

April 14, 2017

MEMORANDUM TO: Dr. Brett M. Baker
Assistant Inspector General for Audits

FROM: Frederick D. Brown **/RA/**
Deputy Executive Director for Materials, Waste,
Research, State, Tribal, Compliance, Administration,
Human Capital Programs
Office of the Executive Director for Operations

SUBJECT: AUDIT OF THE U.S. NUCLEAR REGULATORY COMMISSION'S
SOURCE MATERIAL EXPORTS TO FOREIGN COUNTRIES
(OIG-17-A-08)

This is in response to the Office of the Inspector General's (OIG) "Audit of Source Material Exports to Foreign Countries" (Report Number OIG-17-A-08), dated February 16, 2017. The Office of International Programs and the Office on Nuclear Material Safety and Safeguards have documented actions for the five proposed recommendations. The management decision, corrective actions, target completion date, and the point of contact for each recommendation are enclosed.

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301-287-9241

SUBJECT: AUDIT OF THE U.S. NUCLEAR REGULATORY COMMISSION'S SOURCE
MATERIAL EXPORTS TO FOREIGN COUNTRIES (OIG -17-A-08) DATE April
14, 2017

Enclosure:
Staff Response to Final Audit Report

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THE U.S. NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSE ON OFFICE OF
THE INSPECTOR GENERAL FINAL REPORT "AUDIT OF NRC'S OVERSIGHT OF SOURCE
MATERIAL EXPORTS TO FOREIGN COUNTRIES"

RECOMMENDATION #1

Coordinate among the Office of International Programs (OIP), Office of Nuclear Materials Safety and Safeguards (NMSS), and regional offices, as appropriate, in developing and implementing an export inspection program to include pre-licensing site visits and periodic post-licensing inspections at Part 110 applicant and licensee locations. The pre-licensing visits may only apply to export applicants who do not already possess another NRC license.

RESPONSE: The U.S. Nuclear Regulatory Commission (NRC) staff agrees in part, and disagrees in part, with recommendation #1.

ACTION: The staff will develop and analyze options for an export/import post-licensing inspection program for Commission consideration. The Commission paper will provide options on how best to effectively and efficiently develop a program that includes periodic post-licensing inspections of export licensees and will provide, for the Commission's consideration, the staff's assessment of performing pre-licensing site visits. OIP will continue to implement the current export inspection program consistent with direction in staff requirements memorandum (SRM) SECY-06-0171, until the Commission determines whether modifications to the program are warranted.

As previously noted in the staff's February 7, 2017, response, the staff believes that conducting pre-licensing visits to ascertain where 10 CFR Part 110 records would be maintained and safeguarded by a prospective licensee is neither a productive nor efficient use of agency resources. Although the staff understands that the Office of the Inspector General's (OIG) recommendation is modeled on findings in the context of domestic licensing for certain byproduct materials, the rationale for pre-licensing visits for domestic possession licenses does not apply in the export licensing context, as we explained in the staff's formal comments on the report. In contrast to pre-licensing inspections for domestic licenses, which could serve to provide verification of the existence or condition of the very facilities or locations where licensed activities are proposed to take place, pre-licensing inspection of an exporter's address would not provide such verification relating to a proposed export, since the activity to be licensed – taking the material across the U.S. border into a foreign country -- will not actually take place at the exporter's address. The staff's response identified six factors in the export licensing process that make such pre-licensing site visits unnecessary. Current export licensing activities that support not conducting pre-licensing site visits, include executive branch reviews that scrutinize information submitted by a new export applicant, frequent contacts with the export applicant by OIP licensing officers, and the transparency of the export licensing process. In its response to the staff's formal comments, OIG stated that use of these factors are an excellent way to evaluate export applicants, but maintained its recommendation for pre-licensing site visits. For the reasons noted in its formal comments and as discussed above, it remains the staff's position that undertaking such inspections is neither a productive nor an efficient use of the agency's limited resources. Expending resources for all new applicants of source material exports does not aid in the assessment of the non-proliferation licensing criteria, nor does it support a mission essential priority for use of limited NRC resources.

Enclosure

Completion Date: The staff will submit a Commission Paper on potential revisions to the post licensing inspection program for Commission review by February 1, 2018.

POC: Peter Habighorst, OIP

RECOMMENDATION #2

Communicate to export applicants and licensees that U.S. carriers and all other parties to the export, aside from intermediate consignees performing shipping services are to be listed on future export applications and licenses.

RESPONSE: The NRC staff disagrees with recommendation #2, but acknowledges the lack of clarity in the use of “party” in the regulation and will take action to address this condition.

ACTION: OIP will update internal guidance document LIC-01, *Appendix P Licensing*, LIC-02, *Non-Appendix P to 10 CFR 110, Export and Import of Nuclear Equipment and Material* to clarify that U.S. and non-U.S. carriers or consignees performing shipping services only are not legally responsible formal parties-in-interest to an export license.

Completion Date: August 1, 2017

POC: OIP, Peter Habighorst

DISCUSSION: The staff continues to disagree with OIG’s interpretation that “carriers” are parties to an export under Part 110, and should therefore be listed as such on an export license application. OIG originally cited 10 CFR § 110.32(a) and (b) as support, but neither of these regulations specifies that carriers are parties to, or are required to be listed in, an export application. In its response to the agency’s comments, OIG argued that a “standard definition” of the word *party* shows that applicants must include carriers on Form 7. The term *party* should be interpreted in light of its regulatory context. Section 110.32(b) provides that applicants must include on Form 7 the “name and address of any other party, including the supplier of equipment or material, if different from the applicant.” This language omits any mention of carriers and cites only suppliers of equipment or material, which carriers are not. The NRC never intended that carriers be construed as a party in interest to an export license.¹ Unlike suppliers, carriers have no role in contracting for the supply of equipment or material to a foreign recipient, or legal responsibility for ensuring that the statutory and regulatory criteria for such exports are satisfied. Carriers serve only as transporters, and their legal responsibility from a regulatory standpoint is limited to complying with the NRC’s and the Department of Transportation’s transportation requirements. Thus, and in contrast to suppliers, the identity of the commercial carrier used for domestic transport of equipment or materials is irrelevant to OIP’s review of the statutory non-proliferation criteria implemented in 10 CFR § 110.42 for export licenses.

¹ The NRC added the term *party* to § 110.32 in 2010. The first regulatory iteration of this section only required applicants to list the “name and address of supplier of equipment or material, if different from the applicant.” Export and Import of Nuclear Equipment and Material, 43 Fed. Reg. 21,641, 21,647 (May 19, 1978). In the Statements of Consideration to the 2010 final rule, the NRC explained that the purpose of the rule change was to “to clarify that the name and address of any other party, including the supplier of the equipment or material, if different from the applicant, must be provided on the application.” Export and Import of Nuclear Equipment and Material; Updates and Clarifications, 75 Fed. Reg. 44,072, 44,082 (July 28, 2010). There is no suggestion in the 2010 rule that shippers were meant to be included in the definition of “party.”

As further support for its position, OIG cites § 110.32(d), which requires “all intermediate and ultimate consignees, other than intermediate consignees performing shipping services only” to be listed on an export application. OIG reads the exclusionary language, “consignees performing shipping services only,” as referring only to *foreign* consignees performing shipping services, and concludes that this exclusion “illustrates that NRC made a conscious effort to exclude listing export carriers in foreign countries, yet did not do so for U.S. carriers.” However, nothing in § 110.32(d) specifies that the exclusion for “consignees performing shipping services only” is limited only to foreign consignees performing shipping services. The language of the regulation encompasses all consignees performing shipping services, whether domestic or foreign. The exclusionary language in § 110.32(d), therefore, reinforces the staff’s position that § 110.32(b) does not require domestic carriers to be listed on an NRC export license. OIP further notes that some export license applicants have listed carriers in their applications. OIP does not discourage potential export license applicants from listing carriers on their license. But the fact that some applicants choose to include this information in their application does not convert the carriers into legally responsible formal parties-in-interest to an export license. Carriers are irrelevant to the NRC’s review of an export application to determine whether the statutory non-proliferation criteria have been met.

Absent any legal requirement, treating carriers as a formal party to an export would result in a significant additional unnecessary burden on staff and licensee resources without any benefit. If all carriers are *required* by NRC regulation to be listed on the license as parties, then all carriers must be treated as legal parties in interest to a license and be held accountable for satisfying the NRC export criteria in the same manner as the other parties. This would mean that both license application amendments and license amendments, and associated fees for NRC review costs (10 CFR Part 170), would become necessary every time a change in planned carrier(s) occurred. It is not uncommon that carriers change often during the licensing process and also after issuance of the export license.

RECOMMENDATION #3

Update OIP guidance to include the definition of “intermediate consignee.”

RESPONSE: NRC staff agrees with recommendation #3.

ACTION: OIP will update internal guidance document LIC -01, *Appendix P Licensing*, LIC-02, *Non-Appendix P to 10 CFR 110, Export and Import of Nuclear Equipment and Material* and update frequently asked questions on NRC’s external web page on export licensing to clarify “intermediate consignee” consistent with 10 CFR 110 regulations.

Completion Date: August 1, 2017

POC: Peter Habighorst, OIP

RECOMMENDATION #4

Update OIP internal guidance to refer to Part 40.12(b) and verify that all carriers on export applications have a Part 40 license if exports exceed 500 kilograms of natural uranium.

RESPONSE: The NRC staff agrees with recommendation #4.

ACTION: OIP will update the Part 40.12(b) requirements into guidance document LIC-02, *Non-Appendix P to 10 CFR 110, Export and Import of Nuclear Equipment and Material*.

Completion Date: August 1, 2017

POC: Peter Habighorst, OIP

RECOMMENDATION #5

Develop and implement a qualification program for OIP licensing officers.

RESPONSE: The NRC staff agrees with recommendation #5.

ACTION: OIP will establish and publish a qualification program for licensing officers, and will seek to have that program approved in the NRC's Inspection Manual Chapter Appendix.

Completion Date: September 30, 2017

POC: Peter Habighorst, OIP