

NUCLEAR REGULATORY COMMISSION

10 CFR Part 40

RIN 3150-AI95

[NRC-2011-0072]

**Regulatory Changes to Implement the
United States/Australian Agreement for Peaceful Nuclear Cooperation**

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is amending its regulations to implement the 2010 “Agreement between the Government of Australia and the Government of the United States of America Concerning Peaceful Uses of Nuclear Energy” (the Agreement). The Agreement prohibits the United States from using Australian-obligated nuclear material to produce tritium for use in a nuclear explosive device, or for any other “military purpose” as defined in the Agreement. The Agreement’s definition of military purpose states that it includes “depleted uranium munitions, and other direct military non-nuclear applications, as mutually determined by the Parties.” The amendments in this final rule help enable the U.S. Government to meet its Agreement obligations with the Government of Australia.

DATES: This final rule is effective November 8, 2011.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

- **NRC's Public Document Room (PDR):** The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

- **Federal Rulemaking Web Site:** Public comments and supporting materials related to this final rule can be found at <http://www.regulations.gov> by searching on Docket ID **NRC-2011-0072**. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Naiem S. Tanious, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-6103; e-mail: Naiem.Tanious@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 123 of the Atomic Energy Act of 1954, as amended, sets the specific terms and conditions that must be included in the agreements concluded between the United States and a

foreign government to establish the framework for peaceful nuclear cooperation and trade between the countries. The United States has entered into over twenty such agreements that are active at this time, including agreements with the European Atomic Energy Community and the International Atomic Energy Agency (IAEA). The United States entered into a Section 123 agreement with Australia in 1979.

In 2010, the United States and Australia negotiated a new agreement. While it is very similar to the agreement signed in 1979, the 2010 Agreement clarifies restrictions on the use of Australian-obligated nuclear material in the United States by adding a definition of “military purpose.” The 2010 Agreement retains Article 9(4) of the 1979 agreement, which states in relevant part that the U.S. must “establish and maintain a system of accounting for and control of all material transferred pursuant to this Agreement and any material used in or produced through the use of any material, equipment or components so transferred.”

Discussion

As discussed in this document, the NRC finds that in order to implement provisions in Article 8 (“No explosive or military application”) of the 2010 Agreement, NRC regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 40 need to be amended.

Article 8(1) states, in relevant part, that Australian-obligated nuclear material “shall not be used for any nuclear explosive device, for research on or development of any nuclear explosive device, including but not limited to, the production of tritium for use in such a device, or for any military purpose.” Article 8(2) states that the term “military purpose” includes “military nuclear propulsion; munitions, including depleted uranium munitions; and other direct military non-nuclear applications as mutually determined by the Parties.” The term “military purpose” does not include “the supply of electricity to a military base from any power network, the

production of radioisotopes to be used for medical purposes in military hospitals, and such other similar purposes as may be mutually determined by the Parties.”

The Agreement defines “material” as including source material, and broadly defines “source material” as including uranium ores “in such concentration as mutually determined by the Parties from time to time.” The term “Australian-obligated source material” is used in this rulemaking to designate the material covered by the rule, and such material is that which originates in Australia and is imported from there to the United States. The term “Australian-obligated source material” should be understood as describing a subset of the material referenced in the existing definition of *Foreign obligations* set forth in § 40.4. The term *Foreign obligations* is used in the existing § 40.64 reporting requirements, under which licensees holding one kilogram or more of source material with foreign obligations must document such holdings on a yearly basis and submit annual inventory reports to the NRC. In accordance with § 40.64(e), licensees subject to 10 CFR Part 75 (which implements requirements established by treaties between the United States and the IAEA) instead submit their inventory reports under §§ 75.34 and 75.35. These 10 CFR Part 40 and Part 75 reporting requirements are not referenced in the 2010 Agreement, and are not affected by this rulemaking. If the Australian Government later has questions concerning inventories of Australian-obligated source material in quantities less than one kilogram, the NRC would request such information from its licensees, who are already required by § 40.61 to keep records showing the receipt, transfer, and disposal of all source material.

The NRC has determined that in order to fully implement Article 8 of the Agreement, it is necessary to amend the regulations in 10 CFR Part 40 to exclude Australian-obligated source material from an existing exemption applicable to mixtures that contain less than one-twentieth of one percent of source material; exclude Australian-obligated source material from an existing exemption applicable to uranium contained in counterweights installed in aircraft and military

projectiles; and prohibit the receipt, processing, transfer, or other use of Australian-obligated source material for military purposes.

Section-by-Section Analysis

The NRC is amending § 40.13(a). Section 40.13(a) exempts from the regulations in 10 CFR Part 40, and from the requirements for a license, source material in any chemical mixture, compound, solution, or alloy, in which the source material is by weight less than one-twentieth of one percent of the mixture, compound, solution, or alloy. This § 40.13(a) exemption is modified to state that it does not apply to any Australian-obligated source material. This change is being made to be consistent with Article 8(2) of the 2010 Agreement, which states that the term “military purpose” includes “direct military non-nuclear applications.”

The NRC is amending § 40.13(c)(5). This exemption applies to uranium contained in counterweights installed in aircraft, rockets, projectiles, and missiles. This § 40.13(c)(5) exemption is being modified by adding a new paragraph 40.13(c)(5)(v), stating that the exemption does not apply to counterweights manufactured for the military using Australian-obligated source material. The new paragraph 40.13(c)(5)(v) is needed to be consistent with Article 8(2) of the 2010 Agreement, which states that the term “military purpose” includes “direct military non-nuclear applications.”

The NRC is amending 10 CFR Part 40 by adding a new § 40.52, titled “Restrictions on the Use of Australian-Obligated Source Material.” The new requirement prohibits those possessing Australian-obligated source material from processing or otherwise using that material for military purposes, and prohibits the transfer of such material to others for military purposes. Section 40.52 defines “military purposes” in a manner consistent with Article 8 of the Agreement.

Notice and Comment Waiver

Because the substance of the amendments made by this rule involves a foreign affairs function of the United States, the notice and comment provisions of the Administrative Procedure Act do not apply (5 U.S.C. 553(a)(1)). These regulations codify explicit obligations established by an international agreement to which the United States is a party, which the NRC has no discretion or authority to modify. Under these circumstances, the NRC finds good cause for dispensing with the usual 30-day delay in the rule's effective date, in accordance with 5 U.S.C. 553(d)(3). The amendments are effective upon publication in the *Federal Register*.

Criminal Penalties

For the purpose of Section 223 of the Atomic Energy Act of 1954, as amended (AEA), the Commission is issuing the final rule to amend 10 CFR Part 40 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule will be subject to criminal enforcement.

Agreement State Compatibility

Under the "Policy Statement on Adequacy and Compatibility of Agreement State Programs" approved by the Commission on June 30, 1997, and published in the *Federal Register* on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility Category "NRC." Compatibility is not required for Category "NRC" regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR. Thus, States should not adopt these program elements.

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this final rule, the NRC is modifying its regulations to implement the Agreement between the United States of America and the Australian Government for Peaceful Nuclear Cooperation. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Environmental Assessment: Finding of No Significant Environmental Impact

The NRC has prepared an environmental assessment (ADAMS Accession Number ML112560425), and has determined that there will be no significant impact to the public from this action.

Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), approval numbers 3150-0020, 3150-0055 and 3150-0003.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information for an information collection requirement unless the requesting document displays a currently valid OMB control number.

Regulatory Analysis

A regulatory analysis has not been prepared for this regulation. The information reported is necessary to satisfy United States Government obligations under the Agreement.

Backfitting

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this final rule because this amendment does not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and record keeping requirements, Source material, Uranium.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; 5 U.S.C. 552 and 553; and the Energy Policy Act of 2005; Pub. L. 109–58, 119 Stat. 594 (2005), the NRC is adopting the following amendments to 10 CFR Part 40.

PART 40--DOMESTIC LICENSING OF SOURCE MATERIAL

1. The authority citation for part 40 continues to read as follows:

AUTHORITY: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95-604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97-415, 96 Stat. 2067 (42 U.S.C. 2022); sec. 193, 104 Stat. 2835, as amended by Pub. L. 104-134, 110 Stat. 1321, 1321-349 (42 U.S.C. 2243), sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109-59, 119 Stat. 594 (2005).

Section 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102-486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 40.13, paragraph (a), the last sentence is revised, and a new paragraph (c)(5)(v) is added to read as follows:

§ 40.13 Unimportant quantities of source material.

(a) * * * The exemption contained in this paragraph does not apply to Australian-obligated source material, nor does it include byproduct materials as defined in this part.

* * * * *

(c) * * *

(5) * * *

(v) Consistent with § 40.52, the counterweights are not manufactured for a military purpose using Australian-obligated source material.

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3. A new § 40.52 is added to read as follows:

§ 40.52 Restrictions on the use of Australian-obligated source material.

(a) In accordance with Article 8 of the Agreement between the Government of Australia and the Government of the United States of America Concerning Peaceful Uses of Nuclear Energy, dated 2010, Australian-obligated source material shall not be used for military purposes. As used in this section, “military purposes” includes, but is not limited to, the production of tritium for use in nuclear explosive devices; military nuclear propulsion; munitions, including depleted uranium munitions; and other direct military non-nuclear applications. “Military purposes” does not include the supply of electricity to a military base from any power network; the production of radioisotopes to be used for medical purposes in military hospitals; and such other similar purposes.

(b) Licensees are prohibited from receiving, processing, transferring, or otherwise using Australian-obligated source material for military purposes.

Dated at Rockville, Maryland, this 13th day of October, 2011

For the Nuclear Regulatory Commission.

/RA/

Michael F. Weber,
Acting Executive Director
for Operations