

May 4, 2004

MEMORANDUM TO: Josephine M. Piccone, Deputy Director
Office of State and Tribal Programs

FROM: Stuart A. Treby, Assistant General Counsel */ra/*
for Rulemaking & Fuel Cycle

SUBJECT: QUESTIONS RELATED TO AGREEMENT STATE ADOPTION AND
IMPLEMENTATION OF THE GENERALLY LICENSED DEVICES RULE

This is in response to your memorandum which posed the following questions:

- (1) Can the States require registration or notification of entry of generally licensed (GL) devices, for general knowledge of activities within a State, or to assess a fee for GL users in their State?
- (2) Can the States require registration of smaller quantities and for other radioisotopes than those established in 31.5(c)(13)(i)?
- (3) Does the GL license to install and service in 31.6, preclude the State from requiring the service licensee to provide notification or registration or payment of fees to an Agreement State when doing work in that State?

I. BACKGROUND

Sections 31.5(c)(13) and 31.6 of 10 CFR are classified as Compatibility Category B. Compatibility Category B indicates that "the provisions affect a program element with significant direct transboundary implications" and, therefore, "[t]he State program element should be essentially identical to that of the NRC." Requirements for Certain Generally Licensed Industrial Devices Containing Byproduct Material, 65 Fed. Reg. 79162, 79184 (Dec. 18, 2000).

A review of the history of the rulemaking reveals that initially § 31.5 in its entirety was to be classified as Compatibility Category C. SECY-99-108, at 30, April 9, 1999. Compatibility Category C indicates that "the provisions affect a program element, the essential objectives of which should be adopted by the State to avoid conflicts, duplications, or gaps in the national program." 65 Fed. Reg. 79162, 79184. Under Compatibility Category C, "[t]he manner in which the essential objectives are addressed need not be the same as NRC, provided the essential

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objectives are met.” *Id.* Due to significant transboundary implications, the Commission later decided to reclassify § 31.5 as Compatibility Category B. However, in doing so, the Commission clearly articulated that § 31.5(c)(13), which lists the specific requirements for registration, and § 31.6 were to remain Compatibility Category C. SECY-00-0106, at 67, May 15, 2000. The Commission reasoned that classifying §§ 31.5(c)(13) and 31.6 as Compatibility Category C:

. . . gives the States flexibility to register all generally licensed devices, or to require preregistration through which they may be (sic) better ensure that the general licensee knows what they need to know before obtaining a device. It also continues the flexibility for Agreement States to require prenotification for servicers licensed in different jurisdictions.

Id. In June 2000, all five of the Commissioners indicated on their vote sheets (attached) that the compatibility category for §§ 31.5(c)(13) and 31.6 should be changed from Compatibility Category C to B. This category change is reflected in the Staff Requirements Memorandum dated July 11, 2000. Finally, the final rule published in the Federal Register indicates that § 31.5 in its entirety and § 31.6 are classified as Compatibility Category B. 65 Fed. Reg. 79162, 79179.

The Commissioners issued comments on their vote sheets indicating why they decided to change the compatibility category for §§ 31.5(c)(13) and 31.6 from Compatibility Category C to B. Commissioner Dicus stated:

. . . there are significant transboundary implications associated not only with 10 CFR Section 31.5, but for specific requirements for registration (§§ 31.5(c)(13) and 31.6). While it is commendable that the NRC give flexibility to States that already have regulations in place for generally-licensed sources and devices, I believe that it is necessary because of these transboundary implications, that Compatibility Category B be required.

Commissioner Diaz commented:

Allowing registration requirements to be Compatibility Category C could lead to 32 different sets of registration requirements. I believe that the transboundary implications associated with both distribution and general licensees’ accountability of devices are sufficient to support Compatibility B for the rule in toto. Consistent regulations are necessary to ensure that distributors provide general licensees’ accountability of devices. Allowing Agreement States to implement different registration requirements, possibly covering types of devices different than those included in 10 CFR 31.5(c)(13), could lead to different levels of assurance of accountability.

I also disagree with the proposal that the general license for servicing of devices, 10 CFR 31.6, be a Compatibility Category C for Agreement States. Specifically, this provision grants a general license for distributors to install and service devices used by

general licensees. Since these activities are essential to the distribution and safe use of the devices, I believe that this regulation has significant transboundary implication. Therefore, 10 CFR 31.6 should be a Compatibility Category B for Agreement States.

Commissioners McGaffigan and Merrifield also stated that §§ 31.5(c)(13) and 31.6 should be categorized as Compatibility Category B due to significant transboundary implications. Chairman Meserve explained that he supported the views of Commissioners Dicus, Diaz, and Merrifield.

II. DISCUSSION

(1) Can the States require a registration or notification of entry of GL devices, for general knowledge of activities within a State, or to assess a fee for GL users in their State?

Section 31.5(c)(13)(iv) exempts GL devices used for a period of less than 180 days from registration requirements. Based on the above background and the fact that § 31.5(c)(13) is classified as Compatibility Category B, a State cannot require registration or notification of GL devices used within the State for a period of less than 180 days in any calendar year. If a State required the registration of GL devices used in the State less than 180 days, then the State's regulation would require more than the NRC's regulation, which the classification of Compatibility Category B prohibits. Furthermore, all of the Commissioners were in agreement that the registration requirements of § 31.5(c)(13)(iv) have significant transboundary implications that necessitated a classification of Compatibility Category B. The State's reasoning for requiring registration or notification, such as for having general knowledge of activities within the State or for accessing fees, does not expunge the transboundary implications the Commission found associated with § 31.5(c)(13). Therefore, only if the GL devices are used in the State for more than 180 days can the State require their registration.

(2) Can the States require registration of smaller quantities and for other radioisotopes than those established in 31.5(c)(13)(i)?

Section 31.5(c)(13)(i) establishes the quantities of certain radioisotopes for which registration and a fee is required. Because § 31.5(c)(13)(i) is classified as Compatibility Category B, States are prohibited from requiring the registration of smaller quantities or for other radioisotopes than those established in § 31.5(c)(13)(i). If States were allowed to augment the requirements in § 31.5(c)(13)(i), the State would be requiring more than the NRC and transboundary implications would exist.

(3) Does the GL license to install and service in 31.6, preclude the State from requiring the service licensee to provide notification or registration or payment of fees to an Agreement State when doing work in that State?

Section 31.6 states that “[a]ny person who holds a specific license issued by an Agreement State . . . is hereby granted a general license . . . in any non-Agreement state. . . .” In May 15,

2000, when the Commission decided to change the compatibility classification of § 31.5 from Compatibility Category C to B, the Commission explicitly left §§ 31.5(c)(13) and 31.6 as Compatibility Category C. The Commission explained that by keeping § 31.6 as Compatibility Category C, “[i]t . . . continues the flexibility for Agreement States to require prenotification for servicers licensed in different jurisdictions.” Because the Commission originally contemplated keeping § 31.6 as Compatibility Category C in order to give the States the flexibility to require notification, the Commission’s silence as to notification when it later reclassified § 31.6 as Compatibility Category B in June 2000 indicates that the States are not permitted to require notification from service licensees. Therefore, if States required notification, they would be requiring more than the NRC, which is not permitted for Compatibility Category B regulations, and transboundary issues that the Commission associated with § 31.6 may arise.

Attachments: As stated