

October 23, 1998

SECY-98-246

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

SUBJECT: STANDARD REVIEW PLAN REGARDING FOREIGN OWNERSHIP,
CONTROL, OR DOMINATION OF APPLICANTS FOR REACTOR
LICENSES

PURPOSE:

To provide the Commission a draft standard review plan (SRP) regarding foreign ownership, control, or domination, to be used in evaluating applicants for facility licenses under sections 103 and 104 of the Atomic Energy Act. The SRP would be published for comment and incorporated in the staff's SRP on Power Reactor Licensing Financial Qualifications and Decommissioning Funding Assurance (See Attachment 1, p.32, to SECY 98-153).

BACKGROUND:

Sections 103 and 104 of the Atomic Energy Act of 1954, as amended (AEA), preclude the issuance of a reactor license to an entity that the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government. There is limited Commission precedent that serves as guidance in this area, and no standard review plan presently exists to ensure uniform application of this guidance. In light of an expected increase in the number of license transfer applications potentially involving foreign interests, the issuance of a standard review plan appears timely.

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DISCUSSION:

Under sections 103 and 104 of the AEA, no license may be issued to:

any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

The proposed SRP, attached to this memorandum, would address the foregoing foreign control prohibition, and apply to applications for licenses for new facilities, as well as applications for the approval of direct or indirect license transfers for existing plants. Although the Atomic Energy Commission in *General Electric Co. and Southwest Atomic Energy Associates*, Docket No. 50-231, 3 AEC 99 (1966), stated that the foreign control prohibition should be given an orientation toward safeguarding the national defense and security, the attached SRP is not designed to address the general requirement regarding common defense and security, such as physical security and safeguards.

Under 10 C.F.R. § 50.33(d), if an applicant is a corporation, it is required to state where it is incorporated and does business, the citizenship of its directors and principal officers, and whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government. The SRP provides that if, based on a threshold review of such information, there is some reason to believe that the applicant may be subject to some degree of foreign control, the reviewer may gather additional information that bears on foreign ownership, control, or domination.

The review procedures set forth in the SRP contemplate that if there is still some reason to believe, following the receipt of additional information, that the applicant may be under foreign control, a negotiation action plan is to be submitted by the applicant. The reviewer will then evaluate whether the plan will ensure that any foreign interest is effectively denied control or domination over the applicant. In making a final determination the staff will consider whether there are conditions that should be imposed in connection with granting of any application so as to effectively deny foreign control of the applicant.

The SRP shares some features with the Gaseous Diffusion Plant Certification Standard Review Plan, Chapter 1.4, which addresses section 193(f) of the AEA. That section contains a similar, but not identical foreign control prohibition. To the extent deemed appropriate, the attached SRP overlaps the Gaseous Diffusion Plant Certification review document

COORDINATION

The Office of Nuclear Reactor Regulation concurs in the proposed SRP, and recommends that the attached SRP be combined with the SRP on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance which is presently before the Commission (Attachment 1 to SECY 98-153, dated June 29, 1998). The title of the latter SRP

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would be expanded to reflect ownership transfers and be issued in final form following resolution of any comments received on the foreign ownership SRP attached to this paper.

RECOMMENDATION

It is recommended that the Commission approve issuance of the attached SRP for comment. The draft would be placed in the Public Document Room and noticed in the Federal Register.

Karen D. Cyr
General Counsel

Attachment:
Standard Review Plan on Foreign
Ownership, Control and Domination

DRAFT 10/23/98

Standard Review Plan on Foreign Ownership, Control and Domination

1. AREAS OF REVIEW

1.1 General

The NRC is issuing this Standard Review Plan (SRP) to describe the process it uses to review the issue of whether an applicant for a nuclear facility license under sections 103 or 104 of the Atomic Energy Act of 1954, as amended (AEA or Act), is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government. This SRP will be used as the basis for such reviews in connection with license applications for new facilities, or applications for approval of direct or indirect transfers of facility licenses.

Where there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government. If a co-licensee of an existing facility owns a partial interest in the facility and is transferring that interest, the acquirer must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government.

The foreign control determination is to be made with an orientation toward the common defense and security. However, this SRP does not address other common defense and security matters, such as physical security and safeguards.

This SRP reflects current NRC regulations and policy.

1.2 Relevant Statutory And Regulatory Provisions

Sections 103d and 104d of the Act provide, in relevant part, that no license may be issued to:

any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

(Section 103d also states that no license may be issued to an alien.)

Section 184 of the Act provides, in relevant part:

No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

10 CFR § 50.33(d), in relevant part, provides:

Each application shall state:

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and, if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

10 CFR § 50.38 provides:

Any person who is a citizen, national, or agent of a foreign

country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

10 CFR § 50.80 provides, in pertinent part:

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

* * *

(c) . . . [T]he Commission will approve an application for the transfer of a license, if the Commission determines:

* * *

(2) That the transfer of the license is otherwise consistent with applicable provisions of the law, regulations, and orders of the Commission pursuant thereto.

2. INFORMATION TO BE SUBMITTED BY APPLICANT

2.1 Information Required By Regulation

At the time the applicant submits its application for a license or for approval of the transfer of a license, the applicant must submit information sufficient to comply with 10 CFR § 50.33(d).

2.2 Additional Information

If the reviewer, based on the information required to be submitted by 10 C.F.R. § 50.33(d), has reason to believe that the applicant may be owned, controlled, or dominated by foreign interests, the reviewer may request and obtain the following additional information:

1. If the applicant's equity securities are of a class which is registered pursuant to the Securities Exchange Act of 1934, copies of all current Securities and Exchange Commission Schedules 13D and 13G, which are required to be filed by owners of more than 5% of such a class with the Securities and Exchange

Commission, the security issuer (applicant), and the exchange on which the issuer's securities are traded.

2. Management positions held by non-U.S. citizens.
3. The ability of foreign entities to control the appointment of management personnel.

2.3 Negation Action Plan

If applicable under Section 4.4 *infra*, the applicant should also submit a Negation Action Plan, which is described in detail in Section 4.4.

3. **ACCEPTANCE CRITERIA**

3.1 Basic Statutory and Regulatory Limitations

License applications for new facilities or applications for approval of transfers of licenses required in the case of proposed new ownership of existing facilities may involve foreign entities proposing to own all or part of a reactor facility. Sections 103d and 104d of the AEA prohibit the NRC from issuing a license to an applicant if the NRC knows or has reason to believe that the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (or is an alien, in the case of section 103d).

Likewise, under 10 CFR 50.38,

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

3.2 Guidance On Applying Basic Limitations

An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the "power," direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant. The Commission has stated that the words "owned, controlled, or dominated" mean relationships where the will of one party is subjugated to the will of another. *General Electric Co.*, 3 AEC at 101.

A foreign interest is defined as any foreign government, agency of a foreign

government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the U.S. or its possessions and trust territories; any person who is not a citizen or national of the U.S.; and any U.S. interest effectively controlled by one of the above foreign entities.

The Commission has stated that the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.

Even though a foreign entity contributes 50% of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control.

An applicant that is up to 50% owned by a foreign entity may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.

Where an applicant is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign parent's stock is "largely" owned by U.S. citizens. If the foreign parent's stock is owned by U.S. citizens, and certain conditions are imposed, such as requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material, the applicant may still be eligible for a license, notwithstanding the foreign control limitation.

4. REVIEW PROCEDURES

4.1 Threshold Review and Determination

The reviewer should first analyze all of the information submitted by the applicant sufficient to comply with 10 C.F.R. § 50.33(d), as well as other relevant information of which the reviewer is aware, to determine whether there is any reason to believe that the applicant is an alien or citizen, national, or agent of a foreign country, or an entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government. If there is no such reason to believe based on the foregoing information, no further review is required and the reviewer should proceed to make a recommendation regarding whether there is any foreign control obstacle to granting the application. On the other hand, if there is any reason to believe that the applicant may be owned, controlled, or dominated by foreign interests, the reviewer should request and obtain the additional information specified in Section 2.2.

4.2 Supplementary Review

If it is necessary to obtain the additional information specified in Section 2.2, the reviewer should consider the acceptance criteria above, and consult with the Office of the General Counsel on Commission precedent. Information related to the items listed below may be sought and may be taken into consideration in determining whether the applicant is foreign owned, controlled, or dominated. The fact that some of the below listed conditions may apply does not necessarily render the applicant ineligible for a license.

1. Whether any foreign interests have management positions such as directors, officers, or executive personnel in the applicant's organization.
2. Whether any foreign interest controls, or is in a position to control the election, appointment, or tenure of any of the applicant's directors, officers, or executive personnel. If the reviewer knows that a domestic corporation applicant is held in part by foreign stockholders, the percentage of outstanding voting stock so held should be quantified. The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.
3. Whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant.
4. Whether the applicant has interlocking directors or officers with foreign corporations.
5. Whether the applicant has foreign involvement not otherwise covered by items 1-4 above.

4.3 Supplementary Determination

After reviewing the additional information specified in Section 2.2, if the reviewer continues to conclude that the applicant may be an alien or owned, controlled, or dominated by foreign interests, or has some reason to believe that may be the case, the reviewer shall determine:

1. The nature and extent of foreign ownership, control, or domination, to include whether a foreign interest has a controlling or dominant minority position.
2. The source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.
3. The type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to a level consistent with the Atomic

Energy Act and NRC regulations.

On the other hand, if the reviewer determines after reviewing the additional information specified in Section 2.2 that there is no further reason to believe that the applicant is an alien or owned, controlled, or dominated by a foreign person or entity, no additional review is necessary.

4.4 Negation Action Plan

If the reviewer continues to conclude following the Supplementary Determination that an applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, the applicant shall be promptly advised and requested to submit a negation action plan. When factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination. Examples of such measures that may be sufficient to negate foreign control or domination include:

1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign source income.
3. Demonstration of financial viability independent of foreign interests.
4. Elimination or resolution of problem debt.
5. Assignment of specific oversight duties and responsibilities to board members.
6. Adoption of special board resolutions.

5. EVALUATION FINDINGS

The reviewer should verify that sufficient information has been provided to satisfy the regulations and this Standard Review Plan. In consideration of the guidance of this Standard Review Plan, the reviewer should then draft an analysis and recommendation, based on the applicable information specified in Sections 2 and 4 above, concerning whether the reviewer knows, or has reason to believe that the applicant is an alien, or is a corporation or other entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and whether there are conditions that should be imposed before granting the application so as to effectively deny foreign control of the applicant.

6. REFERENCES

1. Sections 103, 104, and 184 of the Atomic Energy Act of 1954, as amended (42 USC 2133, 2134, and 2234).
2. Part 50 "Domestic Licensing of Production and Utilization Facilities" of Title 10 of the Code of Federal Regulations (10 CFR Part 50).
3. *General Electric Co. and Southwest Atomic Energy Associates*, Docket No. 50-231, 3 AEC 99 (1966).
4. Letter from W. Dircks to J. MacMillan (Dec. 17, 1982) (Re: Babcock & Wilcox/McDermott) (Attached).
5. Letter from N. Palladino to A. Simpson (Sept. 22, 1983) w/attachment (Re: Union Carbide/Cintichem) (Attached).