

ATTACHMENT 2

POLICY AND GUIDANCE DIRECTIVE
PG X-XX

STAFF REVIEWS OF GASEOUS DIFFUSION PLANT
TRANSFERS OF OWNERSHIP OR CONTROL

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STAFF REVIEWS OF GASEOUS DIFFUSION PLANT TRANSFERS OF OWNERSHIP OR CONTROL

1. Purpose

The purpose of this directive is to provide instructions for staff reviews of transfers of ownership or control of gaseous diffusion plants.

2. Background

In February 1999, staff issued Draft "Standard Review Plan for the Recertification of the Gaseous Diffusion Plants," NUREG-1671. Chapter 16 of Draft NUREG-1671 provides staff guidance applicable to foreign ownership and "reliable and economical" reviews that would be undertaken for routine recertifications; for changes to the previous review basis; for changes in ownership or control; and for changes applicable to certificate conditions on foreign ownership. Detailed financial and business characteristics analyses would be performed if a certificate holder, or other entities taking ownership or control, do not have investment-grade corporate bond ratings.

In November 2001, the Commission in the Memorandum and Order (CLI-01-23) of the June 14, 2001 Directors's Decision concerning the application of section 193 (f) of the Atomic Energy Act of 1954, as amended, held that the "reliable and economical" reviews are not required for recertification. Rather, the "reliable and economical" review is only required for a change in ownership or control. As to the scope of the "reliable and economical" review, the Commission held that the following test applies: 1) is the certificate holder to be owned, controlled, or dominated by a foreign entity, and 2) if the certificate holder is not to be owned, controlled, or dominated by a foreign entity, is the certificate holder likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to a) the common defense and security, or b) maintaining a domestic enrichment capability.

3. Guidance

Based on the Commission's decision in CLI-01-23 and Commission guidance in the Staff Requirements Memorandum dated February 21, 2002, the staff is revising the guidance in Draft Chapter 16 of the NUREG-1671 as an Office of Nuclear Material Safety and Safeguards Policy and Guidance Directive that would be applicable only in cases of a transfer of ownership or control of the gaseous diffusion plants. In accordance with the Commission's instructions, staff revised the guidance to reflect that the foreign ownership, control, or domination review satisfies the criteria for a "reliable and economical" domestic source of enrichment services. The guidance applicable to foreign ownership reviews is attached in Enclosure 1.

In addition, staff added a new guidance document for performing financial qualification reviews oriented to ensuring that entities have financial resources sufficient to conduct the required health and safety programs. Then financial qualification review will be part of the public health and safety review of an application for transfer of ownership or control. This is modeled from the staff adapted financial qualifications guidance from NUREG-1520, "Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility," and NUREG-1718, "Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility." This

guidance also applies only in cases of a transfer of ownership or control of the gaseous diffusion plants. The guidance applicable to financial qualifications reviews is attached in Enclosure 2.

ENCLOSURE 1

DETERMINATION OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION, COMMON DEFENSE AND SECURITY, AND RELIABLE AND ECONOMICAL SOURCE OF DOMESTIC ENRICHMENT SERVICES

1 Responsibility for Review

1.1 **Primary:** As designated.

1.2 **Secondary:** Facility security specialist/safeguards technical analyst.

1.3 **Supporting:** Material control and accounting inspector/resident inspector.

2 Purpose of Review

The purpose of this review is to determine that an applicant for transfer of certificates to a new entity is not owned, controlled, nor dominated by an alien, a foreign corporation, or a foreign government; that issuance of a certificate would not be inimical to the common defense and security of the United States; and that issuance of a certificate would not be inimical to the maintenance of a reliable and economical domestic source of enrichment services.² Reviews under this section will apply to certificate transfers to a new owner or any transfer of control under 10 CFR 76.65. Reviews under this section will also apply to submittals required under the certificate conditions described in Section 4.2.1, Item 6, in this NMSS P&GD.

3 Areas of Review

The staff reviews an application to transfer certificates to a new entity to examine if the application for the transfer meets the requirements related to foreign ownership, control, or domination; common defense and security; and whether a reliable and economical domestic source of enrichment services will be maintained.

² Note: The procedures in this Nuclear Material Safety and Safeguards Policy and Guidance Directive (NMSS P&GD), for a statutory determination of foreign ownership, control, or domination, are not to be used to determine foreign ownership, control, or influence (FOCI) for granting access to classified material. The National Industrial Security Program Operating Manual (NISPOM) (see Reference 1) is the governing document for determining FOCI and the granting of access to classified material.

4 Review Procedures

4.1 Acceptance Review

An acceptance review under this section is needed only when there is an application to transfer certificates for a change of ownership or control. The primary reviewer should determine that the application meets the requirements of 10 CFR 76.35, "Contents of Application," and 10 CFR 76.36, "Renewals," with respect to the determination of foreign ownership (see Section 5.1, "Regulatory Requirements"), and that the topics discussed in Section 3, "Areas of Review," have been addressed.

If significant deficiencies are identified in the application, the applicant should be requested to submit additional material before the staff begins the application review.

4.2 Evaluation

The reviewer should determine whether the applicant is subject to any of the criteria set forth in 10 CFR 76.22, "Ineligibility of Certain Applicants." If so, the primary reviewers should perform an evaluation of the information presented in the application against the acceptance criteria in Section 5, using the evaluation procedures described in the following sections.

4.2.1 Foreign Ownership, Control, or Domination

An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the power, direct or indirect, whether or not exercised, through the ownership of the applicant's securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of the applicant.

A foreign interest is defined as any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the United States (U.S.) or its possessions and trust territories; any person who is not a citizen nor national of the U.S.; and any U.S. interest effectively controlled by one of the above foreign entities.

Information submitted by the applicant, as specified in, "Foreign Ownership, Control, or Influence Guidance Documents for the Privatization of the United States Enrichment Corporation," (see Reference 2) will be reviewed. The reviewer assesses the following items to determine if the applicant is foreign owned, controlled, or dominated:

1. The applicant provides answers to the following questions. If any of the answers are affirmative, the applicant furnishes detailed information that describes all conditions that exist. The information is considered in the aggregate. The fact that some of the below listed conditions may apply does not necessarily render the applicant ineligible for recertification.

- a. Does a foreign interest own or have beneficial ownership in 5 percent or more of the organization's voting securities?
 - b. Does the organization own 10 percent or more of any foreign interest?
 - c. Do any foreign interests have management positions, such as directors, officers, or executive personnel, in the organization?
 - d. Does any foreign interest control or influence, or is any foreign interest in a position to control or influence, the election, appointment, or tenure of any of the directors, officers, or executive personnel?
 - e. Does the organization have any contracts, binding agreements, understandings, or arrangements, with a foreign interest(s), that cumulatively represent 10 percent or more of the organization's gross income?
 - f. Is the organization indebted to foreign interests?
 - g. During the last fiscal year, did the organization derive 5 percent or more of its total revenues or net income, from any single foreign interest or, in the aggregate, 30 percent or more of its revenues or net income from foreign interests?
 - h. Is 5 percent or more of any class of the organization's securities held in "nominee shares," in "street names," or in some other method that does not disclose beneficial owner of equitable title?
 - i. Does the organization have interlocking directors/officers with foreign interests?
 - j. Are there any citizens of foreign countries employed by the organization or who may visit offices or facilities in a capacity that may permit them to have access to classified information or a significant quantity of special nuclear material?
 - k. Does the organization have foreign involvement not otherwise covered in the answers to the above questions?
2. The reviewer obtains a foreign intelligence threat assessment. This assessment is conducted through the intelligence community and others, and is coordinated by the U.S. Department of Energy (DOE). The reviewer obtains the assessment by contacting the DOE representative to the Enrichment Oversight Committee.
 3. If the applicant submits any affirmative information listed in Section 5.1 or Steps 1.a through 1.k above, or the foreign intelligence threat assessment contains information that the applicant may be foreign owned, controlled, or dominated, the reviewer determines:

- a. The nature and extent of foreign ownership, control, or domination, to include whether a foreign interest occupies a controlling or dominant minority position;
 - b. The source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations; and
 - c. The type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to an acceptable level.
4. The staff determines that an applicant is considered to be foreign owned, controlled, or dominated, or that additional action is necessary to negate the foreign ownership, control, or domination; the applicant is promptly advised and requested to submit a negation action plan. In cases that involve foreign ownership, a plan may consist of one of the methods described in Chapter 2, Section 2-306, of the National Industrial Security Program Operating Manual (NISPOM). When factors not related to ownership are present, the plan provides positive measures that assure that the foreign interest can be effectively denied control or domination. Examples of such measures include: modification or termination of loan agreements, contracts, and other understandings with foreign interests; diversification or reduction of foreign source income, demonstration of financial condition independent of foreign interests; elimination or resolution of problem debt; assignment of specific oversight duties and responsibilities to board members; adoption of special board resolutions; and other actions that negate foreign control or domination.
5. The reviewer arranges to meet with, or otherwise communicate these findings to, the principal members of the Enrichment Oversight Committee and obtain their comments.
6. The reviewer ensures that the U.S. Nuclear Regulatory Commission (NRC) remains informed regarding foreign ownership, control, or domination by preparing certificate conditions of the following types:

If, at any time after the privatization date, the applicant obtains information reasonably indicating changes described in the NISPOM, Chapter 1, Section 3, 1-302(h) (see Reference 1), to the information previously submitted to NRC, described in the NISPOM, Chapter 2, Section 3, 2-302 b(1) through (11) (see Reference 1), the applicant shall notify NRC, in writing, within 15 days.

If the applicant enters into negotiations for the proposed merger, acquisition, or takeover by a foreign person, the applicant submits notification to NRC, in writing, within 15 days of the beginning of such negotiations. The submission includes the type of transaction under negotiation (stock purchase, asset purchase, etc.); the identity of the potential foreign person investor; a plan to negate foreign ownership, control, or domination; and copies of any related loan, purchase, and shareholder agreements, as well as annual reports, bylaws, articles of incorporation, partnership agreements, and reports filed with other Federal agencies.

4.2.2 Common Defense and Security

The reviewer assesses the following items to determine if the applicant is in compliance with NRC regulatory requirements to protect the common defense and security:

1. The reviewer determines that NRC has reviewed and approved the applicant's physical security plan and fundamental nuclear material control plan.
2. The reviewer consults with the primary reviewer of the Classified Matter Plan to ensure that the applicant's security plan for the protection of classified matter has been reviewed and approved.
3. If the applicant has been issued a certificate of compliance previously, the reviewer ensures that NRC inspection reports -- dealing with facility and transportation physical protection, material control and accounting, information security programs, and control of classified material -- do not indicate a general failure to protect the common defense and security interests of the United States.
4. The reviewer arranges to meet with, or otherwise consult with, the principal members of the Enrichment Oversight Committee, to obtain their assessment of the applicant's performance as the U.S. agent for the Russian Highly Enriched Uranium (HEU) Agreement if applicable.
5. If applicable, the reviewer ensures that NRC remains informed regarding the applicant's performance as the U.S. agent for the Russian HEU Agreement by preparing a certificate condition of the following type:

The applicant, or its successors, as the Executive Agent for the United States for implementing the Russian HEU Agreement, shall notify NRC, in writing within 15 days, if at any time and for any reason, including actions of third parties, the applicant or its successors become aware of, or anticipate, any change in the provisions of, or in the implementation of, the terms of any Memorandum of Agreement applicable to an entity serving as Executive Agent for the Russian HEU Agreement. [License reviewer to provide specific Memorandum of Agreement Title and Date of Execution]

4.2.3 Reliable and Economical Source of Domestic Enrichment Services

Under the Atomic Energy Act of 1954, as amended, Section 193(f)(2)(B) requires that the Commission may not issue a license or certificate of compliance if the Commission determines that issuance would be inimical to "...the maintenance of a reliable and economical domestic source of enrichment services." Section 193(f)(2)(B) is principally directed to the possibility of foreign entities gaining control and undermining U.S. domestic enrichment capabilities. Therefore, the reviews related to Foreign Ownership, Control, or Domination, and Common Defense and Security will encompass the "reliable and economical" issue when there is an application to transfer certificates to a new facility owner, or transfer of control under 10 CFR 76.65.

Issuance of a certificate of compliance is considered inimical to the maintenance of a reliable and economical source of domestic enrichment services if the applicant does not meet the conditions for foreign ownership, control, and domination, and common defense and security.

The review consists of the procedures in Sections 4.2.1 and 4.2.2.

5 Criteria

5.1 Regulatory Requirements

1. 10 CFR 76.22 addresses the ineligibility of applicants for recertification.
2. 10 CFR 76.33 provides for NRC to require the applicant to supply additional information, as necessary.
3. 10 CFR 95.15 addresses the collection of information necessary to determine that the applicant is not owned, controlled, nor dominated by an alien, foreign corporation, or foreign government.
4. 10 CFR Parts 76 and 95 contain and reference applicable regulatory requirements necessary to protect the common defense and security.

5.2 Regulatory Guidance

1. U.S. Nuclear Regulatory Commission, NUREG/CR-5734, "Recommendations to the NRC on Acceptable Standard Format and Content for the Fundamental Nuclear Material Control (FNMC) Plan Required for Low-Enriched Uranium Enrichment Facilities."
2. U.S. Nuclear Regulatory Commission, Regulatory Guide 5.67, "Material Control and Accounting for Uranium Enrichment Facilities Authorized to Produce Special Nuclear Material of Low Strategic Significance."
3. U.S. Nuclear Regulatory Commission, "Security Plan Format and Content Guide for NRC Licensees, Certificate Holders, and Related Organizations."

5.3 Regulatory Review Criteria

The staff should use the following regulatory review criteria, or information demonstrating acceptable alternatives, in its review of the application. Acceptability should be based on the following:

Foreign Ownership, Control, or Domination

After a review of the potential foreign involvement information, in accordance with the Review Procedures, in Section 4, the reviewer determines that no foreign interest has the ability, direct or indirect, to direct or decide matters affecting the management or operations of the applicant.

The following additional criteria are applicable:

1. Foreign competitors of the current certificate holder are precluded from participating in any acquisition of the current certificate holder.
2. Entities with a substantial commercial relationship with foreign enrichment providers, with respect to uranium and uranium products, are precluded from participating in any acquisition of the current certificate holder.
3. Foreign interests own no more than 10 percent of the outstanding voting securities of the applicant.
4. Foreign-sourced financing of an acquisition of the current certificate holder is no more than 10 percent of the purchase price.

Common Defense and Security

1. NRC has reviewed and approved the applicant's physical security plan.
2. NRC has reviewed and approved the applicant's security plan for the protection of classified matter.
3. NRC has reviewed and approved the applicant's fundamental nuclear material control plan.
4. If the applicant has previously been issued a certificate of compliance, a review of NRC inspection reports does not indicate the applicant's general failure to protect the common defense and security interests of the United States.
5. If applicable, consultation with the principal members of the Enrichment Oversight Committee indicates that the applicant's performance as the U.S. Agent for the Russian HEU Agreement is acceptable.

Reliable and Economical Source of Domestic Enrichment Services

The review criteria for a finding related to a reliable and economical source of domestic services includes the above criteria for foreign ownership, control, and domination. The following additional criterion is applicable if the applicant is not to be owned, controlled, or dominated by a foreign entity: The applicant is not likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to a) the common defense and security, or b) maintaining a domestic enrichment capability.

6 Evaluation Findings

6.1 Introduction

The staff's review should verify that sufficient information has been provided in the application to satisfy the intent of requirements in 10 CFR 76.35, "Contents of Application," and 10 CFR 76.36, "Renewals," relative to determination of foreign ownership; and the information provided is consistent with the guidance in this NMSS P&GD. On the basis of this information, the staff should be able to conclude that this evaluation is complete.

6.2 Sample Evaluation Findings

The staff could document the safety evaluation for the certificate application as follows:

On the basis of the staff's review and evaluation of the application to transfer certificates for a change in ownership or control, the staff has found no cause to determine that:

1. *The applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or*
2. *Issuance of a certificate of compliance would be inimical to the common defense and security of the United States; or*
3. *Issuance of a certificate of compliance would be inimical to the maintenance of a reliable and economical domestic source of enrichment services.*

On the basis of its review, the NRC staff determined that the information related to foreign ownership, control, or domination, common defense and security, and reliable and economical source of domestic enrichment services, is acceptable to support the application to transfer certificates to: a new facility owner; or transfer of control, under 10 CFR 76.65.

7 References

1. U.S. Department of Defense, "National Industrial Security Program Operating Manual (NISPOM)," DOD 5520.22-M, January 1995.
2. U.S. Department of Energy, U.S. Nuclear Regulatory Commission, U.S. Enrichment Corporation, "Foreign Ownership, Control, or Influence, Guidance Documents for the Privatization of the United States Enrichment Corporation."

ENCLOSURE 2

FINANCIAL QUALIFICATIONS

1 Responsibility for Review

- 1.1 **Primary:** Financial Specialist
- 1.2 **Secondary:** Licensing Project Manager
- 1.3 **Supporting:** Office of the General Counsel

2 Purpose of Review

The purpose of this review is to determine that an applicant for transfer of ownership or control of certificates to a new entity has current financial qualifications and continuing access to the financial resources necessary to engage in the proposed activity. Reviews under this section will apply only to certificate transfers to a new owner or any transfer of control under 10 CFR 76.65.

3 Areas of Review

The staff reviews an application for transfer of ownership or control of the certificate to a new entity to determine if the applicant has provided financial information sufficient to indicate that resources are available to the applicant to pursue the activities for which the certificate is sought.

The areas of review for financial qualifications should include:

- 1. Projected Costs of Operation
 - a. Projected costs of gaseous diffusion plant operations.
 - b. Projected costs of significant new corporate projects.
- 2. Sources of Funds
 - a. Funding plans for the proposed action and significant new corporate projects (if any), including, but not limited to, revenues and debt equity.
 - b. The source(s) and planned or existing funding commitments or contracts which the applicant relies, including government contracts.

3. Contingency Funds

The contingencies for cost overruns and revenue shortfalls.

4. Financial Qualifications

The financial description of the applicant, of any partnership established to finance the proposed action, and of any parent or other affiliated companies whom the applicant is relying for sources of operating funds.

The applicant should provide the U.S. Nuclear Regulatory Commission (NRC) with a copy of the most recent financial report and U.S. Securities and Exchange Commission Report 10-K, for itself, any planned or existing partners, and any parent or other affiliated companies whom the applicant is relying for the sources of operating funds. If an annual financial report and U.S. Securities and Exchange Commission Report 10-K is not available for the applicant, a partner, or other affiliated company, the applicant should provide audited financial statements that include:

- a. Statements of earnings, to include revenues: costs and expenses; earnings before and after taxes; net earnings; and per-share earnings and dividends;
- b. Consolidated statements of changes in share owners' equity;
- c. Statements of financial position, to include assets, liabilities, and equity;
- d. Statements of cash flows, to include cash flows from operating, investing, and financing activities;
- e. Management's discussion of financial operations, resources, liquidity, and significant selected financial data;
- f. Any notes applicable to the financial statements needed to clarify or explain significant items, assumptions, potential risks and liabilities, or limitations; and
- g. An independent auditor's report describing the accounting principles used, and any opinions or qualifications applicable to the financial statements.

4 Review Procedures

4.1 Acceptance Review

An acceptance review under this section is needed only when there is an application for transfer of ownership or control of the certificate to a new entity. If significant deficiencies are identified in the application, the applicant should be requested to submit additional material before the staff begins the application review.

4.2 Evaluation

After determining that the financial qualifications are acceptable for review in accordance with Section 4.1, the primary reviewer should perform an evaluation against the acceptance criteria described in Section 5. On the basis of its review, the staff may request that the applicant provide additional information or modify the application to meet the acceptance criteria in Section 5.

5 Acceptance Criteria

5.1 Regulatory Requirements

The regulation applicable to the area of financial qualifications review is 10 CFR 76.35(a)(3).

5.2 Regulatory Guidance

There are no regulatory guides that apply to financial qualifications for a gaseous diffusion plant certificate.

5.3 Regulatory Acceptance Criteria

The application is acceptable if the description of the applicant's financial qualifications demonstrates that the applicant's current and continuing access to the financial resources is sufficient to engage in the proposed activity.

The reviewer should find the applicant's financial qualifications acceptable if the following acceptance criteria are met:

1. Projected Costs of Operation

The applicant's costs of operation do not appear to be underestimated given the size and scope of the proposed actions and any significant new corporate projects.

2. Sources of Funds

The applicant's sources of funds (including the applicant's funding plan(s) and debt, equity and revenue levels, and planned or existing source(s) of funding commitments) are consistent with the estimated operating costs of the proposed action and any significant new corporate projects.

3. Contingency Funds

The applicant's contingency funds are appropriate for unforeseen operating contingencies. The applicant indicates its plans for the case where cost overruns are much higher than anticipated (e.g., in excess of 30 percent).

4. Financial Qualifications

The financial data for the applicant, planned or existing partners, or other affiliated companies, support the financial commitments of each; are consistent with generally accepted accounting practices; and represent a reasonable financial basis for operating the facility.

The applicant commits to providing its annual report to NRC. If the applicant does not issue an annual report, the applicant commits to annually provide NRC with the information described in Section 3.4(a)-(g).

6 Evaluation Findings

The primary reviewer should document the safety evaluation by preparing material suitable for inclusion in the Safety Evaluation Report. The primary reviewer should describe the review, explain the basis for the findings, and state the conclusions.

The staff could document the safety evaluation as follows:

The staff reviewed the financial qualifications for [insert name of facility] according to NMSS Policy and Guidance Directive X-XX. The staff evaluated [insert a summary of the material reviewed] and found that [state the findings].

The staff concluded that the applicant appears financially qualified to engage in the proposed activities in accordance with 10 CFR Part 76. As a result, the staff finds that the applicant's financial qualifications support the staff's approval of the transfer of ownership or control.

7 References

Code of Federal Regulations, Title 10, Part 76, "Certification of Gaseous Diffusion Plants," U.S. Government Printing Office, Washington, DC.