

Adopt He-P 4038 to read as follows:**PART He-P 4038 THE PHYSICAL PROTECTION OF CATEGORY 1 AND CATEGORY 2 QUANTITIES OF RADIOACTIVE MATERIAL**

He-P 4038.01 Purpose. The purpose of this rule is to set forth the requirements for the physical protection program for any licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material listed in Table 4038.1 in this section. These requirements provide reasonable assurance of the security of category 1 or category 2 quantities of radioactive material by protecting these materials from theft or diversion. Specific requirements for access to material, use of material, transfer of material, and transport of material are included. No provision of this part authorizes possession of licensed material.

He-P 4038.02 Scope.

(a) He-P 4038.07 through He-P 4038.22 apply to any person who, under the regulations in He-P 4038, possesses or uses at any site, an aggregated category 1 or category 2 quantity of radioactive material.

(b) He-P 4038.23 through He-P 4038.28 applies to any person who, under the regulations of He-P 4038:

(1) Transports or delivers to a carrier for transport in a single shipment, a category 1 or category 2 quantity of radioactive material; or

(2) Imports or exports a category 1 or category 2 quantity of radioactive material; the provisions only apply to the domestic portion of the transport.

He-P 4038.03 Definitions. As used in in He-P 4038:

(a) "Access control" means a system for allowing only approved individuals to have unescorted access to the security zone and for ensuring that all other individuals are subject to escorted access.

(b) "Aggregated" means accessible by the breach of a single physical barrier that would allow access to radioactive material in any form, including any devices that contain the radioactive material, when the total activity equals or exceeds a category 2 quantity of radioactive material.

(c) "Approved individual" means an individual whom the licensee has determined to be trustworthy and reliable for unescorted access in accordance with He-P 4038.07 through 4038.13 and who has completed the training required by He-P 4038.15(c).

(d) "Background investigation" means the investigation conducted by a licensee or applicant to support the determination of trustworthiness and reliability and that includes at a minimum, a personal history information disclosure, and Federal Bureau of Investigation (FBI) fingerprint and criminal history record checks.

(e) "Carrier" means a person engaged in the transportation of passengers or property by land or water as a common, contract, or private carrier, or by civil aircraft.

(f) “Category 1 quantity of radioactive material” means a quantity of radioactive material meeting or exceeding the category 1 threshold in Table 4038.1 in He-P 4038. This is determined by calculating the ratio of the total activity of each radionuclide to the category 1 threshold for that radionuclide and adding the ratios together. If the sum is equal to or exceeds 1, the quantity would be considered a category 1 quantity. Category 1 quantities of radioactive material do not include the radioactive material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet.

(g) “Category 2 quantity of radioactive material” means a quantity of radioactive material meeting or exceeding the category 2 threshold but less than the category 1 threshold in Table 4038.1 in He-P 4038. This is determined by calculating the ratio of the total activity of each radionuclide to the category 2 threshold for that radionuclide and adding the ratios together. If the sum is equal to or exceeds 1, the quantity would be considered a category 2 quantity. Category 2 quantities of radioactive material do not include the radioactive material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet.

(h) “Diversion” means the unauthorized movement of radioactive material subject to this part to a location different from the material's authorized destination inside or outside of the site at which the material is used or stored.

(i) “DHHS/RHS” means the state of New Hampshire Department of Health and Human Services/Radiological Health Section.

(j) “Escorted access” means accompaniment while in a security zone by an approved individual who maintains continuous direct visual surveillance at all times over an individual who is not approved for unescorted access.

(k) “Fingerprint orders” means the legally binding requirements issued by DHHS/RHS, an agreement state, or the Nuclear Regulatory Commission that require fingerprints and criminal history records checks for individuals with unescorted access to category 1 and category 2 quantities of radioactive material or safeguards information-modified handling.

(l) “License”, except where otherwise specified, means a license for byproduct material issued pursuant to the rules in He-P 4030 through He-P 4036 and He-P 4039;

(m) “License issuing authority” means the licensing agency that issued the license, i.e. DHHS/RHS, the appropriate agency of an agreement state, or the Nuclear Regulatory Commission;

(n) “Local law enforcement agency” (LLEA)” means a public or private organization that has been approved by a federal, state, or local government to carry firearms and make arrests, and is authorized and has the capability to provide an armed response in the jurisdiction where the licensed category 1 or category 2 quantity of radioactive material is used, stored, or transported.

(o) “Mobile device” means a piece of equipment containing licensed radioactive material that is either mounted on wheels or casters, or otherwise equipped for moving without a need for disassembly or dismantling; or designed to be hand carried. Mobile devices do not include stationary equipment installed in a fixed location.

(p) “Movement control center” means an operations center that is remote from transport activity and that maintains position information on the movement of radioactive material, receives reports of

attempted attacks or thefts, provides a means for reporting these and other problems to appropriate agencies and can request and coordinate appropriate aid.

(q) “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 may not be more than 6 hours after the estimated arrival time for shipments of category 2 quantities of radioactive material.

(r) “Non-agreement state” means any state that has not entered into an effective agreement under subsection 274b. of the Atomic Energy Act of 1954, as Amended (73 Stat. 689).

(s) “Person” means:

(1) Person as defined in RSA 125-F:3, XII; and

(2) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Nuclear Regulatory Commission or the DOE, except that the DHHS/RHS shall be considered a person within the meaning of the regulations in 10 CFR chapter I to the extent that its facilities and activities are subject to the licensing and related regulatory authority of the Nuclear Regulatory Commission under section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), the Uranium Mill Tailings Radiation Control Act of 1978 (92 Stat. 3021), the Nuclear Waste Policy Act of 1982 (96 Stat. 2201), and section 3(b)(2) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (99 Stat. 1842), any state or any political subdivision of or any political entity within a state, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and

(3) Any legal successor, representative, agent, or agency of the foregoing.

(t) “Reviewing official” means the individual authorized by the licensee who shall make the trustworthiness and reliability determination of an individual to determine whether the individual may have, or continue to have, unescorted access to the category 1 or category 2 quantities of radioactive materials that are possessed by the licensee.

(u) “Sabotage” means deliberate damage, with malevolent intent, to a category 1 or category 2 quantity of radioactive material, a device that contains a category 1 or category 2 quantity of radioactive material, or the components of the security system.

(v) “Safe haven” means a readily recognizable and readily accessible site at which security is present or from which, in the event of an emergency, the transport crew can notify and wait for the local law enforcement authorities.

(w) “Security zone” means any temporary or permanent area determined and established by the licensee for the physical protection of category 1 or category 2 quantities of radioactive material.

(x) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(y) “Telemetric position monitoring system” means a data transfer system that captures information by instrumentation and/or measuring devices about the location and status of a transport vehicle or package between the departure and destination locations.

(z) “Trustworthiness and reliability” are characteristics of an individual considered dependable in judgment, character, and performance, such that unescorted access to category 1 or category 2 quantities of radioactive material by that individual does not constitute an unreasonable risk to the public health and safety or security. A determination of trustworthiness and reliability for this purpose is based upon the results from a background investigation.

(aa) “Unescorted access” means solitary access to an aggregated category 1 or category 2 quantities of radioactive material or the devices that contain the material.

He-P 4038.04 Communications. All communications and reports concerning the rules in He-P 4038 shall be sent as follows:

(a) By mail addressed to: ATTN: Radioactive Materials Manager, DHHS/Radiological Health Section, 29 Hazen Drive, Concord, NH 03301-6504; or

(b) By hand, delivery to the above address.

He-P 4038.05 Interpretations. Except as specifically authorized by DHHS/RHS in writing, no interpretation of the meaning of He-P 4038 by any officer or employee of DHHS/RHS other than a written interpretation by the Attorney General’s Office shall be recognized as binding upon DHHS/RHS.

He-P 4038.06 Specific Exemptions.

(a) The DHHS/RHS may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the rules in He-P 4038 as it determines are authorized by law and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

(b) Any licensee's, DHHS/RHS, or NRC-licensed activities are exempt from the requirements of He-P 4038.07 through He-P 4038.22 to the extent that the activities are included in a security plan required by He-P 4038 or the Nuclear Regulatory Commission in accordance with 10 CFR 73.

(c) A licensee that possesses radioactive waste that contains category 1 or category 2 quantities of radioactive material is exempt from the requirements of He-P 4038.07 through He-P 4038.28 of this part. Except that any radioactive waste that contains discrete sources, ion-exchange resins, or activated material that weighs less than 2,000 kg (4,409 lbs.) is not exempt from the requirements of this part. The licensee shall implement the following requirements to secure the radioactive waste:

(1) Use continuous physical barriers that allow access to the radioactive waste only through established access control points;

(2) Use a locked door or gate with monitored alarm at the access control point;

(3) Assess and respond to each actual or attempted unauthorized access to determine whether an actual or attempted theft, sabotage, or diversion occurred; and

(4) Immediately notify the LLEA and request an armed response from the LLEA upon determination that there was an actual or attempted theft, sabotage, or diversion of the radioactive waste that contains category 1 or category 2 quantities of radioactive material.

He-P 4038.07 Personnel Access Authorization Requirements for Category 1 or Category 2 Quantities of Radioactive Material.

(a) Any licensee or applicant:

(1) That possesses an aggregated quantity of radioactive material at or above the category 2 threshold shall establish, implement, and maintain an access authorization program in accordance with the requirements of He-P 4038.07 through He-P 4038.13;

(2) That becomes newly subject to the requirements of He-P 4038.07 through He-P 4038.13 upon application for modification of its license shall implement the requirements of He-P 4038, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material; or

(3) That has not previously implemented the security orders or been subject to the requirements in He-P 4038.07 through He-P 4038.13 shall implement the provisions of He-P 4038.07 through He-P 4038.13 before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(b) The licensee's access authorization program shall ensure that the individuals specified in He-P 4038.07(c)(1) and (c)(2) are trustworthy and reliable.

(c) Licensees shall subject the following individuals to the access authorization program:

(1) Any individual whose assigned duties require unescorted access to category 1 or category 2 quantities of radioactive material or to any device that contains the radioactive material; and

(2) All reviewing officials.

(d) Licensees are not required to subject the categories of individuals listed in He-P 4038.11(a)(1) through (a)(13) to the investigation elements of the access authorization program.

(e) Licensees shall approve for unescorted access to category 1 or category 2 quantities of radioactive material only those individuals with job duties that require unescorted access to category 1 or category 2 quantities of radioactive material.

(f) Licensees shall include individuals needing access to safeguards information-modified handling under He-P 4038 in the access authorization program under He-P 4038.07 through He-P 4038.13.

He-P 4038.08 Access Authorization Program Requirements.

(a) Licensees shall implement the requirements of He-P 4038.07 through He-P 4038.13 for granting initial or reinstated unescorted access authorization.

(b) Individuals who have been determined to be trustworthy and reliable shall also complete the security training required by He-P 4038.15(c) before being allowed unescorted access to category 1 or category 2 quantities of radioactive material.

(c) Reviewing officials are the only individuals who may make trustworthiness and reliability determinations that allow individuals to have unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee.

(d) Each licensee shall name one or more individuals to be reviewing officials. After completing the background investigation on the reviewing official, the licensee shall provide under oath or affirmation, a certification that the reviewing official is deemed trustworthy and reliable by the licensee. The fingerprints of the named reviewing official must be taken by a law enforcement agency, Federal or state agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by New Hampshire to take fingerprints. The licensee shall recertify that the reviewing official is deemed trustworthy and reliable every 10 years in accordance with He-P 4038.09(d).

(e) Reviewing official shall:

(1) Be permitted to have unescorted access to category 1 or category 2 quantities of radioactive materials or access to safeguards information or safeguards information-modified handling, if the licensee possesses safeguards information or safeguards information-modified handling;

(2) Not approve other individuals to act as reviewing officials;

(3) Not need to undergo a new background investigation before being named by the licensee as the reviewing official if:

a. The individual has undergone a background investigation that include fingerprinting and an FBI criminal history records check and has been previously determined to be trustworthy and reliable by the licensee; or

b. The individual is subject to a category listed in He-P 4038.11(a).

(f) Licensees shall not initiate a background investigation without the informed and signed consent of the subject individual. This consent shall include authorization to share personal information with other individuals or organizations as necessary to complete the background investigation. Before a final adverse determination, the licensee shall provide the individual with an opportunity to correct any inaccurate or incomplete information that is developed during the background investigation. Licensees shall not need to obtain signed consent from those individuals that meet the requirements of He-P 4038.09(b). A signed consent must be obtained prior to any reinvestigation.

(g) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(1) If an individual withdraws his or her consent, the licensee may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent; and

(2) The withdrawal of consent for the background investigation is sufficient cause for denial or termination of unescorted access authorization.

(h) Any individual who is applying for unescorted access authorization shall disclose the personal history information that is required by the licensee's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by this He-P 4038.07 through He-P 4038.13 is sufficient cause for denial or termination of unescorted access.

(i) The reviewing official shall:

(1) Determine whether to permit, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access authorization based on an evaluation of all of the information collected to meet the requirements of He-P 4038.07 through He-P 4038.13;

(2) Not permit any individual to have unescorted access until the reviewing official has evaluated all of the information collected to meet the requirements of He-P 4038.07 through He-P 4038.13 and determined that the individual is trustworthy and reliable. The reviewing official may deny unescorted access to any individual based on information obtained at any time during the background investigation;

(3) Document the basis for concluding whether or not there is reasonable assurance that an individual is trustworthy and reliable;

(4) Shall terminate or administratively withdraw an individual's unescorted access authorization based on information obtained after the background investigation has been completed and the individual granted unescorted access authorization; and

(5) Maintain a list of persons currently approved for unescorted access authorization. When a licensee determines that a person no longer requires unescorted access or meets the access authorization requirement, the licensee shall remove the person from the approved list as soon as possible, but no later than 7 working days, and take prompt measures to ensure that the individual is unable to have unescorted access to the material.

(j) Licensees shall develop, implement, and maintain written procedures for implementing the access authorization program. The procedures shall include:

(1) Provisions for the notification of individuals who are denied unescorted access. The procedures must include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization; and

(2) Provision to ensure that the individual is informed of the grounds for the denial or termination of unescorted access authorization and allow the individual an opportunity to provide additional relevant information.

(k) Prior to any final adverse determination, licensees shall provide:

- (1) Each individual subject to He-P 4038.07 through He-P 4038.13 with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation;
 - (2) A confirmation of receipt by the individual of this notification to be maintained by the licensee for a period of 1 year from the date of the notification;
 - (3) Each individual with an opportunity to make revisions, corrections, updates to, or explanations of information in his or her criminal history record, if the individual believes it is incorrect or incomplete in any respect. The individual may initiate a challenge which shall include:
 - a. A direct application by the individual challenging the record to the law enforcement agency that contributed the questioned information or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, ATTN: SCU, Mod. D-2, 1000 Custer Hollow Road, Clarksburg, WV 26306 as set forth in 28 CFR 16.30 through 16.34. In the latter case, the Federal Bureau of Investigation (FBI) will forward the challenge to the agency that submitted the data, and will request that the agency verify or correct the challenged entry;
 - b. At least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record being made available for his or her review; and
 - (4) A final adverse determination based upon the criminal history records shall be made only after receipt of the FBI's confirmation or correction of the record; and
 - (5) Upon receipt of an official communication directly from the law enforcement agency that contributed the original information, the FBI Identification Division shall make any changes necessary in accordance with the information supplied by that law enforcement agency.
- (l) The licensee shall retain:
- (1) Documentation regarding the trustworthiness and reliability of individual employees for 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material;
 - (2) A copy of the current access authorization program procedures as a record for 3 years after the procedure is no longer needed. If any portion of the procedure is superseded, the licensee shall retain the superseded material for 3 years after the record is superseded; and
 - (3) The list of persons approved for unescorted access authorization for 3 years after the list is superseded or replaced.

He-P 4038.09 Background Investigations.

- (a) Before allowing an individual unescorted access to category 1 or category 2 quantities of radioactive material or to the devices that contain the material, licensees shall complete a background

investigation of the individual seeking unescorted access authorization. The scope of the investigation shall encompass at least the 7 years preceding the date of the background investigation or since the individual's eighteenth birthday, whichever is shorter. The background investigation shall include at a minimum:

(1) Fingerprinting and an FBI identification and criminal history records check in accordance with He-P 4038.10;

(2) Verification of the true identity of the individual who is applying for unescorted access authorization to ensure that the applicant is who he or she claims to be. A licensee shall:

a. Review official identification documents (e.g., driver's license; passport; government identification; certificate of birth issued by the state, province, or country of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information;

b. Document the type, expiration, and identification number of the identification document, or maintain a photocopy of identifying documents on file in accordance with He-P 4038.12;

c. Certify in writing that the identification was properly reviewed, and shall maintain the certification and all related documents for review upon inspection;

d. Complete an employment history verification, including military history. Licensees shall verify the individual's employment with each previous employer for the most recent 7 years before the date of application;

e. Verify that the individual participated in the education process during the claimed period;

f. Complete reference checks to determine the character and reputation of the individual who has applied for unescorted access authorization. Unless other references are not available, reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under this subpart must be limited to whether the individual has been and continues to be trustworthy and reliable;

g. Obtain independent information to corroborate that provided by the individual (e.g., seek references not supplied by the individual); and

h. If a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within a time frame deemed appropriate by the licensee but at least after 10 business days of the request or if the licensee is unable to reach the entity, document the refusal, unwillingness, or inability in the record of investigation; and attempt to obtain the information from an alternate source.

(b) The individuals who have been determined to be trustworthy and reliable for unescorted access to category 1 or category 2 quantities of radioactive material under the fingerprint orders may continue to have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation. These individuals shall be:

- (1) Subjected to the reinvestigation requirement in (d) below; and
- (2) Trustworthy and reliable under the security orders for access to safeguards information, safeguards information-modified handling, or risk-significant material may have unescorted access to category 1 and category 2 quantities of radioactive material without further investigation.

(c) The licensee shall document that the individual was determined to be trustworthy and reliable under the provisions of He-P 4038, the regulations of an equivalent agreement state, the Nuclear Regulatory Commission 10 CFR 73, or a security order. Security order, in this context, means any order that was issued by the NRC that required fingerprints and an FBI criminal history records check for access to safeguards information, safeguards information-modified handling, or risk significant material such as special nuclear material or large quantities of uranium hexafluoride.

(d) Licensees shall conduct a reinvestigation every 10 years for any individual with unescorted access to category 1 or category 2 quantities of radioactive material. The reinvestigation shall:

- (1) Consist of fingerprinting and an FBI identification and criminal history records check in accordance with He-P 4038.10; and
- (2) Be completed within 10 years of the date on which these elements were last completed.

He-P 4038.10 Requirements for Criminal History Records Checks of Individuals Granted Unescorted Access to Category 1 or Category 2 Quantities of Radioactive Material.

(a) General performance objective and requirements:

- (1) Except for those individuals listed in He-P 4038.11 and those individuals grandfathered under He-P 4038.09(b), each licensee subject to the provisions of this subpart shall fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material. Licensees shall transmit all collected fingerprints to the Commission for transmission to the FBI. The licensee shall use the information received from the FBI as part of the required background investigation to determine whether to grant or deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual;
- (2) The licensee shall notify each affected individual that his or her fingerprints will be used to secure a review of his or her criminal history record, and shall inform him or her of the procedures for revising the record or adding explanations to the record;
- (3) Fingerprinting is not required if a licensee is reinstating an individual's unescorted access authorization to category 1 or category 2 quantities of radioactive materials if:

- a. The individual returns to the same facility that granted unescorted access authorization within 365 days of the termination of his or her unescorted access authorization; and
- b. The previous access was terminated under favorable conditions;

(4) Fingerprints do not need to be taken if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to category 1 or category 2 quantities of radioactive material, access to safeguards information, or safeguards information-modified handling by another licensee, based upon a background investigation and fingerprinting orders, conducted under He-P 4038.07 through He-P 4038.13, the regulations of an equivalent agreement state, or the Nuclear Regulatory Commission 10 CFR 73. An existing criminal history records check file may be transferred to the licensee asked to grant unescorted access in accordance with the provisions of He-P 4038.12(c); and

(5) Licensees shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access authorization to category 1 or category 2 quantities of radioactive materials, access to safeguards information, or safeguards information-modified handling.

(b) A licensee shall not:

(1) Base a final determination to deny an individual unescorted access authorization to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving:

- a. An arrest more than 1 year old for which there is no information of the disposition of the case; or
- b. An arrest that resulted in dismissal of the charge or an acquittal.

(2) Use information received from a criminal history records check obtained under He-P 4038 in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall licensees use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, gender, or age.

(c) When processing fingerprint checks, the licensee shall:

(1) Use an appropriate method listed in the Nuclear Regulatory Commission 10 CFR 37.7 to submit to the Nuclear Regulatory Commission, Director, Division of Facilities and Security, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop TWB-03B46M, Rockville, Maryland 20852-2738, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by writing the Office of Information Services, Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling 1-630-829-9565, or by email to FORMS.Resource@nrc.gov. Guidance on submitting electronic fingerprints can be found at <http://www.nrc.gov/site-help/e-submittals.html>;

- (2) Submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Security Branch, Division of Facilities and Security at 301-492-3531.) Combined payment for multiple applications is acceptable. The Commission publishes the amount of the fingerprint check application fee on the NRC's public Web site. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and see the link for the Criminal History Program under Electronic Submission Systems.); and
- (3) The Nuclear Regulatory Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks.

He-P 4038.11 Relief from Fingerprinting, Identification, and Criminal History Records Checks and Other Elements of Background Investigations for Designated Categories of Individuals Permitted Unescorted Access to Certain Radioactive Materials.

(a) Fingerprinting, and the identification and criminal history records checks required by Section 149 of the Atomic Energy Act of 1954, as amended, and other elements of the background investigation are not required for the following individuals prior to granting unescorted access to category 1 or category 2 quantities of radioactive materials:

- (1) An employee of the Nuclear Regulatory Commission or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history records check;
- (2) A member of Congress;
- (3) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history records check;
- (4) The Governor of New Hampshire or his or her designated state employee representative;
- (5) Federal, state, or local law enforcement personnel;
- (6) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;
- (7) Employees of the state of New Hampshire or an agreement state conducting security inspections on behalf of the NRC under an agreement executed under section 274.i. of the Atomic Energy Act;
- (8) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S. IAEA Safeguards Agreement who have been certified by the NRC;
- (9) Emergency response personnel who are responding to an emergency;
- (10) Commercial vehicle drivers for road shipments of category 2 quantities of radioactive material;

(11) Package handlers at transportation facilities such as freight terminals and railroad yards;

(12) Any individual who has an active Federal security clearance, provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that granted the Federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material; and

(13) Any individual employed by a service provider licensee for which the service provider licensee has conducted the background investigation for the individual and approved the individual for unescorted access to category 1 or category 2 quantities of radioactive material. Written verification from the service provider must be provided to the licensee. The licensee shall retain the documentation for a period of 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

(b) Fingerprinting, and the identification and criminal history records checks required by section 149 of the Atomic Energy Act of 1954, as amended, are not required for an individual who has had a favorably adjudicated U.S. Government criminal history records check within the last 5 years, under a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material. These programs include, but are not limited to:

(1) National Agency Check;

(2) Transportation Worker Identification Credentials (TWIC) under 49 CFR part 1572;

(3) Bureau of Alcohol, Tobacco, Firearms, and Explosives background check and clearances under 27 CFR part 555;

(4) Health and Human Services security risk assessments for possession and use of select agents and toxins under 42 CFR part 73;

(5) Hazardous Material security threat assessment for hazardous material endorsement to commercial driver's license under 49 CFR part 1572; and

(6) Customs and Border Protection's Free and Secure Trade (FAST) Program.

He-P 4038.12 Protection of Information.

(a) Each licensee who obtains background information on an individual under He-P 4038.07 through He-P 4038.13 shall establish and maintain a system of files and written procedures for protection of the record and the personal information from unauthorized disclosure.

(b) The licensee shall not disclose the record or personal information collected and maintained to persons other than the subject individual, his or her representative, or to those who have a need to have

access to the information in performing assigned duties in the process of granting or denying unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling. No individual authorized to have access to the information shall disseminate the information to any other individual who does not have a need to know.

(c) The personal information obtained on an individual from a background investigation shall be provided to another licensee:

(1) Upon the individual's written request to the licensee holding the data to disseminate the information contained in his or her file; and

(2) The recipient licensee verifies information such as name, date of birth, social security number, gender, and other applicable physical characteristics.

(d) The licensee shall make background investigation records obtained under He-P 4038.07 through He-P 4038.13 available for examination by DHHS/RHS to determine compliance with the regulations and laws.

(e) The licensee shall retain all fingerprint and criminal history records (including data indicating no record) received from the FBI, or a copy of these records if the individual's file has been transferred, on an individual for 3 years from the date the individual no longer requires unescorted access to category 1 or category 2 quantities of radioactive material.

He-P 4038.13 Access Authorization Program Review.

(a) Each licensee shall be responsible for:

(1) Continuing effectiveness of the access authorization program;

(2) Ensuring that access authorization programs are reviewed to confirm compliance with the requirements of this subpart and that comprehensive actions are taken to correct any noncompliance that is identified;

(3) Evaluating all program performance objectives and requirements; and

(4) Reviewing annually the access program content and implementation.

(b) The results of the reviews, along with any recommendations, shall:

(1) Be documented;

(2) Identify conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken; and

(3) Take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(c) Review records shall be maintained for 3 years.

He-P 4038.14 Security Program.

(a) Each licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material shall establish, implement, and maintain a security program in accordance with the requirements of He-P 4038.14 through He-P 4038.22;

(1) An applicant for a new license and each licensee that would become newly subject to the requirements of He-P 4038.14 through He-P 4038.22 upon application for modification of its license shall implement the requirements of He-P 4038.14 through He-P 4038.22, as appropriate, before taking possession of an aggregated category 1 or category 2 quantity of radioactive material; and

(2) Any licensee that has not previously implemented the security orders or been subject to the provisions of He-P 4038.14 through He-P 4038.22 shall provide written notification to DHHS/RHS at least 90 days before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

(b) Each licensee shall establish, implement, and maintain a security program that is designed to monitor and, without delay, detect, assess, and respond to an actual or attempted unauthorized access to category 1 or category 2 quantities of radioactive material.

(c) Each licensee's security program shall include the program features, as appropriate, described in He-P 4038.15 through He-P 4038.21.

He-P 4038.15 General Security Program Requirements.

(a) The security plan shall require:

(1) Each licensee identified in He-P 4038.14(a) to develop a written security plan specific to its facilities and operations. The purpose of the security plan shall be to establish the licensee's overall security strategy to ensure the integrated and effective functioning of the security program. The security plan shall, at a minimum:

a. Describe the measures and strategies used to implement the requirements of this He-P 4038.15 through He-P 4038.22; and

b. Identify the security resources, equipment, and technology used to satisfy the requirements of He-P 4038.15 through He-P 4038.22.

(2) A review and approval by the individual with overall responsibility for the security program;

(3) The security plan shall be revised by the licensee as necessary to ensure the effective implementation of DHHS/RHS requirements. The licensee shall ensure that:

a. The revision has been reviewed and approved by the individual with overall responsibility for the security program; and

b. The affected individuals are instructed on the revised plan before the changes are implemented.

(4) The current security plan shall be retained by the licensee for 3 years after the security plan is no longer required. If any portion of the plan is superseded, the licensee shall retain the superseded material for 3 years after the record is superseded.

(b) The security plan shall be implemented by the following procedures:

(1) The licensee shall develop and maintain written procedures that document how the requirements of He-P 4038.14 through He-P 4038.22 and the security plan will be met;

(2) The implementing procedures and revisions to these procedures shall be approved in writing by the individual with overall responsibility for the security program; and

(3) The licensee shall retain a copy of the current procedure as a record for 3 years after the procedure is no longer needed. Superseded portions of the procedure shall be retained for 3 years after the record is superseded.

(c) The security plan shall include the following training requirements:

(1) Each licensee shall conduct training to ensure that those individuals implementing the security program possess and maintain the knowledge, skills, and abilities to carry out their assigned duties and responsibilities effectively. The training shall include instruction in:

a. The licensee's security program and procedures to secure category 1 or category 2 quantities of radioactive material, and in the purposes and functions of the security measures employed;

b. The responsibility to report promptly to the licensee any condition that causes or may cause a violation of Commission requirements;

c. The responsibility of the licensee to report promptly to the local law enforcement agency and licensee any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material; and

d. The appropriate response to security alarms.

(2) In determining those individuals who shall be trained on the security program, the licensee shall consider each individual's assigned activities during authorized use and response to potential situations involving actual or attempted theft, diversion, or sabotage of category 1 or category 2 quantities of radioactive material. The extent of the training shall be commensurate with the individual's potential involvement in the security of category 1 or category 2 quantities of radioactive material; and

(3) Refresher training shall be provided at a frequency not to exceed 12 months and when significant changes have been made to the security program. This training shall include:

- a. Review of the training requirements of paragraph (c) of this section and any changes made to the security program since the last training;
- b. Reports on any relevant security issues, problems, and lessons learned;
- c. Relevant results of DHHS/RHS inspections; and
- d. Relevant results of the licensee's program review and testing and maintenance.

(4) The licensee shall maintain records of the initial and refresher training for 3 years from the date of the training. The training records shall include dates of the training, topics covered, a list of licensee personnel in attendance, and related information.

(d) All information and implementing procedures included as part of a security plan shall be protected as follows:

(1) Licensees authorized to possess category 1 or category 2 quantities of radioactive material shall limit access to and unauthorized disclosure of their security plan, implementing procedures, and the list of individuals that have been approved for unescorted access;

(2) Efforts to limit access shall include the development, implementation, and maintenance of written policies and procedures for controlling access to, and for proper handling and protection against unauthorized disclosure of, the security plan and implementing procedures;

(3) Before granting an individual access to the security plan or implementing procedures, licensees shall:

- a. Evaluate an individual's need to know the security plan or implementing procedures; and

- b. If the individual has not been authorized for unescorted access to category 1 or category 2 quantities of radioactive material, safeguards information, or safeguards information-modified handling, the licensee shall complete a background investigation to determine the individual's trustworthiness and reliability. A trustworthiness and reliability determination shall be conducted by the reviewing official and shall include the background investigation elements contained in He-P 4038.09(a)(2).

(4) Licensees need not subject the following individuals to the background investigation elements for protection of information:

- a. The categories of individuals listed in He-P 4038.11(a)(1) through (a)(13); or

- b. Security service provider employees, provided written verification that the employee has been determined to be trustworthy and reliable, by the required background investigation in He-P 4038.09(a), has been provided by the security service provider.

(5) The licensee shall document the basis for concluding that an individual is trustworthy and reliable and should be granted access to the security plan or implementing procedures;

(6) Licensees shall maintain a list of persons currently approved for access to the security plan or implementing procedures. When a licensee determines that a person no longer needs access to the security plan or implementing procedures or no longer meets the access authorization requirements for access to the information, the licensee shall remove the person from the approved list as soon as possible, but no later than 7 working days, and take prompt measures to ensure that the individual is unable to obtain the security plan or implementing procedures;

(7) When not in use, the licensee shall store its security plan and implementing procedures in a manner to prevent unauthorized access. Information stored in non-removable electronic form shall be password protected; and

(8) The licensee shall retain as a record for 3 years after the document is no longer needed:

a. A copy of the information protection procedures; and

b. The list of individuals approved for access to the security plan or implementing procedures.

He-P 4038.16 Local Law Enforcement Agency (LLEA) Coordination.

(a) A licensee subject to He-P 4038.14 through He-P 4038.22 shall coordinate, to the extent practicable, with a licensed law enforcement agency (LLEA) for responding to threats to the licensee's facility, including any necessary armed response. The information provided to the LLEA shall include:

(1) A description of the facilities and the category 1 and category 2 quantities of radioactive materials along with a description of the licensee's security measures that have been implemented to comply with He-P 4038.14 through He-P 4038.22; and

(2) A notification that the licensee will request a timely armed response by the LLEA to any actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of material.

(b) The licensee shall notify the DHHS/RHS within 3 business days if:

(1) The LLEA has not responded to the request for coordination within 60 days of the coordination request; or

(2) The LLEA notifies the licensee that the LLEA does not plan to participate in coordination activities.

(c) The licensee shall document its efforts to coordinate with the LLEA. The documentation shall be kept for 3 years.

(d) The licensee shall coordinate with the LLEA at least every 12 months, or when changes to the facility design or operation adversely affect the potential vulnerability of the licensee's material to theft, sabotage, or diversion.

He-P 4038.17 Security Zones.

(a) Licensees shall ensure that all aggregated category 1 and category 2 quantities of radioactive material are used or stored within licensee established security zones. Security zones shall be permanent or temporary.

(b) Temporary security zones shall be established as necessary to meet the licensee's transitory or intermittent business activities, such as periods of maintenance, source delivery, and source replacement.

(c) Security zones shall, at a minimum, allow unescorted access only to approved individuals through:

(1) Isolation of category 1 and category 2 quantities of radioactive materials by the use of continuous physical barriers that allow access to the security zone only through established access control points. A physical barrier is a natural or man-made structure or formation sufficient for the isolation of the category 1 or category 2 quantities of radioactive material within a security zone; or

(2) Direct control of the security zone by approved individuals at all times; or

(3) A combination of continuous physical barriers and direct control.

(d) For category 1 quantities of radioactive material during periods of maintenance, source receipt, preparation for shipment, installation, or source removal or exchange, the licensee shall, at a minimum, provide sufficient individuals approved for unescorted access to maintain continuous surveillance of sources in temporary security zones and in any security zone in which physical barriers or intrusion detection systems have been disabled to allow such activities.

(e) Individuals not approved for unescorted access to category 1 or category 2 quantities of radioactive material shall be escorted by an approved individual when in a security zone.

He-P 4038.18 Monitoring, Detection, and Assessment.

(a) Security zones shall be assessed as follows:

(1) Licensees shall establish and maintain the capability to continuously monitor and detect without delay all unauthorized entries into its security zones. Licensees shall provide the means to maintain continuous monitoring and detection capability in the event of a loss of the primary power source, or provide for an alarm and response in the event of a loss of this capability to continuously monitor and detect unauthorized entries.

(2) Monitoring and detection shall be performed by:

a. A monitored intrusion detection system that is linked to an onsite or offsite central monitoring facility;

b. Electronic devices for intrusion detection alarms that will alert nearby facility personnel;

c. A monitored video surveillance system;

- d. Direct visual surveillance by approved individuals located within the security zone; or
- e. Direct visual surveillance by a licensee designated individual located outside the security zone.

(3) A licensee subject to He-P 4038.14 through He-P 4038.22 shall also have a means to detect unauthorized removal of the radioactive material from the security zone. This detection capability shall provide:

a. For category 1 quantities of radioactive material, immediate detection of any attempted unauthorized removal of the radioactive material from the security zone. Such immediate detection capability shall be provided by:

1. Electronic sensors linked to an alarm;
2. Continuous monitored video surveillance; or
3. Direct visual surveillance.

b. For category 2 quantities of radioactive material, weekly verification through physical checks, tamper indicating devices, use, or other means to ensure that the radioactive material is present.

(b) Licensees shall immediately assess each actual or attempted unauthorized entry into the security zone to determine whether the unauthorized access was an actual or attempted theft, sabotage, or diversion.

(c) For personnel and automated or electronic systems supporting the licensee's monitoring, detection, and assessment systems, licensees shall:

- (1) Maintain continuous capability for personnel communication and electronic data transmission and processing among site security systems; and
- (2) Provide an alternative communication capability for personnel, and an alternative data transmission and processing capability, in the event of a loss of the primary means of communication or data transmission and processing. Alternative communications and data transmission systems shall not be subject to the same failure modes as the primary systems.

(d) Licensees shall immediately respond to any actual or attempted unauthorized access to the security zones, or actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material at licensee facilities or temporary job sites. For any unauthorized access involving an actual or attempted theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material, the licensee's response shall include requesting, without delay, an armed response from the LLEA.

He-P 4038.19 Maintenance and Testing.

(a) Each licensee subject to He-P 4038.14 through He-P 4038.22 shall implement a maintenance and testing program to ensure that intrusion alarms, associated communication systems, and other

physical components of the systems used to secure or detect unauthorized access to radioactive material are maintained in operable condition and are capable of performing their intended function when needed. The equipment relied on to meet the security requirements of He-P 4038 shall be inspected and tested:

- (1) For operability and performance at the manufacturer's suggested frequency; or
 - (2) If there is no suggested manufacturer's suggested frequency, at least annually, not to exceed 12 months.
- (b) The licensee shall maintain records on the maintenance and testing activities for 3 years.

He-P 4038.20 Requirements for Mobile Devices. Each licensee that possesses mobile devices containing category 1 or category 2 quantities of radioactive material shall:

(a) Have two independent physical controls that form tangible barriers to secure the material from unauthorized removal when the device is not under direct control and constant surveillance by the licensee; and

(b) For devices in or on a vehicle or trailer, unless the health and safety requirements for a site prohibit the disabling of the vehicle, the licensee shall utilize a method to disable the vehicle or trailer when not under direct control and constant surveillance by the licensee. Licensees shall not rely on the removal of an ignition key to meet this requirement.

He-P 4038.21 Security Program Review.

- (a) Each licensee shall:
- (1) Be responsible for the continuing effectiveness of the security program;
 - (2) Ensure that the security program is reviewed to confirm compliance with the requirements of this subpart and that comprehensive actions are taken to correct any noncompliance that is identified;
 - (3) Review the radioactive material security program content and implementation; and
 - (4) Periodically, meaning at least annually, review the security program content and implementation.
- (b) The results of the review, along with any recommendations, shall be documented. Each review report shall:
- (1) Identify conditions that are adverse to the proper performance of the security program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken; and
 - (2) Review the findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.
- (c) The licensee shall maintain the review documentation for 3 years.

He-P 4038.22 Reporting of Events.

(a) The licensee shall immediately notify the LLEA after determining that an unauthorized entry resulted in an actual or attempted theft, sabotage, or diversion of a category 1 or category 2 quantity of radioactive material. As soon as possible after initiating a response, but not at the expense of causing delay or interfering with the LLEA response to the event, the licensee shall notify DHHS/RHS by calling (603-271-4588) Monday through Friday during regular working hours, 8:00 a.m. - 4:30 p.m., or at any other time shall notify the NH State Police by calling (603 271-3636). In no case shall the notification to DHHS/RHS be later than 4 hours after the discovery of any attempted or actual theft, sabotage, or diversion.

(b) The licensee shall assess any suspicious activity related to possible theft, sabotage, or diversion of category 1 or category 2 quantities of radioactive material and notify the LLEA as appropriate. As soon as possible but not later than 4 hours after notifying the LLEA, the licensee shall notify DHHS/RHS by calling (603-271-4588) Monday through Friday during regular business hours, 8:00 a.m. - 4:00 p.m., or at any other time shall notify the NH State Police by calling (603 271-3636).

(c) The initial telephonic notification required by He-P 4038.22(a) shall be followed within a period of 30 days by a written report submitted to DHHS/RHS. The report shall include sufficient information for DHHS/RHS analysis and evaluation, including identification of any necessary corrective actions to prevent future instances.

He-P 4038.23 Additional Requirements for Transfer of Category 1 and Category 2 Quantities of Radioactive Material. A licensee transferring a category 1 or category 2 quantity of radioactive material to a licensee of DHHS/RHS, an agreement state, or the U.S. Nuclear Regulatory Commission shall meet the license verification provisions listed below instead of those listed in He-P 4030.16(d) or the Nuclear Regulatory Commission 10 CFR 30.41(d):

(a) Any licensee transferring category 1 quantities of radioactive material to a licensee of the DHHS/RHS, an agreement state, or the Nuclear Regulatory Commission, prior to conducting such transfer, shall verify with the DHHS/RHS', an agreement state's, or NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred and that the licensee is authorized to receive radioactive material at the location requested for delivery. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(b) Any licensee transferring category 2 quantities of radioactive material to a licensee of the DHHS/RHS, an agreement state, or the Nuclear Regulatory Commission, prior to conducting such transfer, shall verify with the DHHS/RHS', an agreement state's, or NRC's license verification system or the license issuing authority that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred. If the verification is conducted by contacting the license issuing authority, the transferor shall document the verification. For transfers within the same organization, the licensee does not need to verify the transfer.

(c) In an emergency where the licensee cannot reach the license issuing authority and the license verification system is nonfunctional, the licensee may accept a written certification by the transferee that it is authorized by license to receive the type, form, and quantity of radioactive material to be transferred. The certification shall:

- (1) Include the license number, current revision number, issuing agency, expiration date, and for a category 1 shipment the authorized address;
 - (2) Be retained by the licensee for a period of 3 years; and
 - (3) Be confirmed by use of the DHHS/RHS', an agreement state's, or NRC's license verification system or by contacting the license issuing authority by the end of the next business day.
- (d) The transferor shall keep a copy of the verification documentation as a record for 3 years.

He-P 4038.24 Applicability of Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material During Transfer.

(a) For shipments of category 1 quantities of radioactive material, each shipping licensee shall comply with the requirements for physical protection contained in He-P 4038.25(a) and (e); He-P 4038.26; He-P 4038.27(a)(1), (b)(1), and (c); and He-P 4038.28(a), (c), (e), (g), and (h).

(b) For shipments of category 2 quantities of radioactive material, each shipping licensee shall comply with the requirements for physical protection contained in He-P 4038.25(b) through (e); He-P 4038.27(a)(2), (a)(3), (b)(2), and (c); and He-P 4038.28(b), (d), (f), (g), and (h). For those shipments of category 2 quantities of radioactive material that meet the criteria of the Nuclear Regulatory Commission 10 CFR 71.97(b), the shipping licensee shall also comply with He-P 4038.23 through He-P 4038.28 unless the receiving licensee has agreed in writing to arrange for the in-transit physical protection required under He-P 4038.

(c) Each licensee that imports or exports category 1 quantities of radioactive material shall comply with the requirements for physical protection during transit contained in He-P 4038.25(a)(2) and (e); He-P 4038.26; He-P 4038.27(a)(1), (b)(1), and (c); and He-P 4038.28(a), (c), (e), (g), and (h) for the domestic portion of the shipment.

(d) Each licensee that imports or exports category 2 quantities of radioactive material shall comply with the requirements for physical protection during transit contained in He-P 4038.27(a)(2), (a)(3), and (b)(2); and He-P 4038.28(b), (d), (f), (g), and (h) for the domestic portion of the shipment.

He-P 4038.25 Preplanning and Coordination of Shipment of Category 1 or Category 2 Quantities of Radioactive Material.

(a) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 1 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall:

- (1) Preplan and coordinate shipment arrival and departure times with the receiving licensee;
- (2) Preplan and coordinate shipment information with the governor of New Hampshire or the governor's designee of New Hampshire or any state through which the shipment will pass to:
 - a. Discuss the state's intention to provide law enforcement escorts; and

b. Identify safe havens; and

(3) Document the preplanning and coordination activities.

(b) Each licensee that plans to transport, or deliver to a carrier for transport, licensed material that is a category 2 quantity of radioactive material outside the confines of the licensee's facility or other place of use or storage shall coordinate the shipment no-later-than arrival time and the expected shipment arrival with the receiving licensee. The licensee shall document the coordination activities.

(c) Each licensee who receives a shipment of a category 2 quantity of radioactive material shall confirm receipt of the shipment with the originator. If the shipment has not arrived by the no-later-than arrival time, the receiving licensee shall notify the originator.

(d) Each licensee, who transports or plans to transport a shipment of a category 2 quantity of radioactive material, and determines that the shipment will arrive after the no-later-than arrival time provided pursuant to He-P 4038.25(b), shall promptly notify the receiving licensee of the new no-later-than arrival time.

(e) The licensee shall retain a copy of the documentation for preplanning and coordination and any revision thereof, as a record for 3 years.

He-P 4038.26 Advance Notification of Shipment of Category 1 Quantities of Radioactive Material. As specified in He-P 4038.26(a) and (b), each licensee shall provide advance notification to the governor of a state, or the governor's designee and DHHS/RHS of the shipment of licensed material in a category 1 quantity, through or across the boundary of New Hampshire, before the transport, or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(a) Procedures for submitting advance notification shall be:

(1) Made to DHHS/RHS, and the office of each appropriate governor or governor's designee.

(2) Delivered by mail shall be postmarked at least 7 days before transport of the shipment commences at the shipping facility.

(3) Delivered by any means other than mail shall reach DHHS/RHS at least 4 days before the transport of the shipment commences and shall 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.

(b) Each advance notification of shipment of category 1 quantities of radioactive material shall contain the following information, if available at the time of notification:

(1) The name, address, and telephone number of the shipper, carrier, and receiver of the category 1 radioactive material;

(2) The license numbers of the shipper and receiver;

(3) A description of the radioactive material contained in the shipment, including the radionuclides and quantity;

- (4) The point of origin of the shipment and the estimated time and date that shipment will commence;
 - (5) The estimated time and date that the shipment is expected to enter each State along the route;
 - (6) The estimated time and date of arrival of the shipment at the destination; and
 - (7) A point of contact, with a telephone number, for current shipment information.
- (c) Notices shall be revised according to the following:
- (1) The licensee shall provide any information not previously available at the time of the initial notification, as soon as the information becomes available but not later than commencement of the shipment, to the governor of the state or the governor's designee, to DHHS/RHS.
 - (2) A licensee shall promptly notify the governor of the state or the governor's designee of any changes to the information provided in accordance with He-P 4038.26(b) and (c)(1) of this section. The licensee shall also immediately notify DHHS/RHS of any such changes.
- (d) Each licensee who cancels a shipment for which advance notification has been sent shall send a cancellation notice to the governor of each state or to the governor's designee previously notified, to DHHS/RHS. The licensee shall send the cancellation notice before the shipment would have commenced or as soon thereafter as possible. The licensee shall state in the notice that it is a cancellation and identify the advance notification that is being cancelled.
- (e) The licensee shall retain a copy of the advance notification and any revision and cancellation notices as a record for 3 years.
- (f) State officials, state employees, and other individuals, whether or not licensees of the DHHS/RHS, an agreement state, or the Nuclear Regulatory Commission, who receive schedule information of the kind specified in He-P 4038.26(b) shall protect that information against unauthorized disclosure as specified in He-P 4038.15(d).

He-P 4038.27 Requirements for Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material During Shipment.

- (a) For any shipment made by road:
- (1) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:
 - a. Ensure that movement control centers are established that maintain position information from a remote location. These control centers shall monitor shipments 24 hours a day, 7 days a week, and have the ability to communicate immediately, in an emergency, with the appropriate law enforcement agencies;

b. Ensure that redundant communications are established that allow the transport to contact the escort vehicle (when used) and movement control center at all times. Redundant communications shall not be subject to the same interference factors as the primary communication;

c. Ensure that shipments are continuously and actively monitored by a telemetric position monitoring system or an alternative tracking system reporting to a movement control center. A movement control center shall provide positive confirmation of the location, status, and control over the shipment. The movement control center shall be prepared to promptly implement preplanned procedures in response to deviations from the authorized route or a notification of actual, attempted, or suspicious activities related to the theft, loss, or diversion of a shipment. These procedures will include, but not be limited to, the identification of and contact information for the appropriate LLEA along the shipment route;

d. Provide an individual to accompany the driver for those highway shipments with a driving time period greater than the maximum number of allowable hours of service in a 24-hour duty day as established by the Department of Transportation Federal Motor Carrier Safety Administration. The accompanying individual may be another driver;

e. Develop written normal and contingency procedures to address:

1. Notifications to the communication center and law enforcement agencies;

2. Communication protocols. Communication protocols shall include a strategy for the use of authentication codes and duress codes and provisions for refueling or other stops, detours, and locations where communication is expected to be temporarily lost;

3. Loss of communications; and

4. Responses to an actual or attempted theft or diversion of a shipment.

f. Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall ensure that drivers, accompanying personnel, and movement control center personnel have access to the normal and contingency procedures.

(2) Each licensee that transports category 2 quantities of radioactive material shall maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance.

(3) Each licensee who delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

a. Use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system shall allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control.

b. Use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

c. Use carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(b) For any shipment made by rail:

(1) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 1 quantity of radioactive material shall:

a. Ensure that rail shipments are monitored by a telemetric position monitoring system or an alternative tracking system reporting to the licensee, third-party, or railroad communications center. The communications center shall provide positive confirmation of the location of the shipment and its status. The communications center shall implement preplanned procedures in response to deviations from the authorized route or to a notification of actual, attempted, or suspicious activities related to the theft or diversion of a shipment. These procedures shall include, but not be limited to, the identification of and contact information for the appropriate LLEA along the shipment route.

b. Ensure that periodic reports to the communications center are made at preset intervals.

(2) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a category 2 quantity of radioactive material shall:

a. Use carriers that have established package tracking systems. An established package tracking system is a documented, proven, and reliable system routinely used to transport objects of value. In order for a package tracking system to maintain constant control and/or surveillance, the package tracking system shall allow the shipper or transporter to identify when and where the package was last and when it should arrive at the next point of control.

b. Use carriers that maintain constant control and/or surveillance during transit and have the capability for immediate communication to summon appropriate response or assistance; and

c. Use carriers that have established tracking systems that require an authorized signature prior to releasing the package for delivery or return.

(c) Each licensee who makes arrangements for the shipment of category 1 quantities of radioactive material shall immediately conduct an investigation upon the discovery that a category 1 shipment is lost or missing. Each licensee who makes arrangements for the shipment of category 2 quantities of radioactive material shall immediately conduct an investigation, in coordination with the receiving licensee, of any shipment that has not arrived by the designated no-later-than arrival time.

(a) The shipping licensee shall notify the appropriate LLEA and DHHS/RHS within 1 hour of its determination that a shipment of category 1 quantities of radioactive material is lost or missing. The appropriate LLEA would be the law enforcement agency in the area of the shipment's last confirmed location. During the investigation required by He-P 404038.27(c), the shipping licensee will provide agreed upon updates to DHHS/RHS on the status of the investigation.

(b) The shipping licensee shall notify DHHS/RHS by calling (603) 271-4588 Monday through Friday during regular business hours, 8:00 a.m.- 4:00 p.m., or at any other time shall notify the NH State Police by calling (603) 271-3636 within 4 hours of its determination that a shipment of category 2 quantities of radioactive material is lost or missing. If, after 24 hours of its determination that the shipment is lost or missing, the radioactive material has not been located and secured, the licensee shall immediately notify DHHS/RHS.

(c) The shipping licensee shall notify the designated LLEA along the shipment route as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment or suspicious activities related to the theft or diversion of a shipment of a category 1 quantity of radioactive material. As soon as possible after notifying the LLEA, the licensee shall notify DHHS/RHS by calling (603) 271-4588 Monday through Friday during regular business hours, 8:00 a.m. – 4:00 p.m. and at any other time shall notify the NH State Police by calling (603) 271-3636 upon discovery of any actual or attempted theft or diversion of a shipment, or any suspicious activity related to the shipment of category 1 radioactive material.

(d) The shipping licensee shall notify DHHS/RHS by calling (603) 271-4588 Monday through Friday during regular business hours, 8:00 a.m. – 4:00 p.m., and at any other time shall notify the NH State Police by calling (603) 271-3636 as soon as possible upon discovery of any actual or attempted theft or diversion of a shipment, or any suspicious activity related to the shipment, of a category 2 quantity of radioactive material.

(e) The shipping licensee shall notify DHHS/RHS by calling (603) 271-4588 Monday through Friday during regular business hours, 8:00 a.m. – 4:00 p.m., and at any other time shall notify the NH State Police by calling (603) 271-3636, and the LLEA as soon as possible upon recovery of any lost or missing category 1 quantities of radioactive material.

(f) The shipping licensee shall notify DHHS/RHS by calling (603)271-4588 Monday through Friday during regular business hours, 8:00 a.m. – 4:00 p.m., and at any other time shall notify the NH State Police by calling (603) 271-3636 as soon as possible upon recovery of any lost or missing category 2 quantities of radioactive material.

(g) The initial telephonic notification required by He-P 4038.28(a) through (d) shall be followed within a period of 30 days by a written report submitted to DHHS/RHS by an appropriate method listed in He-P 4038.04. A written report is not required for notifications on suspicious activities required by He-P 4038.38(c) and (d). In addition, the licensee shall provide one copy of the written report addressed to DHHS/RHS. The report shall set forth the following information:

- (1) A description of the licensed material involved, including kind, quantity, and chemical and physical form;
- (2) A description of the circumstances under which the loss or theft occurred;
- (3) A statement of disposition, or probable disposition, of the licensed material involved;

(4) Actions that have been taken, or will be taken, to recover the material; and

(5) Procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed material.

(h) Subsequent to filing the written report, the licensee shall also report any additional substantive information on the loss or theft within 30 days after the licensee learns of such information.

He-P 4038.29 Forms of Records.

(a) Any record or document required by He-P 4038 shall be legible throughout the retention period specified by He-P 4038.

(b) The record may be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period.

(c) The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.

(d) Records such as letters, drawings, and specifications, shall include all pertinent information such as stamps, initials, and signatures.

(e) The licensee shall maintain adequate safeguards against tampering with and loss of records.

He-P 4038.30 Record Retention.

(a) Licensees shall maintain the records or documents that are required by He-P 4038 for the period specified by the appropriate section.

(b) If a retention period is not otherwise specified, these records shall be retained until the DHHS/RHS terminates the facility's license.

(c) All records related to He-P 4038.30(a) may be destroyed upon DHHS/RHS termination of the facility license.

He-P 4038.31 Inspections. Each licensee shall make available to DHHS/RHS for inspection, upon reasonable notice, records kept by the licensee pertaining to its receipt, possession, use, acquisition, import, export, or transfer of category 1 or category 2 quantities of radioactive material.

Table 4038.1—Category 1 and Category 2 Threshold

The terabecquerel (TBq) values are the regulatory standard. The curie (Ci) values specified are obtained by converting from the TBq value. The curie values are provided for practical usefulness only.

Radioactive material	Category 1 (TBq)	Category 1 (Ci)	Category 2 (TBq)	Category 2 (Ci)
Americium-241	60	1,620	0.6	16.2

Americium-241/Be	60	1,620	0.6	16.2
Californium-252	20	540	0.2	5.40
Cobalt-60	30	810	0.3	8.10
Curium-244	50	1,350	0.5	13.5
Cesium-137	100	2,700	1	27.0
Gadolinium-153	1,000	27,000	10	270
Iridium-192	80	2,160	0.8	21.6
Plutonium-238	60	1,620	0.6	16.2
Plutonium-239/Be	60	1,620	0.6	16.2
Promethium-147	40,000	1,080,000	400	10,800
Radium-226	40	1,080	0.4	10.8
Selenium-75	200	5,400	2	54.0
Strontium-90	1,000	27,000	10	270
Thulium-170	20,000	540,000	200	5,400
Ytterbium-169	300	8,100	3	81.0

Note: *Calculations Concerning Multiple Sources or Multiple Radionuclides*

The "sum of fractions" methodology for evaluating combinations of multiple sources or multiple radionuclides is to be used in determining whether a location meets or exceeds the threshold and is thus subject to the requirements of this part.

I. If multiple sources of the same radionuclide and/or multiple radionuclides are aggregated at a location, the sum of the ratios of the total activity of each of the radionuclides must be determined to verify whether the activity at the location is less than the category 1 or category 2 thresholds of Table 4038.1, as appropriate. If the calculated sum of the ratios, using the equation below, is greater than or equal to 1.0, then the applicable requirements of this part apply.

II. First determine the total activity for each radionuclide from Table 4038.1. This is done by adding the activity of each individual source, material in any device, and any loose or bulk material that contains the radionuclide. Then use the equation below to calculate the sum of the ratios by inserting the total activity of the applicable radionuclides from Table 4038.1 in the numerator of the equation and the corresponding threshold activity from Table 4038.1 in the denominator of the equation.

Calculations must be performed in metric values (i.e., TBq) and the numerator and denominator values must be in the same units.

R_1 = total activity for radionuclide 1

R_2 = total activity for radionuclide 2

R_N = total activity for radionuclide n

AR_1 = activity threshold for radionuclide 1

AR_2 = activity threshold for radionuclide 2

AR_N = activity threshold for radionuclide n

$$\sum_1^n \left[\frac{R_1}{AR_1} + \frac{R_2}{AR_2} + \frac{R_n}{AR_n} \right] \geq 1.0$$

APPENDIX

Rule	State or Federal Statute or Federal Regulation Implemented
He-P 4038 (specific provisions implementing specific statutes are given below)	RSA 125-F:1; RSA 125-F:2; and RSA 125-F:5, II, IV, and V; Section 274 of the Atomic Energy Act of 1954, as amended
He-P 4038.01	10 CFR 37.1
He-P 4038.02	10 CFR 37.2
He-P 4038.03	10 CFR 37.5
He-P 4038.04	10 CFR 37.7
He-P 4038.05	10 CFR 37.9
He-P 4038.06	10 CFR 37.11
He-P 4038.07	10 CFR 37.21
He-P 4038.08	10 CFR 37.23
He-P 4038.09	10 CFR 37.25
He-P 4038.10	10 CFR 37.27
He-P 4038.11	10 CFR 37.29
He-P 4038.12	10 CFR 37.31
He-P 4038.13	10 CFR 37.33
He-P 4038.14	10 CFR 37.41
He-P 4038.15	10 CFR 37.43
He-P 4038.16	10 CFR 37.45
He-P 4038.17	10 CFR 37.47
He-P 4038.18	10 CFR 37.49
He-P 4038.19	10 CFR 37.51
He-P 4038.20	10 CFR 37.53
He-P 4038.21	10 CFR 37.55
He-P 4038.22	10 CFR 37.57
He-P 4038.23	10 CFR 37.71
He-P 4038.24	10 CFR 37.73
He-P 4038.25	10 CFR 37.75
He-P 4038.26	10 CFR 37.77
He-P 4038.27	10 CFR 37.79
He-P 4038.28	10 CFR 37.81
He-P 4038.29	10 CFR 37.101
He-P 4038.30	10 CFR 37.103
He-P 4038.31	10 CFR 37.105
Table 4038.1	10 CFR 37 Appendix A