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January 18, 2011 (4:30 pm)

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATTN: Rulemakings and Adjudications Staff

Subject: Request for Public Comment on "Physical Protection of Byproduct Material; Proposed Rule" (75 FR 33902) and Draft Guidance Document (75 FR 40756); Docket Number NRC-2008-0120

Project Number: 689

Dear Ms. Vietti-Cook:

On behalf of the nuclear industry, the Nuclear Energy Institute (NEI)¹ appreciates the opportunity to provide both general and specific comments on the Commission's proposed rule and implementation guidance for Physical Protection of Byproduct Material, published in the *Federal Register* (FR) in June and July of 2010. We commend the staff on making available a draft guidance document that is informative, comprehensive, efficient in its format, and easy to follow. In addition to the points contained in this cover letter, Attachment 1 contains general comments and observations on the proposed rule and draft guidance, and Attachment 2 provides specific comments for the staff's consideration. In providing these comments, we have also addressed the questions raised in the FR notices. The industry is concerned with the proposed significant measures to enhance security, without an articulated safety and security risk reduction. This proposed rulemaking will have significant regulatory burden, does not appear to have a clear analytical basis, and does not conform to recent Commission direction regarding risk-based security provided in the draft Policy Statement on the Protection of Cesium-137 Chloride sources.

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

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The FR notices provided proposed rule language and implementation guidance, for public comment, on a new 10 Code of Federal Regulations (CFR) 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 the U.S. Nuclear Regulatory Commission (NRC). We support the NRC's efforts to use rulemaking to codify necessary physical protection requirements rather than continuing to rely on the previously issued security orders. Given that current requirements were issued by orders, this is industry's first opportunity to comment on existing byproduct materials security requirements, some of which have been in effect since shortly after September 11, 2001, for Category 1 and 2 quantities of radioactive materials.

On January 6, 2009, NEI submitted comments on preliminary draft rule language to the NRC. At that time, there were significant concerns within the industry regarding the practicality of some of the changes proposed in the new rule that extend beyond those contained in previously issued and implemented NRC security orders or compatible Agreement State requirements. Many of the concerns identified at that time still remain applicable to the proposed rule and guidance and were emphasized during the two public meetings the NRC conducted in September 2010. In addition, many byproduct materials licensees are small businesses that cannot continue to absorb the costs associated with the cumulative effects of various source security requirements. For example, the aggregate impacts on licensees to implement security orders, the National Source Tracking System and future license verification, are not considered in this rulemaking. In some cases, the annual costs to implement the requirements alone can exceed the annual license fees.

We offer the following fundamental points for your consideration which we elaborate on in the attachments to this letter:

- We believe the most efficient approach is for the NRC to conduct two separate rulemakings. Specifically, codify the existing orders into the regulations and then work with affected stakeholders in a deliberative and constructive manner to determine, based on risk, which elements of the current proposed rule that go beyond the current orders should be incorporated into a subsequent more risk-informed and performance based rulemaking.
- The NRC appears to be adopting a "one-size-fits-all approach" which is overly prescriptive and does not consider the relative risk and quantity of material possessed by the wide-range licensees that would be subject to this rule.
- We fully support the NRC's approach to terminate existing orders issued under common defense and security authority, coincident with the effective date of Part 37 (in each respective jurisdiction). This approach will help avoid potential confusion and non-compliance, as was experienced most recently with the 10 CFR Part 73 rulemaking to codify security orders.

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- The industry is concerned with the exceptionally high resource estimate noted in the draft Regulatory Analysis for implementation of the proposed rule which indicates that "there are no quantifiable values (i.e. Benefits) associated with this rule," and the qualitative benefits identified are essentially identical to the regulatory program in place today.
- As a matter of practice, the NRC should routinely share the technical basis for rulemaking with stakeholders, which in this case, it has not.
- Consistent with the Energy Policy Act of 2005, continued stakeholder input and involvement in this area is essential, and we request that the NRC allow substantive opportunities to engage industry over the next four years on the myriad of issues that the Congressionally mandated Radiation Source Protection and Security Task Force is addressing as we continue to work collectively toward our mutual safety and security objectives.

Should the NRC proceed to promulgate the current proposed rule, the NRC should consider conducting an additional public workshop prior to submitting the draft final rule and implementation guidance to the Commission for approval. The purpose would be to explain how the staff addressed and resolved the more major or controversial topics addressed in the public comments received, including comments from the Organization of Agreement States which have been previously raised and rejected by the NRC. The September 2008 workshop that the NRC conducted on the Security and Continued Use of Cesium-137 Chloride sources would serve as an excellent model for such a workshop.

Thank you for the opportunity to comment. Should you have any questions, please feel free to contact me or Andrew Mauer (202-739-8018; anm@nei.org).

Sincerely,



Janet R. Schlueter

Attachments

c: Ms. Cindy K. Bladley, ADM/DAS/RADB, NRC
Ms. Merri L. Horn, FSME/DILR/RB-B, NRC
Ms. Josephine M. Piccone, FSME/DILR, NRC

**General Comments on the Proposed Rule and Implementation Guidance for Part 37
Physical Protection of Byproduct Material in Category 1 and Category 2 Quantities**

Current Security is Strong and Effective

The United States is a world leader regarding physical protection and accountability of byproduct material. Over the last 8 years, the NRC, Agreement States and industry have taken significant actions to markedly enhance security of Category 2 and greater quantities of byproduct material and reduce the risk of terrorism involving these materials. These actions include background checks, enhanced physical barriers and intrusion detection, coordination with law enforcement, prompt notification of incidents, and closer monitoring of shipments. In addition to these controls, NRC and industry have effectively implemented the National Source Tracking System which maintains an up-to-date accounting of the more than 70,000 Category 1 and 2 sources in the country. NRC has indicated that these efforts have created a strong and effective regulatory framework that ensures a common baseline level of security to ensure adequate protection of public health and safety and the common defense and security. In addition to the regulatory requirements, industry has supported efforts of the National Nuclear Security Administration (NNSA) for implementing voluntary security enhancements at licensee facilities, which extend beyond regulatory requirements. In addition, Chairman Jaczko's recent Report to the President and Congress "The 2010 Radiation Source Protection and Security Task Force Report" highlights a significant number of initiatives beyond those mentioned above that further improves the security of these materials.

Basis for Proposed Enhancements is Unclear

The industry is concerned that NRC has not articulated an analytical basis, an explanation of the safety and security benefit, and the corresponding risk reduction. Industry understands that the NRC developed the existing performance-based security orders based upon the results of vulnerability assessments (which identified gaps or vulnerabilities in security and considered the cost and effectiveness of enhancements) and consideration of the threat environment, among other things, such as efforts within the international community. These considerations formed the safety and security basis for the existing orders which were developed using a performance-based and graded approach based on the relative risk and quantity of material possessed by licensees. Upon careful review of the proposed rule and guidance and through attendance at the public workshops, it does not appear that additional vulnerability assessments have been performed or there was a change in the threat environment to warrant "enhancements," or entirely new physical protection requirements for some licensees. It also appears that NRC is adopting a "one size fits all approach" that is overly prescriptive and does not consider the relative risk and quantity of material possessed by the wide range of licensees that would be subject to this rule. We believe the most efficient approach is for NRC to codify the existing orders into the regulations and then work with affected stakeholders in a deliberative and constructive manner to determine, based on risk, which elements of the proposed rule that go beyond the current orders should be incorporated into a subsequent, separate more risk-informed and performance based rulemaking.

This two part approach would be a major accomplishment for the NRC and would be consistent with NRC's Principles of Good Regulation. In addition, this approach would reflect the Commission's Staff Requirements Memorandum (SRM) on the draft policy statement on the protection of Cesium-137 Chloride sources (SRM for COMSECY-09-0029) which states that "any additional efforts to enhance security for these sources should consider whether there are benefits of further risk reduction given the NRC's actions to date and the current threat environment." Further, the draft Policy Statement which was approved by the Commission indicates that current security is adequate and states that current requirements are based on vulnerability assessments and follow the principles of the International Atomic Energy Agency Code of Conduct on the safety and security of sources.

We note that the NRC does not routinely share the technical basis for rulemakings with stakeholders. The NRC's website indicates that the staff was given permission from the Commission to share the technical basis for two rulemakings: "Unique Waste streams" and "Options to Revise Radiation Protection Regulations." In light of the lack of a clear articulated basis for this significant rulemaking, we believe that as a matter of practice, NRC should routinely share the technical basis for rulemaking with stakeholders. Providing the technical basis may have proven helpful for affected stakeholders to comment on this proposed rulemaking.

Patchwork Regulatory Approach

It appears that the NRC is adopting a patchwork regulatory approach in the promulgation of this proposed rule based on the following examples and we believe that each of these issues needs thorough consideration to ensure consistency in implementation.

Reviewing Official

The proposed rule modifies the process for assessing trustworthiness and reliability by employing a "reviewing official" concept. Industry understands that the reviewing official who would make trustworthiness and reliability determinations for the licensee (usually human resources personnel) would be required to have access to radioactive materials and undergo a fingerprinting and criminal history records check by the Federal Bureau of Investigation (FBI). The responsible regulatory agency would be responsible for adjudicating the results and making a trustworthiness and reliability determination solely on the basis of fingerprints. This approach requires avoidable and unnecessary access to radioactive materials by personnel who do not need access to perform their job responsibilities and is contrary to the As Low as Reasonably Achievable principle required by Part 20. Moreover, it encourages licensees who appoint reviewing officials who do not have a real need for access to radioactive material in light of their positions to certify that they do to meet the legal basis for fingerprinting.

While we understand that the basis for this change is to ensure that someone conducts a background check on the official making determinations in the company, fingerprinting alone is not a sufficient background investigation. Consequently, the proposed method of

implementation does not equate to the comprehensive process in place today to assess trustworthiness and reliability, as the review for the regulatory official only considers the fingerprint check, which does not contain sufficient information to approve an individual. Industry recommends that NRC continue to seek legislative changes to require the reviewing official to be fingerprinted without requiring them to have access to materials and re-consider the completeness of the background check to be conducted by the NRC or Agreement States.

Alternatively, as discussed in the public meeting, NRC should consider working with the FBI to develop a program modeled off of the Centers for Disease Control and Prevention (CDC) Select Agent Program, where the Federal Government conducts and adjudicates background checks for individuals with access to select agents. This type of program would ensure nationwide consistency in the implementation of background checks, relieve the licensees of a significant financial burden and liability, reduce the burden on the Agreement States, and provide a simplified means of trustworthy and reliable individuals to move from one facility to another. This is an example of an area where industry and the NRC could constructively work together through public meetings to find the most efficient and effective solution to address NRC's concern.

Applicability Beyond Byproduct Materials Licensees

The proposed rule indicates that the applicability extends beyond the byproduct materials licensees in 10 CFR Part 30, to fuel cycle, research and test reactor, power reactor, decommissioning reactor and source material licensees. Licensees whose activities involving the quantities of concern are covered under the physical protection requirements of 10 CFR Part 73 would be exempt from the requirements of 10 CFR Part 37 under §37.11. For example, a power reactor licensed under Part 50 that also possesses an industrial radiography source would not need to implement the Part 37 provisions if the source is protected under a Part 73 security program. As discussed during the public meetings, buildings on reactor sites which store radioactive waste are not typically covered under Part 73 and NRC indicated that these materials would be subject to Part 37. The NRC recently issued orders to decommissioning reactors to implement increased controls. This resulted in a number of exemption requests by licensees due to the diffuse nature and/or large volume of the material. For routine radioactive material storage facilities, the volume of the materials that would comprise a quantity in excess of Category 2 would occupy several semi-tractor trailer loads and exceed several thousand pounds. A limit associated with volume or weight of the aggregated quantity of material should be established such that exemption requests are not necessary and the security provisions of Part 37 would not apply. Industry is concerned that by casting a wide net beyond the true intent of the requirements will present a situation whereby certain categories of facilities are regulated through exemptions. If NRC conducts a vulnerability assessment and determines that there is a safety and security basis to warrant enhanced security for these somewhat diffuse and relatively low risk materials, a separate rulemaking should be conducted and tailored to the nature of these facilities.

Conforming Revision to Part 73 Needed

The Commission proposes to implement Part 37 under its public health and safety authority, which for some licensees represents a change in regulatory basis (previously under common defense and security authority) and a change in the regulatory agency (NRC vs. Agreement State) responsible for security inspections. The Commission does not propose to make needed conforming revisions to Part 73 at this time. Under the Part 37 proposed rule and existing requirements in Part 73, certain materials licensees would remain subject to the Safeguards Information requirements. The staff indicates in SECY-09-0181 that a future rulemaking to revise Part 73 is appropriate (i.e. removing the Safeguards Information handling requirements for licensees subject to Part 37), but is silent on the schedule for this rulemaking. Until such time that Part 73 can be amended to reflect this change, the NRC would remain responsible for inspections against the information handling/protection requirements, including licensees in Agreement States that were issued NRC Orders. In addition, it is not clear that the Part 73 conforming rulemaking is consistent with the staff plans communicated to the Commission in SECY-10-0148, with respect to variances between 10 CFR Part 73 and Commission security Orders. Industry recommends that conforming changes to Part 73 be included as part of the regulation development under Part 37, to ensure efficiency, clarity, and help ensure compliance.

Benefits not justified by the Costs

Industry is concerned with the exceptionally high NRC resource estimates noted in the draft Regulatory Analysis for the proposed rule which indicates that "there are no quantifiable values (i.e. Benefits) associated with this rule" and the qualitative benefits identified are essentially identical to the regulatory program in place today - the no action alternative. Therefore, the proposed rule provides essentially no qualitative or quantitative benefit beyond current regulatory requirements, at an NRC estimated cost (difference between pre-order and main analysis) to industry of approximately \$500-700 million. This is in addition to the approximately \$500 million NRC estimated costs borne by industry to implement existing security requirements. These costs are all in addition to the \$26 million that NNSA is spending to implement voluntary security enhancements at certain facilities. The very significant costs associated with these proposed additional requirements, in combination with the lack of any apparent improvement to safety or security, adversely impacts industry and the end consumers, who will face increased costs for many of the products and services they rely on which provide a direct and immediate benefit to public health and safety. Finally, it is not clear that NRC has considered the potential impacts to licensee safety programs, important research, and an increase in disused sources due to "deteriorating financial circumstances" (mentioned in SECY-10-0164) that may result from this rulemaking. Such an analysis, similar to what the NRC staff evaluated in the context of SECY-10-0008, would provide relevant information to the impacts of this rulemaking.

NEI is aware of one academic and research licensee that reviewed the proposed rule and based in part on the significant changes to current requirements and associated resource impacts, decided to shut down their irradiator from service. Also, many byproduct materials licensees are small

businesses that cannot continue to absorb the costs associated with the cumulative effects of various source security requirements. For example, the aggregate impacts on licensees to implement security orders, the National Source Tracking System and future license verification, are not considered in this rulemaking. In some cases, the annual costs to implement the requirements alone can exceed the annual license fees.

Regulatory Analysis Underestimates the Scope of Personnel Affected

The industry is concerned that the scope of the proposed rule is severely underestimated in the draft Regulatory Analysis. For example, the estimated industry costs assume an average of 10 individuals per facility and a total of 1,400 facilities will fall within the background investigation program. This estimate provides for 14,000 individuals subject to this program, however, NRC stated that as of April 2009, approximately 77,000 people have been fingerprinted for access to materials under the current Orders. In addition, it is unclear whether the regulatory analysis considered the cost impacts to all of the licensees the proposed rule is intended to cover such as fuel cycle, research and test reactor, power reactor, decommissioning reactor, and source material licensees. Before finalizing the Regulatory Analysis the staff should conduct public meetings to discuss the document and receive insights from affected stakeholders on their perspectives on its content.

Implementation

Should NRC proceed to finalize this rulemaking, industry proposes that the effective date of the rule be 365 days after publication of the final rule, to allow sufficient time for implementation and minimize impacts to safety and security. We also fully support the NRC's approach to terminate existing orders issued under common defense and security authority, coincident with the effective date (in each respective jurisdiction) of Part 37, to avoid potential confusion and non-compliance.

Continued Industry Interaction is Necessary

Continued industry input and involvement in this area is essential. Industry has supported joint Industry/Government security meetings through the Nuclear Sector Coordinating Council and Government Coordinating Council over the last several years, and has made valuable contributions toward the security of radioactive materials. Recently, discussions within that forum have indicated that the key materials security issues going forward are being integrated into the Congressionally mandated Radiation Source Protection and Security Task Force. Therefore, we request that the NRC provide substantive opportunities to engage industry over the next four years on the myriad of issues the Task Force is addressing as we continue to work collectively toward our mutual safety and security objectives.

**Specific Comments on the Proposed Rule and Implementation Guidance for Part 37
Physical Protection of Byproduct Material in Category 1 and Category 2 Quantities**

Subpart A GENERAL PROVISIONS

§37.1 – Purpose

The applicability of the rule and aggregated quantities of licensed materials needs clarification. For reactor and fuel cycle facilities that may store radioactive waste in interim waste storage facilities or radioactive materials outside a protected area there is not a limit associated with the physical size or volumes of the bulk quantities of radioactive material that would be considered in determining an aggregated quantity. Interim radioactive waste storage facilities could be expected to contain individual packages containing quantities of radioactive material exceeding a Category 2 classification and total quantities exceeding Category 1 classification.

Several issues with the applicability of the rule could be resolved by a revision to the applicability of the new Part 37. We propose that the NRC limit the applicability to exclude material that meet a criterion for a specific activity at which the risk is not of security concern. Future development of such a criterion could be informed by interactions with affected stakeholders.

Each package would generally be in heavily shielded concrete or steel overpacks that require a mobile crane for access and in containers weighing in excess of a thousand pounds. In addition, for routine radioactive material storage facilities, the volume of the materials that would comprise a quantity in excess of Category 2 would occupy several semi-tractor trailer loads and exceed several thousand pounds. A limit associated with specific activity per unit volume or weight of the aggregated quantity of material should be established such that exemption requests are not necessary and the security provisions would not apply.

The specific requirements for access to materials include the transport of Category 1 and 2 materials and should be consistent with 10 CFR Part 71 and 49 CFR 171 through 180.

§37.5 – Definitions

This section appears to be omitted from the guidance document. We recommend that all sections of the rule be included in the guidance document and commend NRC for the format of the document which is easy to use and should prove useful to licensees.

The definition of "aggregated" introduces the terms "common physical barrier" and "multiple sources of bulk material" which need clarification or their own definition to avoid potential compliance issues. For reactor and fuel cycle facilities that may store radioactive materials outside a protected area, it is unclear what constitutes an adequate physical barrier. For example, would a locked, six-foot chain-

link fence be adequate? Would an unlocked concrete container that could not be opened without the use of a mobile crane be adequate? If locks are required, what controls are required for the keys to such facilities? Additional definitions or guidance on this issue is needed.

As discussed above, for reactor and fuel cycle facilities that may store radioactive waste in interim waste storage facilities outside a protected area, there should be a limit associated with the physical size or volume of bulk material that would be considered in determining an aggregated quantity. Further, it is unclear whether NRC's use of the term "bulk material" aligns with DOT terminology for bulk packaging.

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. We recommend that NRC work with the states to identify potential safe haven locations, in advance of the final rule and 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.

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 to ensure intent meets practice. NRC should clearly define what "safe havens" are since many States do not recognize, identify, or acknowledge that they have such sites. 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.

The definition of "No-later-than arrival time" (N-L-T) should allow a 24-hour maximum time which 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.

§37.11(b) – Specific Exemptions

The explanation in the guidance should be modified to indicate that "licensees that protect Category 1 and 2 quantities of radioactive material under a Part 73 security program are exempt from the Part 37 requirements." The term "Part 73 security program" should be reflected throughout the proposed rule and guidance. This will provide flexibility to licensee security programs under Part 73 and accomplish NRC's security objectives.

The NRC should clearly articulate any applicability to licensees whose activities are covered under physical protection requirements of Part 73. For example, if Subpart D of Part 37 applies to such licensees, it should be made clear in the guidance.

Subpart B BACKGROUND INVESTIGATIONS AND ACCESS CONTROL PROGRAM

§37.21 – Personnel access authorization program requirements for category 1 or category 2 quantities of radioactive material

Paragraph (a)(2) should be clarified as to whether it is based on possession or authorized possession.

Paragraph (a)(3) states that the requirement of that section goes into effect 30 days after publication of the final rule. However, the Statements of Consideration provides that the rule does not go into effect until 270 days after publication. This discrepancy needs clarification.

Paragraph (b) of this rule provides that the performance objective is to prevent an unreasonable risk to the public health and safety or the common defense and security. However, the Statements of Consideration indicates that the basis for this rule is health and safety and not common defense and security. If under the rule, findings must be made concerning a person's risk for the common defense and security, it is unclear whether this rule can be implemented under a public health and safety basis.

The proposed rule provides relief to the investigation element of the access authorization if an individual has an active Federal security clearance. This relief should be extended to include other aspects of the authorized individual process. For example, requiring NRC approval for someone with a Federal security clearance to be a reviewing official does not appear to provide an increased benefit (37.23(b)(4) and 37.23(b)(5)). In addition, requiring a controlled list of authorized individuals who have access to Category 1 and 2 materials is more restrictive than for facilities that manage classified material and does not provide increased benefit.

Paragraph (c)(1) of this rule requires the licensee to include in their access authorization program individuals that are typically not employed by the licensee when Category 1 quantities of material are involved. The vehicle driver and accompanying individual(s) and movement control center personnel are typically employed by the carrier, and the access authorization program should be under the carrier's responsibility.

§37.23 – Access authorization program requirements

The proposed rule modifies the process for assessing trustworthiness and reliability by employing a "reviewing official" concept. Industry understands that the reviewing official who would make trustworthiness and reliability determinations for the licensee (usually human resources personnel) would be required to have access to radioactive materials and undergo a fingerprinting and criminal history records check by the Federal Bureau of Investigations (FBI). The responsible regulatory

agency would be responsible for adjudicating the results and making a trustworthiness and reliability determination solely on the basis of fingerprints. This approach requires avoidable and unnecessary access to radioactive materials by personnel who do not need access to perform their job responsibilities and is contrary to the As Low as Reasonably Achievable principle required by Part 20. Moreover, it encourages licensees who appoint reviewing officials who do not have a real need for access to radioactive material in light of their positions, to certify that they do to meet the legal basis for fingerprinting.

While we understand that the basis for this change is to ensure that someone conducts a check on the official making determinations in the company, fingerprinting alone is not a sufficient background investigation. Consequently, the proposed method of implementation does not equate to the comprehensive process in place today to assess trustworthiness and reliability, as the review for the regulatory official only considers the fingerprint check, which does not contain sufficient information to approve an individual. Industry recommends that NRC continue to seek legislative changes to require the reviewing official to be fingerprinted without requiring them to access materials and re-consider the completeness of the background check.

Alternatively, as discussed in the public meeting, NRC should consider working with the FBI to develop a program modeled off of the Centers for Disease Control and Prevention (CDC) Select Agent Program, where the Federal Government conducts and adjudicates background checks for individuals with access to select agents. This type of program would ensure nationwide consistency in the implementation of background checks, relieve the licensees of a significant financial burden and liability, reduce the burden on the Agreement States, and provide a simplified means of trustworthy and reliable individuals to move from one facility to another. This is an example of an area where industry and the NRC could constructively work together through public meetings to find the most efficient and effective solution.

§37.23(b) - This section specifically stipulates that fingerprints of the reviewing official "be taken by a law enforcement agency, Federal or State agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a state to take fingerprints." These three options seem arbitrarily restrictive. There does not appear to be a similar requirement concerning individuals fingerprinted for criminal history checks to grant unescorted access to Category 1 or 2 materials. For example, licensees subject to Part 73 have access authorization personnel perform fingerprinting at licensee facilities for background checks. In addition, the standards for approving a reviewing official are not clear since the regulatory agency will not be considering the full background investigation that the NRC has said, in the guidance for the proposed rule in 37.23, "is essential to ensure that individuals seeking unescorted access... are dependable in judgment, character, and performance such that ... does not constitute an unreasonable risk to the public health and safety or common defense and security." Also, it is unclear who reviews the background information on the reviewing official that is collected pursuant to §37.23 (b)(1).

§37.23(b)(3) and (4) - The requirement that reviewing officials cannot approve other individuals to be reviewing officials seems arbitrary. The reviewing official can approve unescorted access to Category 1 and 2 quantities of radioactive material. Since the intent of Part 37 is to prevent theft or diversion of radioactive material, access to the material seems more important from a security perspective than the functions of a reviewing official. Once a reviewing official is approved by the NRC or an Agreement State, they should be authorized to make trustworthiness and reliability determinations. Excluding this function for additional reviewing officials is not justified. If the intent is to maintain a listing of approved reviewing officials, this can be accomplished without the stipulations in this proposed rule, and would be further enhanced by the CDC model described above.

§37.23(c)(1) – In light of the grandfathering provision of §37.25 (b), it is not clear why the 4th sentence raises the consent issue for persons who have already been subject to a background investigation under the fingerprint orders.

§37.23(e)(2) – The NRC should provide criteria on what constitutes “disqualifying” information or remove the term from this section. The guidance provided with Q8/A8 for this section is not clear within the regulations.

§37.23(f) – For licensees subject to Part 73 with additional radioactive materials not covered by the Part 73 security plan, the procedures used for Part 73 background investigations, updating of background investigations, etc. should be considered adequate to meet the intent of Part 37.

§37.25 – Background Investigations

This rule is overly prescriptive and represents a significant increased burden to licensees without any apparent quantitative or qualitative benefit. This rule significantly expands the existing comprehensive background checks by adding verification of true identity, military history verification, local criminal history check, and a credit check. If the NRC proceeds with these additions and places the total responsibility on licensees, detailed adjudication criteria are necessary to implement a consistent national program. In addition, NRC should share with the Agreement States and licensees the specific and detailed adjudication criteria that it will use in approving reviewing officials.

Industry is very concerned with the credit checks required under the proposed rule as a gauge to assess trustworthiness and reliability. As other business sectors have experienced, credit check history results can have questionable accuracy. The degree of accuracy (or inaccuracy) coupled with the national economic climate where there are high unemployment rates and record numbers of home foreclosures, has negatively impacted many citizens’ credit histories, without a corresponding

degradation of trustworthiness and reliability. The increase in security added by this proposal is unclear.

Additional guidance is needed for the new requirement to check local criminal history records. For example, a person may live within the jurisdiction of multiple law enforcement agencies.

The requirement for employment history evaluation for the most recent 10 years is not consistent with and more restrictive than 10 CFR 26.61 requirements for employment history evaluation for the past 3 years and 10 CFR 73.56 employment history review and evaluation covering the past 3 years. Absent justification for this proposal, this section should be modified to perform employment history evaluations for the most recent 3 years.

§37.25(b) – Individuals determined trustworthy and reliable under Part 73 should also be grandfathered under these provisions.

§37.33 – Access authorization program review

The annual access authorization review should be changed. A reasonable frequency would be 36 months, as this area is not expected to change very often.

Facilities utilizing Federal security clearances should be exempted from this section.

Implementation Guidance for 10 CFR Part 37, Subpart B – Annex A, Process to Challenge NRC Denials or Revocation of Approval to be a Reviewing Official

The focus of this annex appears to be communication between the NRC and the individual nominated as a reviewing official. Information regarding communication between the NRC and the licensee or the individual and the licensee is not discussed. A licensee official, other than the individual nominated as a reviewing official, should be involved in these communications.

An individual is afforded 10 days to initiate an action challenging the results of an FBI criminal history records check. In consideration of holidays and weekends, we suggest revising this to 10 business days. Additionally, the licensee representative should initiate the challenging action at the request of the nominated individual.

Subpart C PHYSICAL PROTECTION REQUIREMENTS DURING USE

§37.41 – Security Program

The proposed rule places security requirements on licensees that do not possess but are authorized to possess Category 1 and 2 materials. It is unclear how the current requirements in this area are

ineffective, since licensees must implement a full security program before they possess Category 1 and 2 quantities. This new approach is inconsistent and seems to place an undue burden on licensees. §37.41(a) would ensure that licensees implement a security program based on actual possession.

§37.43 – General security program requirements

The proposed rule is overly prescriptive as it requires the development of a security plan and identifies the necessary information. Industry has already developed their security programs under current requirements, they have been inspected, and compliance has been verified. The benefits to safety and security for this requirement are unclear.

References to the security plan should be more specific, such as “Part 37 security plan” to avoid security plans required in other Parts of the regulations.

The proposed rule indicates that refresher training is required “at a frequency not to exceed 12 months.” Under this proposal, it would be our understanding that refresher training could be taken greater than 365 days from the previous training as long as it is taken within the same month of the succeeding year.

The proposed rule requires security programs to include a description of the environment, building or facility where radioactive material is stored or used. Many licensees use radioactive material in several different locations each day. Establishing and documenting a site specific security program (for sites that change daily such as pipeline locations) would require many companies to hire additional personnel and involve a significant amount of work without a commensurate improvement in security.

§37.45 – LLEA coordination and notification

The proposed rule adds requirements regarding interactions with local law enforcement agencies (LLEA). Coordination with LLEA was one of the most difficult areas to implement for the current security requirements and places responsibility on licensees for activities that they cannot control. This aspect of the proposed rule is not realistic and appears unenforceable. For example, it is not practical to expect that LLEA would notify a licensee that their response capabilities have become degraded and this provision should be removed. It is also unrealistic and unnecessary to require licensees to provide advance notification to LLEA of work at temporary jobsites. Simply put, there is insufficient information in the public domain to determine who the responsible LLEA is for a specific site (including overlapping jurisdictions for multiple LLEAs) and work at temporary jobsites often times requires that work be required the same day as the licensee is notified. A three-day advance notification is unworkable and risks safety of critical oil and gas infrastructure if work is not initiated promptly, and many times the timeframe to complete the work is unknown at the outset. Licensees

maintain communication abilities at temporary jobsites and call 911 in the event of an emergency – this is sufficient.

The goals and objectives of this section are admirable and an area where NRC should consider taking concerted efforts to engage law enforcement communities to improve situational awareness now, rather than waiting for feedback from licensees regarding potential LLEAs refusing to cooperate. NRC asked several questions in the FRN regarding benefits and periodicity for notifying LLEA of work at temporary jobsites, identification of the appropriate LLEA, and interest that LLEAs may have in receiving this information. Rather than asking industry to comment on this and speculate on these matters, NRC should consider an outreach campaign aimed at direct communications with these entities to better understand their perspectives regarding these issues.

§37.47 – Security Zones

The concept of security zones will be difficult to implement in the actual work environments for most of the types of licensees that would be subject to Part 37. Licensees have already developed security procedures under existing requirements and they have been inspected, and compliance has been verified. The benefits to safety and security for this requirement are unclear.

Clear criteria for applicability would be needed to implement this provision. For example, assume multiple high integrity containers, each inside a shield, stored inside a fenced common area which contains, in the aggregate, a category 1 or 2 quantity of radioactive material. The lid of a shielded container weighs at least 10 tons and is the only access to the shield. There is no crane in the area to lift the shield container lid. Establishing a security zone for the common storage area is required under this section, which is excessive.

Once a shipment of Category 1 or 2 radioactive material is prepared (DOT paperwork in possession of the driver) but still on a licensee's site, a temporary security zone cannot accompany the shipment until it physically exits the licensee's property or jobsite. Therefore, the NRC should clarify at what point the shipment is under DOT rules and not under Part 37.

§37.49 – Monitoring, detection, and assessment.

The continuous monitoring of security zones and detection capability is a significant additional cost without any benefit for Category 1 and Category 2 material that may be stored at a nuclear facility in a concrete mausoleum or within individual concrete vaults that require heavy equipment, such as a crane to access.

§37.51 – Maintenance, testing, and calibration

It is unclear what more is expected of licensees with respect to calibration, beyond maintenance and testing. NRC should clarify what is expected for compliance with this section. In addition, the timeframes for inspection and testing for operability and performance appear arbitrary and should be consistent with operational history and vendor recommendations.

§37.53 – Requirements for mobile devices

Relief from the vehicle disabling provisions should be provided on an as needed basis. Temporary jobsite work is often performed in dangerous environments and requirements to disable vehicles can oftentimes conflict with safety requirements, especially when a prompt evacuation of a work area is needed.

§37.55 – Security program review

This section introduces the term 'radioactive material security program' which should be clarified and consistently used in the regulations. The implementation guidance does not expand on this term in but rather discusses security program reviews.

§37.57 – Reporting of events

This proposed section should be consistent with other NRC notification requirements to ensure that multiple reports for the same event are not an unintended consequence.

Subpart D PHYSICAL PROTECTION IN TRANSIT

§37.71 – Additional requirements for the transfer of category 1 and category 2 quantities of radioactive material

Until such time that the NRC's license verification system is operational, demonstrated to be effective, and accessible to licensees without undue burden, this provision of the proposed rule should not be implemented as it will cause an unintended impact on regulators to respond to inquiries from licensees trying to comply and may negatively impact commerce. NRC should reflect lessons learned from the deployment of the National Source Tracking System and ensure that the system accessibility is straightforward and unintrusive, and set a performance goal that using the system will not take more time than other methods available to meet the proposed requirement.

Industry has identified several potential challenges to implementing this proposed revision. For example, implementation of this provision for larger manufacturers prior to a successful deployment of the license verification system, will result in significant delays and/or cancelled shipments due to projected instances where licensees will be unable to contact the regulatory authority due to unavailability of personnel. In addition, it is unclear how the proposed rule will work at temporary

jobsites, especially those in rural or remote areas. Adding an address verification requirement for Category 2 quantities in these instances would be particularly difficult, if not impossible. The proposed rule would also be difficult to implement for licenses which do not always have individual building addresses (e.g. broad scope licensees). Additional guidance and flexibility is needed to address the myriad of challenges presented by this new proposed requirement. If NRC proceeds with this section of the rule, there should be built in flexibility so licensees do not need to repeatedly seek verification from the regulators (or LVS) for repeat transactions – an annual check would be sufficient.

Finally, this requirement appears to duplicate the transfer requirements under 10 CFR 30.41. Licensees should be exempted from 30.41 if they have Category 1 or 2 quantities and follow Part 37. This is an example of an area where industry and the NRC could constructively work together through public meetings to find the most efficient and effective solution to address NRC's concern.

§37.75 – Preplanning and coordination of shipment of category 1 or category 2 quantities of radioactive material

We recommend deleting § 37.75 (a). Preplanning and coordinating 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 fulfilled its significant 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. In addition, if this provision remains, it is incumbent upon NRC to ensure that references it maintains with relevant contact information be accurate and up-to-date. Alternatively, advance notifications to a governor or governor's designee could be made through the NRC Operations Center.

Industry opposes the requirement provided in §37.75(a)(2)(iii) – "arrange for positional information sharing when requested." 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.

Section § 37.75(a)(2)(i) needs clarification as the term "minimal delay" is ambiguous and subject to interpretation. Because of this ambiguity, there is little or no value added given the requirement to coordinate with local law enforcement. We propose that 37.75(a)(2)(i) at a minimum be clarified or deleted.

We recommend that the rule language or guidance relative to §37.75(b) & (c) be reworded to allow licensees to utilize the National Source Tracking System as a method to fulfill the notification requirement.

There appears to be an editorial error in section 37.75(d) which references 37.75(a)(1). The appropriate reference should be 37.75(b).

The proposal to include a "no-later-than" arrival time places a prescriptive requirement on licensees for activities outside of their control. Once a shipment is given to a carrier the routes and delays are the responsibility of the carrier. Licensees routinely monitor the status of shipments and notify both the carrier and the regulatory agency if a shipment does not arrive within a reasonable timeframe. The regulations should specify what is required and not how to achieve it; this will avoid making the system fail and unnecessarily subjecting the regulated community to essentially irrelevant non-compliances.

§37.77 – Advance notification of shipment of category 1 quantities of radioactive material

We recommend that §37.77(a)(3) be clarified 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.

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

We recommend that §37.79(a)(1)(i) be modified to change "movement control centers" to read "communication control centers." This will maintain consistency with previous Orders.

An exemption from the requirements of §37.79 should be added for shipments transported as *Exclusive Use*, in accordance with Title 49 Code of Federal Regulations Part 173.441. 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.

Additional Comments

Reporting Suspicious Activities

The FRN requested comments on a proposal to require reporting of suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material

to NRC and LLEA. We believe that suspicious activities should be reported, are being reported, and should continue to be reported on a voluntary basis. The principal issue with requiring it in the regulations is its enforceability, given the subjective nature of this topic.

Document Retention

The proposed rule requires documentation retention for 5 years. NRC discussed the 5-year information retention requirements for this section and others at the public meetings and indicated the rationale was to ensure documentation was available for inspection, which for some licensees is every 5 years. However, many licensees are inspected much more frequently and this retention is onerous and inconsistent with other regulatory requirements. For example, 49 CFR 172.201(e) requires record retention for 3 years for hazardous waste and 2 years for other hazardous material shipments. Industry recommends that throughout the proposed rule, NRC link documentation retention requirements to the inspection frequency in Inspection Manual Chapter 2800, which would appear to meet NRC objectives and remove unnecessary regulatory burden.

Regulatory Consistency

The proposed regulations should be consistent with existing NRC regulations related to radioactive materials, should not duplicate any existing requirements, and should not rely on the general statements of "notwithstanding the requirements of any other regulations in this chapter."

Rulemaking Comments

From: REED, Joseph [jsr@nei.org] on behalf of SCHLUETER, Janet [jrs@nei.org]
Sent: Tuesday, January 18, 2011 4:13 PM
Subject: Request for Public Comment on "Physical Protection of Byproduct Material; Proposed Rule" (75 FR 33902) and Draft Guidance Document (75 FR 40756); Docket Number NRC-2008-0120
Attachments: 01-18-11_NRC_Request for Comment on Proposed Part 37.pdf; 01-18-11_NRC_Request for Comment on Proposed Part 37_Attachment 1.pdf; 01-18-11_NRC_Request for Comment on Proposed Part 37_Attachment 2.pdf

January 18, 2011

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

Subject: Request for Public Comment on "Physical Protection of Byproduct Material; Proposed Rule" (75 FR 33902) and Draft Guidance Document (75 FR 40756); Docket Number NRC-2008-0120

Project Number: 689

Dear Ms. Vietti-Cook:

On behalf of the nuclear industry, the Nuclear Energy Institute (NEI) appreciates the opportunity to provide both general and specific comments on the Commission's proposed rule and implementation guidance for Physical Protection of Byproduct Material, published in the *Federal Register* (FR) in June and July of 2010. We commend the staff on making available a draft guidance document that is informative, comprehensive, efficient in its format, and easy to follow. In addition to the points contained in this cover letter, Attachment 1 contains general comments and observations on the proposed rule and draft guidance, and Attachment 2 provides specific comments for the staff's consideration. In providing these comments, we have also addressed the questions raised in the FR notices. The industry is concerned with the proposed significant measures to enhance security, without an articulated safety and security risk reduction. This proposed rulemaking will have significant regulatory burden, does not appear to have a clear analytical basis, and does not conform to recent Commission direction regarding risk-based security provided in the draft Policy Statement on the Protection of Cesium-137 Chloride sources.

The FR notices provided proposed rule language and implementation guidance, for public comment, on a new 10 Code of Federal Regulations (CFR) 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 the U.S. Nuclear Regulatory Commission (NRC). We support the NRC's efforts to use rulemaking to codify necessary physical protection requirements rather than continuing to rely on the previously issued security orders. Given that current requirements were issued by orders, this is industry's

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

On January 6, 2009, NEI submitted comments on preliminary draft rule language to the NRC. At that time, there were significant concerns within the industry regarding the practicality of some of the changes proposed in the new rule that extend beyond those contained in previously issued and implemented NRC security orders or compatible Agreement State requirements. Many of the concerns identified at that time still remain applicable to the proposed rule and guidance and were emphasized during the two public meetings the NRC conducted in September 2010. In addition, many byproduct materials licensees are small businesses that cannot continue to absorb the costs associated with the cumulative effects of various source security requirements. For example, the aggregate impacts on licensees to implement security orders, the National Source Tracking System and future license verification, are not considered in this rulemaking. In some cases, the annual costs to implement the requirements alone can exceed the annual license fees.

We offer the following fundamental points for your consideration which we elaborate on in the attachments to this letter:

- We believe the most efficient approach is for the NRC to conduct two separate rulemakings. Specifically, codify the existing orders into the regulations and then work with affected stakeholders in a deliberative and constructive manner to determine, based on risk, which elements of the current proposed rule that go beyond the current orders should be incorporated into a subsequent more risk-informed and performance based rulemaking.
- The NRC appears to be adopting a “one-size-fits-all approach” which is overly prescriptive and does not consider the relative risk and quantity of material possessed by the wide-range licensees that would be subject to this rule.
- We fully support the NRC’s approach to terminate existing orders issued under common defense and security authority, coincident with the effective date of Part 37 (in each respective jurisdiction). This approach will help avoid potential confusion and non-compliance, as was experienced most recently with the 10 CFR Part 73 rulemaking to codify security orders.
- The industry is concerned with the exceptionally high resource estimate noted in the draft Regulatory Analysis for implementation of the proposed rule which indicates that “there are no quantifiable values (i.e. Benefits) associated with this rule,” and the qualitative benefits identified are essentially identical to the regulatory program in place today.
- As a matter of practice, the NRC should routinely share the technical basis for rulemaking with stakeholders, which in this case, it has not.
- Consistent with the Energy Policy Act of 2005, continued stakeholder input and involvement in this area is essential, and we request that the NRC allow substantive opportunities to engage industry over the next four years on the myriad of issues that the Congressionally mandated Radiation Source Protection and Security Task Force is addressing as we continue to work collectively toward our mutual safety and security objectives.

Should the NRC proceed to promulgate the current proposed rule, the NRC should consider conducting an additional public workshop prior to submitting the draft final rule and implementation guidance to the Commission for approval. The purpose would be to explain how the staff addressed and resolved the more

major or controversial topics addressed in the public comments received, including comments from the Organization of Agreement States which have been previously raised and rejected by the NRC. The September 2008 workshop that the NRC conducted on the Security and Continued Use of Cesium-137 Chloride sources would serve as an excellent model for such a workshop.

Thank you for the opportunity to comment. Should you have any questions, please feel free to contact me or Andrew Mauer (202-739-8018; anm@nei.org).

Sincerely,

Janet R. Schlueter
Director, Fuel and Materials Safety

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Sender: "REED, Joseph" <jsr@nei.org>

Date: Tue, 18 Jan 2011 16:12:38 -0500

Subject: Request for Public Comment on "Physical Protection of Byproduct
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Thread-Topic: Request for Public Comment on "Physical Protection of
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Document (75 FR 40756); Docket Number NRC-2008-0120

Thread-Index: Acu3VG+zL0m+zTMiQ+eXFeDc28J7DA==

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