watch list.

*NRC Response:* The NRC agrees that FBI fingerprint checks are likely only to give information about domestic criminal history. Fingerprinting has long been a trusted method of verifying an applicant's identity, and it serves as an accepted method of searching existing U.S. records for domestic criminal history. The scope of this proposed rulemaking is to develop regulations implementing the fingerprint requirements set forth in Section 149 of the AEA. Section 149.a.(2) of the AEA requires that, "All fingerprints obtained by an individual or entity... be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check," for those seeking or permitted unescorted access to utilization facilities. The NRC recognizes that an FBI criminal history records check may be only one aspect of a licensee's determination to grant an individual unescorted access to an NPR. Many licensees undertake more extensive background investigations as they deem necessary. No changes to the rule language were made as a result of this comment.

### ***General Comments Received During Reopened Public Comment Period***

All eleven comments received during the reopened public comment period referred to the proposed rule and previously submitted public comments provided by other facilities and the National Organization of Test, Research, and Training Reactors (TRTR). All eleven comments supported TRTR's comments submitted on October 3, 2010 (NRC-2008-0619-0019), which are addressed previously in this document under, "General Comments Received During Initial Public Comment Period." The sentiments stated that the proposed rule adds additional requirements for security at NPR facilities that will further limit student, faculty, and research access and divert additional resources from educational and research missions. Some of the eleven comments provided views that were in addition to those supporting TRTR's comments. The following are those additional comments received during the reopened public comment period.

*Comment:* Several commenters expressed the view that there is no clear evidence these additional requirements will provide a commensurate improvement in the protection of public health and safety. They stated that after the events of September 11, 2001, the NRC required compensatory measures that were implemented by all NPR facilities via the Confirmatory Action Letter process. Several years later, the NRC issued order EA-07-074, requiring fingerprinting and criminal history records checks for individuals with unescorted access as defined by the order. In the decade since September 11, 2001, there have been no credible threats to security at NPRs. The measures and order implemented since then have provided more than adequate additional protections given the implications of that historic occurrence. With no indications of an increased probability of threat against NPRs, there can be no justification for further prescribed additional security requirements which heretofore have been adequate.

*NRC Response:* The NRC agrees that there is no current, specific, credible threat to the security of NPRs. Furthermore, the NRC agrees that NPR security requirements, including regulations, NRC-issued security orders, and compensatory measures have provided adequate protection at NPRs to date. However, the NRC is required under Section 149 of the AEA to implement the requirement to fingerprint all persons seeking unescorted access to utilization facilities, including NPRs. Since 2007, the NRC has relied on security orders to fulfill this statutory requirement, but the NRC prefers to regulate by rulemaking vice regulating by orders. The rulemaking process allows deliberate processes and extensive stakeholder involvement that orders do not. The 2007 NRC-issued security orders have provided adequate protection and allowed a shorter implementation time, but this final rule has been shaped by lessons learned from the orders, rulemaking process best practices, and engagement from the NPR community.

*Comment:* Two commenters stated similarly that they believed the proposed rule would begin limiting the educational opportunities at many facilities without further advancing the security of these facilities. The proposed rule adds additional requirements for security at NPR facilities that will very likely limit student, faculty, and researcher access and divert additional resources from their educational and research missions. They note that in difficult budget times, resources are very tight and funding support at the State level is already limited. Additional requirements would likely further reduce the educational and research capabilities of some facilities to the point where they may be closed and cease to contribute to these missions and the nuclear education in our country. They have no problem with the need to provide a secure and safe environment, but feel that current procedures are more than adequate so that the proposed additional requirements add extremely little to that environment (if anything) while diverting both attention and resources from more important matters.



*NRC Response:* The NRC is sensitive to the costs of regulation. The only requirement in this final rule that is additional to the 2007 NRC-issued security orders is to fingerprint those persons seeking unescorted access to vital areas. As stated above, the NRC believes the impact of the vital area criterion will be minimal because few NPR facilities have vital equipment besides SNM (unescorted access to which already requires fingerprinting due to the material criterion of this rule). Additionally, the NRC believes the impact of the vital area criterion will be minimal because few licensee personnel will require unescorted access to vital areas that do not require unescorted access to SNM or to SGI. In the development of this rulemaking, the NRC re-evaluated whether an area criterion, as applied to the requirements of fingerprinting individuals seeking unescorted access to the facility, is required to ensure that the fingerprinting requirements in Section 149 of the AEA – the regulatory basis by which this rulemaking was initiated – are properly and completely implemented for NPRs. The rule bifurcates the fingerprint requirement for “access to a utilization facility” into two criteria which the rule terms “SNM” and “vital area” – both of which licensees must comply with by the implementation date of this rule. The NRC made an affirmative determination that both a material criterion and an area criterion are required to implement the statutory requirements in Section 149 of the AEA for NPR facilities.

*Comment:* Another commenter was concerned that the proposed rule would further discourage utilization of research reactor facilities by individuals who pose essentially no security risk. The commenter stated that many reactors today already face the prospect of diminished utilization and anything that would further discourage potential users will have a detrimental impact on the viability of these facilities. The commenter concluded that any regulations proposed by the NRC should have an adequately demonstrated basis in terms of information available in the public record. The commenter was unaware of any serious security incidents, such as attempted theft of SNM or sabotage of reactor facilities, by persons without

fingerprinting checks. The commenter recommended that cognizant Federal agencies should use caution in broadly applying new rules, particularly without taking into account the added paperwork burdens and costs associated with such rulemaking. This impact can be particularly devastating for smaller research reactor facilities that are already under considerable budgetary pressure from their host institutions.

*NRC Response:* The NRC does not intend to discourage utilization of research reactor facilities in any way. However, the principle focus of this rule is to implement Section 149 of the AEA as amended, which requires fingerprinting of all individuals given unescorted access to an NPR. The NRC believes that this requirement presents a minimal burden to NPRs as the differences between this final rule and the 2007 NRC-issued security orders are minimal. In order to ensure complete and proper implementation of the statute's requirements for both current NPR licensees and future NPRs, this rulemaking incorporates an additional area criterion beyond the SNM criterion invoked by the order. The area criterion is to ensure that individuals seeking unescorted access to areas that contain vital equipment are fingerprinted and thereby receive FBI fingerprint-based criminal history records checks.

### ***Comments Responding to NRC-Posed Questions***

In the proposed rule *Federal Register* notice dated July 20, 2010 (75 FR 42008), the NRC requested stakeholder feedback on additional topics. The three questions presented were:

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?

*Comment:* The NRC received 3 total responses to the question concerning the implementation of § 73.57. Two commenters stated that the 120 days for implementation is sufficient time provided that individual licensees may request an extension based on other activities and limited staff resources. One of the commenters stated that this time period was sufficient only if the rule was amended as they had requested.

*NRC Response:* The NRC understands the concern regarding the implementation period. Accordingly, the NRC held a Category 3 public meeting on June 23, 2011, to better understand concerns associated with implementation. The effective date of the rule was extended to 180 days in response to these concerns to enable implementation planning meetings with all affected stakeholders. Given the NRC security orders already in place, the NRC will allow 180 days for full implementation of this rule to provide for a smooth transition in adoption of this regulation.

*Comment:* In response to the NRC question whether there are other newly issued NRC regulations that have an aggregate impact to implementing § 73.57, several commenters stated that the proposed rule for 10 CFR part 37, "Physical Protection of Byproduct Material" (75 FR 33902; June 15, 2010), will impact their ability to implement § 73.57 as the same process and procedures are impacted by both rules. The actual impact of 10 CFR part 37 (as with the final § 73.57) is unknown as the rule is in draft.

One commenter continued by stating that they identified no specific aggregate impact, but if the proposed rule were implemented as worded, multiple areas will be declared *vital areas*, facility access will be further restricted, SNM of no significance will be removed from temporary

storage areas and moved into the vital controlled access areas, research/education activities using these materials will be halted if necessary to comply with the regulation until suitable protections can be evaluated, and clear documentation established. This commenter requested that NRC ensures regulatory discretion remains for individual licensees when implementing the new rule.

Another commenter continued by stating that individual licensees may have aggregate impacts (such as ongoing licensing actions or relicensing) and also recommended that the NRC ensure regulatory discretion remains when implementing the new rule.

*NRC Response:* The NRC disagrees with the comments with regard to the implementation challenges. As noted in response to the previous comments, the NRC extended the effective date of the rule to 180 days and NRC staff will meet with NPR licensees to support implementation. Regarding the relationship of proposed 10 CFR part 37, "Physical Protection of Byproduct Material" (75 FR 33902; June 15, 2010), and this rulemaking, 10 CFR part 37 would deal specifically with the use and transport of Category 1 and Category 2 quantities of radioactive material as defined in proposed 10 CFR part 37. The changes to § 73.57 presented in this final rule are written specifically to ensure proper fingerprinting for unescorted access to SNM and vital areas at NPRs. As such, this amendment to § 73.57 is separate and distinct from the provisions that the NRC may incorporate into 10 CFR part 37 to address radioactive material.

The use of the vital area criterion expands a requirement to fingerprint individuals who wish to have unescorted access to areas in NPRs that may not contain SNM, but instead may contain *vital equipment* that is important from a radiological sabotage standpoint (i.e., if it is a vital area that is established to contain only SNM, then that is already captured in the SNM criterion). The term *vital area* is used in its definition found in § 73.2. As such, only those NPR licensees who have *vital areas* as defined in 10 CFR part 73 are likely subject to this added

requirement. This *vital equipment* would likely exist only at the higher power NPRs, and the *vital areas* where they are contained can be identified by reference to the current security plans and informed by the security assessments. For most NPR facilities, the SNM criterion adequately ensures that individuals who wish to have unescorted access are fingerprinted. No regulatory discretion is allowed for this rule; however, the NRC staff will work with NPR licensees to support proper interpretation and implementation of these criteria.