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July 25, 2016

Cindy Bladey
Office of Administration
Mail Stop: OWFN-12-H08
US Nuclear Regulatory Commission
Washington, DC 20555-0001

81 FR 33556

5/26/2016

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SUBJECT: NRC-2016-0088: Draft Standard Review Plan on Foreign Ownership, Control or Domination, Revision 1; Draft Regulatory Guide X.XX, Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility

- REFERENCES:
1. Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1; 81 FR 24,893 (Apr. 27, 2016)
 2. Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility; 81 FR 33,556 (May 26, 2016)
 3. Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1; 81 FR 33,555 (May 26, 2016)

Dear Ms. Bladey:

On April 27, 2016, the U.S. Nuclear Regulatory Commission ("NRC") issued a notice in the *Federal Register* soliciting public comments on the Draft Standard Review Plan ("SRP") on Foreign Ownership, Control or Domination ("FOCD"), Revision 1 (Reference 1). On May 26, 2016, the NRC issued a separate notice seeking public comments on the related Draft FOCD Regulatory Guide (Reference 2). The NRC requested comments for both draft documents by July 25, 2016 (Reference 3). Attachment 1 to this letter provides comments from Atkins on both draft documents.

Atkins believes the draft guidance should be revised to clarify the scope of licenses to which the FOCD requirements of 10 CFR § 50.38 are applicable. More specifically, the documents should make clear that, consistent with its purpose of implementing the FOCD restrictions in the Atomic Energy Act of 1954, as amended ("AEA"), 10 CFR § 50.38 applies only to production and utilization facilities, as those terms are defined in the AEA, rather than to all licenses originally issued under 10 CFR Part 50. Further, consistent with NRC precedent, the documents should clarify that permanently defueled facilities whose licenses no longer authorize operation of the reactor are not production or utilization facilities, as those terms are defined in the AEA, because they are no longer capable of producing or making use of special nuclear material as a matter of law under NRC's regulations.

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Finally, Atkins believes the references to a purported "absolute prohibition" regarding 100 percent indirect foreign ownership should be removed from the draft guidance. This position is not mandated by the Commission, lacks a principled legal basis, and is inconsistent with the position of the United States regarding Foreign Ownership, Control or Influence ("FOCI") restrictions under the Department of Defense's National Industrial Security Program Operating Manual ("NISPOM").

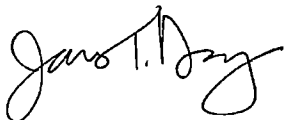
WS Atkins plc (Atkins) is publically traded in the United Kingdom and one of the world's most respected design, engineering and project management firms. Atkins has a significant U.S. presence and performs work for clients in a number of sectors, including providing nuclear services to the U.S. Department of Energy (DOE). For your information we have experience working closely with DOE to address FOCI issues and certain of our U.S. subsidiaries are able to perform DOE-classified work through FOCI mitigation instruments. Atkins would like to participate in the U.S. marketplace for decommissioning services. Further, Atkins would like to utilize business models that have evolved for decommissioning in the United States, which include the license stewardship model, where an experienced decommissioning vendor assumes direct responsibility under an NRC reactor license for decommissioning the reactor facility.

Sound public policy dictates that the NRC should encourage broad participation in decommissioning projects by vendors that provide nuclear services in the international marketplace. By encouraging broad participation by international vendors, the U.S. nuclear industry will benefit from increased competition and introduction of best practices from abroad. Thus, the NRC should take a flexible approach when it interprets the FOCD restrictions imposed by statute, and NRC should narrowly apply these restrictions where necessary to protect nuclear safety and security for operating reactors.

We appreciate the opportunity to comment on the draft guidance and value the efforts of the NRC Staff in addressing these important issues. Atkins respectfully requests that the attached comments be incorporated in the final versions of the SRP, Revision 1, and Regulatory Guide.

Sincerely,

ATKINS

A handwritten signature in black ink, appearing to read "Jason T. Day", with a stylized flourish at the end.

Jason T. Day
General Counsel,
Nuclear Americas

Attachment

ATTACHMENT 1

Atkins believes the U.S. Nuclear Regulatory Commission's ("NRC") Draft Standard Review Plan on Foreign Ownership, Control or Domination, Revision 1,¹ and Draft Regulatory Guide X.XX, Foreign Ownership, Control, or Domination [{"FOCD"}] of Nuclear Power, and Non-Power Production or Utilization Facility² (collectively, "Draft FOCD Guidance"), should be revised to clarify the scope of licenses to which the FOCD requirements of 10 CFR § 50.38 are applicable. Additionally, Atkins believes the references to a purported "absolute prohibition" regarding 100 percent indirect foreign ownership should be removed from the draft guidance. Atkins provides three specific recommendations in this regard, below.

1. The Draft FOCD Guidance Should Clarify That 10 CFR § 50.38 Applies Only to Production and Utilization Facilities, As Defined in the AEA

The Draft FOCD Guidance should be revised to make clear that 10 CFR § 50.38 applies only to production and utilization facilities, as those terms are defined in the Atomic Energy Act of 1954, as amended ("AEA"), rather than to all licenses originally issued under 10 CFR Part 50. As explained below, this is consistent with the underlying purpose 10 CFR § 50.38, which is to implement the FOCD restrictions in the AEA.

The AEA authorizes the NRC to issue licenses for production and utilization facilities, as those terms are defined in the statute.³ The NRC implements this licensing authority via its regulations at 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities." The Commission's licensing authority, however, is subject to certain statutory limitations, including those in AEA sections 103d and 104d:

No license may be issued to an alien or 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.⁴

This prohibition is implemented through Commission regulations at 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*.⁵

¹ Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1 (undated) (ML16048A025) ("Draft SRP, Rev. 1").

² Draft Regulatory Guide X.XX, Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility (undated) (ML16137A520) ("Draft FOCD Regulatory Guide").

³ AEA §§ 103a (42 U.S.C. § 2133(a)), 104b (42 U.S.C. § 2134(b)), 104c (42 U.S.C. § 2134(c)).

⁴ AEA § 103d (42 U.S.C. § 2133(d)). The analogous provision in AEA § 104d does not include the phrase "an alien or," but is otherwise identical. See AEA § 104d (42 U.S.C. § 2134(d)).

⁵ 10 CFR § 50.38 (emphasis added).

Unfortunately, the words “a license” could be perceived as rendering the FOCD restriction broadly applicable to *all* licenses originally issued under Part 50. Such an interpretation, however, would be at odds with the Commission’s intent. As the NRC has explained, “the underlying purpose of 10 CFR 50.38 is to implement the FOCD restrictions of sections 103d. and 104d. of the AEA and to prevent foreign control, domination or ownership over *production and utilization facilities as defined by the AEA.*”⁶ The regulation was never intended to apply to facilities that fall outside of those statutory definitions.

In fact, in 2013, the NRC recognized the fact that application of 10 CFR § 50.38 to Part 50 licenses for facilities other than production and utilization facilities was inconsistent with the Commission’s purpose in promulgating the regulation.⁷ Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company held Part 50 licenses to operate their respective nuclear power reactors. However, after ceasing power operations and permanently defueling the facilities, the “possession only” Part 50 licenses no longer authorized operation of the reactors.⁸ The NRC agreed that these facilities were neither production nor utilization facilities, and that imposing 10 CFR § 50.38 on such facilities was inconsistent with the underlying purpose of the rule.⁹

However, licensees should not need to request “exemptions,” in individual licensing proceedings, from a regulation that was never intended to apply to such facilities in the first instance. Accordingly, the Draft FOCD Guidance should include the following clarification:

- The term “a license” in 10 CFR § 50.38 refers exclusively to licenses for production and utilization facilities, as those terms are defined in the Atomic Energy Act of 1954, as amended; it does not include any other licenses issued under 10 CFR Part 50.

2. The Draft FOCD Guidance Should Clarify That Permanently Defueled Facilities Are Not Production or Utilization Facilities, As Defined in the AEA

By operation of law, after ceasing power operations and permanently defueling, facilities licensed under 10 CFR Part 50 are no longer capable of producing or making use of special nuclear material. This is mandated as a matter of law by operation of 10 CFR § 50.82(a)(2). Consistent with NRC precedent, the Draft FOCD Guidance should explain that such facilities are not production or utilization facilities, as those terms are defined in the AEA.

⁶ See Letter from M. Lombard to W. Norton, Request for Exemption from Title 10 of the Code of Federal Regulations 50.38 Requirements for Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company – (TAC Nos. L24538, L24565, and L24566), Encl. at 5 (July 15, 2013) [hereinafter Yankee Exemption] (ML13086A010).

⁷ See *id.* at 1.

⁸ See *id.*, Encl. at 1.

⁹ See *id.*, Encl. at 4-5. Given the fact that

The AEA defines production and utilization facilities as those that are capable of "the production of" (production facility) or "making use of" (utilization facility) special nuclear material ("SNM") in certain quantities and manners.¹⁰ Operating nuclear power reactors have such capabilities at their inception. However, when those facilities shutdown, their licenses no longer authorize operation of the reactor. The NRC should explain that its interpretations of the AEA's definitions of "production facility" and "utilization facility" recognize the bright line between operating reactor facilities, which satisfy the AEA criteria for production and utilization facilities, versus permanently shut down and defueled facilities, which do not.

NRC regulations require Part 50 licensees to submit written certifications "[w]hen a licensee has determined to permanently cease operations," and again, "[o]nce fuel has been permanently removed from the reactor vessel."¹¹ As explained in 10 CFR § 50.82(a)(2):

Upon docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel . . . the 10 CFR part 50 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

Thus, by operation of law, a permanently defueled facility is no longer capable of producing or making use of SNM. Although the Yankee facilities (discussed above) had been dismantled, the basis for their exemption request was that the "*conditions of the licenses* do not allow their use as a production or utilization facility, and they are therefore not subject to Sections 103d. or 104d. of the AEA."¹² The NRC agreed that such facilities were neither production nor utilization facilities.¹³

The appropriate inquiry is whether the facility legally is capable of producing or making use of SNM; it is not relevant whether, theoretically, a licensed facility could be operated unlawfully. It is contrary to NRC policy to assume that a licensee will intentionally violate its legal obligations.¹⁴ Accordingly, the Draft FOCD Guidance should include the following clarification:

- For purposes of interpreting the applicability of 10 CFR § 50.38, facilities licensed under 10 CFR Part 50 that have docketed certifications for (1) permanent cessation of operations, and (2) permanent removal of fuel from the reactor vessel, pursuant to 10 CFR § 50.82(a)(1), are considered incapable of producing or making use of special nuclear material, and thus, are not production or utilization facilities as those terms are defined in the Atomic Energy Act of 1954, as amended.

¹⁰ AEA §§ 11v (production facility); 11cc (utilization facility).

¹¹ 10 CFR § 50.82(a)(1).

¹² Yankee Exemption, Encl. at 2.

¹³ *Id.*, Encl. at 4.

¹⁴ See, e.g., *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003).

3. The Draft FOCD Guidance Should Not Endorse an “Absolute Prohibition” on 100 Percent Indirect Foreign Ownership

The Draft SRP, Rev. 1, only provides guidance regarding graded generic negation action plan criteria for entities with “≤ 99%” indirect foreign ownership,¹⁵ and the Draft FOCD Regulatory Guide explicitly states, “the only absolute prohibitions regarding FOCD are direct foreign ownership at any percentage or 100 percent indirect foreign ownership.”¹⁶ However, this position is not mandated by the Commission, lacks a principled legal basis, and is inconsistent with Foreign Ownership, Control or Influence (“FOCI”) reviews conducted by other Federal agencies. Thus, references to any such “absolute prohibition” should be deleted from the Draft FOCD Guidance.

In 2012, an Atomic Safety and Licensing Board (“ASLB”) held that the applicants for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant, Unit 3, were ineligible to obtain a license because they were indirectly 100 percent foreign owned.¹⁷ On appeal, the Commission did not address the merits of the Board’s finding.¹⁸ Indeed, the Commission has never held that 100 percent indirect foreign ownership is prohibited by the AEA as a matter of law.

Furthermore, the assertion that the AEA establishes an “absolute prohibition” against 100 percent indirect foreign ownership is unsupported. The idea that 99% indirect foreign ownership could be mitigated, but 100% indirect foreign ownership could not, is purely arbitrary. There simply is no principled basis to distinguish these two scenarios.

Finally, the Staff’s position is inconsistent with the position of the United States government regarding FOCI restrictions under the Department of Defense’s (“DoD”) National Industrial Security Program Operating Manual (“NISPOM”). Under the NISPOM, 100 percent foreign ownership of a U.S. defense or military contractor is not prohibited. Indeed, the DoD has entered into contracts with entities that are entirely foreign owned, permitting them to have access to classified information, subject to appropriate negation measures.¹⁹ Indeed, foreign-owned companies such as Rolls Royce North America, Inc. and BAE Systems North America have become critical DoD contractors, and the U.S. Government has acknowledged the benefits of accepting this international participation in the U.S. marketplace.²⁰

¹⁵ Draft SRP, Rev. 1 at 6-2, A-1.

¹⁶ Draft FOCD Regulatory Guide at 5.

¹⁷ Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant), LBP-12-19, 76 NRC 184, 187 (2012).

¹⁸ Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant), CLI-13-4, 77 NRC 101, 187 (2013).

¹⁹ See *generally* National Industrial Security Program; Interim final rule, 79 Fed. Reg. 19,467 (Apr. 9, 2014).

²⁰ See Lorell, Mark, “Going Global: U.S. Government Policy and the Defense Aerospace Industry,” pages 173-177 (2002) (RAND Project Air Force; Contract F49642-01-C-0003). With FOCI mitigation under a Proxy Agreement and later under a Special Security Agreement, Rolls Royce acquired Allison Engine Company, which is considered a “crown jewel” supplier of jet engines to DoD. With FOCI mitigation under a Special Security Agreement, BAE Systems acquired Sanders, the world’s

Accordingly, references to an “absolute prohibition” against 100 percent indirect foreign ownership should be deleted from the Draft FOCD Guidance, and the graded generic negation action plan criteria should contemplate entities that are 100 percent indirectly foreign owned.

premier supplier of highly sophisticated and technologically sensitive electronic warfare equipment for combat aircraft.