

21

STATE OF ILLINOIS  
**DEPARTMENT OF NUCLEAR SAFETY**

1035 OUTER PARK DRIVE • SPRINGFIELD, ILLINOIS 62704  
217-785-9900 • 217-782-6133 (TDD)

George H. Ryan  
Governor

Thomas W. Ortiger  
Director

DOCKET NUMBER  
PROPOSED RULE 40

(67FR 55175)

November 12, 2002

DOCKETED  
USNRC

November 14, 2002 (4:04PM)

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attn: Rulemakings and Adjudications Staff

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Re: Comments on Proposed Rule;  
Federal Register / Vol. 67, No. 167 / Pages 55175-55179;  
"Transfers of Certain Source Materials by Specific Licensees"

Gentlemen:

The Illinois Department of Nuclear Safety (Department) hereby provides comments on the above-identified proposed rule. The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to allow persons exempt from licensing to dispose of "unimportant quantities of source material," and to require NRC approval for transfers from specific licensees of "unimportant quantities of source material" to persons exempt from licensing (under 10 CFR 40.13(a).)

On September 29, 2000, the Department submitted comments regarding the predecisional text for this proposed rule, as described in the State Agreements Program Letter, STP-00-065. The Department persists in maintaining the positions itemized in that comment letter (copy attached.) One of the issues upon which the Department commented is addressed in the current Federal Register proposal. The Department can not determine whether our remaining comments were considered or resolved.

The single above-referenced issue pertains to the clarification option of "*adding rule language specifically prohibiting intentional dilution*," which is strongly advocated by the Department. While the discussion of this policy in the supplemental information section of the Federal Register notice provides the regulatory intent for subsequent compliance determinations, such wording is not readily available to licensees many years later. Providing the suggested clarification in the text of the proposed rule will help ensure that specific licensees understand the prohibition regarding intentional dilution.



recyclable

Template = SECY-067

SECY-02

### General License Issue


It is stated in the Federal Register notice that "[t]he primary concern for this proposed rule is to handle situations where quantities of licensed source material have been processed through licensed operations resulting in mixtures of material containing less than 0.05 percent by weight source material." The notice further states that the similar issue regarding general licensed source material is not a concern, "...because of the more limited quantities of material handled under general license."

While this may be true for most cases, the Department has had concerns with at least one Illinois general licensee that possesses a rather large inventory of source material obtained under the general license provided by the Illinois §40.22-compatible rule, as well as the exemption provided by the Illinois §40.13(a)-compatible rule. Since these rules do not limit total possession at any one time, but rather limit received quantities and annual receipts, large inventories can develop at the general licensee's facility, or at the disposal facility local to the general licensee.

The Department recommends the NRC re-visit its assessment to include unusual or atypical conditions that can be created by the general license provision. If potential exposure hazard is the criterion for the NRC approval requirement in the proposed rule, then the Department urges the NRC not to casually discount source material contamination and exposure potentially generated by general licensee inventories. The Department acknowledges that this issue may be more-appropriately addressed under new Part 40 rulemaking.

Should you have any questions regarding the Department's concerns, please contact me at (217) 785-9947.

Sincerely,

  
for Joseph G. Klinger, Chief  
Division of Radioactive Materials

JGK:DSP

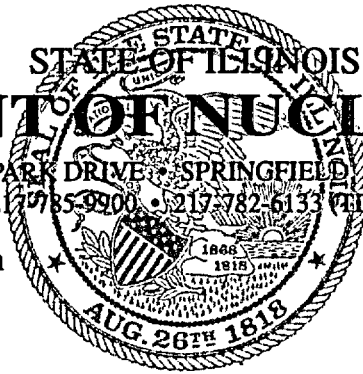
Attachment

cc: Jim Lynch, State Agreements Officer  
Josie Piccone, Deputy Director, Office of State and Tribal Programs

STATE OF ILLINOIS  
**DEPARTMENT OF NUCLEAR SAFETY**

1035 OUTER PARK DRIVE • SPRINGFIELD, ILLINOIS 62704  
217-785-9900 • 217-782-6133 (TDD)

George H. Ryan  
Governor



Thomas W. Ortziger  
Director

September 29, 2000

COPY

Office of State Programs  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attn: Frederick C. Combs, Deputy Director, STP

Re: State Agreements Program Letter, STP-00-065  
"Transfers of Certain Exempt Source Materials by Specific Licensees"

Dear Mr. Combs:

The Illinois Department of Nuclear Safety (Department) hereby provides comments requested in the above-identified Agreement States letter. The State Programs letter describes predecisional text for a proposed amendment to NRC regulations, intended to:

- 1) require Commission approval for transfers (by a licensee) of unimportant quantities of source material (less than 0.05 percent by weight) to persons exempt from licensing requirements, and
- 2) clarify that disposal of unimportant quantities of source material is exempted.

The predecisional text for the proposed rule was posted on the Technical Conference Forum. The Department is aware that the comment period for the predecisional text has expired. The short comment time allotment is, in fact, one of the Department's criticisms.

The predecisional text mischaracterizes the scope and implications of the proposed regulatory change. The proposal is presented as two innocuous changes to the rules -- an additional safety requirement is to be added, accompanied by a simple clarification of existing wording. The proposal is actually an extraordinarily significant change to long-standing regulatory policy regarding exempt disposal of licensed source material that is likely to introduce far-ranging impacts on the regulators, the regulated community and the public.

Whether the mischaracterization is intentional or not, NRC should not proceed with the rule change until the ramifications of the policy change have been properly presented, with adequate time for constructive review by the Agreement States and NRC offices.

The short review period, which is formally recognized in the STP letter, is untenable. Contending that *"NRC offices have the same amount of time for review and concurrence"* is not justification for expedited action. (The Department also objects to the disparaging presumption of automatic Agreement State "concurrence.")

In the "Supplementary Information" section of the proposed rule, the Commission indicates that, in the past, NRC has made decisions on a case-by-case basis, regarding a specific licensee transferring "unimportant quantities" of source material to exempt persons. In the past fifteen-to-twenty years, individual Agreement States have repeatedly confronted this issue, and have requested NRC guidance and interpretation of the exempt-transfer authorization granted by 10 CFR 40.51(b)(3). From the intent of the new proposal, it is apparent *[but only to the informed reader]* that the NRC has changed its regulatory interpretation and policy.

Review of past State Programs letters, NRC Information Notices, Branch Technical Positions, Health Physics Positions and regulatory interpretations demonstrates that the NRC has steadfastly considered licensed material to always be licensed material, regardless of any reduction (i.e., dilution) of activity concentration, and that such licensed material may not be transferred to exempt persons. If the NRC has recently approved transfers based on case-by-case evaluation of dose and risk, the Agreement States have not been formally advised of the practice (although documents may have been posted that contained information for specific cases,) and have not been provided guidance regarding the evaluation of such licensee applications. Regarding the exemption applicability to diluted licensed material, whenever specific guidance has been requested by an Agreement State, the NRC has discouraged the practice, and strongly contended that the material must be classified and disposed of as low-level waste. Three recent examples are cited [underlined emphasis added]:

State Programs Information letter (SP-98-023) -- March 30, 1998

*"Uranium and/or thorium below 0.05 wt. percent in a matrix or media other than ore is still source material and, when not under the control of a licensee, is exempt from licensing under 10 CFR 40.13(a). Since the question being addressed deals with licensed material, the 10 CFR 40.13(a) exemption does not apply, and the licensed material must either be transferred to an individual licensed to possess it or disposed of as low-level waste."*

State Program Information letter (SP-94-090) -- June 10 1994

*"Consider as a first case an NRC licensee that has a source material license.... All materials that cannot be decontaminated, including those at or below the 10 CFR 40.13(a) limit, must be managed as LLRW. Diluting the material to below the 0.05% level would only increase the volume of LLRW requiring disposal pursuant to 10 CFR 20.2001."*

*"A second case could be an individual that never had a specific radioactive materials license and handled only source material in concentrations less than the exemption limit in 10 CFR 40.13(a). In this case the material would not require disposal under 10 CFR 20.2001 because the possessor is not a licensee subject to Part 20. NRC neither requires nor precludes disposal in this case to a LLRW disposal site."*

*"With respect to whether such material is exempt from NRC disposal requirements, the answer is no for the first case discussed above, except for material meeting the unrestricted release criteria, and yes for the second case."*

*"With respect to whether the material is considered LLRW, the answer is yes in the first case. As stated above, a licensee cannot dilute material to make it exempt under 40.13(a)...."*

James G. Partlow, Director, Division of Inspection Programs, Office of Inspection and Enforcement, NRC (Attachment to SP-96-073) -- July 1, 1996

*"...the NRC staff should maintain a strong position that 10 CFR Section... 40.13(a) (unimportant quantities of source material)... do not authorize radioactive waste disposal by transfer to unlicensed persons."*

*"In informal discussions with members of my staff, cognizant individuals in the Division of Waste Management/NMSS, the Office of Nuclear Reactor Regulation, and the Office of State Programs have indicated their agreement with this established position and their concerns about the potential adverse impacts of its reversal."*

If the NRC is indeed changing its historic policy on this practice, the Agreement States should be provided for review (prior to Federal Register proposal) comprehensive guidance on all affected and relevant issues. (For instance, the issue regarding the disposal of "intentionally-diluted" material, as opposed to "operations-inherent dilution.") Perhaps a format similar to that used for NUREG-1556, "Consolidated Guidance About Materials Licensees," would be appropriate for describing acceptable criteria for, and agency review of, licensee proposals. Whatever form of guidance is used, it should clarify the applicability of previous documented guidance, and obviate the need for future interpretation requests from NRC offices, Agreement States and licensees. Previous guidance, regarding source material exemptions and general licenses, should be "retired" or clarified by the updated guidance document. The following list of potentially affected guidance is a sample of NRC documents revealed during the Department's research, and is not intended to be comprehensive:

SP-97-046, "Thorium Alloys Scrap Metal"

SP-96-073, "Clarification of Requirements for Disposal of Exempt Materials"

NRC-Information Notice 93-14, "Clarification of 10 CFR 40.22, Small Quantities of Source Material"

Memorandum to James H. Joyner (April 13, 1983) from Jay M. Guitierrez, Regional Counsel, "Disposal of Exempt Quantities of Radioactive Material"

Branch Technical Position (October 19, 1981) "Discussion of Options for NRC Approval of Applications for Disposal or Onsite Storage of Thorium or Uranium Wastes..."

HPPOS-190, "Disposal of Exempt Quantities of Byproduct Material"

The Department contends that the proposed regulatory amendment can not be adequately reviewed unless the reader is familiar with previous NRC policy, guidance statements and SECY and COMSECY documents. While the Department recommends comprehensive guidance on the implementation issues for the proposed rule, we recognize that the Federal Register notice is not necessarily an appropriate vehicle for comprehensive discussion. The Department does recommend, however, that the "Supplementary Information" section of the proposed notice text be expanded to more clearly describe the NRC's licensing/disposal policy and interpretation relative to source material exemptions, licensing, transfers and disposal. The NRC should provide at least enough information to permit a licensee to confidently apply a regulatory transfer authorization [Section 40.51(b)(3)] without the need for additional interpretation, and without fear of noncompliance with NRC policy. The NRC should also direct the reviewer's attention to documents SECY-98-284, COMSECY-98-022, SECY-99-259, SECY-94-074, NUREG/CR2881 and any other relevant documents.

In addition to the above general recommendations, the Department has specific questions:

- 1) When 40.51(e) rule refers to "...annual total dose equivalent to a member of the public," is the NRC referring to the dose to the maximally-exposed individual of the critical group, or to the average dose to a member of the critical group?
- 2) How is a licensee to interpret the 40.51(e) phrase "*derived from*"? The potential scope of the definition could be significant.
- 3) Does the proposed rule permit, as it appears to, the intentional dilution of licensed source material prior to transfer to exempt persons for uncontrolled disposal? No prohibition appears here or in existing rules (appears only in previous NRC policy, which is obviously subject to change.)

The Department expects further definition and discussion on the topic, and will likely have additional comments on the underlying issues. Should you have any questions regarding the Department's concerns, please contact me at (217) 785-9947.

Sincerely,

COPY

Joseph G. Klinger, Chief  
Division of Radioactive Materials

JGK:DSP

cc: Jim Lynch, Region III, State Agreements Officer  
Clark W. Prichard, NMSS