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RECORD #155

TITLE: Transfer By an NRC Licensee of Radioactive Material ... To
the Department of Energy (DOE)

FICHE: 03789-008

10CFR 71 0348/70



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

SSINS 9196

OCT 1 1979

MEMORANDUM FOR: G. H. Smith, Chief, FFMS Branch, Region I
FROM: Leo B. Higginbotham, Assistant Director, Division of Fuel Facility and Materials Safety Inspection
SUBJECT: APPLICABILITY OF 10 CFR REGULATIONS TO PACKAGING BY NRC LICENSEES OF DOE RADIOACTIVE MATERIAL FOR TRANSPORTATION (AITS F18314H3)

Your March 26, 1979 memorandum, subject as above, raised questions about the applicability of 10 CFR 71 to licensees who process licensed material for DOE. Enclosed for your information is an ELD memorandum, which we believe makes it clear that NRC licensees may transfer licensed material to DOE and DOE then becomes the shipper. In this situation, the licensee does not have to meet the requirements of 10 CFR 71. In situations of this kind, it is necessary for the inspector to determine that the licensee-to-DOE material transfer occurred before the material was delivered to a carrier.

Leo B. Higginbotham
Assistant Director
Division of Fuel Facility and
Materials Safety Inspection

Enclosure:
Memo, G. H. Cunningham to
Burnett, et al, dtd 8/22/79

cc: FFMS Branch Chiefs
RII, RIII, RIV, RV

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49-28188



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

AUG 22 1979

MEMORANDUM FOR: Robert F. Burnett, Director
Division of Safeguards
Office of Nuclear Material Safety and Safeguards

Donald A. Nussbaumer
Assistant Director for Material, Safety and Licensing
Office of Nuclear Material Safety and Safeguards

FROM: Guy H. Cunningham, III
Chief Regulations Counsel
Office of the Executive Legal Director

SUBJECT: TRANSFER BY AN NRC LICENSEE OF RADIOACTIVE MATERIAL OR
OF RADIOACTIVE-CONTAMINATED FACILITY COMPONENTS TO THE
DEPARTMENT OF ENERGY (DOE)

The purpose of this memorandum is to respond to your inquiry as to whether it is legally required that certain NRC regulations regarding shipment and protection of radioactive material (specifically, 10 CFR §§ 71.11, 71.12, and 73.37) be applied to shipments involving the transfer of spent fuel and other radioactive material (including contaminated facility components) from NRC licensees to the U.S. Department of Energy (DOE). The question was posed in recent discussions between NRC and DOE in which it was indicated that several such shipments were contemplated, that DOE considered that it would be the "shipper" in each case, and that DOE desired to assume responsibility for the packaging and protection of such shipments, though not necessarily in accordance with NRC regulations. Since the regulations in question apply to licensees who "deliver licensed material to a carrier for transport"^{1/} or who "transport[] or deliver[] to a carrier for transport irradiated reactor fuel,"^{2/} they will apply to the contemplated shipments unless it is DOE (which is exempt from Commission licensing in this context)^{3/} which

1/ 10 CFR §§ 71.11 and 71.12.

2/ 10 CFR §§ 73.37.

3/ The Atomic Energy Act of 1954, as amended, provides the Commission with licensing authority only with respect to "persons." The term "person" is defined in section 11s of the act to exclude the "Commission." As the successor to certain functions of the Atomic Energy Commission and the Energy Research and Development Administration, the Department of Energy is exempt from the requirement of obtaining licenses from the NRC, except as specifically provided in section 202 of the Energy Reorganization Act of 1974. References in the Commission's regulations to "the Administration" (ERDA) are interpreted by the NRC as applying to DOE.

delivers the material to a carrier. Accordingly, this paper discusses a legally acceptable method that may be used by NRC licensees to transfer possession of radioactive materials and radioactive-contaminated facility components to DOE. As explained below, it is our opinion that 10 CFR §§ 30.41, 40.51, and 70.42 provide adequate authority, if the requirements of these sections are met, to permit the transfer to DOE of byproduct, source, or special nuclear material or of a radioactive-contaminated facility component without the need to amend any NRC specific license.

Discussion

NRC regulations^{4/} prohibit the transfer of byproduct,^{5/} source^{6/} and special nuclear material^{7/} except as authorized in a specific or general license issued by the Commission pursuant to those regulations.

NRC regulations also provide that licenses issued under 10 CFR Parts 30,^{8/} 40^{9/} and 70^{10/} are subject to all valid rules, regulations and orders of the Commission.

- 4/ The Commission's authority to issue regulations regarding the possession and use of byproduct, source, and special nuclear material is specifically set forth in section 161(b) of the Atomic Energy Act.
- 5/ 10 CFR § 30.3 provides in part, "Except for persons exempt as provided in this part and Part 150 of this chapter, no person shall ... transfer, ... byproduct material except as authorized in a specific or general license issued pursuant to the regulations of this chapter.
- 6/ 10 CFR § 40.3 provides in part, "No person subject to the regulations in this part shall ... transfer, ... any source material after removal from its place of deposit in nature, except as authorized in a specific or general license issued by the Commission pursuant to the regulations in this part."
- 7/ 10 CFR § 70.3 provides in part, "No person subject to the regulations in this part shall ... transfer special nuclear material except as authorized in a license issued by the Commission pursuant to these regulations.
- 8/ 10 CFR § 30.34(a) provides, "Each license issued pursuant to the regulations in this part of the regulations and Parts 31-35 shall be subject to all the provisions of the Act, now or hereafter in effect, and to all valid rules, regulations and orders of the Commission."
- 9/ 10 CFR § 40.41(a) provides, "Each license issued pursuant to the regulations in this part shall be subject to all the provisions of the Act, now or hereafter in effect, and to all rules, regulations and orders of the Commission."

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10 CFR §§ 30.41, 40.51 and 70.42 specify, respectively, the kinds of transfers which licensees holding byproduct material licenses, source material licenses and special nuclear material licenses are authorized to make. Licensees who are able to satisfy the requirements of these sections may rely on this authority to make transfers even though the word "transfer" does not appear in their licenses because the Commission regulations expressly provide that the terms and conditions of a license include the condition that the license is issued subject to Commission regulations. A licensee under 10 CFR Parts 30, 40, and 70 of the Commission's regulations is subject to all the provisions of the regulations, including 10 CFR §§ 30.41, 40.51, and 70.42. Accordingly, it may rely on these provisions for the authority necessary to make transfers as long as the requirements of these provisions are met. Thus, no NRC specific license need be amended to accomplish the desired transfer to DOE.

Paragraphs (a) and (b)(1) of 10 CFR § 70.42 provide as follows:

(a) No licensee shall transfer special nuclear material^{11/} except as authorized pursuant to this section.

(b) Except as otherwise provided in this license and subject to the provisions of paragraphs (c) and (d) of^{12/} this section, any licensee may transfer special nuclear material:^{11/}

(1) To the [Energy Research and Development] Administration;...

Pursuant to the provisions of 10 CFR §§ 30.41, 40.51, and 70.42, the Department of Energy may take possession of the radioactive material or the contaminated facility component from an NRC licensee. As a practical matter, this

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10/ 10 CFR § 70.32(a)(8) provides, "The license shall be subject to, and the licensee shall observe, all applicable rules, regulations and orders of the Commission."

11/ Paragraphs 30.41(a) and (b)(1) refer to "byproduct material." Paragraphs 40.51(a) and (b)(1) refer to "source material."

12/ Paragraphs (c) and (d) require NRC licensees to verify whether persons to whom the material is to be transferred are authorized to receive it. The NRC licensing authority over the Energy Research and Development Administration (now DOE) is strictly confined to those activities specified in the Energy Reorganization Act of 1974. Since the DOE may receive, possess, own, and transport nuclear material without an NRC license, paragraphs (c) and (d) do not apply to such transfers to the DOE.

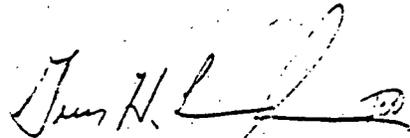
could be accomplished by having an authorized employee or representative of DOE^{3/} present at the licensee's site to assume responsibility and control of the shipment from the site.

Legal Effects of Transfer

If on-site transfer to DOE is completed, the NRC licensee will no longer be in the position of delivering "licensed material to the carrier for transport" under the general license provisions of 10 CFR §§ 71.11 and 71.12 and the conditions precedent (e.g., an NRC-approved quality assurance program for shipping packages) to the licensee's use of such a general license would no longer be applicable. The NRC recently promulgated an "interim final rule," 10 CFR § 73.37, requiring licensees to see that the carrier adheres to additional physical protection requirements when irradiated reactor fuel is in transit. For the same reason as above, 10 CFR § 73.37 would not apply to NRC licensees who transfer spent fuel to DOE prior to shipment by DOE.

Conclusion

An NRC licensee may transfer byproduct, source, or special nuclear material or radioactive-contaminated facility components to the Department of Energy (or one of its duly authorized representatives) pursuant to the provisions of 10 CFR §§ 30.41, 40.51, and/or 70.42 provided that such a transfer is consistent with the constraints described in this memorandum. NRC regulations contained in 10 CFR §§ 71.11, 71.12 and 73.37 would then be inapplicable to subsequent shipment of the transferred material by DOE.



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13/ The analysis and conclusions in this memorandum apply to persons performing work "under contract with and for the account of [DOE]" as well as to DOE itself. This is so because section 110 of the Atomic Energy Act provides that nothing in the facilities licensing chapter of the Act was to be deemed to require a license for certain activities conducted under such contracts with the Atomic Energy Commission. By virtue of the reasoning discussed in footnote 3, supra, the statutory exemption now applies to such activities of contractors of DOE. Though section 110 covers only facilities licensing, the Act has consistently been interpreted as not requiring application of the materials licensing provisions to persons acting "under contract with and for the account of the Commission." See, e.g., 10 CFR § 70.11.