

May 22, 1991

MEMORANDUM FOR: William C. Parler, General Counsel
FROM: Samuel J. Chilk, Secretary /S/
SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION
AND VOTE, 3:30 P.M., TUESDAY, MAY 21, 1991,
COMMISSIONERS' CONFERENCE ROOM, ONE WHITE
FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO
PUBLIC ATTENDANCE)

I. SECY-91-136 - Return of Topaz II Reactor System to the
Soviet Union

The Commission, by a 4-0 vote, approved a final rule (as attached) which amends its regulations pertaining to the import and export of nuclear equipment and material to permit the return to the Soviet Union of the Topaz II Reactor System. This action permits the export of the Topaz II, which is owned by the Government of the USSR, without issuance of a license by the NRC.

Commissioner Curtiss noted that he believes that the Commission should have established a date certain by which the Topaz II will be returned to the USSR. His comments are attached.

The Federal Register Notice should be revised as noted, reviewed by the Regulatory Publications Branch, and returned for signature and publication.

(OGC)

(SECY Suspense: ASAP)

Attachments:

As stated

cc: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
EDO
GPA
ACRS
PDR - Advance
DCS - P1-24

Nuclear Regulatory Commission

10 CFR PART 110

Return of Topaz Reactor to the Soviet Union

AGENCY: Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The U.S. Nuclear Regulatory Commission is amending its regulations pertaining to import and export of nuclear equipment and material to permit the return to the Union of Soviet Socialist Republics (USSR) of the Topaz II Reactor System, which was imported into the United States pursuant to an import license issued by the NRC on January 4, 1991. This action permits the export of Topaz II, which is owned by the Government of USSR, without issuance of a license by the NRC.

EFFECTIVE DATE: (date of publication)

FOR FURTHER INFORMATION CONTACT: Joseph F. Scinto or Joanna M. Becker, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone (301) 492-1740.

SUPPLEMENTARY INFORMATION: In January 1991, the Topaz 11 Reactor, System, a space reactor developed and owned by the USSR, was imported into the U.S. under an NRC import license, at the behest of the Department of Defense (DOD), for exhibit at a Space Nuclear Power Symposium in Albuquerque, N.M. and inspection and study by DOD. The reactor was imported without fuel, coolant or moderator and is non-operating. It is possessed in the United States by Sandia National Laboratory, a prime contractor of the Department of Energy exempt from facility license requirements by NRC regulations in 10 C.F.R. § 50.11.

The Topaz II Reactor System is, in the United States, subject to the provisions of those sections of the Atomic Energy Act applicable to utilization facilities, including Sections 101 and 104.

Section 101 reads as follows:

Sec.101. License Required. -- It shall be unlawful, except as provided in section 91, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 103 or 104.

Section 104d. provides, in pertinent part:

Sec. 104 Medical Therapy and Research and Development

* * * * *

d. No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 123 or except under the provisions of section 109.*****

Section 11.cc. of the Atomic Energy Act of 1954, as amended, defines "utilization facility",
in pertinent part, as

any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such a manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantities as to be of significance to the common defense and security or in a manner as to affect the health and safety of the public...

Commission regulations in 10 CFR 50.2 define "utilization facility" as

any nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233.

Commission regulations in 10 CFR 110.2 define "utilization facility" as

any nuclear reactor, "other than one that is a production facility, and the following major components of a nuclear reactor...

Even though presently unfueled, the Topaz II Reactor is a reactor peculiarly adapted to making use of atomic energy and was imported under NRC import license, No. IR 90002, issued January 4, 1991. That license contained a condition to the effect that it would "become effective only upon written acknowledgement, by an authorized representative of the Union of Soviet

Socialist Republics, that any export from the United States of the TOPAZ II Reactor System must meet the requirements of the U.S. Atomic Energy Act of 1954, as amended. Under the law, at present, these requirements include the need for an Agreement for Cooperation in the Peaceful Uses of Atomic Energy." The authorized representative of the USSR acknowledged this condition. There is currently no such Agreement for Cooperation. However, the Soviet agency which developed, and owns, the Topaz II Reactor System desires its return to the Soviet Union.

Although capable of making use of special nuclear material and peculiarly adapted for making use of atomic energy, taking into account the absence of fuel, moderator or coolant, the intended short stay and limited use as a model for exhibition purposes in the United States, and its return in the near future to the country of origin, the Commission has determined that, in connection with the export of the device, the Topaz II Reactor System imported under NRC License No. IR90002 is not a "utilization facility" and is amending the definition of that term in 10 CFR 110.2. Thus, this device may be exported without issuance of a Commission export license.

Since this matter involves a device which is the property of the Soviet Government transferred for exhibition purposes to the Department of Energy and involves a matter of interest to the Department of Defense and the Department

of State, the Commission has determined that this amendment involves a foreign affairs function of the United States. Thus, the notice and comment provisions of the Administrative Procedure Act do not apply, pursuant to 5 USC 553(a)(1).

Environmental Impact: Categorical Exclusion

The NRC has determined that, pursuant to §§ 51.10 and 51.22(c)(1) of this chapter, the amendments to Part 110 which follow require neither an environmental impact statement nor an environmental assessment.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget under approval number 3150-0036.

Regulatory Analysis:

Adoption of these amendments is necessary in order to enable return of the Topaz II Reactor System to the Soviet Union. No other NRC regulatory actions

or alternative actions by other agencies, to the best of the Commission's knowledge, address this matter nor, in view of the desired time frame, are any alternative courses of action feasible. It is not expected to result in any increased regulatory burden.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant number of small entities. The final rule does not impose additional obligations on the public.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule, and, therefore, a backfit analysis is not required for this final rule because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 110

Administrative practice and procedures, Classified information, Criminal penalty, Export, Import, Incorporation by reference, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 110.

1. The authority citation for Part 110 continues to read as follows:

AUTHORITY: Secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended, (42 U.S.C. 2071, 2073, 2074, 2077, 2092-2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154-2158, 2201, 2231-2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Section 110.1(b)(2) also issued under Pub. L. 96-92, 93 Stat. 710 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c and 57d., 88 Stat. 473, 475 (U.S.C. 2074). Section 110.27 also issued under sec. 309(a), Pub. L. 99-440. Section 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Section 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Sections 110.80-110.113 also issued under 5 U.S.C. 552, 554. Sections 110.30-110.35 also issued under 5 U.S.C. 553.

For the purposes of sec. 223, 6B Stat. 958, as amended (42 U.S.C. 2273); §§ 110.20-110.29, 110.50, and 110.120-110.129 also issued under secs. 161 b and i, 68 Stat. 948, 949, as amended (42 U.S.C. 2201 (b) and (i)); and §§ 110.7a and 110.53 are also issued under sec. 161(o), 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. The definition of "utilization facility" in § 110.2 is amended to read as follows:

§ 110.2 Definitions

As used in this part,

* * * * *

"Utilization facility" means any nuclear reactor, other than one that is a production facility, and the following major components of a nuclear reactor:

- (1) Pressure vessels designed to contain the core of a nuclear reactor;
- (2) Primary coolant pumps;
- (3) Fuel charging or discharging machines; and
- (4) Control rods.

A utilization facility does not include the steam turbine generator portion of a nuclear power plant. For purposes of export from the United States under the jurisdiction of the Nuclear Regulatory Commission, ~~A~~ utilization facility does not include the Topaz II Reactor System owned by the Union of Soviet Socialist Republics and imported into the United States pursuant to NRC License No. IR90002, issued January 4, 1991.

3. Section 110.5 is amended to read as follows:

§ 110.5 Licensing requirements

Except as provided under Subpart B and the definition of utilization facility in § 110.2 of this part, no person may export any nuclear equipment or material listed in § 110.8 and § 110.9, or import any nuclear equipment or material listed in § 110.9a, unless authorized by a general or specific license issued under this part.

Dated at Rockville, MD, this _____ day of May, 1991.

For the Nuclear Regulatory Commission

Samuel J. Chilk,
Secretary of the Commission

Commissioner Curtiss' comments on SECY-91-136:

Based upon the assurances from the Office of General Counsel that there are no precedential ramifications, either domestic or international, of the approach that the staff has recommended in the subject SECY paper, I have no objection to such an approach, subject to the understanding that the Department of State will assume jurisdiction over the Topaz II device forthwith and arrange for return of the device to the Soviet Union by a date certain. In this regard, given the reliance that the staff's interpretation places on the fact that the device will remain in this country for a "limited time" and that return to the Soviet Union is "imminent", I believe that it is important to specify that date as a condition of whatever action we take on this matter.¹

Additionally, in view of the novel legal theory that is being advanced in support of the staff's recommendation,² as well as the fact that the action will become effective without an opportunity for public comment, I believe it would be prudent to consult with the relevant Congressional oversight committees on the approach that is being proposed.

Additional minor editorial comments are attached.

¹ Under the approach recommended by the staff, if the device were to remain in the country beyond that period of time, I assume an export license would be required.

² Looking to the elements of the definition of "utilization facility" in Section 11.cc. of the Atomic Energy Act of 1954, as amended, the Commission would assume that the return of the TOPAZ device to the Soviets will occur in such a short time period that the device could not be made operational in a manner that could affect the health and safety of the public in the United States. In addition, since the device would be returned to its original designer and owner, the Commission would assume that the return would not be of significance to the common defense and security of the United States. These assumptions, in turn, would lead the Commission to conclude that the TOPAZ device need not be defined

as a utilization facility for purposes of its return to the Soviets.