Amend He-P 4038.04(b), effective 5-25-16 (Document #11105), so that He-P 4038.04 intro and (b) are cited and read as follows:

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

(b) By hand delivery to the above address.

Amend He-P 4038.06(a), effective 5-25-16 (Document #11105), to read as follows:

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 and are otherwise in the public interest.

Amend He-P 4038.08, effective 5-25-16 (Document #11105), as amended effective 11-19-16 (Document #12055), by amending He-P 4038.08(d), (f), (j)(1), and (k), so that He-P 4038.08(d), (f), (j) intro., (j)(1), and (k) are cited and read as follows:

He-P 4038.08 Access Authorization Program Requirements.

(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. Provide oath or affirmation certifications to DHHS/RHS. 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).

(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) and (c). A signed consent must be obtained prior to any reinvestigation.

(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 shall include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization; and

(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 challenge procedures to change, correct, update, or explain anything in the record. 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; and

b. 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;

(4) Provide 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

(5) Make 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

Amend He-P 4038.09, effective 5-25-16 (Document #11105), as amended effective 11-19-16 in He-P 4038.09(a) (Document #12055), by amending He-P 4038.09(a)(2)f. and (b)(2), so that He-P 4038.09(a) intro., (a)(2) intro., (a)(2)f., (b) intro., and (b)(2) are cited and read as follows:

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:

(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:

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 He-P 4038.07 and He-P 4038.13 must be limited to whether the individual has been and continues to be trustworthy and reliable;

(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:

(2) 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 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.

Amend He-P 4038.10(a)(1), effective 5-25-16 (Document #11105), as amended effective 11-19-16 (Document #12055), so that He-P 4038.10(a) intro., and (a)(1) are cited and read as follows:

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 He-P 4038.07 through He-P 4038.13, 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 Nuclear Regulatory 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;

Amend He-P 4038.11(a)(10), (a)(12), (a)(13) and (b) intro, effective 5-25-16 (Document #11105), so that He-P 4038.11 (a) intro., (a)(10), (a)(12), (a)(13), and (b) intro., are cited and read as follows:

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:

(10) Commercial vehicle drivers for road shipments of category 1 and category 2 quantities of radioactive material;

(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 shall 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 shall 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 shall 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:

Amend He-P 4038.13(a)(2) and (b)(3), effective 5-25-16 (Document #11105), so that He-P 4038.13(a) intro., (a)(3), (b) intro., and (b)(3) are cited and read as follows:

He-P 4038.13 Access Authorization Program Review.

(a) Each licensee shall be responsible for:

(2) Ensuring that access authorization programs are reviewed to confirm compliance with the requirements of He-P 4038.07 through He-P 4038.13 and that comprehensive actions are taken to correct any noncompliance that is identified;

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

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

Amend He-P 4038.14(a)(2), effective 5-25-16 (Document #11105), so that He-P 4038.14(a) intro. and (a)(2) are cited and read as follows:

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;

(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 as specified in He-P 4038.04 at least 90 days before aggregating radioactive material to a quantity that equals or exceeds the category 2 threshold.

Amend He-P 4038.15(a)(1), (a)(4), (c)(1)b., and (d), effective 5-25-16 (Document #11105) so that He-P 4038.15(a) intro., (a)(1), (a)(4), (c) intro., (c)(1) intro., (c)(1)b., and (d) are cited and read as follows:

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 required by He-P 4038.14 through He-P 4038.22. The security plan shall, at a minimum:

a. Describe the measures and strategies used to implement the requirements of this He-P 4038.14 through He-P 4038.22; and

b. Identify the security resources, equipment, and technology used to satisfy the requirements of He-P 4038.14 through He-P 4038.22.

(4) The current security plan as a record 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.

(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:

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

(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, implementing procedures, or the list of individuals that have been approved for unescorted access, licensees shall:

a. Evaluate an individual's need to know the security plan, implementing procedures, or the list of individuals that have been approved of unescorted access; 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)(2), 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, implementing procedures, or the list of individuals that have been approved for unescorted access;

(6) Licensees shall maintain a list of persons currently approved for access to the security plan, implementing procedures, or the list of individuals that have been approved for unescorted access. When a licensee determines that a person no longer needs access to the security plan or implementing procedures, or the list of individuals that have been approved for unescorted access, 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, implementing procedures, or the list of individuals that have been approved for unescorted access;

(7) When not in use, the licensee shall store its security plan, implementing procedures, and the list of individuals that have been approved for unescorted access 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, implementing procedures, or the list of individuals that have been approved for unescorted access.

Amend He-P 4038.16(b) intro., effective 5-25-16 (Document #11105), to read as follows:

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

(b) The licensee shall notify the DHHS/RHS as specified in He-P 4038.04, within 3 business days if:

Amend He-P 4038.21(a)(2), effective 5-25-16 (Document #11105), so that He-P 4038.21(a) intro. and (a)(2) are cited and read as follows:

He-P 4038.21  Security Program Review.

(a) Each licensee shall:

   (2) Ensure that the security program is reviewed to confirm compliance with the requirements of He-P 4038.14 through He-P 4038.22 and that comprehensive actions are taken to correct any noncompliance that is identified;

Readopt with amendment He-P 4038.22, effective 5-25-16 (Document #11105), to read as follows:

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 by an appropriate method listed in He-P 4038.04. The report shall include sufficient information for DHHS/RHS analysis and evaluation, including identification of any necessary corrective actions to prevent future instances.

Readopt with amendment He-P 4038.24, effective 5-25-16 (Document #11105), to read as follows:

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).

(c) The shipping licensee shall 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 4038.23 through He-P 4038.28.

(d) 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.

(e) 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.

Amend He-P 4038.26 (a)(1), effective 5-25-16 (Document #11105), as amended effective 11-19-16 (Document #12055), so that He-P 4038.26 intro., (a) intro., and (a)(1) are cited and read as follows:

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. The contact information, including telephone and mailing addresses, of governors and governors’ designees, is available on the Nuclear Regulatory Commission’s website at https://nrc.scp.gov/special/designee.pdf. A list of the contact information is also available upon request from the Director, Division of Material Safety, Security, State, and Tribal Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

Amend He-P 4038.28(b), (c), (d), (e), and (f), effective 5-25-16 (Document #11105), so that He-P 4038.28(b), (c), (d), (e), and (f) are cited and read as follows:

He-P 4038.28 Reporting of Shipping Events.

(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.
## APPENDIX

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