



NUCLEAR ENERGY INSTITUTE

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June 1, 2009

Ms. Merri Horn
Project Manager
Division of Intergovernmental Liaison and Rulemaking
Office of Federal and State Materials and Environmental Management Programs
U.S. Nuclear Regulatory Commission
MS T-8F-42
Washington, D.C. 20555-0001

Subject: Preliminary Draft Rule Language for Physical Protection of Byproduct Material (Proposed Part 37, Subpart B)

Project Number: 689

Dear Ms. Horn:

On behalf of the Nuclear Energy Institute (NEI),¹ whose members represent a wide variety of licensed nuclear facilities, the following comments on the preliminary draft rule language for the physical protection of certain byproduct material are submitted for your consideration as solicited in an April 17, 2009 *Federal Register* notice (FRN). We trust you will find these comments useful as you proceed to draft the proposed rule which will be issued for public comment. We appreciate this early opportunity to provide input into the rulemaking process.

In general, the preliminary draft rule language for the background investigation and access control requirements, proposed for Subpart B of the new Part 37, appears consistent with the security orders issued by the U.S. Nuclear Regulatory Commission (NRC) to licensees that possess aggregated quantities of Category 1 or Category 2 radioactive material. As noted in the FRN, this draft preliminary language is part of a three-pronged approach to promulgate NRC physical protection requirements for these materials. NEI submitted comments on the draft preliminary language for transportation requirements, which was issued for public comment in a November 10,

¹ 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.

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2008 FRN, and we plan to comment on the draft preliminary language for security requirements proposed for Subpart C of the new Part 37, as posted in a May 1, 2009 FRN with a due date of June 15, 2009. Obviously, we have considered the language in all three notices when developing the specific comments on draft Subpart B that are attached to this letter.

NRC should consider rescinding the standing security orders captured by this rulemaking once the final rule becomes effective to avoid duplication and misinterpretation of requirements by those subject to the rule and the public. If for some reason this approach is not feasible, NRC should include the following information in the proposed rule *Federal Register* notice: 1) a matrix to include the proposed language, its citation and origin (e.g., security order); and 2) a clear statement on whether the rule takes precedence over the previously issued NRC security orders and, if not, why not. Such an explanation is particularly important where conflicts exist between the rule and the security order, and the order currently in place is more restrictive than the rule. We need to avoid the situation that exists today with Part 73 where licensees are subject to both the rule and those requirements in the security orders that are more restrictive than the rule.

Finally, it should also be noted that a number of licensees appear to be subject to both Parts 37 and 73 since they operate offsite laboratories or support facilities. For example, a nuclear power plant or fuel-cycle facility is currently subject to Part 73 at the main facility but would be subject to Part 37 at its offsite laboratories and support facilities. This group of licensees should not be subject to two sets of requirements, particularly if there are conflicts between them. As such, the NRC should ensure that the Part 37 proposed definitions and requirements are consistent and not in conflict with existing Part 73 requirements or an exception should be granted that the more restrictive Part 73 requirements take precedence over the corresponding Part 37 requirements.

Again, we thank you for the early comment opportunity and look forward to reviewing the proposed rule during the public comment period. If you would like to discuss these comments further, please contact me or Janet Schlueter (202-739-8098; jrs@nei.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Felix M. Killar, Jr.", written in a cursive style.

Felix M. Killar, Jr.