

## **RULEMAKING ISSUE NEGATIVE CONSENT**

June 24, 2003

SECY-03-0106

FOR: The Commissioners

FROM: William D. Travers  
Executive Director for Operations

SUBJECT: UPDATE ON PROPOSED RULE CHANGES TO 10 CFR 40.51

### PURPOSE:

To request, by negative consent, Commission approval to postpone further action on the final rule, "Transfers of Certain Source Materials by Specific Licensees," amending 10 CFR 40.51, until the Commission has an opportunity to review associated issues that could impact the action taken in the final rule.

### BACKGROUND:

In a staff requirements memorandum (SRM) dated March 29, 2002 (Attachment 1), the Commission approved publication of the proposed rule (SECY-00-0201, September 25, 2000). The proposed rule was published in the Federal Register on August 28, 2002 (67 FR 55175) (Attachment 2). The comment period closed November 12, 2002, with 25 comment letters received from a wide range of individuals, industrial groups, environmental organizations, and other Federal and State government agencies.

The purpose of the rule is to amend the regulations in 10 CFR 40.51 to require U.S. Nuclear Regulatory Commission (NRC) approval for transfers of low concentrations of source material (less than 0.05 percent by weight) from licensees to persons exempt from licensing under 10 CFR 40.13(a). The Statement of Considerations (SOC) for the proposed rule provides the following guidance:

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If the approval request is for transfer for the purpose of direct disposal in an appropriate facility [e.g., a Resource Conservation and Recovery Act (RCRA) Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or U.S. Environmental Protection Agency (EPA) permits], the request for transfer would normally be approved if the dose to a member of the general public is unlikely to exceed 0.25 millisieverts per year (0.25 mSv/yr) [25 millirem per year (25 mrem/yr)]. If the expected dose to a member of the general public is estimated to be between 0.25 mSv/yr (25 mrem/yr) and 1 mSv/yr (100 mrem/yr), the NRC staff will inform the Commission of the request and its resolution status. However, these limitations do not preclude a licensee from requesting approval for a transfer that could potentially result in doses, to a member of the general public, above 1 mSv/yr (100 mrem/yr); but such approval would be based on the unique circumstances of the specific case under review and would not be approved by the NRC staff without full Commission review.

The above dose limits are applicable to transfers for the purpose of direct disposal in an appropriate facility (e.g., a RCRA Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or EPA permits). If transfers of material are sought for other purposes, such as recycle or indirect disposal, such dose limits may not be appropriate. Lower dose limits may need to be considered.

The objective of this rule is to ensure that the regulations regarding transfers of materials containing low concentrations of source material, to persons exempt from licensing under 10 CFR 40.13(a), are adequate to protect public health and safety.

In addition, the rule amends 10 CFR 40.13(a) to add the word “disposes” to the list of exempted activities. The rule also requested comments on adding regulatory language prohibiting dilution as directed by the SRM to SECY-00-0201.

## DISCUSSION:

### *Related Issues*

Since publication of the proposed rule, the staff has developed a number of related issues which, depending on their outcome, could be considered inconsistent with guidance provided in the SOC or reduce the need for the final rule. These issues are primarily related to: the recently issued SECY-03-0068 (“Interagency Jurisdictional Working Group Evaluating the Regulation of Low-Level Source Material or Materials Containing Less than 0.05 Percent by Weight Concentration Uranium and/or Thorium,” May 1, 2003); disposition of solid materials; and recent discussions between EPA and NRC that would allow certain low-level wastes to be disposed of in RCRA sites. Each of these issues is discussed below.

#### 1) SECY-03-0068

In SECY-03-0068, the staff recommends further consideration of decreasing NRC’s jurisdiction over uranium and thorium by limiting NRC authority to uranium and thorium extracted or purposely concentrated for the use of the uranium and thorium. Should NRC jurisdiction be decreased, as envisioned by the staff, the staff expects that concentration limits would no longer be necessary and therefore would expect to remove 10 CFR 40.13(a) as an exemption. Because the proposed amendment to 10 CFR 40.51 results from a concern specifically related

to transfers to persons exempted under 10 CFR 40.13(a), this change in NRC's jurisdiction would remove the need for the proposed rule. As a result, should NRC finalize the proposed rule and the change in jurisdiction suggested in SECY-03-0068 occurs, the staff would need to rescind the new rule, likely through a small conforming amendment made as part of the rule implementing the reduction in jurisdiction. It should, however, be noted that the period between finalization of the changes related to 10 CFR 40.51 and finalization of changes to NRC jurisdiction discussed in SECY-03-0068 may be a number of years. Based on the known possibility of having to rescind the rule in the relatively near future, should the Commission choose to adopt the staff's recommendation in SECY-03-0068, the staff would recommend withdrawing the proposed rule amending 10 CFR 40.51. If after that time, the Commission or Congress determines that no jurisdictional changes should be made related to this effort, the staff would revisit the transfer issue.

## *2) Disposition of Solid Materials*

The staff is conducting a rulemaking on its approach for control of disposition of solid materials. Doses from uranium or thorium at concentrations below 0.05 percent by weight concentration (the exemption limit in 10 CFR 40.13(a)) could exceed those included for consideration in the June 30, 1999, Issues Paper on release of solid materials at licensed facilities (64 FR 35090). Although the Issues Paper included the exclusion that "10 CFR 40.51 and 40.13 contain transfer or unimportant quantities provisions, respectively, which are the subject of a separate Commission-directed initiative on Part 40 and are outside the scope of this effort (the disposition of solid materials)," the staff has since determined that source material should be included in this effort. This conclusion is based in part on the SRM to SECY-00-0201, where the Commission directed the staff to evaluate the acceptability of the potential dose (of source material transfers) on a case-by-case basis until the Commission's approach to the release of solid material is resolved.

As part of the rulemaking activities for the control of disposition of solid materials, the staff held public workshops in May 2003. Topics discussed included what type of disposal might be acceptable in RCRA Subtitle C or Subtitle D landfills. In order to minimize the potential for inconsistencies between the guidance in the SOC for the proposed changes to 10 CFR 40.51 and the results of the rulemaking activities on solid material disposition, the staff believes that consideration should be given to postponing publication of the rule amending 10 CFR 40.51 until comments on issues related to disposal in RCRA sites resulting from the workshops are reviewed by staff. The staff expects that its review would be completed in conjunction with the submittal to the Commission of the draft environmental impact statement on the disposition of solid materials in July 2004.

## *3) Discussions with EPA on Mixed-Waste Disposal in RCRA Sites*

EPA is developing an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a potential regulatory framework to permit disposal of low-activity radioactive waste and mixed waste in RCRA Subtitle "C" facilities. Although NRC has authorized some transfers of low concentrations of source material to RCRA sites in the past, the recipient site has received the material as "exempt NRC material" rather than using any specific EPA criteria. Although these transfers have generally been estimated to result in exposures to the general public that are well below 0.25 mSv/yr (25 mrem/yr), the proposed rule change related to 10 CFR 40.51 would allow potential doses that exceed 0.25 mSv/yr (25 mrem/yr) in some

cases. Although EPA is still in early development of its approach to the mixed-waste disposal issue, there is a possibility that EPA may impose limits below the constraints provided in the SOC for the proposed 10 CFR 40.51 transfer rule.

In comments submitted on the proposed amendment of 10 CFR 40.51, EPA states "It would appear that transfers for the purpose of direct disposal would be approved at dose levels that are extraordinarily high, particularly when such disposal may occur at EPA-permitted RCRA facilities not designed for such disposal. At a minimum, disposal at EPA-regulated facilities should be consistent with EPA's risk management policies." EPA further states in its comments, "A final rule that provides Commission approval and limits the radiological impact of such transfers to no more than 15 mrem/yr including consideration of 'As Low as Reasonably Achievable' (ALARA), would provide improved protection of public health and the environment."

If limits are promulgated in EPA's approach to the disposal of mixed waste that are below those proposed in the amendment of 10 CFR 40.51, the constraints in the proposed SOC for the 10 CFR 40.51 transfer rule may eventually result in public confusion and concern that NRC is allowing the potential for higher doses to the public, or may result in the guidance provided in the SOC being moot because RCRA sites will not accept transfers resulting in exposures higher than the EPA limits for a RCRA facility. As a result, the staff believes it may be appropriate to postpone publication of the rule amending 10 CFR 40.51 until after EPA proposes what limits it will establish for RCRA facilities accepting mixed waste. EPA currently plans to issue its ANPR sometime during 2003.

#### *Impacts of Proposed Delay*

A number of public comments submitted during the comment period for the proposed rule changes to 10 CFR 40.51 stated concerns related to the guidance provided in the SOC versus the unrestricted release criteria in the License Termination Rule (LTR). In general, these comments stated concerns that the Commission was willing to allow transfers of source material to exempt persons that could result in doses to the general public above the unrestricted release criteria of 0.25 mSv/yr (25 mrem/yr) found in 10 CFR 20.1402 and higher than doses allowed at NRC-licensed disposal facilities. Although the dose constraints provided in the SOC were only applicable to "appropriate facilities," most comment letters can be interpreted to indicate that because NRC would no longer exercise regulatory control over the source material, the criteria should be consistent, if not lower, than current unrestricted release criteria. The staff believes that, in conjunction with the actions discussed previously, publication of the 10 CFR 40.51 rule changes at this time may reduce public confidence.

Based upon review of the license tracking system, the largest percentage of NRC licensees that hold source material use it in concentrated solid forms (i.e., shielding) and do not likely have material in forms that would fall under the proposed transfer rule. Less than 20 existing licensees (this does not include Site Decommissioning Management Plan sites that do not have NRC licenses) were identified that might potentially have large volumes of source material below 0.05 percent by weight that could be transferred under the final rule; many of these identified licensees are currently in decommissioning.

Since 1998, the staff has reviewed and approved requests for transfers of source material to "appropriate facilities" from approximately two to three licensees per year (some licensee's submitted more than one transfer request over the period). Based on the staff evaluations for

transfers to "appropriate facilities," the staff has generally found calculated exposures to be below 0.25 mSv/yr (25 mrem/yr) for most scenarios. The staff expects that most transfers by licensees would be for similar purposes as these approved transfers and thus result in similar exposure levels; however, some scenarios, particularly for purposes other than disposal, have a potential for higher exposure levels.

The staff has also identified a few licensees that have transferred source material to exempt persons without prior NRC approval. Although the staff believes that these cases are infrequent, the staff cannot be certain additional cases have not occurred. While the staff would prefer licensees to coordinate with NRC any releases of these low concentrations of source material, in the absence of finalizing this rulemaking, there is no requirement for licensees to actually inform NRC. However, based on the small number of licensees that have significant quantities of concern and the relatively small impacts that have been calculated from previously approved transfers, the staff believes that postponing publication of the final rule, until the issues discussed above are reviewed by the Commission, would not have a significant impact on public health and safety. However, it should be noted that the staff's review did not include any evaluation of impacts from transfers from licensees in Agreement States.

The Commission should also be aware that the rule would also amend 10 CFR 40.13(a) to add the word "disposes" to the list of exempted activities. Because this amendment was only considered to be clarifying in nature, postponing publication of the final rule is expected to have no impact. Finally, the proposed rule also requested comment on adding regulatory language prohibiting dilution. Although comments on the proposed rule were split on this issue, since publication of the proposed rule, the staff has decided to address dilution more generically as part of SECY-03-0069 ("Results of the LTR Analysis," May 2, 2003). As a result, postponing publication of the final rule is expected to have no impact on this effort.

Based on the discussions above, the staff believes that publication of the final rule should be postponed until the issues discussed above are resolved.\*

#### COORDINATION:

The Office of the General Counsel has no legal objection to postponing the final rulemaking.

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\*Should the Commission determine to proceed at this time with finalizing the rule, the staff recommends that the Commission direct the staff to remove language in the SOC related to specific dose criteria and, instead, state that decisions would be made based upon assuring that the transferred materials do not result in risks to the general public that are higher than those risks associated with naturally-occurring radioactive material approved for acceptance at the disposal facility. This would recognize that the hazard from the disposal of exempt material should be consistent with the risks from disposal of unregulated radioactive material in the environment. Transfers for purposes other than disposal in an appropriate facility would still be evaluated on a case-by-case basis.

CONCLUSION:

Unless otherwise directed by the Commission, the staff intends to postpone publication of the final rule related to the transfers of source material until the issues discussed above are resolved. We consider this action to be within the delegated authority of the EDO.

*/RA/*

William D. Travers  
Executive Director  
for Operations

Attachments:

1. SRM dated March 29, 2002
2. August 28, 2002, FRN

CONCLUSION:

Unless otherwise directed by the Commission, the staff intends to postpone publication of the final rule related to the transfers of source material until the issues discussed above are resolved. We consider this action to be within the delegated authority of the EDO.

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Attachments:

1. SRM dated March 29, 2002
2. August 28, 2002, FRN

DOCUMENT NAME: C:\ORPCheckout\FileNET\ML031390395.wpd NMSS Ticket # 200300056

ADAMS Package Number: ML030860481 \*See Previous Concurrence

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