

Clean Copy of Draft Revised Firearms Guidelines (45-Day appeal deadline and extension request provisions removed)

GUIDELINES ON THE USE OF FIREARMS BY SECURITY PERSONNEL IN PROTECTING U.S. NRC REGULATED FACILITIES, RADIOACTIVE MATERIAL, AND OTHER PROPERTY, REVISION 2

1. Authority and Scope.

On August 8, 2005, the President signed into law the Energy Policy Act of 2005 (the Act), Pub. L. 109-58, 119 Stat. 594 (2005). Section 653 of the Act amended the Atomic Energy Act of 1954, as amended, (AEA) by adding section 161A, "Use of Firearms by Security Personnel," 42 U.S.C. 2201a. Section 161A of the AEA provides new authority to the U.S. Nuclear Regulatory Commission (Commission or NRC) to enhance security at designated facilities of NRC licensees and certificate holders and to enhance security with respect to certain radioactive material or other property owned or possessed by an NRC licensee or certificate holder, or the transportation of such material or other property.

Specifically, section 161A provides two potential advantages to NRC licensees and certificate holders to enhance security. First, the Commission is authorized to permit the security personnel of licensees and certificate holders to obtain enhanced weapons, such as machineguns, short-barreled shotguns, and short-barreled rifles, not previously permitted to be owned or possessed under Commission authority (enhanced weapons authority). Second, section 161A authorizes the Commission to permit the security personnel of licensees or certificate holders to transfer, receive, possess, transport, import, and use handguns, rifles, shotguns, short-barreled shotguns, short-barreled rifles, machineguns, semiautomatic assault weapons, ammunition for such weapons, and large capacity ammunition feeding devices notwithstanding State, local, and certain Federal firearms laws, including regulations, that prohibit such conduct (preemption authority).

Prior to the enactment of section 161A, with limited exceptions, only Federal, State or local law enforcement could lawfully possess machineguns. Section 161A authority, however, allows licensees and certificate holders, who obtain the necessary authorization from the NRC, to lawfully possess machineguns (enhanced weapons authority) that they previously were not authorized to possess.

An NRC licensee or certificate holder must apply to the Commission to take advantage of the provisions of section 161A. Prior to granting an application to permit security personnel of an NRC licensee or certificate holder to transfer, receive, possess, transport, import, and use a weapon, ammunition, or device not previously authorized, the Commission must determine that the requested authority is necessary in the discharge of the official duties of the security personnel and the security personnel are engaged in protecting: (1) a facility owned or operated by an NRC licensee or certificate holder and designated by the Commission, or (2) radioactive material or other property that has been determined by the Commission to be of significance to public health and safety or the common defense and security, and that is owned or possessed by an NRC licensee or certificate holder, or that is being transported to or from an NRC-regulated facility. The Commission's authorization shall only apply to use by security personnel of a licensee or certificate holder of a weapon, ammunition, or a device listed in section 161A.b. when used by such personnel while in the discharge of their official duties.

Section 161A also mandates that all security personnel that receive, possess, transport, import, or use a weapon, ammunition, or a device otherwise prohibited by State, local, or certain federal laws, including regulations, as provided by section 161A.b. (42 U.S.C. 2201a(b)) shall be subject to a fingerprint-based background check by the Attorney General and a firearms background check against the Federal National Instant Background Check System (NICS).

These firearms background checks will provide assurance that such security personnel are not barred from possessing, transporting, or using any covered weapons.

Section 161A took effect with the publication of these guidelines in the *Federal Register* on September 11, 2009 (74 FR 46800).

Regulations or orders issued by the Commission concerning section 161A shall be consistent with the provisions of these guidelines. Modification of these guidelines by the Commission must be made with the concurrence of the Attorney General.

Definitions of terms that may not have a commonly understood meaning are contained in section 8 of these guidelines.

2. Commission Designations and Determinations.

After the issuance of these guidelines, the Commission will promulgate regulations or issue orders that designate specific classes of licensees and certificate holders eligible to apply to the Commission to use the authority of section 161A. Commission regulations or orders will designate the specific types of facilities, radioactive material, or other property owned or possessed by NRC licensees and certificate holders, or specific types of radioactive material or other property being transported to or from a facility owned or operated by an NRC licensee or certificate holder, for which an application to the Commission may be made to use the authority of section 161A. The Commission's designation of specific radioactive material or other property will be based upon a finding that the material or property is of significance to the common defense and security or public health and safety. These regulations or orders will require NRC licensees or certificate holders that have been designated by the Commission pursuant to section 161A, and that have chosen to apply for preemption authority only or for enhanced weapons authority and preemption authority, to ensure that their armed security personnel who will have access to covered weapons and who are engaged in the protection of a

designated facility, radioactive material, or other property, complete a satisfactory firearms background check as described in section 5 of these guidelines.

The Commission will promulgate regulations or issue orders establishing a process for NRC-regulated entities to apply for and obtain preemption authority under section 161A. The Commission will also promulgate regulations or issue orders establishing a process for NRC-regulated entities to apply for and obtain both enhanced weapons authority and preemption authority under section 161A. An NRC-regulated entity may obtain preemption authority without applying for enhanced weapons authority. An NRC-regulated entity seeking enhanced weapons authority must obtain both enhanced weapons authority and preemption authority. A licensee's or certificate holder's applications for preemption authority and enhanced weapons authority may be sequential or concurrent, but the NRC must approve the licensees' and certificate holders' applications for preemption authority at the same time as or before approving their application for enhanced weapons authority.

In addition, Commission regulations or orders will require that before licensees and certificate holders may be granted authority by the NRC to obtain enhanced weapons they must: (1) apply to the NRC for preemption authority, (2) apply to the NRC for approval to obtain enhanced weapons, and (3) develop new, or revise existing, physical security plans (including plans for the safe storage of enhanced weapons), security personnel training and qualification plans, safeguards contingency plans, and safety assessments incorporating the use of the enhanced weapons to be employed. These plans and assessments must be specific to the facility, radioactive material, or other property being protected; must identify the specific type(s) of enhanced weapons that will be used by security personnel; and must address how these enhanced weapons will be employed in meeting the NRC-required protective strategy. Licensees and certificate holders must submit these new, or revised, plans and assessments to

the NRC for review and written approval. The requirements for the contents of the licensee's and certificate holder's physical security plans, security personnel training and qualification plans, safeguards contingency plans, and safety assessments on the use of enhanced weapons are contained in NRC regulations.

Based upon the NRC's review of an applicant's plans and assessments (as provided in the preceding paragraph) and upon a determination that all of the requirements of section 161A have been, or will be, met, the NRC will provide a written statement to the licensee or certificate holder stating that the NRC has determined that the licensee's or certificate holder's need for the specific enhanced weapons that the licensee or certificate holder intends to deploy satisfies the requirements of the NRC under section 161A.

Licensees and certificate holders lawfully possessing enhanced weapons under an authority other than section 161A on or before the effective date of these guidelines are not required to revise their previously approved security plans, unless the licensee or certificate holder applies to the NRC under section 161A for preemption authority or for enhanced weapons authority and preemption authority.

3. Applicability of Federal Firearms Laws, Regulations and Licensing Requirements.

In addition to complying with Commission regulations and orders implementing section 161A, NRC licensees and certificate holders must also comply with applicable provisions of Title 18 U.S.C. Chapter 44 (the Gun Control Act (GCA)) and Title 26 U.S.C. Chapter 53 (National Firearms Act (NFA)) and 27 CFR Parts 478 and 479 (the applicable regulations promulgated under those laws by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)), regarding the transfer, receipt, possession, transportation, importation, or use of covered weapons, except to the extent that those regulations are superseded by section 161A. After a licensee's or certificate holder's receipt of the NRC's written approval of their application for

enhanced weapons authority, the licensee or certificate holder may in accordance with 26 U.S.C. Chapter 53 have enhanced weapons transferred to them. An application to transfer an enhanced weapon to a licensee or certificate holder must be submitted to ATF by the transferor of the enhanced weapon. The application must include all required information including a copy of the NRC's written approval to possess specific enhanced weapons under section 161A. All enhanced weapons must be registered with ATF under the name of the licensee or certificate holder.

4. Training and Qualification on Enhanced Weapons.

The Commission will promulgate regulations or issue orders requiring NRC licensees or certificate holders who have received written NRC approval of their application for section 161A enhanced weapons authority to provide specific training to their security personnel on the possession, storage, maintenance, and use of enhanced weapons and on tactical maneuvers employing such weapons in protecting NRC-designated facilities, radioactive material, or other property, whichever is applicable. The regulations or orders will require such licensees and certificate holders to incorporate within their security personnel training and qualification plans specific training and qualification information applicable to the enhanced weapons to be employed, including information regarding tactical maneuvers that security personnel will carry out with those weapons. This training and qualification information must conform with firearms training and qualification standards developed by nationally-recognized firearms organizations or standard setting bodies, or with standards developed by Federal agencies, such as the U.S. Department of Homeland Security's Federal Law Enforcement Training Center, the U.S. Department of Energy's National Training Center, and the U.S. Department of Defense.

5. Firearms Background Checks.

The Commission will promulgate regulations or issue orders establishing requirements for firearms background checks. Licensees and certificate holders may apply to the NRC for preemption authority only or for both enhanced weapons authority and preemption authority. In either case, to obtain approval of such an application, satisfactory firearms background checks must have been completed for the licensee's or certificate holder's security personnel whose official duties require access to covered weapons. The firearms background check requirement applies to such security personnel whether they are directly employed by the licensee or certificate holder or they are employed by a security contractor who provides security services to the licensee or certificate holder.

The Commission's regulations or orders will set forth the criteria for satisfactory and adverse firearms background checks, as defined in section 8(a) of these guidelines. The regulations or orders will require that NRC licensees and certificate holders designated by the Commission pursuant to section 161A, and who have applied for preemption authority only or for enhanced weapons authority and preemption authority, ensure that their armed security personnel who have access to covered weapons and who are engaged in the protection of a designated facility, radioactive material, or other property, complete a firearms background check. The firearms background checks are in addition to any other background checks or criminal history checks required for security personnel under Commission regulations or orders.

An applicant for preemption authority only or for enhanced weapons authority and preemption authority may begin firearms background checks of its security personnel who are proposed to have official duties that require access to covered weapons in the protection of such facilities, radioactive material, or other property after the NRC notifies the applicant that its application has been accepted for review. Upon notification that any personnel have received a

“denied” National Instant Criminal Background Check system (NICS) response, an applicant must immediately remove such personnel from duties that would require access to covered weapons. Once a licensee or certificate holder has been granted preemption authority only or enhanced weapons authority and preemption authority under section 161A, a licensee or certificate holder must prohibit any personnel receiving a “denied” or “delayed” NICS response from assuming duties requiring access to covered weapons. Security personnel who received a "denied" or "delayed" NICS response and who subsequently receive a response that a satisfactory firearms background check has been completed may be permitted access to covered weapons.

Before granting preemption authority, the Commission will require persons who are licensees and certificate holders on the effective date of these guidelines, and who have applied for preemption authority only or for enhanced weapons authority and preemption authority, to notify the NRC in writing after a sufficient number of security personnel have completed a satisfactory firearms background check to permit the licensee or certificate holder to meet the licensee’s or certificate holder’s security personnel minimum staffing and fatigue requirements. The NRC will review such readiness notifications on a case-by-case basis prior to approving a licensee’s or certificate holder’s application for preemption authority.

Any licensee or certificate holder granted preemption authority only or enhanced weapons authority and preemption authority is required to conduct periodic firearms background checks of all security personnel who have, or are proposed to have, official duties that require access to covered weapons in the protection of such a facility, radioactive material, or other property, at a minimum of once every five years after their first background check. However, these checks may be conducted more frequently if required by Commission regulation or order, or if the licensee or certificate holder requires an earlier check.

Security personnel who receive an adverse firearms background check response upon a recheck must be removed from duties that require access to covered weapons. Security personnel so removed who subsequently complete a satisfactory firearm background check may be permitted access to covered weapons. In addition, the Commission will require a new firearms background check for security personnel who have had a break of greater than one (1) week in employment by the licensee or certificate holder or in employment by a contractor who provides security services to a licensee or certificate holder.

The Commission will require a new firearms background check for security personnel who have transferred to the employment or the service of the licensee or certificate holder from a different licensee or certificate holder in whose employ they previously completed a satisfactory firearms background check. However, a change in the ownership of the licensee or certificate holder, a change in the ownership of the security contractor providing the security personnel, or a change in the security contractor providing the security personnel will not require, by itself, the performance of a new firearms background check for personnel who have previously completed a satisfactory firearms background check.

The Commission will promulgate regulations or issue orders requiring a licensee or certificate holder who has been granted preemption authority only or enhanced weapons authority and preemption authority to establish procedures for notifying the NRC when a security officer assigned duties requiring access to covered weapons is permanently removed from such duties because of an adverse firearms background check. The NRC will promptly report suspected violations of Federal law to the appropriate Federal agency and suspected violations of State law to the appropriate State agency.

The Commission will promulgate regulations or issue orders requiring licensees and certificate holders to inform security personnel who have received an adverse firearms

background check of the process to appeal a "denied" NICS response to the FBI, or to provide additional information to the FBI to resolve a "delayed" NICS response.

6. Enhanced Weapons Accountability, Transfer, Transportation, and Record Keeping.

The Commission will promulgate regulations or issue orders requiring licensees and certificate holders to perform periodic accountability inventories of the enhanced weapons in their possession to verify their continued possession of each enhanced weapon. The regulations or orders will require licensees or certificate holders to complete such inventories at specified intervals, and at least one inventory will be conducted each year. These inventories must be based upon the verification of the presence at the licensee's or certificate holder's facility of each enhanced weapon or upon a verification of the presence of an intact tamper indicating device (TID) for enhanced weapons that are stored in locked and sealed storage or ready-service containers at the licensee's or certificate holder's facility. The regulations or orders will require that licensees and certificate holders permitting enhanced weapons to be removed from their facility (i.e., the owner controlled area) by security personnel for permissible reasons verify that such weapons are subsequently returned to the licensee's or certificate holder's facility upon completion of official use of the weapons.

Permissible reasons for removal of enhanced weapons from the licensee's or certificate holder's facility include: (1) removal for use at a firing range or training facility used by the licensee or certificate holder, and (2) removal for use in escorting shipments of radioactive material or other property designated by the Commission under section 2 of these guidelines, if the material or other property is being transported to or from the licensee's or certificate holder's facility. The Commission may provide other permissible reasons for the removal of enhanced weapons by regulation or order.

Any removal of the enhanced weapons from a licensee's or certificate holder's facility by a contractor would constitute a transfer of those weapons unless accompanied by the licensee's security personnel who are authorized to direct the contractor and therefore maintain control over the weapons. The licensee or certificate holder may only transfer (by sale or otherwise) enhanced weapons pursuant to an application approved by ATF under 26 U.S.C. Chapter 53.

A licensee or certificate holder receiving enhanced weapons must assist the transferor in completing an application to transfer such weapons in accordance with 26 U.S.C. 5812, and must provide the transferor a copy of the NRC's written approval of their application for enhanced weapons authority. Enhanced weapons may only be transferred to the licensee or certificate holder, not to a contractor of the licensee or certificate holder.

The Commission will promulgate regulations or issue orders requiring a licensee or certificate holder possessing enhanced weapons to notify the NRC and the appropriate local authorities of any stolen or lost enhanced weapons upon the discovery of such theft or loss. Licensees and certificate holders will also have an independent obligation, pursuant to 27 CFR 479.141, to report to ATF stolen or lost enhanced weapons registered in accordance with 26 U.S.C. 5841 immediately upon the discovery of such theft or loss.

Security personnel transporting enhanced weapons to or from a firing range or training facility used by the licensee or certificate holder are responsible for assuring that the weapons are unloaded and locked in a secure container during transport. Except as provided in the next paragraph, security personnel transporting enhanced weapons to or from a licensee's or certificate holder's facility following the completion of, or in preparation for, escorting designated radioactive material or other property being transported to or from the licensee's or certificate holder's facility are responsible for assuring that the weapons are unloaded and locked in a secure container during transport. Only authorized personnel shall have access to the contents

of the container. Unloaded covered weapons and ammunition for such weapons may be transported in the same secure container during transport.

Security personnel required to carry covered weapons while escorting designated radioactive material or other property being transported to or from the licensee's or certificate holder's facility (whether intrastate or interstate) are responsible for assuring that such weapons are maintained in a state of loaded readiness and available for immediate use while they are accompanying the transport.

To facilitate compliance with these guidelines, the NRC's regulations or orders will require licensees and certificate holders to keep records (capable of being inspected or audited by the NRC) relating to the receipt, transfer, and transportation of enhanced weapons. The records will be required to include the following minimum information relating to receipt and transfer of enhanced weapons: the date of receipt of the enhanced weapon; the name and address of the person from whom the enhanced weapon was received; the name of the manufacturer and importer (if any) of the enhanced weapon; the model, serial number, type, and caliber or gauge of the enhanced weapon; and for any transfer of an enhanced weapon (including sending off for repairs) by the licensee or certificate holder to another person, the name and address of the person to whom the enhanced weapon was transferred and the date of the transfer. The records will be required to include the following minimum information relating to transportation of enhanced weapons: the date of departure of the enhanced weapon from, and the date of return of the enhanced weapon to, the licensee's or certificate holder's facility; the purpose of the enhanced weapon's transportation; the name of the person transporting the enhanced weapon and the name of the person/facility to whom the enhanced weapon is being transported; and the model, serial number, type, and caliber or gauge of the enhanced weapon.

7. Termination, Modification, Suspension, and Revocation.

The Commission will promulgate regulations or issue orders setting forth standards for the termination, modification, suspension, or revocation of the NRC's approval of a licensee's or certificate holder's preemption authority or enhanced weapons authority and preemption authority. Within three (3) business days of notifying the licensee or certificate holder, the NRC will notify ATF of the termination, modification, suspension, or revocation of a licensee's or certificate holder's preemption authority or enhanced weapons authority and preemption authority. Such a notification will be made to the position or point of contact designated by ATF. The regulations or orders will require licensees and certificate holders to transfer any enhanced weapons that they are no longer authorized to lawfully possess under section 161A, or that they wish to dispose of, to (1) a Federal, State, or local government entity; (2) a federal firearms licensee authorized to receive the enhanced weapons under applicable law and regulations; and (3) other NRC licensees and certificate holders subject to section 161A that are authorized to receive and possess these weapons. Licensees and certificate holders may also abandon such weapons to ATF. Transfers of such enhanced weapons must be made in accordance with section 6 of these guidelines.

The regulations or orders will require licensees and certificate holders to transfer any enhanced weapons (1) prior to NRC approval of the termination or modification of a licensee's or certificate holder's authority to possess the enhanced weapons under section 161A, and (2) as soon as practicable following NRC suspension or revocation of the licensee's or certificate holder's authority to lawfully possess enhanced weapons under section 161A.

Licensees and certificate holders who have had their preemption authority or enhanced weapons and preemption authority suspended or revoked may reapply for such authority by filing a new application for such authority under these guidelines.

Licensees and certificate holders who intend to obtain enhanced weapons different from the weapons previously approved by the NRC must submit to the NRC for prior review and approval revised physical security plans, training and qualification plans, safeguards contingency plans, and safety assessments addressing the use of these different enhanced weapons.

8. Definitions.

(a) As used in these guidelines –

Adverse firearms background check means a firearms background check that has resulted in a "denied" or "delayed" NICS response.

Covered weapon means any handgun, rifle, shotgun, short-barreled shotgun, short-barreled rifle, semi-automatic assault weapon, machinegun, ammunition for any such weapon, or large capacity ammunition feeding device otherwise prohibited by State, local, or certain federal laws, including regulations, as specified under section 161A.b.

Enhanced weapon means any short-barreled shotgun, short-barreled rifle, or machinegun. Enhanced weapons do not include destructive devices as defined in 18 U.S.C. 921(a).

Firearms background check means a background check by the Attorney General pursuant to section 161A that includes a check against the Federal Bureau of Investigation's (FBI's) fingerprint system and the NICS.

NICS means the National Instant Criminal Background Check System established by Section 103(b) of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, that is operated by the FBI's Criminal Justice Information Services Division.

NICS response means a response provided by the FBI as the result of a firearms background check against the NICS. Such a response may be “proceed,” “delayed,” or “denied.”

Satisfactory firearms background check means a firearms background check that has resulted in a "proceed" NICS response.

(b) The terms “handgun, rifle, shotgun, short-barreled shotgun, short-barreled rifle, semi-automatic assault weapon, machinegun, ammunition, and large capacity ammunition feeding device” have the same meaning provided for these terms in 18 U.S.C. 921(a).

(c) The terms “proceed,” “delayed,” and “denied,” as used in NICS responses, have the same meaning provided for these terms in the FBI’s regulations in 28 CFR Part 25.

DISCLAIMER

These guidelines may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any manner, civil or criminal, and they do not place any limitations on otherwise lawful activities of the agencies.