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RECORD #135

TITLE: 10 CFR 40.14 is not to be Used for Issuing E-Licenses

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JUN 18 1981

Mr. Raymond N. Fleck
Assistant Counsel
Union Oil Company of California
Union Oil Center
Box 7600
Los Angeles, California 90051

Dear Mr. Fleck:

I am pleased to respond to your letter of May 29, 1981, relating to the exemption in 10 CFR § 40.13(c)(1)(vi) as unimportant quantities of source material of certain thorium-containing rare earth metals and compounds, mixtures and products. In particular, you ask how the limit used as the basis for that exemption, "0.25 percent by weight thorium, uranium, or any combination of these, . . ." was obtained.

This exemption in the regulations is based on the statutory exemption for unimportant quantities of source material contained in section 62 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2092) which reads as follows:

"Sec. 62. License For Transfers Required. --Unless authorized by a general or specific license issued by the Commission, which the Commission is hereby authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant. (Emphasis supplied. The underlined language is identical to that found in Sec. 5(b)(2) of the Atomic Energy Act of 1946.)

In carrying out its regulatory responsibilities, the NRC, like its predecessor the AEC, has consistently followed the practice of implementing the licensing requirements imposed by the Atomic Energy Act, including any statutory exemptions from those requirements, by promulgating regulations. The statutory exemption for unimportant quantities of source material is implemented in 10 CFR § 40.13 of the Commission's regulations. Over the years, § 40.13 has been amended from time to time to add new items which the Commission has determined qualify for exemption from licensing requirements because they involve unimportant quantities of source material. In some instances, these rulemaking actions have been initiated by the Commission

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itself; in others, the Commission's decision to institute a rulemaking proceeding was triggered by a petition for rulemaking filed in accordance with the procedures specified in 10 CFR §§ 2.800 - 2.809 of the Commission's regulations.

The exemption for certain rare earth metals and compounds, mixtures and products was originally established by the Atomic Energy Commission on March 31, 1947, when the Commission's regulations on the "Control of Source Material," then codified in 11 CFR Part 40, became effective. At that time, the basis for the exemption, insofar as it can be ascertained, was that the quantity of source material present in the exempted materials was not of significance to the common defense and security.

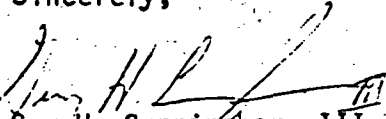
The exemption was not retained in the revision of 10 CFR Part 40, "Licensing of Source Material," which became effective February 13, 1961, because there had been neither a demonstrated need for the exemption nor any radiation survey data indicating that health and safety considerations permitted exemption of the specified concentrations of thorium or uranium.

In response to the petition of the American Potash and Chemical Corporation, the Atomic Energy Commission reconsidered the exemption in March, 1961. At that time, the AEC was aware that rare earth fluorides and rare earth oxides containing approximately 0.2% thorium were used in the manufacture of arc carbons. The AEC was also aware that the only rare earth material appearing in consumer products was in the form of enamel frits, television tube glass, paint dryers, and American-produced lighter flints which contain on the order of 0.19% thorium by weight. On the basis of this information, radioactivity exposure data furnished by the petitioner with respect to its rare earth material manufacturing operations since 1956, and other data within its general expertise, the Commission concluded that the rare earth exemption, with the value of 0.25% by weight thorium, uranium, or any combination of the two, involved unimportant quantities of source material within the meaning of section 62 of the Atomic Energy Act and should be re-established in the regulations.

With respect to your question concerning 10 CFR § 40.14, both the Commission and its predecessor, the AEC, have taken the position that, as a matter of policy, these procedures will not be used to authorize exemptions from the basic requirement to obtain a license. Under the Commission's present regulations, a source material license is required whenever a rare earth metal, compound, mixture or product contains 0.25 percent or more by weight thorium, uranium or any combination of these. There have been no instances in which § 40.14 has been used to specifically exempt from classification as source material any rare earth mixture containing thorium in excess of 0.25% by weight.

I hope this information has been helpful. If you have any further questions, please let me know.

Sincerely,



Guy H. Cunningham, III
Director and Chief Counsel
Regulations Division
Office of the Executive
Legal Director

cc: John Hickey, FCML, NRC

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Raymond N. Fleck
Assistant Counsel

May 29, 1981

Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Regulation of Thorium-Containing
Rare Earth Mixtures as Source
Materials

Dear Director:

We are concerned with the regulation of certain thorium containing rare earth mixtures as source materials. Mr. John Hickey, of NRC's Industrial Licensing, suggested that I contact you in this matter.

According to 10 CFR 40.13(c)(1) a rare earth mixture is a source material if it contains in excess of 0.25 weight percent thorium. It appears that the setting of the limit of 0.25 weight percent thorium may have been somewhat arbitrary. This limit is discussed briefly at page 3063, of the Federal Register, for April 11, 1961. A copy of that account is enclosed.

We are interested in the circumstances by which the Commission arrived at the limit of 0.25 weight percent. We are also interested in knowing if the Commission has ever exercised its discretion under 10 CFR 40.14 to exempt from classification as source materials any rare earth mixtures which contain somewhat in excess of 0.25 weight percent thorium?

We greatly appreciate any help that you might provide in this matter.

Thanks very much,

A handwritten signature in cursive script that reads "Ray N. Fleck".

RNF:ais

Enclosure