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PR 37  
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NUCLEAR ENERGY INSTITUTE

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June 15, 2009

DOCKETED  
USNRC

Ms. Annette Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20006

June 16, 2009 (8:00am)  
OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**ATTN:** Rulemakings and Adjudications Staff

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

**Project Code:** 689

On behalf of the Nuclear Energy Institute (NEI),<sup>1</sup> 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 materials are submitted for your consideration as solicited in a May 1, 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 physical security requirements for use and storage of aggregate quantities of category 1 and category 2 radioactive material proposed for Subpart C of the new Part 37 appear consistent with the security orders issued by the U.S. Nuclear Regulatory Commission (NRC) to applicable licensees. 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 in a letter dated January 6, 2009 and comments on the draft preliminary language for background investigation and access control requirements proposed for Subpart B of the new Part 37 in a letter dated June 1, 2009. Obviously, we have considered the language in all three notices when developing the specific comments on draft Subpart C which are attached to this letter.

<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.

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Finally, as we stated in our June 1, 2009 letter on Subpart B of Part 37, it should 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,



Felix M. Killar, Jr.

Enclosure

c: Mr. Robert McDougall, U.S. Nuclear Regulatory Commission

## **Specific Comments on Preliminary Draft Rule Language for Part 37 Subpart C**

### **Section 37.3, "Definitions":**

As stated in NEI's comment letter dated June 1, 2009 on the preliminary rule language for Part 37 Subpart B, NRC should ensure that terms defined in Subpart C, which are also used in Subpart B but not defined there, do not negatively impact the intent of or conflict with Subpart B requirements. Examples of such terms are "approved individual" and "escorted access."

### **Section 37.1201, "Security Program":**

As stated in NEI's comment letter referenced above, clarification is needed on whether aggregation of radioactive material is intended to be captured by Part 37. Specifically, draft Subpart C uses the term "aggregated quantity" but Subpart B does not, e.g., 37.21. The regulatory approach in Subpart B and C should be consistent with regard to whether aggregated quantities are captured. Also, the previously issued security orders for category 1 and category 2 materials were applied to aggregated quantities of radioactive material that meet or exceed the Category 1 or 2 thresholds. If aggregate quantities are intended to be captured, conforming edits in at least one citation, e.g., 37.1201(d) should read, "each licensee that possesses *an aggregate quantity of category 1 or category 2 quantity of radioactive material.....*"

Item (a)(2). Clarification of the phrase, "until the licensee seeks to possess radioactive material..." Specifically, it is suggested that the phrase "before taking possession" be used consistent with the apparent intent of item (3) of this section and 37.21(a)(3) in Subpart B.

### **Section 37.1203, "General program requirements":**

Item (a)(2)(iii). This requirement states that the licensee should notify NRC and affected local law enforcement agencies within 6 months after a revision to the security program is made. NRC should consider adding a "significance threshold" for what types of program modifications warrant such notifications so that resources are not expended by all parties to track more minor, administrative changes that do not reach a certain security significance.

Item (c)(5). This item requires records of initial and supplemental training as required by Subpart F but there does not appear to be any requirement to conduct or record periodic refresher training. NRC should consider whether refresher training should be required and, if so, add appropriate requirements.

## Rulemaking Comments

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**From:** REED, Joseph [jsr@nei.org] on behalf of KILLAR, Felix [fmk@nei.org]  
**Sent:** Monday, June 15, 2009 4:13 PM  
**Subject:** Preliminary Draft Rule Language for Physical Protection of Byproduct Material (Proposed Part 37, Subpart C)  
**Attachments:** 06-15-09\_NRC\_Preliminary Draft Rule Language for Physical Protection of Byproduct Material (Proposed Part 37, Subpart C).pdf; 06-15-09\_NRC\_Preliminary Draft Rule Language for Physical Protection of Byproduct Material (Proposed Part 37, Subpart C)\_Enclosure.pdf

June 15, 2009

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In general, the preliminary draft physical security requirements for use and storage of aggregate quantities of category 1 and category 2 radioactive material proposed for Subpart C of the new Part 37 appear consistent with the security orders issued by the U.S. Nuclear Regulatory Commission (NRC) to applicable licensees. 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 in a letter dated January 6, 2009 and comments on the draft preliminary language for background investigation and access control requirements proposed for Subpart B of the new Part 37 in a letter dated June 1, 2009. Obviously, we have considered the language in all three notices when developing the specific comments on draft Subpart C which are attached to this letter.

Finally, as we stated in our June 1, 2009 letter on Subpart B of Part 37, it should 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](mailto:jrs@nei.org)).

Sincerely,

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