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New York State Energy Research and Development Authority

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U.S. Nuclear Regulatory Commission
Office of the Secretary
ATTN: Rulemakings and Adjudications Staff
Washington, DC 20555

Subject: "Modernizing Requirements Relating to the Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material" [NRC-2025-1238]

To all concerned:

The State of New York appreciates the opportunity to comment on the U.S. Nuclear Regulatory Commission's (NRC) proposed rule "Modernizing Requirements Relating to the Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material" (NRC-2025-1238) published in the Federal Register on April 8, 2026. This rulemaking, undertaken pursuant to Executive Order 14300, "Ordering the Reform of the Nuclear Regulatory Commission,"[1] proposes to remove or relax multiple physical security requirements that have safeguarded risk-significant radioactive materials since 2013.[2]

New York's Interest in the Proposed Rule

New York State has been an NRC Agreement State since 1962, with the New York State Department of Health ("NYSDOH") and the New York State Department of Environmental Conservation ("NYSDEC")

[1]Executive Order 14300, "Ordering the Reform of the Nuclear Regulatory Commission," 90 FR 22587 (May 29, 2025). Available at: https://www.presidency.ucsb.edu/documents/executive-order-14300-ordering-the-reform-the-nuclear-regulatory-commission

[2]NRC, "Physical Protection of Byproduct Material," 78 FR 16922 (March 19, 2013). This final rule established 10 CFR Part 37 requirements.

serving as the designated regulatory agencies for radioactive materials within the State's jurisdiction.[3] The NYSDOH Bureau of Environmental Radiation Protection is responsible for licensing and inspecting approximately 1,300 radioactive materials licensees, including commercial, medical, academic, and government facilities.[4] Many of these licensees possess or use category 1 and category 2 quantities of radioactive material, and New York's dense population centers present unique security considerations that amplify the consequences of any lapse in the physical protection of risk-significant sources.

While New York recognizes the importance of reducing unnecessary regulatory costs and supports the NRC's efforts to modernize any outdated provisions, several of the proposed changes raise significant concerns regarding the continued adequacy of the national physical protection framework for high-risk radioactive materials. The security requirements in 10 CFR Part 37 were developed in the aftermath of the September 11, 2001 attacks and were informed by years of operational experience, interagency coordination, and the work of the congressionally mandated Radiation Source Protection and Security Task Force.[5] Any relaxation of these requirements should be supported by a thorough, threat-and-vulnerability-informed analysis that demonstrates the changes will not diminish the security of these materials.

These comments address each of the proposed changes, identify the issues of greatest concern to New York State, and offer constructive recommendations for the NRC's consideration as it develops the final rule.

Concerns with the Proposed Rule

A. Removal of Reviewing Official Certification Transmission Requirement (§37.23(b)(2))

The NRC proposes to remove the requirement in §37.23(b)(2) that, after completing the background investigation on a reviewing official, the licensee must submit a certification to the NRC affirming that the designated reviewing official is deemed trustworthy and reliable. The NRC's justification for this change is that the NRC would continue to verify compliance through routine inspections, thereby making the transmission of certifications unnecessary.

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[3]New York has been an NRC Agreement State since 1962. The NYS Department of Health (NYSDOH) and the NYS Department of Environmental Conservation (NYSDEC) serve as the designated regulatory agencies. See NRC Agreement State Information for New York, available at: https://www.nrc.gov/agreement-states/new-york

[4]NYSDOH Bureau of Environmental Radiation Protection licenses and inspects approximately 1,300 radioactive materials licensees. See: https://www.health.ny.gov/environmental/radiological/radon/

[5]Energy Policy Act of 2005, Public Law 109-58, Section 651, establishing the Radiation Source Protection and Security Task Force.

New York opposes this proposed change. Currently, many Agreement States, including New York State, utilize the transmission of a licensee's Trustworthiness and Reliability (T&R) Determination Certifications for Reviewing Official ("RO") to properly contact a T&R'd individual to communicate issues, questions or concerns regarding a licensee's Part 37 program. Given concerns around the physical protection requirements for Category 1 and 2 quantities of byproduct material, many Agreement States utilize this information during inspections and between inspections to promptly obtain information pertaining to risk-significant quantities of material and affiliated security programs. Eliminating this requirement may hinder and delay the ability of Agreement States to obtain prompt information on a licensee's Part 37 program and may further delay an Agreement State's ability to provide a timely response to the NRC where concerns, allegations, or inquiries are relayed to an Agreement State to follow up on.

An example of this is in the NRC inquiring with Agreement States whether certain individuals may be granted access to and/or inventory records from the National Source Tracking System (NSTS) on behalf of a licensee. NRC previously requested New York State to grant access or relay information pertaining to Category 1 and 2 sources to individuals on behalf of the licensee. However, New York State does not maintain documentation of T&R determination for individuals to access NSTS. To assist, New York State had contacted the licensee's Reviewing Official (RO) on file to fulfill such requests and provided them with access to NSTS and/or inventory information, as the RO must be T&R'd and have been cleared to access such information.

Should §37.23(b)(2) be removed, the NRC should no longer impose administrative expectations or involvement of Agreement States in NSTS submissions, modifications, access requests, or authorizations on behalf of the NRC or licensees.

New York therefore recommends that the NRC either retain the certification transmission requirement or, if the requirement is removed, establish an alternative mechanism to ensure that Agreement States have timely access to current reviewing official contact information for all licensees within their jurisdiction. Additionally, the NRC should clarify the resulting division of administrative responsibilities between the NRC and Agreement States with respect to the National Source Tracking System.

B. Elimination of the Ten-Year Reinvestigation Requirement (§37.25(c))

The NRC proposes to eliminate the requirement that licensees conduct a background reinvestigation every ten years for individuals with unescorted access to category 1 or category 2 quantities of radioactive material. The NRC's stated rationale for this change is that no reinvestigation conducted since the rule took effect in 2013 has produced information leading a licensee to revoke an individual's access.

New York opposes the removal of this requirement. From discussions with licensees, the most common risk of a diversion, or theft of category 1 and 2 sources would be from insider threats due to ease of access and knowledge of security systems and plans. The promotion of a positive safety and security culture is contingent on the persistent evaluation and re-evaluation of individuals who have sufficient knowledge of and access to a licensee's Part 37 program. The removal of a 10-year reinvestigation may lead to a potential gap and lapsed opportunity to proactively address the likelihood of insider threat, as behaviors and motives of individuals are dynamic and may change over time. While a limited number of insider threats have occurred since the promulgation of Part 37 requirements, the cost of reinvestigation is reasonable to promote a positive security and safety culture within an organization.

The absence in the past of a documented revocation resulting from reinvestigation does not demonstrate that reinvestigations lack value. The reinvestigation requirement serves a crucial deterrent function by ensuring that individuals who maintain access to risk-significant materials know that their continued fitness will be periodically verified. Removing this requirement would create a system in which an individual cleared at the beginning of a career could retain unescorted access to the most dangerous radioactive materials for decades without any formal reassessment of trustworthiness and reliability. Significant changes in an individual's circumstances—including criminal conduct, financial distress, substance abuse, or affiliations that bear on reliability—may arise over extended periods and may not come to the attention of a reviewing official absent a structured reinvestigation process.

The NRC's reliance on the existing authority under §37.23(e)(4), which permits a reviewing official to terminate access based on subsequently obtained information, is insufficient as a substitute. That provision is reactive, dependent on information fortuitously coming to the reviewing official's attention. Without a reinvestigation mechanism, there is no systematic process to surface disqualifying information that may reside in law enforcement databases, credit records, or other sources accessible through the FBI identification and criminal history records check required under §37.27. The proposed rule thus replaces a proactive, systematic safeguard with a passive, ad hoc approach that is inherently less reliable.

Furthermore, the insider threat remains a primary concern in the security of radioactive materials.[6] Federal agencies responsible for safeguarding classified information and other sensitive materials routinely require periodic reinvestigations, often on cycles of five to ten years. The NRC's proposal to eliminate periodic reinvestigations entirely for access to materials that could be weaponized in a radiological dispersal device is inconsistent with the practices of

[6]National Academies of Sciences, Engineering, and Medicine, "Radioactive Sources: Applications and Alternative Technologies," (2021). Chapter 2: Radioactive Source Uses, Risks, and Control. Available at: https://www.ncbi.nlm.nih.gov/books/NBK573878/

other federal security programs and sends an unsupported signal that the insider threat to radioactive materials is negligible.

C. Elimination of Weekly Verification for Category 2 Quantities (§37.49(a)(3)(ii))

The NRC proposes to remove the requirement that licensees possessing category 2 quantities of radioactive material verify the presence of the material at least weekly through physical checks, tamper-indicating devices, use, or other means. The NRC's justification rests on the assertion that many category 2 sources, such as radiography devices, are used routinely in daily operations, making formal weekly verification unnecessary.

New York opposes the removal of this requirement but would be in support of modifying this requirement to only require verification of category 2 quantities of radioactive materials maintained in storage without continual observation or tamper indicating devices for longer durations. The intent of this regulation appeared to only apply to category 2 quantities of material that are in storage-only status without use. While most category 2 sources are used within a 7-day duration, many category 2 sources may be maintained in storage-only without use, continual observation, and tamper indicating devices due to maintenance needs, disposal costs, and other purposes. While such devices in storage-only status are unlikely to be re-commissioned for use within a 7-day duration, the extension of this requirement to a longer duration, such as 30 days, may afford adequate protection and accountability without unnecessary regulatory costs.

New York is concerned that the NRC's rationale does not account for the diversity of category 2 source holders and use patterns. Not all category 2 sources are used on a daily basis. Sources maintained in storage, used intermittently, or held as backup devices may go unobserved for extended periods absent a formal verification requirement. In densely populated areas, the consequences of an undetected loss or diversion of a category 2 source could be particularly severe, both in terms of direct radiological harm and the economic disruption, public anxiety, and emergency response costs that would follow.

Data from the NRC's Nuclear Materials Events Database and the Global Incidents and Trafficking Database maintained by the James Martin Center for Nonproliferation Studies demonstrate that losses and thefts of radioactive sources, while generally involving lower-category materials, are not uncommon in the United States.[7] Historical analyses have identified over a thousand incidents of lost, stolen, or abandoned sealed sources over multi-year

[7]CNS Global Incidents and Trafficking Database, James Martin Center for Nonproliferation Studies, Nuclear Threat Initiative (July 2019). Available at: https://media.nti.org/documents/global_incidents_trafficking_2018.pdf

reporting periods.[8] The weekly verification requirement provides a minimum backstop ensuring that any discrepancy is identified within seven days, enabling timely notification of regulators and initiation of recovery operations.[9]

By removing this requirement while relying solely on the general performance-based obligation to monitor, detect, assess, and respond under §37.49, the NRC is substituting a clear, enforceable, time-bounded standard with a vague directive that will be difficult for regulators to inspect against and for licensees to consistently implement.

D. Elimination of Security Communication Capability Requirements (§37.49(c))

The NRC also proposes to remove the requirements in §37.49(c)(1) and (c)(2) for licensees to maintain continuous and alternative communication capabilities for personnel communication and electronic data transmission among site security systems. The NRC argues that the existing obligation to monitor, detect, assess, and respond under §37.49 already encompasses the need for functional communications.

New York is concerned that removing this explicit requirement could lead to degraded communication preparedness. The requirement for both a primary and alternative communication capability was intentionally designed as a defense-in-depth measure, recognizing that communication systems are critical to effective security response and are among the first systems targeted or disrupted during a security event. A performance-based obligation to "monitor, detect, assess, and respond" does not, by its terms, require redundant communication pathways. Without an express requirement, some licensees may reduce investment in backup communication systems, creating a single point of failure that could compromise emergency response coordination with local law enforcement and other first responders precisely when it is most needed.

E. Reduction of Local Law Enforcement Coordination from Annual to Triennial (§37.45(d))

The proposed rule would reduce the required frequency of licensee coordination with local law enforcement agencies ("LLEAs") from at least every twelve months to at least every three years. While the State acknowledges that the requirement to coordinate more frequently when facility changes affect vulnerability would remain in place, this reduction raises concerns

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[8]GAO-03-804, "Nuclear Security: Federal and State Action Needed to Improve Security of Sealed Radioactive Sources" (August 2003). Available at: https://www.gao.gov/assets/a239625.html

[9]Proceedings of the 18th International Symposium on the Packaging and Transportation of Radioactive Materials (PATRAM 2016), "Category 1 and 2 Radioactive Materials Events." Available at: https://resources.inmm.org/system/files/patram_proceedings/2016/F4052.pdf

about the ongoing effectiveness of emergency preparedness in communities that host high-activity radioactive sources.

Effective coordination with local law enforcement is not merely an administrative exercise that can be documented once and considered adequate for three years. An officer or commander who was briefed on a facility's layout, source inventory, and response protocols may have transferred, retired, or departed within months of the initial coordination. A three-year interval introduces a significant risk that, at the time of an actual security event, the responding officers may have no institutional memory of the facility, its hazards, or the agreed-upon response protocols.

Annual coordination helps ensure that at least some personnel in the responding agency are familiar with the nature of the radioactive materials at the facility and the appropriate protective measures for a radiological event.

F. Elimination of the Maintenance and Testing Program Requirement (§37.51 and §37.43(c)(3)(iv))

The NRC proposes to entirely remove §37.51, which currently requires licensees to implement a maintenance and testing program for intrusion alarms, communication systems, and other physical security components, as well as the associated training requirement in §37.43(c)(3)(iv). The NRC's rationale is that the performance-based requirements under §37.49 already require that security systems remain operable.

Requiring a licensee to maintain operable and capable security functions without requiring them to maintain and test these systems may create a gap in a licensee's ability to confidently determine if a security system's individual components are working as intended. Not all aspects of a security system are utilized or exercised in routine practices to meet physical protection requirements. For example, tamper indicating devices are not overridden during routine use. However, the functionality of a tamper indication device is crucial if it is used as a standalone detection mechanism. Furthermore, the complexity of security systems may lead to faulty or non-functional equipment, which may drive the need for testing and maintenance to prevent unauthorized access. The removal of this requirement is counterproductive to promotion of a positive safety and security culture.

New York recommends that security system components are tested on a frequency as specified by the manufacturer, or on an annual basis if such testing and maintenance is not specified by the manufacturer's specifications.

New York additionally notes that eliminating the express maintenance and testing requirement will reduce the consistency and verifiability of security system upkeep across the

regulated community. A performance-based standard that systems must be capable of performing their intended function “when needed” is meaningful only if licensees proactively verify that those systems work before they are called upon during an actual security event. The NRC’s assumption that equipment failures will inevitably manifest during normal operations and prompt corrective action is overly optimistic. Security systems such as intrusion alarms, sensors, and monitoring equipment may fail silently, without producing an observable indication during routine operations, until they are explicitly tested. A facility may operate for months with a nonfunctional perimeter sensor or a degraded alarm annunciation system without detecting the failure, because the failure would only become apparent when an intrusion attempt actually occurs.

G. Extension of Refresher Training Interval from Annual to Triennial (§37.43(c)(3))

The proposed rule would change the required frequency of security refresher training for individuals implementing the security program from not to exceed twelve months to at least every three years. The NRC notes that the requirement to provide training when significant changes are made to the security program would remain.

While the State recognizes that a three-year training cycle may be appropriate for certain types of regulatory compliance training, security training serves a fundamentally different purpose. Security awareness and vigilance are perishable competencies that degrade without regular reinforcement. Annual training provides recurring opportunities to review threat indicators, rehearse response procedures, incorporate lessons learned from security events at other facilities, and maintain the security culture necessary to protect high-risk radioactive materials. A three-year interval is too long to maintain the level of awareness needed to detect pre-operational surveillance, social engineering attempts, and other indicators of potential adversary activity.

Conclusion

New York appreciates the NRC’s stated commitment to maintaining the safety and security of category 1 and category 2 quantities of radioactive material while reducing unnecessary regulatory costs. However, the State is concerned that some of the proposed changes risk creating gaps in the physical protection framework that was carefully constructed in the post-September 11 security environment.

The recommendations offered in these comments are intended to help the NRC achieve its objectives while preserving the core protective elements of Part 37. The State stands ready to work collaboratively with the NRC and other Agreement States to ensure that the final rule reflects a balanced, threat-and-vulnerability-informed approach to the physical protection of the nation’s most dangerous radioactive materials.

Thank you for the opportunity to comment. If you have any questions or concerns, please contact me.

Sincerely,

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