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**From:** REED, Joseph [jsr@nei.org] on behalf of KILLAR, Felix [fmk@nei.org]  
**Sent:** Tuesday, January 06, 2009 12:18 PM  
**Subject:** Comments on Preliminary Draft Rule Language for Physical Protection of Byproduct Material (new 10 CFR Part 37)  
**Attachments:** 01-06-09\_NRC\_Comments on Preliminary Draft Rule Language for Physical Protection of Byproduct Material (new 10 CFR Part 37).pdf; 01-06-09\_NRC\_Comments on Preliminary Draft Rule Language for Physical Protection of Byproduct Material (new 10 CFR Part 37)\_Enclosure.pdf

January 6, 2009

DOCKETED  
USNRC

January 6, 2009 (1:30pm)

Ms. Annette Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
ATTN: Rulemakings and Adjudications Staff

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**Subject:** Comments on Preliminary Draft Rule Language for Physical Protection of Byproduct Material (new 10 CFR Part 37)

**Project Number: 689**

Dear Ms. Vietti-Cook:

On behalf of licensees authorized to possess and use certain quantities of radioactive material, the Nuclear Energy Institute (NEI) offers the following comments in response to the November 19, 2008 Federal Register Notice (FRN) (69590 FR volume 73) regarding preliminary draft rule language for physical protection requirements. The industry comments contained herein were provided by NEI members and do not represent the full spectrum of comments and concerns that are likely to be submitted on a corresponding proposed rule. Also, we appreciate the early opportunity to provide input and understand that the U.S. Nuclear Regulatory Commission (NRC) will not respond directly to any comments received during this advanced phase of the rulemaking process.

The FRN provided preliminary draft rule language, for public comment, on a new 10 Code of Regulations Part 37 that would contain physical protection requirements for radioactive materials that meet the Category 1 or 2 quantity thresholds, as defined by the International Atomic Energy Agency and adopted by NRC. NEI appreciates NRC's effort to provide licensees, interested stakeholders and the public with early visibility of its efforts to promulgate security requirements applicable to the transportation of Category 1 and 2 quantities of radioactive materials. We also support the NRC's efforts to use rulemaking to codify necessary physical protection requirements rather than relying on the issuance of security Orders. As you are aware, the NRC process for issuing security orders does not afford the public or licensees the necessary level of transparency of the rulemaking process as required by the Administrative Procedures Act. In that regard, this is industry's first

opportunity to comment on existing transportation security requirements, some of which have been in effect since shortly after September 11, 2001, for Category 1 and 2 quantities of radioactive materials.

We offer the following general comments and enclosed specific comments on the preliminary Part 37 rule language, based on our experience to date, for your consideration as you draft a proposed rule for public comment.

- It is not clear why the NRC is creating a new 10 CFR Part 37 versus modifying existing 10 CFR Part 73 to codify current physical protection requirements. A new part may cause unnecessary confusion, particularly for licensees subject to both sets of security-related regulations.
- A fully implemented National Source Tracking System (NSTS) should provide NRC with significant information thereby potentially avoiding dual reporting of certain information by licensees. We encourage the NRC to eliminate any duplicative reporting requirements based on experience gained by NRC, the States and licensees nationwide with the recently deployed NSTS.
- Advance notification requirements should be consistent with the existing requirements for Highway Route Controlled Quantities of radioactive material.
- The roles of the licensee, carrier, shipper, NRC, other federal agencies, and the states need to be clarified with regard to the requirements for pre-planning, coordination and the transport of Category 1 and 2 materials to help ensure compliance.
- Certain terms currently in use need to be better defined or eliminated based on experience to date, e.g., the required timelines associated with event reporting need to allow for normal licensee prompt investigation since apparent losses are almost always rectified during the first 24 hours after identifying a package as not having reached its destination.

Equally important as the general and specific comments offered on the rule, it is not clear whether and to what degree the NRC has consulted with the U.S. Department of Homeland Security, the U.S. Department of Transportation, the U.S. Transportation Security Agency and the states in the advance planning of this rule. We strongly encourage the NRC to work with its federal and state partners to ensure that their respective roles are clearly articulated and reflected in the codification of any new or existing requirements imposed through the security orders. In that regard, it is our understanding that the NRC is in the process of developing a Memorandum of Understanding with its federal partners to help clarify their respective roles. We suggest that this effort be conducted prior to, or in parallel with, any related rulemaking efforts to ensure that any NRC requirements are not in conflict with other federal requirements. Finally, the industry and government coordinating councils on these security matters have relevant ongoing studies on the transport and security of Category 1 and 2 materials which should be fully considered during each phase of the rulemaking process.

We appreciate the opportunity to comment during this advanced phase of the rulemaking process and can assure you that licensees take their role, in the transportation security of Category 1 and 2 quantities of radioactive material to prevent a theft or diversion of such materials, very seriously. If you have any questions regarding the contents of this letter, please contact me at 202-739-8126 or [fmk@nei.org](mailto:fmk@nei.org).

Sincerely,

Felix M. Killar, Jr.

Senior Director, Fuel Supply/Material Licensees  
Nuclear Generation Division

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January 6, 2009

Ms. Annette Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
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ATTN: Rulemakings and Adjudications Staff

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(new 10 CFR Part 37)

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<sup>1</sup> NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

efforts to use rulemaking to codify necessary physical protection requirements rather than relying on the issuance of security Orders. As you are aware, the NRC process for issuing security orders does not afford the public or licensees the necessary level of transparency of the rulemaking process as required by the Administrative Procedures Act. In that regard, this is industry's first opportunity to comment on existing transportation security requirements, some of which have been in effect since shortly after September 11, 2001, for Category 1 and 2 quantities of radioactive materials.

We offer the following general comments and enclosed specific comments on the preliminary Part 37 rule language, based on our experience to date, for your consideration as you draft a proposed rule for public comment.

- It is not clear why the NRC is creating a new 10 CFR Part 37 versus modifying existing 10 CFR Part 73 to codify current physical protection requirements. A new part may cause unnecessary confusion, particularly for licensees subject to both sets of security-related regulations.
- A fully implemented National Source Tracking System (NSTS) should provide NRC with significant information thereby potentially avoiding dual reporting of certain information by licensees. We encourage the NRC to eliminate any duplicative reporting requirements based on experience gained by NRC, the States and licensees nationwide with the recently deployed NSTS.
- Advance notification requirements should be consistent with the existing requirements for Highway Route Controlled Quantities of radioactive material.
- The roles of the licensee, carrier, shipper, NRC, other federal agencies, and the states need to be clarified with regard to the requirements for pre-planning, coordination and the transport of Category 1 and 2 materials to help ensure compliance.
- Certain terms currently in use need to be better defined or eliminated based on experience to date, e.g., the required timelines associated with event reporting need to allow for normal licensee prompt investigation since apparent losses are almost always rectified during the first 24 hours after identifying a package as not having reached its destination.

Equally important as the general and specific comments offered on the rule, it is not clear whether and to what degree the NRC has consulted with the U.S. Department of Homeland Security, the U.S. Department of Transportation, the U.S. Transportation Security Agency and the states in the advance planning of this rule. We strongly encourage the NRC to work with its federal and state partners to ensure that their respective roles are clearly articulated and reflected in the codification of any new or existing requirements imposed through the security orders. In that regard, it is our understanding that the NRC is in the process of developing a Memorandum of Understanding with its federal partners to help clarify their respective roles. We suggest that this effort be conducted prior to, or in parallel with, any related rulemaking efforts to ensure that any NRC requirements are not in conflict with other

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Page 3

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Sincerely,



Felix M. Killar, Jr.

Enclosure

c: Ms. Merri Horn, U.S. Nuclear Regulatory Commission  
NRC Document Control Desk

## Specific Comments on the Preliminary Draft Language for Part 37 Physical Protection of Byproduct Material in Category 1 and Category 2 Quantities

### §37.3 – Definitions

1. Delete the term "safe haven" to be consistent with U.S. Department of Transportation (DOT) regulations.

Basis for change: DOT removed "safe haven" terminology from its radioactive material transportation requirements several years ago because it was not implementable, in that, specific locations identified as potential "safe havens" were not allowing transport vehicles on site, e.g., military installations.

2. If the term "safe haven" is retained in the regulations, include a definition in §37.3. Work with the states to identify potential safe haven locations, in advance of the final rule. Publish with the final rule a list of safe havens that have confirmed to the State their willingness to be listed as a "safe haven" for the purpose of this rule.

Basis for change: In the context of this rule an appropriate definition may be: *"A Safe Haven is a well lit and reasonably secure area such as a weigh station, law enforcement or fire department facility or interstate truck stop/travel center that has confirmed with the State its willingness to serve in this capacity for the purpose of this rule."*

The term "safe haven" is loosely defined by various agencies and states; in most cases, the licensee will not be provided a list of approved safe havens and may not be granted access to safe havens such as military installations. A definition alone is not adequate to ensure compliance with the rule; therefore, state coordination is needed.

3. Delete the term "readily" in the definition of lost or missing licensed material since it is subjective and could lead to inadvertent non-compliance by licensees.
4. Strengthen the definition of "No-later-than arrival time." Consider language such as: *"No-later-than arrival time means the date and time that the shipping licensee and receiving licensee have established as the time at which an investigation will be initiated if the shipment has not arrived at the receiving facility. The no-later-than arrival time should not be more than 24 hours later than the estimated arrival time, and may be adjusted during transit to account for travel conditions. For export shipments of Category 2 quantities, the receiving facility may be considered the airport/customs of the receiving country."*

Basis for change: The draft language does not include an enforceable parameter. The shipper and receiver could establish a no-later-than arrival time that an NRC inspector feels is too long. A 24-hour maximum time should be adequate to account for normal delays in transit. The N-L-T arrival time should be adjustable once the shipment begins if weather conditions or vehicle breakdowns would result in the shipment to miss the original N-L-T.

For export shipments of Category 2 quantities, the final transport to the end user is typically arranged by the final end user and not the shipper. As this takes place in other countries, it is outside the jurisdiction of the NRC. In addition, the shipper is usually not aware of these arrangements and therefore cannot readily determine final arrival at the end user facility.

**§37.99 – Additional requirements for transfer of category 1 quantities of radioactive material.**

1. Reword §37.99 (a) to read: "Before domestically transferring category 1 quantities of radioactive material, the licensee transferring the material shall verify with the license issuing authority (NRC, DOE or Agreement State) that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred and verify that the delivery address of the transferee is valid."

Basis for change: An NRC licensee should not be expected to consult directly with a foreign licensing agency; the specific import/export licensing requirements ensures that the foreign licensing agency authorizes the transfer of category 1 material to the foreign licensee.

2. General comment §37.99 (a) and (b) – It is not clear whether use of the National Source Tracking System (NSTS) Database would fulfill the verification of delivery address and licensee authorization. If so, then a statement as such should be included in §37.99 (a). If not, NRC should consider relying on NSTS to perform this function so as to avoid dual reporting of information.
3. Delete §37.99 (c).

Basis for change: The transferor is already required to contact the licensing authority in §37.99 (a); the licensing authority should make the determination as to whether or not the transferee can receive the source. In addition, the rule is unenforceable as written because it is subjective. "The transferor must verify with the transferee and the license issuing authority any unusual orders or changes that depart from historical patterns of ordering by an existing licensee customer. The transferor shall document the verification and keep a copy of the documentation as a record for 3 years." Unless the NRC defines the statement "any unusual orders or changes that depart from historical patterns" it is not clear how the licensee would know when this rule goes into effect. Also, it is not clear whether this is a percentage increase in activity or frequency and, if so, how much (e.g., 500% increase?). Finally, the shipper must verify the receiver's license prior to shipment, as long as those conditions are met, there should be no other action required.

**§37.101 – Physical protection of category 1 and category 2 quantities of radioactive material during transit.**

1. Delete § 37.101(d).

Basis for change: These regulations discuss "import" of category 1 and 2 materials and require compliance with § 37.103(a)(2); yet if the source is transported from overseas by

ship (which is not regulated by 10 CFR 37, Subpart D), it will be virtually impossible to meet § 37.103(a)(2)(ii, iii, and iv) requirements.

2. Modify §37.101 (d) and (e) – Add to the end of each paragraph, "... during the domestic portion of the shipment."

Basis for addition: This phrase clarifies that the physical protection requirements during transit pertain only to activities that occur in the U.S.

3. Add a paragraph to §37.101 that provides a mechanism for alternative methods of compliance as approved by the NRC.

Basis for addition: There are instances, particularly at the U.S.-Mexico border, where the carrier requirements and communication requirements cannot be met.

### **§37.103 – Preplanning and coordination of shipment of category 1 or 2 quantities of radioactive material**

1. Modify § 37.103(a)(1) and (b) to allow amendment of departure and arrival times when needed.

Basis for change: Unlike 10 CFR 71.97(e), there are no provisions for amending departure and arrival times due to unforeseeable acts (inclement weather, transport vehicle mechanical issues, etc.). As written, it appears that licensees would be expected to start including a date and time that can clearly be met rather than the "expected time" the shipment should arrive at its destination. Provisions should be added for amending departure and arrival times when needed similar to 10 CFR 71.97(e).

2. Recommend deleting §37.103(a)(2) in its entirety.

Basis for change: Preplanning a category 1 shipment with a governor or governor's designee would complicate the shipping logistics. Industry is very sensitive to the security concerns regarding category 1 shipments and has taken on a significant amount of responsibility in this regard. Industry believes category 1 shipments conducted under the security order supports the notion that the advanced notification of the shipment would provide sufficient time for the states to review the shipment and advise the licensee on any additional requirements or necessary changes in the route and schedule.

3. In addition to the recommendation to delete §37.103(a)(2) in its entirety, industry strongly opposes the requirement provided in §37.103(a)(2)(iii) – "arrange for positional information sharing when requested." This requirement should not be included in any of section of the proposed rule.

Basis for change: The language could be construed as meaning that a state should be able to log onto the carrier's tracking system. Taken in this context, this requirement could provide a mechanism for a state to block the transport of Category 1 material through the

state, if they cannot log onto the tracking system. There are several commercially available tracking systems for licensees to choose from; a state should not dictate which system a carrier uses so that the carrier can "share" position information.

4. In addition to the recommendation to delete §37.103(a)(2) in its entirety, if the language of §37.103(a)(2)(iv) - Identify Highway Route Control Quantity shipments and safe havens, is retained in some part of the rule, then clarification is necessary. Are safe havens only required for HRCQ shipments? Who is responsible for identifying safe havens, the State, the shipper or the carrier? If safe havens must be identified even if it is not an HRCQ shipment then separate HRCQ and safe havens into two separate paragraphs.

Basis for change: Language is confusing and could lead to inadvertent non-compliance as written.

5. Clarify § 37.103(a)(2)(i).

Basis for change: This section uses the term "minimal delay" which is ambiguous and subject to interpretation. A less ambiguous term should be used, or the term "minimal delay" should be clarified/defined in the rule language or related guidance documents.

6. Delete §37.103(b).

Basis for change: The NSTS should fulfill this requirement. Currently under the transport order for Category 2 shipments, the shipper is allowed to verify receipt by reviewing the carrier's tracking system which shows that the shipment arrived at its destination. This approach has been effective, and industry strongly recommends that this option be retained. This allows for an efficient and documented method for verifying receipt of the majority of shipments. If it is required to manually follow up on each individual shipment, this will result in an unjustified expenditure of resources without correspondingly increased safety and security. Also, it would not be in "real-time" due to delays in communication.

Also, it is not clear what is meant by "immediate notification" in paragraph (c) e.g., close of business or N-L-T as allowed by current order. The NRC's expectation on notification needs clearer definition and must take into account normal delays in communication.

7. Reword §37.103(c), that allows the licensee to utilize the NSTS, to read:  
"Each licensee who receives a shipment of a category 1 or category 2 quantity of radioactive material shall notify the shipping licensee of the arrival of the shipment at its destination. This notification may be made utilizing the NSTS database or other mechanism such as fax, phone or email."

Basis for change: For sources, the NSTS system will fulfill this requirement. Delete the term "immediately" or define the notification requirement as a period of time (see comment 8).

8. Modify § 37.103(c) to identify a specific time period, e.g., 3 hours.

Basis for change: This section requires that the licensee immediately notify the shipping licensee upon arrival of the package. 10 CFR 20.1906(c) allows up to a 3-hour delay in monitoring the package following arrival at the licensee's facility. There appears to be a disconnect between proposed 10 CFR 37.103(c) and 10 CFR 20.1906(c). Additionally, "immediately" is subject to interpretation: does it mean within 15 minutes, 30 minutes, etc.? 10 CFR 37.103(c) should be revised to identify a specific period (e.g., 3 hours) in which the notification must be made to resolve this apparent disconnect and remove any ambiguity. For example, wording similar to 10 CFR 20.1906(c) could be used; "... as soon as practical after receipt but not later than 3 hours after the package is received ..."

9. Add a documentation and retention requirement to §37.103.

Basis for addition: Documentation and retention of the preplanning and coordination efforts should be required.

**§37.105 – Advance notification of shipment of category 1 quantities of radioactive material.**

1. Revise the contact information list referenced in the opening paragraph that is available at <http://nrc-stp.ornl.gov/special/designee.pdf> to include a column for Part 37.

Basis for change: Ensures that the licensee is submitting a notification to the correct contact. Fax numbers and email addresses would be beneficial.

2. Clarify Paragraph §37.105(a)(3) to define "other means" – A notification delivered by any other means than mail, such as fax or email, must reach the office of the governor or the governor's designee at least 4 days before transport of a shipment within or through the state.

Basis for change: Provides clarification; also provides a fax number and email address for the NRC's Director, Division of Security Policy, Office of Nuclear Security and Incident Response.

3. Add New Paragraph §37.105(b)(4) – The route the shipment will take through each state. Renumber remaining paragraphs of §37.105(b) accordingly.

Basis for addition: Supports the requirement to provide the date and time the shipment is expected to enter each state along the "route" in the current §37.105(b)(4).

4. §37.105(c)(2) reword this paragraph to define "will not be met," allow for alternative methods aside from a telephone call to revise a notification and require a notification in the event of a route change. Language such as:

"Notify affected states and the NRC's Director, Division of Security Policy, Office of Nuclear Security and Incident Response of schedule delays in excess of 12 hours or changes in the route previously furnished to a governor or governor's designee, in accordance with this

section.”

Basis for change: The current Order defines “will not be met” as 6 hours. Industry feels that this is rather restrictive for long-haul shipments when you consider potential weather, road and traffic conditions. Under the existing Orders, licensees typically make revisions using the same method as the original notification and this appears to work well. The proposed rule should utilize the lessons learned through the implementation of the Order.

5. As a general comment for this section, the NRC should ensure that all proposed requirements are consistent with current requirements for HRCQ under Safeguards Information.

**§ 37.107 – Requirements for physical protection of category 1 and 2 quantities of radioactive material during shipment.**

1. Modify §37.107(a)(1)(i) from “movement control centers” to read “communication control centers.”

Basis for change: Maintain consistency with previous Orders.

2. Clarify § 37.107(a)(1)(ii). This section states, in part: “Alternate communications should not be subject to the same interference factors as the primary communication.” This statement is broad and subject to interpretation. If there must be two truly diverse means of communications, licensees should be allowed to take credit for the established package tracking systems that are required by § 37.107(2)(i) if duress signifies call Local Law Enforcement Agency or other emergency support.
3. Add a paragraph §37.107(a)(2)(iv) – Shipments transported as *Exclusive Use*, in accordance with Title 49 Code of Federal Regulations Part 173.441 are exempted from the requirements of §37.105(a)(2)(i) and (iii).

Basis for addition: Package tracking systems are necessary when a carrier handles multiple consignments on single vehicles and when packages traverse through delivery hubs. An exclusive use shipment removes the risk of lost or misdirected packages and would provide the same level of control as a package tracking system. This would also give the licensee the ability to transport their own category 1 materials.

4. § 37.107, quantities of radioactive materials described in Category 1 and Category 2 will generally be prohibited by aircraft. So, as discussed earlier, if any of these materials were to be “imported” as described in § 37.101(d) and (e); they would either have to come from North or South America or outside of North or South America by ship. § 37.107 does not provide regulatory guidance for shipping by waterway.

**§ 37.109 – Reporting of Events**

1. Clarify §37.109(a). Clarification is needed of the term “immediately” and the statement “determination that a shipment of category 1 radioactive material is lost or missing.” Can this be linked to the N-L-T delivery time? Should the licensee make an attempt to locate the shipment before considering it lost or missing?

Basis for change: Clarification is needed to ensure compliance and avoid inappropriate notifications.

2. Clarify §37.109(b). The same clarification is needed as in item 1 above. Provide some increment of time, i.e. 12 hrs to allow the licensee to locate the shipment before initially notifying the NRC.

Basis: Same as above.

General comment — Typically, if a shipment did not arrive as planned, licensees allow 24 hours for an internal investigation by the carrier to try and track a shipment down prior to any notification. Essentially, 99% of the time the paperwork has been separated from the shipment and they are found and matched up before the initial 24 hours is up; therefore no notification is done. If this internal process is not recognized and allowed, there will likely be many shipments reported as “missing” even though they are just unaccounted for in the transportation cycle for a period of time as part of routine shipments. This situation will result in many “false” reports made public, unnecessary panic and expenditure of resources and time for both the regulator and the shipper.

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