



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

December 8, 2004

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-04-0190

TITLE: FINAL RULE: SECURITY REQUIREMENTS FOR
PORTABLE GAUGES CONTAINING BYPRODUCT
MATERIAL (RIN 3150-AH06)

The Commission (with all Commissioners agreeing) approved the final rule as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of December 8, 2004.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
 Commissioner McGaffigan
 Commissioner Merrifield
 OGC
 EDO
 PDR

VOTING SUMMARY - SECY-04-0190

RECORDED VOTES

| | APRVD | DISAPRVD | ABSTAIN | NOT PARTICIP | COMMENTS | DATE |
|------------------|-------|----------|---------|-----------------|----------|----------|
| CHRM. DIAZ | X | | | | X | 11/15/04 |
| COMR. McGAFFIGAN | X | | | | X | 11/23/04 |
| COMR. MERRIFIELD | X | | | | X | 11/16/04 |

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the final rule and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on December 8, 2004.

AFFIRMATION ITEM

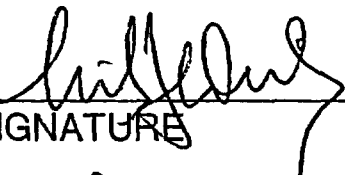
RESPONSE SHEET

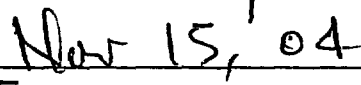
TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN DIAZ
SUBJECT: **SECY-04-0190 - FINAL RULE: SECURITY
REQUIREMENTS FOR PORTABLE GAUGES
CONTAINING BYPRODUCT MATERIAL (RIN 3150-
AH06)**

Approved ^{w/edits} Disapproved Abstain
Not Participating

COMMENTS:

See attached edits.



SIGNATURE


DATE

Entered on "STARS" Yes No

SUPPLEMENTARY INFORMATION:

Background

Portable gauges are devices containing licensed material that are used to determine physical properties (such as density and moisture content of soil, concrete, and other materials) in a field setting. The most commonly used portable gauges contain two encapsulated sources of radioactive material. *One source* ~~The first~~ is a sealed gamma source containing 0.30 to 0.37 gigabecquerels (8 to 10 millicuries) of cesium-137 (Cs-137) used to measure density. *Another* ~~The~~ second source is a sealed neutron source containing 1.48 to 1.85 gigabecquerels (40 to 50 millicuries) of americium-241/beryllium (Am-241/Be) used to measure moisture content. *Other sources have also been utilized in portable gauges.* When not in use, portable gauges are generally stored in a permanent storage location within a licensed facility. Sometimes, portable gauges are stored at a jobsite, at a temporary storage location, or on a vehicle. When transporting a portable gauge in a vehicle, the gauge is often placed in a transportation case, and then is secured in or onto the vehicle.

Under the authority of the Atomic Energy Act of 1954, NRC together with the 33 Agreement States² regulates byproduct material used in portable gauges. There are approximately 1100 NRC specific licensees for portable gauges in non-Agreement States and approximately 4000 State specific licensees for portable gauges in Agreement States. There are an estimated 22,000 to 25,000 portable gauges in use in the United States.

Subpart I of 10 CFR Part 20 addresses storage and control of licensed material. Specifically, § 20.1801, "Security of stored material," requires licensees to secure from unauthorized removal or access licensed materials that are stored in controlled or unrestricted areas. Section 20.1802, "Control of material not in storage," requires licensees to control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area

and that is not in storage. Despite these requirements, the theft of portable gauges continues at a rate of approximately 50 gauges per year with a less than 50-percent recovery rate, based on reports in NRC's Nuclear Materials Events Database (NMED). More than two-thirds of the stolen gauges were taken from vehicles parked outdoors. In most of these incidents, the gauge was in a U. S. Department of Transportation (DOT) "Type A" transportation case, which was then secured with a metal chain to the open bed of a pickup truck. Frequently, the chain was cut or the transportation case was broken, and then the gauge was stolen. NRC has issued several "Information Notices" to increase licensees' awareness of security concerns regarding portable gauges. However, the yearly number of reported incidents has not changed in response to these notices. X

Although the amount of radioactive material used in a portable gauge is relatively small, and the radioactive material is encapsulated in stainless steel, unauthorized removal of portable gauges still poses a potential public health and safety concern. A portable gauge that is not under the controlled of a licensee poses a potential radiation hazard to individuals that may come into close contact with the source. It also creates a concern if the portable gauge that is removed without authorization is abandoned in the environment, recycled in a steel mill, or used inappropriately. X
inadvertently X

Discussion

To reduce the potential risk to public health and safety, a working group with participation of personnel from the Agreement States of Florida and Arkansas developed the proposed rule to impose security requirements for portable gauges to increase licensees' control, which would reduce the opportunity for unauthorized removal of the gauges. The security requirements would require that the portable gauge licensees must use a minimum of

commenter questioned what resulted in the need for a very prescriptive rule for increased security of these gauges since a report to Congress indicated that sources in a single portable gauge are small, and unlikely to be suitable for an effective radiological dispersion device (RDD). Another commenter stated that the potential for the stolen gauges to be used in a radiological dispersion device is minute because it takes such a significant effort to steal a large number of gauges and remove the radioisotopes to manufacture a "dirty bomb." Another commenter indicated that there has not been an increase in gauge thefts in recent years, and that there is no evidence that thefts are for malevolent purposes, but rather it is likely that thefts are more for personal or monetary gain.

Response: NRC agrees. As stated in the regulatory analysis for the proposed rule: "Because of the small quantity of radioactive material in a portable gauge, the potential for its malevolent use is small." Due to the quantity and physical characteristics of the radioactive material used, portable gauges do not pose a substantial risk for malevolent purposes such as a "dirty bomb." Similarly, NRC has not identified any trend or information indicating that reported thefts of portable gauges containing licensed material over the last 2 years resulted in a substantial health and safety consequence. However, NRC is still concerned ^{with} ~~about~~ the continued loss of control of the licensed materials due to unauthorized removal or theft of portable gauges, the multiple resource impacts in response to such events, and the potential exposure to an individual, who come ⁱⁿ ~~into~~ close contact with the source in the portable gauge. NRC believes that these additional requirements are needed to improve the control of the licensed material and thus better protect the public from a potential health and safety risk. ✕

Comment: One commenter stated that the International Atomic Energy Agency (IAEA) has published guidance on the security of radioactive sources, on categorization of radioactive sources, and on graded security measures based on potential hazard, vulnerability of the source or device, and potential consequences of malevolent acts. In the interim guidance

document on security of radioactive sources, the IAEA has categorized portable gauges as Security Group C. Security measures that the IAEA recommended for Group C include one technical measure that separates the source from unauthorized personnel. The commenter stated that NRC's proposed rule exceeds the security measures recommended by the IAEA, and believes that one technical measure is sufficient.

Response: In addition to one technical measure separating the source from unauthorized personnel for Security Group C material (such as portable gauges), the IAEA also recommends access control at the source location as sufficient security measure based on potential hazard, vulnerability of the device, and potential consequences of malevolent acts. This final rule is not based on common defense and security, but is based on protecting public health and safety from ^{the} potential of radiation exposure as a result of unauthorized removal or theft of portable gauges. Instead of one technical measure and access control as recommended by IAEA, NRC believes that two technical measures are needed to sufficiently control the portable gauge from unauthorized removal or theft in the United States. The IAEA guidance on the Security of Radioactive Sources (TECDOC-1355) is an interim guidance for comment by its Member States, and has not been accepted by the United States. In general, NRC may modify IAEA standards, as necessary, before adoption to meet NRC's regulatory needs. NRC's current regulatory framework already requires the licensees to use one measure of control in securing the portable gauges and has concluded that an additional measure is necessary to reduce the number of unauthorized removal or theft of portable gauges. NRC has issued several Information Notices to portable gauge licensees to emphasize the importance of adequate control of the portable gauges; however, the number of unauthorized removals or thefts of portable gauges has not decreased. NRC believes that an additional measure of control is needed to reduce the current number. X

Comment: One commenter stated that "there's some psychology to be reckoned with" because merely the suggestion for redesign of an important engineering tool might make management much more amenable to require employees/authorized users to ensure that gauges were secure.

Response: NRC's regulatory requirements are based on technical information and are not based on psychological reactions of certain individuals. NRC believes that having two independent physical controls is a tangible requirement that can be easily inspected and evaluated.

More Enforcement.

Comment: Three commenters stated that stricter enforcement action against non-compliant licensees would be better than more rules and would dramatically reduce the number of gauges stolen. One commenter stated that rules are only as effective as their enforcement and that current rules already require that gauges be secured against unauthorized removal. Those licensees that are diligent about security do not have gauges stolen. The annual stolen gauge rate is extremely low (about 0.2 percent), so most licensees are doing a good job. Those licensees that are not diligent or vigilant are unlikely to change as a result of a new rule. Only increased emphasis on inspection and enforcement of the security requirements is likely to cause those licensees to change their ways.

Response: ¹ NRC ~~disagrees that more frequent inspections and increased enforcement of current requirements would be better than more rules.~~ ^{Have 2} NRC also disagrees that licensees, who are diligent about security, do not have gauges stolen. Many gauges were stolen from compliant licensees by thieves defeating current security measures. ^{Have 1} NRC does not believe that the existing security requirements are sufficient, and therefore, enforcement alone will not dramatically reduce the number of unauthorized removals or thefts of portable gauges. NRC believes that it is necessary to increase the current security measures to reduce the opportunity

for unauthorized removal or theft. NRC does agree that more frequent inspections and increased enforcement would reduce licensees' future security lapses, but would not affect thefts where all procedures were followed and the thief still defeated the security measures. ②
NRC has and will continue to enforce security requirements for portable gauges.

Information Notice.

Comment: One commenter recommended that NRC rescind the rule and use Information Notices to reduce the number of stolen gauges.

Response: NRC disagrees with the suggestion to use Information Notices as a means to reduce the number of unauthorized removals or thefts of portable gauges. As indicated in the notice of proposed rule (68 FR 45172; August 1, 2003), NRC has issued several Information Notices in the past to remind licensees of their responsibilities concerning the security of portable gauges, and there has been no change in the number of reported incidents annually.

Root Cause Not Addressed.

Comment: One commenter claimed the proposed rule has not effectively addressed the root cause of the problem nor is it consistent with a risk-informed, performance-based approach to regulation.

Response: NRC disagrees with the comment. The NRC working group evaluated various alternatives in developing and evaluating the proposed rule in light of comments. Although certain alternatives might be more effective than the chosen one, the associated cost impacts to the licensees' operations from such alternatives would be immense. For example, the alternative of prohibiting the storage of portable gauges in vehicles might be more effective, but the total resource impact on licensees is estimated to be more than \$200 million per year. This assumes each portable gauge operator would spend an additional 2 hours daily in transporting the portable gauge to and from the licensed facility. NRC believes that requiring

Comment: Licensing authorities are making and enforcing rules that could only be done by trained security experts or mechanical engineers, even if they were justified.

Response: NRC does not believe that the additional security requirements will call for security experts or engineers to implement. However, licensees and their operators are required to have proper training to safely manage the nuclear materials including properly securing and controlling the portable gauges.

Cost Implications.

Comment: One commenter stated that the NRC estimates of savings resulting from the rule are speculative. The saving estimates from implementing the rule are based on the optimistic assumption of a 50 percent reduction in the stolen gauges. This is speculative, as there is no way to predict the actual reduction that may be achieved.

Response: The percent reduction will be dependent, in part, on the type of physical controls that licensees elect to use. If more enclosures are used to secure gauges, a higher reduction in the percentage of unauthorized removal or theft of portable gauges would most likely be achieved. In any event, NRC believes that adding one more tangible barrier as a physical control will reduce the opportunity for unauthorized removal or theft. Given the wide range of physical controls available for the licensees to select, NRC believes that an assumption of a 50 percent reduction is reasonable.

Comment: One commenter stated that the cost is greater than what NRC proposes.

Response: Because the commenter did not provide any ^{data in support of a} ~~basis for~~ higher cost, NRC ^{cannot} ~~is unable~~ perform a comparison. NRC's cost estimate is based on the actual price of an item listed by the vendors. The regulatory analysis for the proposed rule contains the assumptions and unit costs used in calculating the total cost impact on licensees. ~~Because the commenter did not provide any data in support of a higher cost impact, NRC is unable to compare the commenter's cost estimate against NRC's estimate.~~ ^{impact}

are likely to end up in smelters, scrap yards, or incinerators is speculative. The other commenter believes that most nuclear devices end up in scrap yards due to the difficulty of disposing of the equipment and the associated cost. Another commenter stated that it is unlikely that a discarded moisture/density gauge would be smelted down because of the use of sensitive monitoring systems.

Response: NRC agrees that the probability is small for a portable gauge obtained by unauthorized removal or theft to be smelted down and contaminate a steel processing plant. However, the potential does exist. Based on historical data, less than half of the unauthorized removals or thefts of portable gauges are recovered. After the September 2001, terrorist events, more resources have been spent in recovery efforts to retrieve portable gauges from unauthorized removal or theft due to heightened security concerns about loss of control of radioactive materials. As a result, the recovery rate for portable gauges may have improved slightly over the past 2 years, ~~but it is still low.~~ Most gauges from unauthorized removal or theft are abandoned or resold. This raises a concern about the potential public health and safety risk. In past years, there have been cases where gauges were found in the environment and in landfills, scrap yards, or recycling plants. For example, in June 2002, a portable gauge containing a Cs-137 source was found at a steel mill's scrap-metal stream, and, in May 2002, a portable moisture gauge containing Am-241 was discovered at a landfill by landfill personnel sorting through the refuse. In both cases, the gauges were removed for proper disposition. Many facilities are now equipped with radiation monitors, and sources are often detected and removed early in the process. Nonetheless, the potential for radioactive material to enter a metal recycling plant still exists. In fact, in 2001, a radioactive source was melted in a steel mill in Florida. The total cost of the cleanup was more than \$10 million. The State of Florida suspected that the contamination was from a sealed source from a fixed gauge. Once the radioactive source is melted, it is extremely difficult to determine the type of device that may

have contained the source. Although steel mill contamination has never proven to be caused by a portable gauge from unauthorized removal or theft, an abandoned portable gauge still poses a potential concern if it ever gets into a steel mill melt.

Comment: One commenter stated that if an abandoned gauge is deposited in a landfill, the environmental impact would be insignificant.

Response: NRC disagrees with the comment. All licensed materials are required to be properly controlled to ensure protection of public health and safety and the environment. Any uncontrolled licensed material abandoned in the environment or disposed of in a landfill not designed for managing licensed material poses a potential hazard to public health and safety and to the environment. In accordance with 10 CFR Part 61, an Am-241 source used in a portable gauge would be classified as a "greater than Class C waste" and is not generally acceptable for near-surface disposal (e.g., landfill). Given the amount and long half-life (432 years) of Am-241 used in a portable gauge, the potential impact would not be insignificant.

X-Ray Fluorescence.

Comment: One commenter is concerned about controlling lost or stolen generally licensed devices because there are more in circulation than specifically licensed portable devices. There are hundreds, perhaps even thousands, of portable X-Ray Fluorescence (XRF) analyzers that have been distributed as generally licensed devices.

Response: Based on the NMED database, the number of reported incidents of lost or stolen XRF analyzers is extremely low. ^{and} In general, the amount of radioactive material used in XRF analyzers is much smaller than the amount used for portable moisture/density gauges.

^{additionally,} ~~Because~~ ^{therefore, there is a considerably reduced risk to public health and safety.} XRF analyzers are very small and are usually hand-held units, they can be easily

stored in the glove compartment or trunk of a vehicle, ^{the} ~~XRF~~ ^{XRF} analyzers stored in this manner are not visible or easily accessible, which reduces the possibility of opportunistic theft. For these reasons, NRC does not believe that additional security requirements are needed for

REGULATORY ANALYSIS
for
AMENDMENT to
10 CFR 30: RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF
BYPRODUCT MATERIAL
for
SECURITY REQUIREMENTS FOR PORTABLE GAUGES

I. STATEMENT OF THE PROBLEM AND OBJECTIVE:

Portable gauges are devices containing licensed material that are used to determine physical properties such as density and moisture content of soil, concrete, and other materials in a field setting. The most typical specifically licensed portable gauge in use today contains two sources of radioactive materials: a sealed gamma source containing 0.30 to 0.37 gigabecquerels (8 to 10 millicuries) of cesium-137 (Cs-137) used for density measurement and a sealed neutron source containing 1.48 to 1.85 gigabecquerels (40 to 50 millicuries) of americium-241/beryllium (Am-241/Be) used for moisture content measurement. Other radioactive materials have also been utilized in portable gauges.

There are approximately 1100 U.S. Nuclear Regulatory Commission (NRC) portable gauge specific licensees and an additional 4000 Agreement State specific licensees. Since portable gauge licensees often possess multiple portable gauges under the same license, there are an estimated 22,000 to 25,000 portable gauges in use in the United States. Reports in the NRC's Nuclear Materials Events Database (NMED) reveal that there have been approximately 450 gauges stolen since 1990. It is true that the number of incidents reported per year is small when compared to the total number of gauges in use, that the amount of radioactive material in a portable gauge is relatively small, and that the radioactive material is encapsulated in stainless steel. Nevertheless, unauthorized removal or theft of a portable gauge still poses a concern for public health and safety and/or the environment, especially, if the gauge is abandoned in the environment, is ^{inadvertently} recycled in a steel mill, or is used inappropriately.

Under the proposed action, NRC would amend its regulations to include specific security requirements for handling portable gauges in order to reduce the opportunity for unauthorized removal or theft of gauges. The final rule would require a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges are not under the control and constant surveillance of the licensee.

Alternative (1) -- No rulemaking alternative. Under the no rulemaking alternative, the NRC would rely on the current regulations on domestic licensing of byproduct material and specific guidance on portable gauge licenses. This alternative would require no current resources to conduct a rulemaking. However, resources for reporting, recovery, and investigation of stolen gauges will continue to be expended by the licensee, and local, state, and federal regulatory and law enforcement agencies. Within this alternative, NRC may issue a policy statement or revise existing guidance to emphasize the need for securing portable gauges. Resources for issuing a policy or guidance would be much less than for a rulemaking. It is estimated to be less than 0.5 full-time equivalent (FTE). However, this approach would not be as effective as rulemaking because policy and guidance are not legally binding. In addition, Agreement States are not required to adopt such policy or guidance into their regulatory programs.

Alternative (2) -- Amend NRC regulations to adopt more specific and more prescriptive requirements such as the use of a permanently installed enclosure and locks with shielded/protected shackle⁴ to secure specifically licensed portable gauges. Another example would be to prohibit the unattended storage of portable gauges in or on vehicles or at locations other than licensed facilities. These more prescriptive requirements would clearly delineate exactly what is required for the security and control of portable gauges. For these prescriptive requirements, licensees may be required to modify their existing vehicles used for transporting portable gauges and to purchase new locks for securing these gauges. If unattended storage would be prohibited, licensees may be required to return the portable gauge each day to a licensed facility or to an alternate location for storage. Specific requirements would be applied uniformly to licensees without consideration of differing practices and operating situations that may exist. Although alternative (2) provides less degree of flexibility than alternative (3), it is anticipated that it would further reduce the number of stolen gauges than alternative (3).

✓

This alternative would require the development of a proposed rule followed by a final rule. Public involvement would be through the publication of the proposed rule in the Federal Register for notice and comment as provided by the Administrative Procedure Act. The resources needed in the development of a rulemaking would be higher than the current staff resources. NRC staff resources needed for this alternative are estimated to be 1.7 FTE staff years.

gauges, the corresponding rate of abandonment should also be reduced. Therefore, less responses would be needed from law enforcement and fire department personnel. For every abandoned gauge discovered, it is assumed that on an average four fire fighters and two policemen would be at the scene for two hours at \$50/hr. For the purpose of this analysis, a 40 percent discovery rate of abandoned gauges is assumed along with a 70 percent reduction for alternative (2) and 50 percent reduction for alternative (3) in stolen gauges. The estimated *Annual* cost savings due to fewer responses by law enforcement and fire department would be \$8400 and \$6000 for alternatives (2) and (3), respectively.

Calculations:

Alternative (2) projected savings =

$$50 \text{ events} \times 70\% \text{ reduction} \times 40\% \text{ discovery} \times 6 \text{ people} \times 2 \text{ hrs} \times \$50/\text{hr} = \$8400.$$

Alternative (3) projected savings =

$$50 \text{ events} \times 50\% \text{ reduction} \times 40\% \text{ discovery} \times 6 \text{ people} \times 2 \text{ hrs} \times \$50/\text{hr} = \$6000.$$

Potential Cost Savings to Scrap Industry --By reducing the number of stolen gauges, there could be potential cost savings to the scrap metal industry from a reduced possibility that gauges might inadvertently be sent into scrap metal processing. Although quantitative estimates of such savings are not being made in this analysis, some information indicates that avoidance of melting of a gauge could save the scrap metal industry considerable decontamination costs.

In 1995, a joint NRC-Agreement State working group evaluated the issue of the loss of control of radioactive sources. The working group's final report NUREG-1551, "Final Report of the NRC-Agreement State Working Group to Evaluate Control and Accountability of Licensed Devices" (October 1996), included a recommendation to increase the oversight of sources and devices meeting certain criteria. The report also contained cost estimates to the steel industry resulting from the melting of improperly disposed of sources. The cost estimate for decontamination and clean-up from the melting of sources in steel mills was about \$12 million per year from 1983 to 1995 based on experience (as reported by the steel industry) but with high uncertainties. The report included both specifically and generally licensed devices for the risk of source meltings in steel mills. The cost estimates reported did not include incidents at large integrated steel mills for which the resultant clean up could cost as much as \$100 million for a single incident. There was a more recent incident involving a steel manufacturing

gauge still poses a concern for public health and safety and/or environment whenever it is stolen.

NRC published a proposed rule (68 FR 45172; August 1, 2003) in the Federal Register to amend its regulations in § 30.34 and received eleven comment letters on the proposed rule. After considering all comments and evaluating other control methods, NRC finds that the security requirements in the proposed rule are still the best alternative for providing the most flexibility for licensees to choose from a wide range of physical controls and for bearing the least cost impact to the licensee for implementing the controls. Therefore, the final rule contains the exact same requirements as the proposed rule.

II. PROPOSED ACTION

The proposed action is to amend NRC regulations to include specific security requirements for handling portable gauges in order to reduce the opportunity for theft. The final rule would require a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges are not under the control and constant surveillance of the licensee. This final rule will apply to a licensee with a portable gauge regardless of the location, situation, and activities involving the portable gauge. At all times, the licensee will be required to either maintain control and constant surveillance of the portable gauge or use a minimum of two independent physical controls to secure the portable gauge.

III. NEED FOR THE PROPOSED ACTION

The theft of portable gauges poses a potential health and safety concern if the gauge is abandoned in the environment, ~~is~~ ^{inadvertently} recycled in a steel mill, or is used inappropriately. The yearly

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-04-0190 - FINAL RULE: SECURITY
REQUIREMENTS FOR PORTABLE GAUGES
CONTAINING BYPRODUCT MATERIAL (RIN 3150-
AH06)**

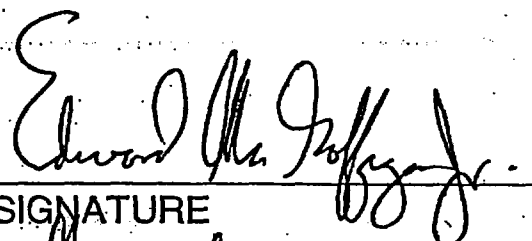
w/comments and edits

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments and edits.


SIGNATURE

November 23, 2004
DATE

Entered on "STARS" Yes No _____

Commissioner McGaffigan's Comments on SECY-04-0190

I approve the final rule set forth in SECY-04-0190 related to security requirements for portable gauges containing byproduct material, subject to the attached edits and following comments. The rule would require that portable gauge licensees must use "a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever the portable gauges are not under the control and constant surveillance of the licensee." I agree with the staff that health and safety concerns exist with respect to the loss of control of portable gauges due to theft and the potential exposure to individuals who may come into close contact with the sources. Further, I share the staff's concern regarding the multiple resource impacts in responding to thefts of portable gauges.

There are an estimated 22,000 to 25,000 portable gauges in use in the United States. There are approximately 5100 specific licensees for portable gauges in both Agreement States and non-Agreement States. Approximately 50 gauges per year are stolen with a 40 percent recovery rate. This means that approximately 30 gauges are stolen but not recovered each year. Gauges that are not recovered pose a potential hazard to the public from exposure and to the environment (should stolen gauges be disposed of in landfills, scrap yards, and the like). Because the recovery rate is low, the number of unrecovered gauges will continue to grow. Therefore, this rulemaking is warranted.

I am concerned, however, that the staff's interpretation of the rule in the Statements of Consideration accompanying it does not sufficiently address a common form of theft. Over 2/3 of the stolen gauges were taken from vehicles parked outside. In most instances the gauge was secured with a metal chain to the open bed of a pickup truck. Frequently, the chain was cut. The language of the rule, requires "two independent physical controls," and is meant to provide flexibility to licensees in selecting controls. The purchase of an additional chain and lock was analyzed in the staff's regulatory analysis. That analysis estimated it would cost licensees \$115 to obtain. I believe that while the NRC wants to give licensees flexibility to select controls that are suitable for them, the deterrent value of a second chain is not substantial.

If a thief can cut through the first chain, it seems to be little deterrent to cut through a second one. In the draft FRN, in response to a commentor who made the same point, the staff stated that "NRC believes that having two physical barriers, such as metal chains, will have a deterrent value by making unauthorized removal or theft of portable gauges more difficult and more time-consuming." The staff does not have any solid evidence to support this statement and I believe it to be very dubious.

I understand that this is a performance based rule. As stated in the proposed rule FRN, the expectation is that the physical barriers "would be designed and constructed of material suitable for securing the gauges from unauthorized removal." (68 F.R. 45,173) In addition, both of these barriers must be defeated in order for the gauge to be stolen "to deter theft by requiring a more determined effort to remove the gauge." Therefore, the two independent barriers that the licensee chooses will together have to be more difficult and more time-consuming to defeat than only one of those two barriers. Adding a locked storage container that is welded to the truck bed, or keeping the gauge chained inside the cab of the truck, clearly would make the gauge more difficult to steal. It would be difficult for a licensee to argue that simply adding another chain to a gauge in the back of an open pickup truck would require "a more determined effort" to steal unless the chains and locks are substantially large and difficult to cut.

Based on this argument, the staff should either update current guidance documents or create a new one for use by licensees and NRC inspectors and license reviewers. This guidance should provide that the two independent barriers should clearly increase the deterrence value over that of a single barrier and should make the gauge more difficult to steal, not just by a second or two. This guidance should include the example that if two chains are used, the new chain should be substantially larger and more difficult to cut than the existing chain.

E M G₂

NUCLEAR REGULATORY COMMISSION

10 CFR Part 30

RIN: 3150-AH06

Security Requirements for Portable Gauges Containing Byproduct Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations governing the use of byproduct material in specifically licensed portable gauges. The final rule requires a portable gauge licensee to use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever the portable gauges are not under the control and constant surveillance of the licensee. The primary intent of this rulemaking is to increase licensees' control of portable gauges to reduce the opportunity for unauthorized removal or theft.

EFFECTIVE DATE: This final rule is effective on (insert 180 days from date of publication).

FOR FURTHER INFORMATION CONTACT: Lydia Chang, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6319, e-mail lwc1@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

Portable gauges are devices containing licensed material that are used to determine physical properties (such as density and moisture content of soil, concrete, and other materials) in a field setting. The most commonly used portable gauges contain two encapsulated sources of radioactive material. The first is a sealed gamma source containing 0.30 to 0.37 gigabecquerels (8 to 10 millicuries) of cesium-137 (Cs-137) used to measure density. The second source is a sealed neutron source containing 1.48 to 1.85 gigabecquerels (40 to 50 millicuries) of americium-241/beryllium (Am-241/Be) used to measure moisture content.

When not in use, portable gauges are generally stored in a permanent storage location within a licensed facility. Sometimes, portable gauges are stored at a jobsite, at a temporary storage location, or on a vehicle. When transporting a portable gauge in a vehicle, the gauge is often placed in a transportation case, and then is secured in or onto the vehicle.

Under the authority of the Atomic Energy Act of 1954, NRC together with the 33 Agreement States regulates byproduct material used in portable gauges. There are approximately 1100 NRC specific licensees for portable gauges in non-Agreement States and approximately 4000 State specific licensees for portable gauges in Agreement States. There are an estimated 22,000 to 25,000 portable gauges in use in the United States.

Subpart I of 10 CFR Part 20 addresses storage and control of licensed material.

Specifically, § 20.1801, "Security of stored material," requires licensees to secure from unauthorized removal or access licensed materials that are stored in controlled or unrestricted areas. Section 20.1802, "Control of material not in storage," requires licensees to control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area

and that is not in storage. Despite these requirements, the theft of portable gauges continues at a rate of approximately 50 gauges per year with a less than 50-percent recovery rate based on reports in NRC's Nuclear Materials Events Database (NMED). More than two-thirds of the stolen gauges were taken from vehicles parked outdoors. In most of these incidents, the gauge was in a U. S. Department of Transportation (DOT) "Type A" transportation case, which was then secured with a metal chain to the open bed of a pickup truck. Frequently, the chain was cut or the transportation case was broken, and then the gauge was stolen. NRC has issued several "Information Notices" to increase licensees' awareness of security concerns regarding portable gauges. However, the yearly number of reported incidents has not changed in response to these notices.

Although the amount of radioactive material used in a portable gauge is relatively small, and the radioactive material is encapsulated in stainless steel, unauthorized removal of portable gauges still poses a potential public health and safety concern. A portable gauge that is not under the ^{CONTROL} of a licensee poses a potential radiation hazard to individuals that may come into close contact with the source. It also creates a concern if the portable gauge that is removed without authorization is abandoned in the environment, recycled in a steel mill, or used inappropriately.

Discussion

To reduce the potential risk to public health and safety, a working group with participation of personnel from the Agreement States of Florida and Arkansas developed the proposed rule to impose security requirements for portable gauges to increase licensees' control, which would reduce the opportunity for unauthorized removal of the gauges. The security requirements would require that the portable gauge licensees must use a minimum of

two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever the portable gauges are not under the control and constant surveillance of the licensee. The primary intent of this rulemaking is to increase the control of portable gauges and thereby reduce the opportunity for and the number of unauthorized removals or thefts of portable gauges and, as a result, reduce the potential impact to public health and safety. NRC published a notice of proposed rule (68 FR 45172; August 1, 2003) in the Federal Register with the opportunity for comment on the proposed amendment to 10 CFR § 30.34.

After considering all comments received on the proposed rule and evaluating recommended alternative methods to increase the control of portable gauges, NRC finds that the requirements in the proposed rule are the preferred alternative because they provide the most flexibility for licensees (permitting a choice from a wide range of physical controls) without imposing excessive costs in implementing the controls. Therefore, the final rule contains the same requirements as the proposed rule.

Summary of Public Comments on the Proposed Rule

NRC received eleven comment letters on the proposed rule. The commenters included a member of the public, members of an industry advisory group, three licensees, a radiation service company, two manufacturers, and three States. Copies of the public comments are available for public inspection and copying for a fee at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD.

Among the eleven comment letters, six state that they fully support the goal to reduce lost or stolen gauges; two state that current requirements are adequate; one indicates that the

rule is well intended; one expresses the view that a double lock requirement may be excessive; and one believes that the current practice of using a chain to secure a portable gauge in an open-bed pickup truck is not adequate. Among comments from the three States, one indicates that the NRC proposed measures do not go far enough; one states that the current regulatory requirements are adequate; and one supports the goal of the rule but believes the proposed rule to be impractical. A discussion of the comments and NRC's responses follow:

Current Requirements Adequate:

Comment: One commenter believes the security procedures to be adequate, but is confident that he can also comply with the language of the proposed change.

Response: Although certain licensees may have adequate procedures for securing the portable gauges, NRC does not believe the current practice of having one physical control is sufficient to reduce the current rate of portable gauge theft.

Comment: The Virginia Department of Transportation (VDOT) has not had any gauges stolen in the past 8 years, and believes that the current security measures are adequate.

Response: NRC disagrees that current security measures are adequate. Although no portable gauge has been reported stolen from VDOT for the past 8 years, NRC notes that there were ~~two~~ ^{three} incidents of stolen gauges in the Commonwealth of Virginia as recently as 2003. To ^{an UPDATE} reduce the overall rate of unauthorized removal or theft of portable gauges, NRC believes it is necessary to increase controls for portable gauges.

Malevolent Use of Portable Gauges:

Comment: Four commenters stated that portable gauges are not likely to be used for malevolent purposes. One commenter stated that no credible study supports the conclusion that portable gauges might be used for malevolent purposes or that gauges are a substantial risk of such use. That commenter also stated that there is no identifiable pattern to support the idea that individuals are stealing portable moisture/density gauges for malevolent use. One

commenter questioned what resulted in the need for a very prescriptive rule for increased security of these gauges since a report to Congress indicated that sources in a single portable gauge are small, and unlikely to be suitable for an effective radiological dispersion device (RDD). Another commenter stated that the potential for the stolen gauges to be used in a radiological dispersion device is minute because it takes such a significant effort to steal a large number of gauges and remove the radioisotopes to manufacture a "dirty bomb." Another commenter indicated that there has not been an increase in gauge thefts in recent years, and that there is no evidence that thefts are for malevolent purposes, but rather it is likely that thefts are more for personal or monetary gain.

Response: NRC agrees. As stated in the regulatory analysis for the proposed rule: "Because of the small quantity of radioactive material in a portable gauge, the potential for its malevolent use is small." Due to the quantity and physical characteristics of the radioactive material used, portable gauges do not pose a substantial risk for malevolent purposes such as a "dirty bomb." Similarly, NRC has not identified any trend or information indicating that reported thefts of portable gauges containing licensed material over the last 2 years resulted in a substantial health and safety consequence. However, NRC is still concerned about the continued loss of control of the licensed materials due to unauthorized removal or theft of portable gauges, the multiple resource impacts in response to such events, and the potential exposure to an individual, who come into close contact with the source in the portable gauge. NRC believes that these additional requirements are needed to improve the control of the licensed material and thus better protect the public from a potential health and safety risk.

Comment: One commenter stated that the International Atomic Energy Agency (IAEA) has published guidance on the security of radioactive sources, on categorization of radioactive sources, and on graded security measures based on potential hazard, vulnerability of the source or device, and potential consequences of malevolent acts. In the interim guidance,

document on security of radioactive sources, the IAEA has categorized portable gauges as Security Group C. Security measures that the IAEA recommended for Group C include one technical measure that separates the source from unauthorized personnel. The commenter stated that NRC's proposed rule exceeds the security measures recommended by the IAEA, and believes that one technical measure is sufficient.

Response: In addition to one technical measure separating the source from unauthorized personnel for Security Group C material (such as portable gauges), the IAEA also recommends access control at the source location as ^{ca} sufficient security measure based on ~~the~~ [✓] potential hazard, vulnerability of the device, and potential consequences of malevolent acts. This final rule is not based on common defense and security, but is based on protecting public health and safety from potential ^{the} of radiation exposure as a result of unauthorized removal or theft of portable gauges. [✓] Instead of one technical measure and access control as recommended by IAEA, NRC believes that two technical measures are needed to sufficiently control the portable gauge from unauthorized removal or theft in the United States. The IAEA guidance on the Security of Radioactive Sources (TECDOC-1355) is an interim guidance for comment by its Member States, and has not been accepted by the United States. In general, NRC may modify IAEA standards, as necessary, before adoption to meet NRC's regulatory needs. [✓] NRC's current regulatory framework already requires the licensees to use one measure of control in securing the portable gauges and has concluded that an additional measure is ^{instances} necessary to reduce the number of unauthorized removal or theft of portable gauges. [✓] NRC has issued several Information Notices to portable gauge licensees to emphasize the importance of adequate control of the portable gauges; however, the number of unauthorized removals or thefts of portable gauges has not decreased. [✓] NRC believes that an additional measure of control is needed to reduce the current number.

Rule Will not Prevent Thefts.

Comment: Although several commenters support the NRC's security concerns, one commenter stated that licensees are already required to secure gauges, but that does not prevent carelessness in their control. Securing gauges with two layers of security will not prevent thefts.

Response: NRC agrees that the requirements would not necessarily prevent carelessness in the control of gauges or human error, or ensure compliance by all licensees. Although NRC also agrees that additional security measures can not totally prevent the unauthorized removal or theft of the portable gauges, requiring an additional layer of physical control should deter the likelihood of the unauthorized removal or theft.

Comment: One commenter stated that the rule requirements would not deter insider or opportunistic thefts that occur because of lapses such as leaving the keys in a vehicle that contains a gauge.

Response: Although background checks and hiring practices could potentially deter theft by insiders, NRC does not believe that the very small number of thefts committed by insiders warrants such additional requirements. Requiring licensees to use two independent physical controls should reduce the risk of unauthorized removal or theft of portable gauges from a variety of causes.

Comment: One commenter stated that licensees are already required by regulations to maintain "adequate security." However, the current practice of leaving the gauge in the open bed of a pickup truck chained to the side of the truck is not "adequate security," because gauges have been stolen from the open bed of a pickup truck after the chain was cut.

Response: NRC agrees that all licensees are required to maintain adequate security and control of the licensed material. It appears that the current practices are not sufficient for control of portable gauges. NRC evaluated various alternatives in developing the proposed

though a typical portable gauge contains much lower activity than a radiography camera, unauthorized removal or theft of such gauge still poses a potential health and safety risk to the public. As for higher-activity devices, NRC is taking appropriate actions to enhance security and protect the common defense and security.

Comment: One commenter stated that even if the stolen gauge rate is reduced from approximately 50 gauges per year to 25 gauges per year, it would not represent a meaningful reduction in risk in the absence of any evidence that any harm has ever occurred to any individual from a stolen portable gauge.

Response: NRC disagrees with the comment that the reduction would not represent a meaningful reduction in risk. On an average, 50 portable gauges are stolen per year. Every gauge that is not recovered from unauthorized removal or theft poses a potential hazard to the public. It is true that severe radiation injury has not been associated with unauthorized removal or theft of portable gauges. Because the recovery rate is low, the number of unrecovered gauges will continue to grow, posing potential risk to the public.

Change in Gauge Design.

Comment: One commenter indicated that if grocery-cart manufacturers can make the wheels of their grocery carts lock if the cart is taken off the property, then portable gauge manufacturers could make it easier for licensees to secure their gauges.

Response: NRC agrees that perhaps portable gauge manufacturers could make it easier for licensees to secure the gauges, but it is not an NRC requirement that such changes take place. Manufacturers are required to design the sealed sources and the devices to operate safely. Because portable gauges are used by licensees in different situations and stored in various locations, the licensees are in a better position to select the security measures best suited for their situation.

Comment: One commenter stated that manufacturers must be required to make gauges “idiot-proof” and less attractive to thieves. The commenter suggests the portable gauges be designed so that if a gauge is stolen, the radioactive material portion is sequestered.

Response: With the current portable gauge design, the sealed sources are inaccessible and can not be readily removed by a member of the public when the gauge is in its locked configuration. Because the commenter did not provide any details on the “sequestering” technology, it is uncertain if it is feasible to implement or sufficient to protect the public health and safety.

Comment: One commenter suggested the gauge be designed so that the source rod has to be removed and stored separately.

Response: NRC does not believe that it is necessary to remove and store the source rod separately. With the current design, the sealed sources are kept within a shielded compartment inside the portable gauge providing protection for the workers. If the sealed source and the source rod would have to be removed and stored separately, it would greatly increase the radiation exposure to workers from removal of the source rods and from having multiple storage sites. Additionally, the removed sealed source and the source rod would present a greater risk to the public if the licensee were to lose control of the material. Therefore, NRC does not believe there would be sufficient benefit from requiring removal of the sealed source or the source rod.

Comment: A commenter suggests that a “secured key” be required for locks.


Response: NRC does not believe that it is necessary to require a secure key for locks. Based on the NMED data, stolen gauges are not linked to a stolen key. Therefore, it would not be cost effective to incorporate a secured key system as means to reduce the opportunity for unauthorized removal or theft of a gauge.

two independent physical controls will reduce the likelihood of unauthorized removal or theft of portable gauges while minimizing cost impacts to the licensees.

Visibility Issue.

Comment: Four commenters suggested that the rule should address the visibility of the gauge (e.g., thief sees it, thinks it's valuable, and steals it). One of the commenters also stated that methods that reduce the visibility of devices are just as important as tangible barriers in preventing theft because most thefts occur when gauges are ⁱⁿ highly visible (i.e., in open-bed trucks). Keeping a gauge inside a box where it is not visible is an effective physical control.

Response: NRC agrees that portable gauges are often stolen because the thief perceives that the transportation case contains valuable commercial equipment. NRC also agrees that there could be benefits from keeping the portable gauge and its transportation case out of sight or covered any time they are not under the control of the operator. NRC considered this and other various approaches to address the visibility issue, but rejected them as costly, impractical, or contrary to other regulatory requirements, and of questionable effectiveness. For example, NRC considered requiring that the gauge and its transportation case be covered, but the DOT staff informed the NRC staff that such covering of portable gauges during transport would be inconsistent with DOT regulations and defeats the intent of the requirements for labels and markings of portable gauges containing radioactive materials. Requiring the use of a cover to conceal the portable gauge and its transportation case could place licensees in non-compliance with DOT requirements. NRC also considered requiring use of an "enclosure" as a means to address the ^Svisibility problem. However, requiring the use of an enclosure would have significant cost impact on licensees that might not be commensurate with the potential benefit gained. Because the rule does not prescribe specific methods for physical control, a licensee will have the flexibility to select an enclosure as one of the two independent physical controls if it were deemed beneficial for its situation. NRC believes it is necessary to have this



flexibility for licensees because of the high number of licensees affected, each of which may vary in its operating and financial conditions.

There are many methods that could be used to secure the gauge and its transportation case, which could also keep the gauge and its transportation case out of sight. NRC does not believe it is cost-effective to require additional requirements for such purpose. NRC believes that regulations should provide sufficient flexibility to allow licensees to select the two independent physical controls to prevent the unauthorized removal of the portable gauges that best fit a licensee's needs.

Accessibility Issue.

Comment: According to an Agreement State, it requires portable gauges to be returned to an approved storage location after work when the temporary job-site is within 93 kilometers (50 miles) of an approved storage location.

Response: NRC considered requiring the return of portable gauges to an approved storage location daily. However, NRC believes that making it a requirement applicable to all licensees would not be feasible and would not be cost efficient due to the time spent transporting the gauges back and forth from licensed facilities. In the regulatory analysis performed for the proposed rule, NRC evaluated several options including the option of daily return of portable gauges to a permanent storage location. Based on the estimated cost impact of this option, NRC determined that the cost would be excessive considering potential benefits gained from such a requirement.

Comment: One commenter stated that the rule is not likely to be effective because it does not address the critical factors that lead to theft. Clearly, two key factors in the theft of gauges are visibility (open-bed truck) and accessibility (parking location). The fact that chains are frequently cut indicates that physical controls alone are not sufficient to deter a determined individual. The NRC rule does not address visibility or accessibility, but focuses on tangible

to
barriers. NRC states that having to defeat two tangible barriers will deter thefts by requiring a more determined effort to remove the gauge. However, if a thief is able cut one chain or lock, a second chain or lock hardly seems like much of an additional deterrent.

Response: NRC agrees that using two metal chains as physical barriers instead of one may not be the most effective means of control. Although the use of metal chains is not the most desirable control method, NRC does want to give licensees flexibility to select the controls that are suitable for them. NRC encourages licensees to store gauges in a permanent location and not in vehicles, but NRC does not want to make it a requirement because of the potential economic impacts on licensees. NRC believes that having two physical barriers, such as metal chains, will have a deterrent value by making unauthorized removal or theft of portable gauges more difficult and more time-consuming.

Too Prescriptive and Not Performance-Based.

Comment: Three commenters indicated that the rule is too prescriptive. Specifically, one commenter stated that the rule would not be effective in all cases and would lead to misunderstandings about what is being required. Another commenter stated that the rule dictates too much detail and would severely limit the licensees' ability to be creative in controlling portable gauges. Another commenter stated that the rule is inconsistent with the NRC's performance-based regulatory philosophy. The rule is far more prescriptive than the existing rules in 10 CFR 20.1801 and 20.1802, which address the security of radioactive material in a performance-based manner without specifying the methods to be used. This rule specifies both the method of control and the number of controls required, which prescriptively limits the licensee's choice of methods for complying with the rule. The commenter suggested that other methods, such as reducing the visibility of devices are just as important. Keeping a gauge inside a box where it is not visible is an effective physical control. Audible and visual alarms are also effective physical controls for deterring theft. Security experts recommend

However since
This is a performance-based rule
licensees must ensure that the two physical barriers chosen clearly increase the deterrence value as

would
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layers of protection involving a variety of methods, such as these. By narrowly prescribing that tangible barriers as the only method of compliance, the rule may reduce a licensee's incentive to use other effective means to deter thefts. Deterrence of theft is largely a matter of common sense, which cannot be mandated by rule or regulation. The situations under which portable gauges may be used and stored vary so widely that no prescriptive rule will be practical or effective for all situations.

Response: NRC disagrees with the commenters that the rule is too prescriptive. This rule does not prescribe a specific physical control that needs to be used to secure portable gauges. Licensees have options in selecting from a wide range of physical controls. Of course, there are some physical controls that are more effective than others. Although options such as storing gauges inside a building or in an enclosure may be effective control methods, factors such as cost impact and variation in licensees' operations must also be considered when considering the control methods. Therefore, requiring "a minimum of two physical controls" affords a licensee the flexibility to choose the appropriate independent physical controls to meet its situation, and at the same time provide sufficient security for the portable gauges. Licensees can use more controls in addition to the requirements of the rule. While developing the rule, the working group considered various control methods including audible and visual alarms for vehicles. NRC believes that it would not be cost effective to make these requirements when considering that: (1) a small percentage of unauthorized removals or thefts of portable gauges was associated with vehicles being stolen; (2) the public tends to ignore alarms; and (3) the alarms would have no, or limited, impact on unauthorized removal or theft of portable gauges from open-bed trucks.

Requirements Not Practical.

Comment: One commenter stated that methods proposed for securing gauges in vehicles are impractical or costly. Portable gauges must be loaded and unloaded from vehicles.

Comment: Licensing authorities are making and enforcing rules that could only be done by trained security experts or mechanical engineers, even if they were justified.

Response: NRC does not believe that the additional security requirements will call for security experts or engineers to implement. However, licensees and their operators are required to have proper training to safely manage the nuclear materials including properly securing and controlling the portable gauges.

Cost Implications.

Comment: One commenter stated that the NRC estimates of savings resulting from the rule are speculative. The saving estimates from implementing the rule are based on the optimistic assumption of a 50 percent reduction in the stolen gauges. This is speculative, as there is no way to predict the actual reduction that may be achieved.

Response: The percent reduction will be dependent, in part, on the type of physical controls that licensees elect to use. If more enclosures are used to secure gauges, a higher reduction in the percentage of unauthorized removal or theft of portable gauges would most likely be achieved. In any event, NRC believes that adding one more tangible barrier as a physical control will reduce the opportunity for unauthorized removal or theft. Given the wide range of physical controls available for the licensees to select, NRC believes that an assumption of a 50 percent reduction is reasonable.

Comment: One commenter stated that the cost is greater than what NRC proposes.

Response: Because the commenter did not provide any basis for higher cost, NRC cannot perform a comparison. NRC's cost estimate is based on the actual price of an item listed by the vendors. The regulatory analysis for the proposed rule contains the assumptions and unit costs used in calculating the total cost impact on licensees. Because the commenter did not provide any data in support of a higher cost impact, NRC is unable to compare the commenter's cost estimate against NRC's estimate.

Comment: Two commenters believe that the rule would have a negative economic impact. One commenter believes that increased regulatory requirements and costs will have a negative impact on the sales and use of portable gauges. The other commenter believes that the economic impact on the construction material testing industry will be wide-spread. The commenter stated that the use of portable gauges provides significant benefits in terms of the quality, safety, and longevity of roads. No other technology is as effective for measurement of the properties of materials in road construction as nuclear gauges.

Response: NRC disagrees with the comment. In determining viable options, NRC considered cost to industry versus any potential benefit. The rule would be unlikely to have a major impact on sales and use of portable gauges due to the increased security requirements. Based on estimates, a \$200 average increase in the cost of portable gauge use per licensee is relatively small when compared to the cost of a gauge of approximately \$7000. A reduction in the number of unauthorized removals or thefts of portable gauges might have a small impact on sales because licensees may need to replace a smaller number of gauges. Throughout this rulemaking, NRC has remained mindful of cost impacts on licensees. NRC's goal in this rulemaking is not to decrease portable gauge use. This regulation may slightly increase the cost of portable gauge use, but this cost must be balanced against improving the security and control of portable gauges.

Comment: One commenter stated that additional regulations represent an undue hardship to portable gauge licensees. A financial burden to a large licensee at a cost of \$114 thousand is unacceptable given the limited potential in reducing the number of stolen gauges.

Response: The NRC disagrees with the comment. With the estimated cost impact of about \$200 per gauge, NRC does not believe the increased cost would result in an undue hardship for portable gauge licensees. There are more than 5,000 portable gauge licensees. If the cost impact on the largest licensee is only approximately \$114 thousand, it demonstrates

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that the additional requirements would not appear to create an undue hardship, especially when licensees have flexibility in selecting the method of physical controls.

Comment: A State commenter indicated that making changes to meet the new requirements would result in a large expenditure to taxpayers.

Response: NRC disagrees with the comment. An average of \$200 increase per gauge is small when compared to the resources spent by State and Federal law enforcement and regulatory personnel in response to, and in investigating, incidents involving unauthorized removal or theft of portable gauges.

Comment: One commenter predicts an increase in reporting of lost and stolen gauges as licensees find they cannot afford either compliance with the proposed rules or lawful disposal of the gauge sealed source.

Response: NRC disagrees with the commenter's prediction of increased reporting due to cost to comply with the rule requirements or to dispose of the source material. NRC does not believe that the increased costs will force licensees to dispose of the devices improperly.

Depending on the physical control selected, the cost impact may be as low as \$100 per gauge for using a chain/cable with a lock or \$500 per gauge for use of a secured metal enclosure.

The disposal cost for each gauge is about \$450 and is waived by one of the manufacturers with the purchase of a new gauge.

Impact on Landfills, Steel Mills, Scrap Yard, and the Environment.

Comment: Three commenters indicated it is unlikely that a stolen gauge would be smelted in scrap-steel processing facilities. According to one commenter, there is no evidence that stolen gauges are more likely to end up at these facilities than gauges which are not stolen. NRC claims that most stolen gauges would be abandoned by the thief and are likely to end up in such places as scrap yards and smelters. In fact, the majority of gauges (51 percent) are recovered according to NRC figures for the last 2 years (SECY-03-0060). That the remainder

are likely to end up in smelters, scrap yards, or incinerators is speculative. The ^{second} other commenter believes that most nuclear devices end up in scrap yards due to the difficulty of disposing of the equipment and the associated cost. Another commenter stated that it is unlikely that a discarded moisture/density gauge would be smelted down because of the use of sensitive monitoring systems.

Response: NRC agrees that the probability is small for a portable gauge obtained by unauthorized removal or theft to be smelted down and contaminate a steel processing plant. However, the potential does exist. Based on historical data, less than half of the unauthorized removals or thefts of portable gauges are recovered. After the September 2001 terrorist events, more resources have been spent in recovery efforts to retrieve portable gauges from unauthorized removal or theft due to heightened security concerns about loss of control of radioactive materials. As a result, the recovery rate for portable gauges may have improved slightly over the past 2 years, but it is still low. Most gauges from unauthorized removal or theft are abandoned or resold. This raises a concern about the potential public health and safety risk. In past years, there have been cases where gauges were found in the environment and in landfills, scrap yards, or recycling plants. For example, in June 2002, a portable gauge containing a Cs-137 source was found at a steel mill's scrap-metal stream, and, in May 2002, a portable moisture gauge containing Am-241 was discovered at a landfill by landfill personnel sorting through the refuse. In both cases, the gauges were removed for proper disposition. Many facilities are now equipped with radiation monitors, and sources are often detected and removed early in the process. Nonetheless, the potential for radioactive material to enter a metal recycling plant still exists. In fact, in 2001, a radioactive source was melted in a steel mill in Florida. The total cost of the cleanup was more than \$10 million. The State of Florida suspected that the contamination was from a sealed source from a fixed gauge. Once the radioactive source is melted, it is extremely difficult to determine the type of device that may

have contained the source. Although steel mill contamination has never proven to be caused by a portable gauge from unauthorized removal or theft, an abandoned portable gauge still poses a potential concern if it ever gets into a steel mill melt.

Comment: One commenter stated that if an abandoned gauge is deposited in a landfill, the environmental impact would be insignificant.

Response: NRC disagrees with the comment. All licensed materials are required to be properly controlled to ensure protection of public health and safety and the environment. Any uncontrolled licensed material abandoned in the environment or disposed of in a landfill not designed for managing licensed material poses a potential hazard to public health and safety and to the environment. In accordance with 10 CFR Part 61, an Am-241 source used in a portable gauge would be classified as a "greater than Class C waste" and is not generally acceptable for near-surface disposal (e.g., landfill). Given the amount and long half-life (432 years) of Am-241 used in a portable gauge, the potential impact would not be insignificant.

X-Ray Fluorescence.

Comment: One commenter is concerned about controlling lost or stolen generally licensed devices because there are more in circulation than specifically licensed portable devices. There are hundreds, perhaps even thousands, of portable X-Ray Fluorescence (XRF) analyzers that have been distributed as generally licensed devices.

Response: Based on the NMED database, the number of reported incidents of lost or stolen XRF analyzers is extremely low. In general, the amount of radioactive material used in XRF analyzers is much smaller than the amount used for portable moisture/density gauges. Because XRF analyzers are very small and are usually hand-held units, they can be easily stored in the glove compartment or trunk of a vehicle. The XRF analyzers stored in this manner are not visible or easily accessible, which reduces the possibility of opportunistic theft. For these reasons, NRC does not believe that additional security requirements are needed for

generally licensed XRF analyzers at this time; therefore, this comment is not within the scope of this rulemaking.

Comment: An Agreement State commenter indicated that it specifically licenses all portable nuclear gauges including lead paint analyzers.

Response: Whether a nuclear device is specifically or generally licensed depends on the design of the device and other factors. In general, most moisture/density gauges are specifically licensed whereas most chemical detectors and lead paint analyzers are generally licensed by either NRC or the Agreement States. NRC regulations establish the basic requirements. Depending on the compatibility categories, individual Agreement States may impose more stringent requirements depending on their specific needs.

The Final Rule

§ 30.34 Terms and conditions of licenses.

After considering public comment and continuing informal discussion with the DOT staff, it was decided that no changes would be made to the proposed rule. The final rule contains the exact same requirements as the proposed rule. Therefore, the requirements state that each portable gauge licensee shall use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal, whenever portable gauges are not under the control and constant surveillance of the licensee.

Criminal Penalties

made in the requirements from the proposed rule to the final rule, the environmental assessment has not been changed. The environmental assessment and finding of no significant impact are available for inspection at the NRC Public Document Room, Public File Area O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. Single copies of the environmental assessment and finding of no significant impact are available from Lydia Chang, telephone (301) 415-6319, e-mail lwc1@nrc.gov, of the Office of Nuclear Material Safety and Safeguards.

Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150-0017.

Public Protection Notification

NRC may not conduct nor 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.

Regulatory Analysis

In the proposed rule, the Commission requested public comment on the draft regulatory analysis specifically on the costs to licensees. No comments were received on the draft

regulatory analysis. However, one of the comments received on the proposed rule indicated that the cost per unit in most cases will be substantially greater than NRC's estimate. Because a licensee has flexibility in selecting the physical controls to be used in securing a portable gauge, the actual cost would depend on the controls selected. The cost per unit could range from \$100 for a metal cable to \$400 for a simple metal tool box, to even a higher cost for a more elaborately designed metal enclosure. In the regulatory analysis, an average of \$200 was used.

The Commission has finalized the regulatory analysis on this regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, Public File Area O1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD. Single copies of the regulatory analysis are available from Lydia Chang, telephone (301) 415-6319; e-mail, lwc1@nrc.gov, of the Office of Nuclear Material Safety and Safeguards.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The final rule would affect about 1100 portable gauge specific NRC licensees and an additional 4000 Agreement State specific licensees. These licenses are issued principally to companies involved in road constructions and maintenance. Many portable gauge licensees would qualify as small business entities as defined by 10 CFR 2.810. However, the final rule is not expected to have a significant economic impact on these licensees. Based on the regulatory analysis conducted for this action, the costs of the final rule for affected licensees are estimated at \$200 per gauge. Among various alternatives considered, NRC believes that

Under this alternative, each licensee would also be required to control and maintain constant surveillance of portable gauges whenever portable gauges are not secured with a minimum of two physical controls. This portion of the revised requirements is consistent with the existing requirement in 10 CFR 20.1802; therefore, no cost impact to the licensees is anticipated for such control and surveillance.

Based on the 20 percent, 40 percent, and 40 percent assumed ratio of control methods selected by the licensees as discussed above, the estimated national impact for implementing alternative (3) would range from \$4.5 to \$5.1 million. There are approximately 5100 affected NRC and Agreement State licensees. Licensees may have as little as one gauge or as many as ten or more gauges, with a national average of about five gauges per licensee. Depending on the security control method selected, each licensee may incur between \$0 to \$4000 to ensure implementation for all of its licensed portable gauges. Based on the assumptions stated above, an average one-time unit cost on a national basis will be around \$200 per gauge with a corresponding national average of about \$1000 per licensee assuming five gauges per licensee for implementing alternative (3). Total annual costs for providing security for new gauges is estimated at \$206,000 assuming the same ratio for control methods selected as for the existing gauges.

Cost for NRC Implementation and Operations -- Both alternatives (2) and (3) would result in NRC implementation costs. Specifically, NRC would incur costs to develop a rule and to revise the existing guidance on portable gauges. NRC staff resources needed for developing the proposed rule, completing the final rule, and revising the guidance is estimated to be 1.7 FTE staff years at \$77/hr and 1,776 hrs/FTE for an estimated total cost of \$232,000. No increase in NRC resources is anticipated for implementation of the revised requirements. The staff also anticipates no significant impact on NRC resources expended on routine inspection for compliance with the new requirements.

Cost for State Implementation -- Both alternatives (2) and (3) would result in Agreement States adapting their regulations to the NRC revised rule. The final rule would have compatibility category "C" requirements; therefore, an Agreement State should adopt the essential objectives of the rule. The compatibility category "C" requirements would be needed to avoid conflict, duplication, gaps, or the conditions that would jeopardize an orderly pattern in

the regulation of agreement material on a nationwide basis. Adoption of the essential objectives can be done through promulgating a comparable rule, issuing orders, revising state guidance, or adding or revising individual license conditions. Since each of the 32 Agreement States may choose different implementation mechanisms, it is difficult to estimate the implementation costs for each Agreement State. However, it is anticipated that implementation costs for each state would be much lower than the implementation cost for the NRC because the Agreement States do not need to spend resources in developing and evaluating various alternatives to come up with the revised requirements. It is assumed that 75 percent of the Agreement States would promulgate state regulations with an average expenditure of one quarter FTE, and the remaining Agreement States would use other mechanisms at 0.1 FTE per state on average. The total estimated state implementation costs would be around \$680,000 using an assumed hourly rate of \$50 and 250 working days per year.

Calculation:

$$((32 \text{ states} \times 75\% \times 0.25 \text{ FTE} + 32 \text{ states} \times 25\% \times 0.1 \text{ FTE}) \times \$50/\text{hr} \times 2,000 \text{ hrs}) = \$680,000$$

BENEFITS

By requiring additional controls, it is expected that both alternatives (2) and (3) would reduce the number of unauthorized removals or thefts of portable gauges. Although the term "unauthorized removal" can describe situations more than "theft," the regulatory analysis took a more conservative approach and only considered the estimated benefit due to the reduction of theft of portable gauges. The primary categories of the benefits attained by reduction in theft of portable gauges are economic benefits and exposure aversion benefits. In addition, there are less tangible benefits. Since incidents involving theft occur in the public domain, incidents to be averted have a significant impact on the public's perception of the risks associated with the use of radioactive material. This, in turn, can improve the credibility of NRC and the Agreement States. Therefore, this rulemaking could further the goal of increasing the confidence of the public.

Summary of Economic Benefits

Economic benefits result from reduction in costs associated with the theft of portable gauges through reduction in the incidence of theft. These costs are--

AFFIRMATION ITEM

RESPONSE SHEET

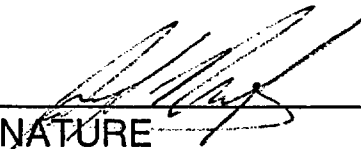
TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-04-0190 - FINAL RULE: SECURITY
REQUIREMENTS FOR PORTABLE GAUGES
CONTAINING BYPRODUCT MATERIAL (RIN 3150-
AH06)**

Approved Disapproved Abstain

Not Participating

COMMENTS:

See attached comments.



SIGNATURE

11/16/04

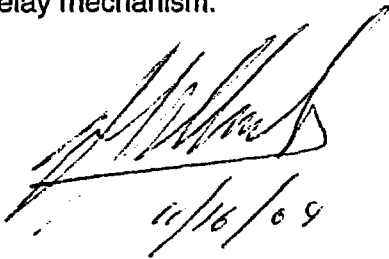
DATE

Entered on "STARS" Yes No

Comments from Commissioner Merrifield on SECY-04-0190:

I approve, with amplifying comments proved below, the staff recommendations in SECY-04-0190 concerning issuing a final rule on increasing security requirements for portable gauges containing byproduct material. Since early in my tenure as a Commissioner I have been concerned about the number of such gauges which have been stolen, even though they may pose a low overall risk. I believe the recommended course of action is appropriate.

I have no comments on the rule language. However, as part of this rulemaking, staff should develop appropriate guidance for licensees and Agreement States to more clearly define the phrase "two independent physical controls that form tangible barriers". I would expect each independent tangible barrier to add a deterrence and a delay capability. For example, I would not expect that simply having two chains with locks would satisfy the rule unless each chain and lock combination were physically robust enough to provide both a deterrence and a reasonable delay mechanism.



11/16/09