

December 5, 2016

EA-16-167

Mr. Eric Carroll
Shipping International, Inc.
17721 Highway 59 N.
Humble, TX 77396

SUBJECT: INDIRECT AND DIRECT TRANSFERS OF CONTROL OF NRC EXPORT
LICENSE XMAT427 – EXERCISE OF ENFORCEMENT DISCRETION AND
NOTICE OF VIOLATION

Dear Mr. Carroll:

This letter refers to a review of records associated with NRC Export License XMAT427 (“XMAT427”) issued to Airgas Specialty Gases, and the export of nuclear material to China on May 9, 2016, by Airgas USA, LLC.

On March 23, 2016, Airgas Specialty Gases notified the U.S. Nuclear Regulatory Commission’s (NRC) Office of International Programs (OIP), via email, that Airgas, Inc., was acquired by Air Liquide and that a new corporation, “Airgas, LLC,” was being created. On March 31, 2016, Airgas Specialty Gases informed the NRC in writing that its parent company, Airgas, Inc., was restructuring, and that as of April 1, 2016, Airgas Specialty Gases would no longer be a separate legal entity and future operations previously performed by Airgas Specialty Gases would be carried out by Airgas USA, LLC. In this letter, Airgas Specialty Gases stated that it wished to transfer XMAT427 from Airgas Specialty Gases to Airgas USA, LLC.

When Airgas Specialty Gases ceased to exist on April 1, 2016, it had neither received written Commission approval nor applied for an amendment to authorize the direct transfer of control of NRC Export License XMAT427 to Airgas USA, LLC. Nonetheless, on May 9, 2016, Airgas USA, LLC, shipped 31 kilograms of deuterium gas to China. Airgas USA, LLC had not obtained written approval from the Commission to use XMAT427 for this export, although it did receive verbal permission from OIP staff.

On May 23, 2016, L’Air Liquide, S.A. (“Air Liquide”) completed the acquisition of Airgas, Inc. This indirect transfer of control of XMAT427 to Air Liquide also occurred without prior written Commission approval.

On August 29, 2016, the NRC held a telephonic briefing with you to discuss issues associated with Airgas USA, LLC, and its affiliated companies. During the briefing you provided additional information concerning the activities described above.

Based on our review of all the information, we have determined that three violations of NRC requirements occurred. The violations involve: (1) the direct transfer of control of XMAT427 without Commission approval as required by Title 10 of the *Code of Federal Regulations*

(10 CFR), Section 110.50(d), and Section 184 of the Atomic Energy Act (AEA) of 1954, as amended (42 U.S.C. § 2234); (2) the indirect transfer of control of XMAT427 without written Commission consent as required by Section 184 of the AEA; and (3) the export of nuclear material without obtaining a specific license as required by 10 CFR 110.5. Specifically, 10 CFR 110.50(d) states that a “specific license may be transferred, disposed of or assigned to another person only with the approval of the Commission by license amendment.” Section 184 of the AEA, states, in part, that no NRC license shall be transferred, 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. And 10 CFR 110.5 states, in part, that no person may export any nuclear material listed in 10 CFR 110.9 unless authorized by a general or specific license issued under 10 CFR Part 110.

The violations were evaluated in accordance with the NRC Enforcement Policy. The current Enforcement Policy is available on the NRC Web site at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>. The violations of 10 CFR 110.50(d) and Section 184 of the AEA associated with the direct and indirect transfers of control of XMAT427 are cited in the enclosed Notice of Violation (Notice). Because Airgas Specialty Gases did not receive Commission approval, the NRC did not have the opportunity to review the planned transfers of control to ensure that the transferee possessed the appropriate authority over the license being directly or indirectly acquired and controlled. The violations associated with the indirect and direct transfers of control of XMAT427, without Commission approval, are being categorized collectively, in accordance with the NRC Enforcement Policy, as a Severity Level (SL) IV problem because of the low radiological or programmatic significance associated with the particular circumstances of this case. Specifically, because the activities conducted under this license do not involve the actual storage of licensed material, the NRC determined that little or no radiological or programmatic safety significance resulted from these violations.

Regarding the apparent violation of 10 CFR 110.5, the NRC staff finds that Airgas USA, LLC failed to obtain a specific license before exporting nuclear material listed in 10 CFR 110.9, and the export was not authorized by a general or specific license issued under 10 CFR Part 110. As mentioned earlier in this letter, on May 9, 2016, Airgas USA, LLC exported 31 kilograms of deuterium, without submitting an application for a specific license or an application for a license amendment to XMAT427 beforehand. On April 27, 2016, Airgas USA, LLC emailed OIP staff to determine the status of NRC approval for its “restructuring.” At that time, NRC staff discovered that the March 31, 2016, letter had not been posted for its 30-day public review period. Airgas USA, LLC indicated that it had been holding the shipment pending the NRC’s approval. After some internal staff communications, the Licensing Officer verbally informed Airgas USA, LLC that it could move forward with its shipment. This verbal permission should not have occurred because a valid export license no longer existed as of April 1, 2016, when Airgas Specialty Gases ceased to exist and XMAT427 was not amended to reflect a new owner.

Normally the aforementioned export of nuclear material without a license would be considered a Severity Level III violation pursuant to the Enforcement Policy. However, in consideration of the Licensing Officer’s communications with you regarding the May 9, 2016, shipment, the NRC has determined that it is appropriate to exercise enforcement discretion and refrain from citing the violation in accordance with Section 3.5 of the Enforcement Policy. Specifically, Section 3.5 of the NRC Enforcement Policy states, in part, that the NRC may reduce or refrain from issuing a

civil penalty or a Notice of Violation for a Severity Level III violation based on the merits of the case after considering the guidance in the policy and such factors as the significance of the violation, the clarity of the requirement and associated guidance, and other relevant circumstances.

You are required to respond to this letter in writing, and should follow the instructions specified in the enclosed Notice when preparing your response. If you have additional information that you believe the NRC should consider, you may provide it in your response. The NRC will use your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

In accordance with 10 CFR 2.390 of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter, its enclosures and your response will be made available electronically for public inspection in the Public Document Room or from the NRC's document system Agencywide Documents Access and Management System accessible from the NRC Website at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy or proprietary information so that it can be made available to the public without redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such information, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information).

Please contact Andrea R. Jones at (301) 415-2309, if you have any questions regarding this matter.

Sincerely,

/RA/

Peter Habighorst, Chief
Export Controls & Nonproliferation Branch
Office of International Programs

Enclosure:
Notice of Violation

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Peter Habighorst, Chief
Export Controls & Nonproliferation Branch
Office of International Programs

Enclosure:
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NOTICE OF VIOLATION

Airgas Specialty Gases, Inc.
Humble, TX

EA-16-167

During a U.S. Nuclear Regulatory Commission (NRC) review completed on August 4, 2016, violations of NRC requirements were identified. In accordance with the NRC Enforcement Policy, the violations are listed below:

- A. Title 10 of the *Code of Federal Regulations* (10 CFR) Section 110.50(d) states that a “specific license may be transferred, disposed of or assigned to another person only with the approval of the Commission by license amendment.”

Section 184 of the Atomic Energy Act (AEA) of 1954, as amended (42 U.S.C. § 2234), states, in part, that no NRC license shall be transferred, 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.

Contrary to the above, on April 1, 2016, NRC export license XMAT427 was effectively transferred to another entity without the prior approval of the Commission by license amendment. Specifically, on April 1, 2016, Airgas Specialty Gases ceased to exist and its specific license was effectively transferred to Airgas USA, LLC, without the prior approval of the Commission by a license amendment.

- B. Section 184 of the AEA states, in part, that no NRC license shall be transferred, 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 the Act, and shall give its consent in writing.

Contrary to the above, on May 23, 2016, L’Air Liquide, S.A. (“Air Liquide”) completed an indirect transfer of control of NRC export license XMAT427 by acquiring Airgas, Inc., without the prior consent of the Commission in writing. Airgas, Inc., was the parent company of the Airgas Specialty Gases, and is now the parent company of Airgas USA, LLC.

This is a Severity Level IV Problem (NRC Enforcement Policy, Sections 6.3 and 6.15).

Pursuant to the provisions of 10 CFR 2.201, you are hereby required to submit a written statement or explanation to the Director, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, within 30 days of the date of this Notice of Violation. This reply should be clearly marked as a "Reply to a Notice of Violation (EA-16-167)" and should include for each violation: (1) the reason for the violation, or, if contested, the basis for disputing the violation or severity level; (2) the corrective steps that have been taken and the results achieved; (3) any additional corrective steps that will be taken; and (4) the date when full compliance will be or was achieved. Your response may reference or include previous docketed correspondence, if the correspondence adequately addresses the required response.

Enclosure

If an adequate reply is not received within the time specified in this Notice, the NRC may issue an Order or a Demand for Information requiring you to explain why your license should not be modified, suspended, or revoked or why such other action as may be proper should not be taken. Where good cause is shown, consideration will be given to extending the response time. If you contest this enforcement action, you should also provide a copy of your response, with the basis for your denial, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

In accordance with 10 CFR 2.390 of the NRC's "Agency Rules of Practice and Procedure," your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS) accessible from the NRC Website at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction.

In accordance with 10 CFR 19.11, you may be required to post this Notice within 2 working days of receipt.

Dated this 5th day of December 2016.

cc:

Mr. Bill Russo, Airgas USA, LLC VP Specialty Gases (via email)
Lola F. Lin, Esq., Airgas, Inc. SVP and General Counsel (via email)
Mr. William E. Carroll, Shipping International, Inc. (via email)