

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-10-0105 – FINAL RULE: LIMITING THE QUANTITY OF BYPRODUCT MATERIAL IN A GENERALLY LICENSED DEVICE (RIN 3150-A133)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_ Attached  X  None \_\_\_

  
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SIGNATURE

  
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DATE

Entered on "STARS" Yes  x  No \_\_\_\_\_

**Chairman Jaczko's Comments on SECY-10-0105,  
"Final Rule: Limiting the Quantity of Byproduct Material in a Generally Licensed Device"**

I approve staff's recommendation to publish in the Federal Register the final rule that will amend 10 CFR 31 to limit the quantity of byproduct material contained in a generally licensed device to below one-tenth of the International Atomic Energy Agency (IAEA) Category 3 thresholds. I also approve the staff's recommendation to change the compatibility categories of 10 CFR 31.5(a), 10 CFR 31.5(c)(13)(i), and 10 CFR 31.6 from B to C.

This rule will improve accountability and control over these sources and reduce the potential for the aggregation of lower activity sources to higher activity levels. Requiring a specific license will provide an opportunity for a detailed review of the radioactive materials program proposed by the applicant, an opportunity to interact with the applicant, a regulatory decision as to whether to grant the license as requested or with modifications, and more routine inspections and enhanced security requirements. The threshold of 1/10 of Category 3 is a reasonable compromise between the need for increased safety and security, and the burden imposed by these requirements on affected licensees. As indicated in comments on the proposed rule by several Agreement States and the Organization of Agreement States, the rule will not impose a significant undue burden or hardship to implement.

The issue of security of radioactive material has received increased scrutiny for several years, and the Commission itself has indicated that Category 3 sources, in particular, may need stricter controls. In the SRM for SECY-05-0092, the Commission directed the staff to evaluate enhanced controls for sources below Category 2 thresholds. In response, in April of 2006, SECY-06-0094 discussed the need for providing enhanced controls for sources and recommended that general licenses be limited to sources smaller than one-half the Category 2 threshold. In the SRM for this SECY paper, the Commission disapproved the staff's recommendation and instead directed that the staff evaluate specific licensing of Category 3.5, and stated that if the staff had appropriate justification for a different threshold, the staff could propose that as an alternative recommendation in the rulemaking package. As eloquently stated by then-Commissioner McGaffigan in his vote directing the specific licensing of Category 3.5,

"Specific licensing brings with it far more control (and of course burden) for licensees. I believe that we should be specifically licensing all Category 3.5 sources...Some States already do this (and more)...NRC would have a much greater degree of control over these radionuclides with margin against any terrorist attempt to aggregate radionuclides of concern...In a post-9/11 world, a greater degree of control of such sources is entirely warranted...Used in a radiological dispersal device (RDD), some Category 3 sources could theoretically contaminate up to a half square kilometer with radioactivity above the EPA and DHS 2 rem/yr intermediate phase protective action

guide...The benefit of averting such an event in an urban setting will far outweigh any licensing costs.”

In March 2007, the NRC Office of Inspector General (OIG) issued a report that synthesized the findings of previous OIG and Government Accountability Office (GAO) reports regarding byproduct material security. This report notes that “NRC has not fully adapted its byproduct material security approach to accommodate changes in threats to the Nation,” and that “NRC’s ‘graded, risk-informed’ approach discounts factors related to malevolent terrorist intentions.” The recurring theme of the 2006 and 2007 OIG reports and the 2003, 2005, and 2006 GAO reports cited in this 2007 report was that NRC must increase the security provided by its materials program.

A watershed event in the area of source security for this agency then occurred later in 2007, when the GAO used the name of a bogus company to obtain a valid NRC materials license authorizing the possession of portable gauges containing radioactive sources. GAO was able to obtain this under our specific licensing program, which contains even more checks and balances than the general licensing program. GAO then altered the license to show that risk-significant quantities of material would easily be obtained by “shopping around” to different vendors.

This GAO sting led to a flurry of activity, including a Congressional hearing, recommendations from GAO for our materials security program, and a 2007 report from the Senate Permanent Subcommittee on Investigations (PSI). The PSI report states that “NRC licensing procedures governing Category 3 sources are not sufficiently rigorous. Category 3 sources deserve more stringent regulation because they are more dangerous than the current category scheme suggests... There is currently no mechanism to prevent malevolent actors from stockpiling numerous lower-risk sources well beyond the limits authorized in the license.”

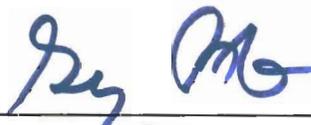
In response to the GAO and PSI reports, the staff developed an Action Plan to address security issues in our materials program (SECY-07-0147). That Action Plan included, among many other items, increased focus on Category 3 sources and a review of the general license framework. The implementation of this Action Plan rightfully became a high priority for the agency. As noted by the Commission in the SRM for this SECY paper, “Successful implementation of this action plan in a timely manner is essential for the NRC...The staff should complete actions as soon as possible and not wait for perfect solutions.”

The Commission, in April 2008, also held a public meeting with the staff to discuss materials licensing and security. Then-Chairman Klein focused specifically on the weaknesses in the program that could be exploited, asking “[W]hat’s going to be the next GAO sting?” Staff’s response was succinctly put: “If I had to guess, it would be general licenses.” I think that staff is correct that the general licensing program, as currently structured, represents a real vulnerability in our security program that could easily be exploited.

In addition, under the current rules, two general licenses (specifically 10 CFR 31.5 and 40.22) have the potential to authorize possession and use of at least Category 2 quantities, and general licensees do not undergo fingerprinting or background checks; therefore, this could lead to a situation where a general licensee could have Category 2 sources with no regulatory review or related security measures. In a related matter, 10 CFR 110 was revised earlier this year to remove the requirement for specific import licenses for Category 1 and 2 sources. The Federal Register Notice for that final rule indicates that this action was based partly on the reasoning that licensees receiving such high-risk sources would undergo fingerprinting and background checks, which, as stated above, holders of these types of sources do not undergo. This proposed rule would correct that deficiency.

Last year, in the May 2009 SRM for SECY-08-0137, the Commission approved the staff's recommendation to publish the proposed rule that would require specific licensing for sources that exceed that Category 3.5 threshold. The Commission directed that staff reach out to general licensees to ensure they are cognizant of the possible impacts resulting from this rulemaking process and that the compliance date for existing holders of generally licensed devices that would be subject to the new requirements should be set at 90 days after the effective date. As noted by Commissioner Svinicki in her vote, this would allow "a realistic amount of time for communications with affected general licensees to occur and for them to complete the steps necessary to file their applications." I agree with Commissioner Svinicki that such time is needed. For the final rule, the staff has proposed an implementation date of 12 months after the effective date of the rule, in order to provide enough time for an existing licensee to decide to submit an application for a specific license or to properly disposition the source. This is a reasonable approach.

In the recently issued 2010 report Radiation Source Protection and Security Task Force Report that was delivered to the President and Congress, the interagency Task Force lists this rulemaking under "Accomplishments", stating that, "As an integral part of the action plan, the NRC initiated the General License Rulemaking to reduce the chances for aggregation of generally licensed material into risk-significant quantities." I strongly agree that this is an integral part of the agency's efforts to increase the effectiveness of its materials security program. Over the last several years, the agency has taken significant steps to strengthen and improve the security of specific licenses, such as pre-licensing visits for licenses for Category 1 and 2 sources, and I commend the staff for their hard work and diligence. Now this final rule will take the next logical step of strengthening the materials security by appropriately adjusting the general licensing program.

  
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Gregory B. Jaczko

  
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