

## **RULEMAKING ISSUE NEGATIVE CONSENT**

June 24, 2003

SECY-03-0106

FOR: The Commissioners

FROM: William D. Travers  
Executive Director for Operations

SUBJECT: UPDATE ON PROPOSED RULE CHANGES TO 10 CFR 40.51

### PURPOSE:

To request, by negative consent, Commission approval to postpone further action on the final rule, "Transfers of Certain Source Materials by Specific Licensees," amending 10 CFR 40.51, until the Commission has an opportunity to review associated issues that could impact the action taken in the final rule.

### BACKGROUND:

In a staff requirements memorandum (SRM) dated March 29, 2002 (Attachment 1), the Commission approved publication of the proposed rule (SECY-00-0201, September 25, 2000). The proposed rule was published in the Federal Register on August 28, 2002 (67 FR 55175) (Attachment 2). The comment period closed November 12, 2002, with 25 comment letters received from a wide range of individuals, industrial groups, environmental organizations, and other Federal and State government agencies.

The purpose of the rule is to amend the regulations in 10 CFR 40.51 to require U.S. Nuclear Regulatory Commission (NRC) approval for transfers of low concentrations of source material (less than 0.05 percent by weight) from licensees to persons exempt from licensing under 10 CFR 40.13(a). The Statement of Considerations (SOC) for the proposed rule provides the following guidance:

**CONTACT:** Gary Comfort, NMSS/IMNS  
(301) 415-8106

If the approval request is for transfer for the purpose of direct disposal in an appropriate facility [e.g., a Resource Conservation and Recovery Act (RCRA) Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or U.S. Environmental Protection Agency (EPA) permits], the request for transfer would normally be approved if the dose to a member of the general public is unlikely to exceed 0.25 millisieverts per year (0.25 mSv/yr) [25 millirem per year (25 mrem/yr)]. If the expected dose to a member of the general public is estimated to be between 0.25 mSv/yr (25 mrem/yr) and 1 mSv/yr (100 mrem/yr), the NRC staff will inform the Commission of the request and its resolution status. However, these limitations do not preclude a licensee from requesting approval for a transfer that could potentially result in doses, to a member of the general public, above 1 mSv/yr (100 mrem/yr); but such approval would be based on the unique circumstances of the specific case under review and would not be approved by the NRC staff without full Commission review.

The above dose limits are applicable to transfers for the purpose of direct disposal in an appropriate facility (e.g., a RCRA Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or EPA permits). If transfers of material are sought for other purposes, such as recycle or indirect disposal, such dose limits may not be appropriate. Lower dose limits may need to be considered.

The objective of this rule is to ensure that the regulations regarding transfers of materials containing low concentrations of source material, to persons exempt from licensing under 10 CFR 40.13(a), are adequate to protect public health and safety.

In addition, the rule amends 10 CFR 40.13(a) to add the word “disposes” to the list of exempted activities. The rule also requested comments on adding regulatory language prohibiting dilution as directed by the SRM to SECY-00-0201.

## DISCUSSION:

### *Related Issues*

Since publication of the proposed rule, the staff has developed a number of related issues which, depending on their outcome, could be considered inconsistent with guidance provided in the SOC or reduce the need for the final rule. These issues are primarily related to: the recently issued SECY-03-0068 (“Interagency Jurisdictional Working Group Evaluating the Regulation of Low-Level Source Material or Materials Containing Less than 0.05 Percent by Weight Concentration Uranium and/or Thorium,” May 1, 2003); disposition of solid materials; and recent discussions between EPA and NRC that would allow certain low-level wastes to be disposed of in RCRA sites. Each of these issues is discussed below.

#### 1) *SECY-03-0068*

In SECY-03-0068, the staff recommends further consideration of decreasing NRC’s jurisdiction over uranium and thorium by limiting NRC authority to uranium and thorium extracted or purposely concentrated for the use of the uranium and thorium. Should NRC jurisdiction be decreased, as envisioned by the staff, the staff expects that concentration limits would no longer be necessary and therefore would expect to remove 10 CFR 40.13(a) as an exemption.

Because the proposed amendment to 10 CFR 40.51 results from a concern specifically related to transfers to persons exempted under 10 CFR 40.13(a), this change in NRC's jurisdiction would remove the need for the proposed rule. As a result, should NRC finalize the proposed rule and the change in jurisdiction suggested in SECY-03-0068 occurs, the staff would need to rescind the new rule, likely through a small conforming amendment made as part of the rule implementing the reduction in jurisdiction. It should, however, be noted that the period between finalization of the changes related to 10 CFR 40.51 and finalization of changes to NRC jurisdiction discussed in SECY-03-0068 may be a number of years. Based on the known possibility of having to rescind the rule in the relatively near future, should the Commission choose to adopt the staff's recommendation in SECY-03-0068, the staff would recommend withdrawing the proposed rule amending 10 CFR 40.51. If after that time, the Commission or Congress determines that no jurisdictional changes should be made related to this effort, the staff would revisit the transfer issue.

## *2) Disposition of Solid Materials*

The staff is conducting a rulemaking on its approach for control of disposition of solid materials. Doses from uranium or thorium at concentrations below 0.05 percent by weight concentration (the exemption limit in 10 CFR 40.13(a)) could exceed those included for consideration in the June 30, 1999, Issues Paper on release of solid materials at licensed facilities (64 FR 35090). Although the Issues Paper included the exclusion that "10 CFR 40.51 and 40.13 contain transfer or unimportant quantities provisions, respectively, which are the subject of a separate Commission-directed initiative on Part 40 and are outside the scope of this effort (the disposition of solid materials)," the staff has since determined that source material should be included in this effort. This conclusion is based in part on the SRM to SECY-00-0201, where the Commission directed the staff to evaluate the acceptability of the potential dose (of source material transfers) on a case-by-case basis until the Commission's approach to the release of solid material is resolved.

As part of the rulemaking activities for the control of disposition of solid materials, the staff held public workshops in May 2003. Topics discussed included what type of disposal might be acceptable in RCRA Subtitle C or Subtitle D landfills. In order to minimize the potential for inconsistencies between the guidance in the SOC for the proposed changes to 10 CFR 40.51 and the results of the rulemaking activities on solid material disposition, the staff believes that consideration should be given to postponing publication of the rule amending 10 CFR 40.51 until comments on issues related to disposal in RCRA sites resulting from the workshops are reviewed by staff. The staff expects that its review would be completed in conjunction with the submittal to the Commission of the draft environmental impact statement on the disposition of solid materials in July 2004.

## *3) Discussions with EPA on Mixed-Waste Disposal in RCRA Sites*

EPA is developing an Advance Notice of Proposed Rulemaking (ANPR) to solicit stakeholder input on a potential regulatory framework to permit disposal of low-activity radioactive waste and mixed waste in RCRA Subtitle "C" facilities. Although NRC has authorized some transfers of low concentrations of source material to RCRA sites in the past, the recipient site has received the material as "exempt NRC material" rather than using any specific EPA criteria. Although these transfers have generally been estimated to result in exposures to the general public that

are well below 0.25 mSv/yr (25 mrem/yr), the proposed rule change related to 10 CFR 40.51 would allow potential doses that exceed 0.25 mSv/yr (25 mrem/yr) in some cases. Although EPA is still in early development of its approach to the mixed-waste disposal issue, there is a possibility that EPA may impose limits below the constraints provided in the SOC for the proposed 10 CFR 40.51 transfer rule.

In comments submitted on the proposed amendment of 10 CFR 40.51, EPA states "It would appear that transfers for the purpose of direct disposal would be approved at dose levels that are extraordinarily high, particularly when such disposal may occur at EPA-permitted RCRA facilities not designed for such disposal. At a minimum, disposal at EPA-regulated facilities should be consistent with EPA's risk management policies." EPA further states in its comments, "A final rule that provides Commission approval and limits the radiological impact of such transfers to no more than 15 mrem/yr including consideration of 'As Low as Reasonably Achievable' (ALARA), would provide improved protection of public health and the environment."

If limits are promulgated in EPA's approach to the disposal of mixed waste that are below those proposed in the amendment of 10 CFR 40.51, the constraints in the proposed SOC for the 10 CFR 40.51 transfer rule may eventually result in public confusion and concern that NRC is allowing the potential for higher doses to the public, or may result in the guidance provided in the SOC being moot because RCRA sites will not accept transfers resulting in exposures higher than the EPA limits for a RCRA facility. As a result, the staff believes it may be appropriate to postpone publication of the rule amending 10 CFR 40.51 until after EPA proposes what limits it will establish for RCRA facilities accepting mixed waste. EPA currently plans to issue its ANPR sometime during 2003.

#### *Impacts of Proposed Delay*

A number of public comments submitted during the comment period for the proposed rule changes to 10 CFR 40.51 stated concerns related to the guidance provided in the SOC versus the unrestricted release criteria in the License Termination Rule (LTR). In general, these comments stated concerns that the Commission was willing to allow transfers of source material to exempt persons that could result in doses to the general public above the unrestricted release criteria of 0.25 mSv/yr (25 mrem/yr) found in 10 CFR 20.1402 and higher than doses allowed at NRC-licensed disposal facilities. Although the dose constraints provided in the SOC were only applicable to "appropriate facilities," most comment letters can be interpreted to indicate that because NRC would no longer exercise regulatory control over the source material, the criteria should be consistent, if not lower, than current unrestricted release criteria. The staff believes that, in conjunction with the actions discussed previously, publication of the 10 CFR 40.51 rule changes at this time may reduce public confidence.

Based upon review of the license tracking system, the largest percentage of NRC licensees that hold source material use it in concentrated solid forms (i.e., shielding) and do not likely have material in forms that would fall under the proposed transfer rule. Less than 20 existing licensees (this does not include Site Decommissioning Management Plan sites that do not have NRC licenses) were identified that might potentially have large volumes of source material below 0.05 percent by weight that could be transferred under the final rule; many of these identified licensees are currently in decommissioning.

Since 1998, the staff has reviewed and approved requests for transfers of source material to "appropriate facilities" from approximately two to three licensees per year (some licensee's submitted more than one transfer request over the period). Based on the staff evaluations for transfers to "appropriate facilities," the staff has generally found calculated exposures to be below 0.25 mSv/yr (25 mrem/yr) for most scenarios. The staff expects that most transfers by licensees would be for similar purposes as these approved transfers and thus result in similar exposure levels; however, some scenarios, particularly for purposes other than disposal, have a potential for higher exposure levels.

The staff has also identified a few licensees that have transferred source material to exempt persons without prior NRC approval. Although the staff believes that these cases are infrequent, the staff cannot be certain additional cases have not occurred. While the staff would prefer licensees to coordinate with NRC any releases of these low concentrations of source material, in the absence of finalizing this rulemaking, there is no requirement for licensees to actually inform NRC. However, based on the small number of licensees that have significant quantities of concern and the relatively small impacts that have been calculated from previously approved transfers, the staff believes that postponing publication of the final rule, until the issues discussed above are reviewed by the Commission, would not have a significant impact on public health and safety. However, it should be noted that the staff's review did not include any evaluation of impacts from transfers from licensees in Agreement States.

The Commission should also be aware that the rule would also amend 10 CFR 40.13(a) to add the word "disposes" to the list of exempted activities. Because this amendment was only considered to be clarifying in nature, postponing publication of the final rule is expected to have no impact. Finally, the proposed rule also requested comment on adding regulatory language prohibiting dilution. Although comments on the proposed rule were split on this issue, since publication of the proposed rule, the staff has decided to address dilution more generically as part of SECY-03-0069 ("Results of the LTR Analysis," May 2, 2003). As a result, postponing publication of the final rule is expected to have no impact on this effort.

Based on the discussions above, the staff believes that publication of the final rule should be postponed until the issues discussed above are resolved.\*

#### COORDINATION:

The Office of the General Counsel has no legal objection to postponing the final rulemaking.

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\*Should the Commission determine to proceed at this time with finalizing the rule, the staff recommends that the Commission direct the staff to remove language in the SOC related to specific dose criteria and, instead, state that decisions would be made based upon assuring that the transferred materials do not result in risks to the general public that are higher than those risks associated with naturally-occurring radioactive material approved for acceptance at the disposal facility. This would recognize that the hazard from the disposal of exempt material should be consistent with the risks from disposal of unregulated radioactive material in the environment. Transfers for purposes other than disposal in an appropriate facility would still be evaluated on a case-by-case basis.

CONCLUSION:

Unless otherwise directed by the Commission, the staff intends to postpone publication of the final rule related to the transfers of source material until the issues discussed above are resolved. We consider this action to be within the delegated authority of the EDO.

*/RA/*

William D. Travers  
Executive Director  
for Operations

Attachments:

1. SRM dated March 29, 2002
2. August 28, 2002, FRN

March 29, 2002

MEMORANDUM TO: William D. Travers  
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS - SECY-00-0201 - PROPOSED RULE -  
10 CFR PART 40 AMENDMENTS TO REQUIRE NRC  
APPROVAL FOR TRANSFER FROM LICENSEES TO EXEMPT  
PERSONS

The Commission has approved publication of the proposed rule to amend 10 CFR § 40.51 to require NRC approval for licensee transfers of “unimportant quantities” of source material to exempt persons for the purpose of disposal subject to the comments and changes provided below. The Commission also approved the amendment of 10 CFR § 40.13(a) to clarify that non-NRC licensees are allowed to dispose of source material under 0.05 percent by weight (EDO) (SECY Suspense: 5/31/02)

1. The Statement of Consideration (SOC) should be modified to provide that requests for transfers would normally be approved if the estimated dose to a member of the public is unlikely to exceed a dose limit of 0.25 mSv/yr (25 mrem/yr). The Commission should be kept informed of requests where the estimated dose is likely to exceed 0.25 mSv/yr (25 mrem/yr). The SOC should clearly indicate that these exposure limits apply to members of the general public. Other factors that might be considered in determining whether to allow such transfers would include whether the dose arises from an occupational exposure (albeit to a worker at an unlicensed facility), whether the exposed individual is informed of and consents to the exposure, the likely duration of exposure, the estimated numbers of exposed individuals, and other appropriate considerations. Such approvals should be premised on disposal sites having in-place the appropriate EPA or State permit.
2. The Commission should be kept informed of transfer and disposal requests that the NRC receives for evaluation of material within the 25 mrem to 100 mrem range, as well as its resolution status.
3. Although this staff memorandum addresses potential Commission approval for specific sites with estimated doses up to 100 mrem/year, this discussion is not meant to preclude the staff from submitting applications for Commission approval with calculated exposures above 100 mrem/year if the staff believes such approvals are justified due to the unique circumstances of the specific case under review.
4. The context for the Commission’s consideration of this matter is in connection with releases of material for disposal in appropriate facilities (e.g., a RCRA Subtitle C facility authorized for such material). The discussion of the tolerable dose limits in the

Statement of Consideration should be modified to reflect this constraint. If releases of exempt material for other purposes are sought (e.g., recycle), the staff should evaluate the acceptability of the potential dose on a case-by-case basis until the Commission's approach to the release of solid material is resolved. The dose limits described in the proposed rule may not be appropriate in contexts other than disposal.

5. The Regulatory Analysis should be revised (at page 4, 1<sup>st</sup> bulleted paragraph) to remove any implication that all Subtitle C RCRA facilities are not equipped to protect against radiation hazards.
6. The staff should develop cost information for disposing of material at uranium mill tailings impoundments. Since this option is now available, providing associated cost estimates will complement and complete the existing data. If the staff is unsure of the cost estimates, it is acceptable to specifically request comments on costs in the proposed rule *Federal Register* notice.
7. While continuing to work toward consistency on a national basis in the regulatory control of materials with equivalent levels of risk, the Commission supports alternatives to a low-level waste disposal facility for low concentrations of source material, provided the public health and safety and environment are adequately protected.
8. The draft rulemaking should request comment on how the rule language could be modified to indicate that diluting source material with non-source material solely to reduce disposal costs is still not acceptable. At a minimum, the SOC should be modified to more clearly state the intent of the Commission and this revision may require specific changes in the proposed rule language as well.
9. The staff should revise 40.51(b) to make the wording gender neutral.

cc: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
CFO  
OCA  
OIG  
OPA  
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)  
PDR

accordance with parts 11 and 614 of this title, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

- (1) Payment rates, payment limits, and cost-share percentages;
- (2) Funding allocations;
- (3) Eligible conservation practices; and
- (4) Other matters of general applicability, including—
  - (i) Technical standards and formulas;
  - (ii) Denial of assistance due to lack of funds or authority; or
  - (iii) Science-based formulas and criteria.

**§ 1465.31 Compliance with regulatory measures.**

Participants who carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

**§ 1465.32 Access to operating unit.**

Any authorized CCC representative shall have the right to enter an operating unit or tract to ascertain the accuracy of any representations made in a contract, in anticipation of entering a contract, or as to the performance of the terms and conditions of the contract. Access shall include the right to provide technical assistance and inspect any work undertaken under the contract. The CCC representative shall make a reasonable effort to contact the participant prior to the exercise of this provision.

**§ 1465.33 Performance based upon advice or action of CCC representative.**

If a participant relied upon the advice or action of any authorized representative of CCC and did not know or have reason to know that the action or advice was improper or erroneous, the State Conservationist may accept the advice or action as meeting the requirements of the AMA Program and may grant relief, to the extent it is deemed desirable by CCC, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant.

**§ 1465.34 Offsets and assignments.**

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person shall be made without regard to questions of title

under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States Government. The regulations governing offsets and withholdings found in part 1403 of this chapter shall be applicable to contract payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at part 1404 of this chapter.

**§ 1465.35 Misrepresentation and scheme or device.**

(a) A producer who is determined to have erroneously represented any fact affecting an AMA Program determination made in accordance with this part shall not be entitled to contract payments and must refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) A producer who is determined to have knowingly:

- (1) Adopted any scheme or device that tends to defeat the purpose of the AMA Program;
- (2) Made any fraudulent representation; or
- (3) Misrepresented any fact affecting an AMA Program determination, shall refund to CCC all payments, plus interest determined in accordance with part 1403 of this chapter, received by such producer with respect to all contracts. The producer's interest in all contracts shall be terminated.

Signed in Washington, DC, on August 19, 2002.

**Bruce I. Knight,**

*Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

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**NUCLEAR REGULATORY COMMISSION**

**10 CFR Part 40**

**RIN 3150-AG64**

**Transfers of Certain Source Materials by Specific Licensees**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to require NRC approval for transfers from licensees of low-concentrations of source material

(less than 0.05 percent by weight) to persons exempt from licensing. The object of this proposed action is to ensure that the regulations regarding transfers of materials containing low concentrations of source material are adequate to protect public health and safety.

**DATES:** Submit comments by November 12, 2002. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attn: Rulemakings and Adjudications Staff.

Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking Web site (<http://ruleforum.llnl.gov>). This site provides the capability to upload comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher (301) 415-5905; e-mail [CAG@nrc.gov](mailto:CAG@nrc.gov).

Certain documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, Room O-1F23, 11555 Rockville Pike, Rockville, MD. These same documents may also be viewed and downloaded electronically via the rulemaking Web site.

The NRC maintains an Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737, or by email to [pdr@nrc.gov](mailto:pdr@nrc.gov).

**FOR FURTHER INFORMATION CONTACT:** Gary Comfort, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-8106, e-mail [gcc1@nrc.gov](mailto:gcc1@nrc.gov).

**SUPPLEMENTARY INFORMATION:** The NRC regulations in 10 CFR 40.13 exempt persons from the licensing requirements for certain materials containing uranium and thorium referred to as "unimportant quantities." One of these exemptions, § 40.13(a), is for "chemical mixtures,

compounds, solutions, or alloys" in which the source material is by weight less than 0.05 percent. Section 40.13(a) exempts any person from NRC licensing requirements "to the extent that such person receives, possesses, uses, transfers, or delivers source material in any chemical mixture, compound, solution, or alloy in which source material is by weight less than one-twentieth of 1 percent (0.05 percent) of the mixture, compound, solution, or alloy." This exemption stems from regulations adopted approximately 40 years ago. The 0.05 percent by weight limit appears to have been chosen on the basis of concentrations of source material that are necessary to be a useful source of fissionable material. (The 0.05-percent by weight limit is equivalent to approximately 339 picocuries uranium/gram (pCiU/gram) for natural uranium or 116 picocuries thorium/gram (pCiTh/gram) for natural thorium.)

Some NRC licensees are in possession of mixtures of material derived from their licensed processes where the source material is under 0.05 percent by weight. These licensees hold licenses because the processes which resulted in this lower concentrated material at some point used material in which the concentration of source material exceeded 0.05 percent by weight source material. Specific licensees are subject to requirements for decommissioning in Part 40 (§ 40.42) and waste disposal requirements in Part 20. The 0.05 percent standard of 10 CFR 40.13(a) is not a disposal standard. However, the current regulations, §§ 40.51(b)(3) and (b)(4), do not specifically require an NRC licensee (either general or specific) to obtain NRC approval before transferring source material to persons exempt from licensing requirements under § 40.13(a) or equivalent Agreement State regulations. After this material is transferred, it is no longer subject to NRC requirements because an exempt person is not subject to the requirements for decommissioning and disposal.

For some limited types and quantities of materials that fall under the exemption in § 40.13(a), transfers could potentially result in scenarios where exposure limits in 10 CFR Part 20 could be exceeded. Recent estimates of possible radiation doses from thorium and uranium suggest that quantities of source material in concentrations below the 0.05-percent limit, in certain situations, could result in individual doses of more than 1 millisievert/year (mSv/yr) (100 millirem/year (mrem/yr)). Examples of some of these estimates can be found in NUREG-1717, "Systematic Radiological Assessment of Exemptions

for Source and Byproduct Materials," June 2001.

This recent information on doses from less than 0.05 percent by weight source material has led the Commission to review its regulations concerning source material. This is especially important in light of decommissioning and decontamination of facilities where less than 0.05 percent by weight source material is present in significant quantities and often involves questions of disposal options for this material. Therefore, the Commission is proposing to amend § 40.51 to require NRC approval for transfers of source material derived from licensees' specifically licensed material to ensure that these transfers do not pose a health and safety concern. Until such an authorized transfer occurs, the material, regardless of its concentration of source material, remains part of the licensee's inventory of licensed material. This approval does not apply to the general license provisions in Part 40—the proposed approval is limited to source material derived from specifically licensed material. This is because of the more limited quantities of material handled under general license. In addition, it is not intended for this requirement to apply to uranium and thorium that is essentially at the natural background levels of the surrounding area. The primary concern for this proposed rule is to handle situations where quantities of licensed source material have been processed through licensed operations resulting in mixtures of material containing less than 0.05 percent by weight source material.

In making its determination regarding transfer of less than 0.05 percent source material, the NRC would generally evaluate the potential use and disposition scenarios on a case-by-case basis. Factors that may be considered include, but are not limited to, whether the dose arises from an occupational exposure (albeit to a worker at an unlicensed facility), whether the exposed individual is informed of and consents to the exposure, the likely duration of the exposure, the estimated number of exposed individuals, the doses the individual has received in the past from similar type actions, and whether appropriate Federal, State, and local regulations regarding possession of such material by the exempt person are met for the intended use or disposal. The Commission would expect licensees to address, as part of their approval requests for transfer of material under this rule, analyses of doses that may occur to the recipients of the material during the transfer and disposal operations, as well as, the

doses that may occur as the result of the disposal consistent with the License Termination Rule, 10 CFR Part 20, Subpart E or RCRA requirements, as appropriate.

If the approval request is for transfer for the purpose of direct disposal in an appropriate facility (e.g., a RCRA Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or EPA permits), the request for transfer would normally be approved if the dose to a member of the general public is unlikely to exceed 0.25 mSv/yr (25 mrem/yr). If the expected dose to a member of the general public is estimated to be between 0.25 mSv/yr (25 mrem/yr) and 1 mSv/yr (100 mrem/yr), the NRC staff will inform the Commission of the request and its resolution status. These limitations, however, do not preclude a licensee from requesting approval for a transfer that could potentially result in doses to a member of the general public above 1 mSv/yr (100 mrem/yr); however, such approval would be based upon the unique circumstances of the specific case under review and would not be approved by the NRC staff without full Commission review.

The above dose limits are applicable to transfers for the purpose of direct disposal in an appropriate facility (e.g., a RCRA Subtitle C facility authorized for such material or other disposal facilities having in place the appropriate State or EPA permits). If transfers of material are sought for other purposes such as recycle or indirect disposal, such dose limits may not be appropriate. Lower dose limits may need to be considered.

Several licensees have requested NRC approval to transfer less than 0.05 percent source material to exempt persons in the past several years. The Commission has made these decisions on a case-by-case basis. Pending publication of these amendments to § 40.51 as a final rule, the Commission will continue its current policy of approving requests to transfer material to exempt persons under § 40.13(a) or equivalent Agreement State regulations on a case-by-case basis.

Additionally, NRC does not permit licensees to intentionally dilute licensed source materials without specific approval. Section 40.41(c) states that "each person licensed by the Commission pursuant to the regulations in this part shall confine his possession and use of source or byproduct material to the locations and purposes authorized in the license." Although it is recognized that inadvertent dilution may occasionally occur (e.g., during the process of preparing contaminated

material for shipment, some mixing with cleaner material may result as it is "dug up" and loaded for shipment before sampling), this natural dilution of the concentration of uranium and thorium is in contrast to the intentional dilution of contaminated material for the purpose of reducing its concentration below 0.05 percent which is not acceptable in the absence of prior authorization. Intentional dilution of licensed source material, without prior NRC authorization, would be considered a violation of § 40.41(c). The NRC is seeking public comment on whether this policy should be better clarified by adding rule language specifically prohibiting intentional dilution without prior authorization in the regulations.

As part of this proposed rule, the Commission is also proposing to amend § 40.13(a) by adding the word "disposes" to the list of exempted activities in § 40.13(a). This addition would clarify the exemption's applicability to disposal. However, it should be noted that any on-site disposal by a licensee of mixtures of material containing under 0.05 percent by weight (that was derived from its licensed material) source material is not addressed by § 40.13(a). Any such disposal would continue to require approval under 10 CFR 20.2002 and be subject to reevaluation under the Decommissioning Timeliness Rule, 10 CFR 40.42 and the License Termination Rule, 10 CFR Part 20, Subpart E.

#### **Agreement State Compatibility**

Section 40.13 is presently a compatibility "B" item, and § 40.51 is presently a compatibility "C" item, except for § 40.51(b)(6) which deals with exports and is reserved for NRC. The compatibility status reflects the extent to which Agreement State regulations must conform to NRC regulations, as detailed in "Policy Statement on Adequacy and Compatibility of Agreement State Programs", published September 3, 1997 (62 FR 46517). The proposed amendments, if made final, would not change the compatibility status of § 40.13 or § 40.51. Agreement States would be required to revise their regulations equivalent to § 40.13(a) and would be expected to have the same or more stringent criteria than NRC's when making their determinations regarding transfers for direct disposal of less than 0.05 percent source material.

#### **Plain Language**

The Presidential Memorandum dated June 1, 1998, entitled, "Plain Language in Government Writing" directed that

the Government's writing be in plain language. In complying with this directive, editorial changes have been made in the proposed revisions to improve the organization and readability of the existing language of paragraphs being revised. These types of changes are not discussed further in this notice. The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading **ADDRESSES** above.

#### **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 the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC is presenting amendments to its regulations that allow transfers of source material that is less than 0.05 percent by weight to persons exempt under § 40.13(a) or equivalent Agreement State regulations. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

#### **Finding of No Significant Environmental Impact: Availability**

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, not to prepare an environmental impact statement for this proposed rule because the Commission has concluded on the basis of an environmental assessment that this proposed rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment. The licensees affected by the proposed changes to § 40.51 fall into two groups: those licensees who would continue to be allowed to transfer their low concentrations of source material to exempt persons and those licensees who would not be allowed to transfer their low concentrations of source materials to exempt persons. For the first group there are no environmental impacts associated with this rule because the only change brought about by this rule is the requirement to apply for such approval. There would be no change to human health or the environment as a result.

For the second group, some transfers to exempt persons may not be approved. Consequently, low concentrations of source materials at these licensed

facilities would need to remain on site or could be transferred to or disposed of at other licensed facilities. As a result, this source material would continue to be managed in a regulated manner that would provide significantly greater protection to the public and the environment from exposure to radiation. Workers at licensed facilities would be expected to be exposed to lower doses of radiation than the levels to which workers at unregulated exempt facilities would be exposed, because of the routine safety precautions required at licensed facilities.

The proposed amendment to § 40.13(a) is only for the purpose of clarifying existing rule language. As a result, there would be no impact on human health or the environment resulting from this amendment.

Because under adoption of the proposed rule, there would be either (1) no change to human health or the environment or (2) greater protection of human health and the environment (relative to the current regulation), the determination of this environmental assessment is that there will be no significant impact to the public from this action. However, the general public should note that the NRC welcomes public participation. The NRC has also committed to complying with Executive Order (EO) 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, dated February 11, 1994, in all its actions. Therefore, the NRC has also determined that there are no disproportionate, high, and adverse impacts on minority and low-income populations. In the letter and spirit of EO 12898, the NRC is requesting public comment on any environmental justice considerations or questions that the public thinks may be related to this proposed rule but somehow were not addressed. The NRC uses the following working definition of "environmental justice": the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture, income, or educational level with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Comments on any aspect of the Environmental Assessment, including environmental justice, may be submitted to the NRC as indicated under the **ADDRESSES** heading.

The NRC has sent a copy of the Environmental Assessment and this proposed rule to every State Liaison Officer and requested their comments on the Environmental Assessment. The Environmental Assessment may be examined at the NRC Public Document

Room, O-1F23, 11555 Rockville Pike, Rockville, MD. Single copies of the environmental assessment are available from Gary Comfort, telephone (301) 415-8106, e-mail, [gcc1@nrc.gov](mailto:gcc1@nrc.gov) of the Office of Nuclear Material Safety and Safeguards.

#### Paperwork Reduction Act Statement

This proposed rule contains information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

The burden to the public for these information collections is estimated to average 50 hours per response for the initial transfer request and an additional 25 hours per response for requests for additional information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in the proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden, to the Records Management Branch (T-6 E6), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail to [INFOCOLLECTS@NRC.GOV](mailto:INFOCOLLECTS@NRC.GOV); and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0020), Office of Management and Budget, Washington, DC 20503.

Comments to OMB on the information collections or on the above issues should be submitted by September 27, 2002. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

#### Public Protection Notification

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

#### Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission.

The Commission requests public comment on the draft regulatory analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading. The analysis is available for inspection in the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Single copies of the regulatory analysis are available from Gary Comfort, telephone (301) 415-8106, e-mail, [gcc1@nrc.gov](mailto:gcc1@nrc.gov) of the Office of Nuclear Material Safety and Safeguards.

During development of the regulatory analysis, the NRC evaluated the possibility of a licensee disposing of its material in a mill tailings impoundment rather than a licensed burial facility, if the licensee was denied approval to transfer their source material to a person exempt under § 40.13(a) or equivalent Agreement State regulations. Although it is expected that this disposition method would reduce the costs related to the potential impact of this proposed rule, sufficient cost data were not available to include it as part of the regulatory analysis. Therefore, the NRC is seeking public comment and any available cost data regarding the inclusion of this disposal method in the Regulatory Analysis. Comments should be sent to the address listed under the heading **ADDRESSES**, above.

#### Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed rule would require licensees to apply to the Commission for approval to transfer source material to persons exempt under § 40.13(a) or equivalent Agreement State regulations. In total, the NRC estimates that, of the approximately 114 licensees under Part 40, approximately three to six licensees per year would apply to the Commission, *i.e.*, about three to five percent of all Part 40 licensees. The

NRC further estimates that the vast majority of licensees would need only submit an application to the NRC at an estimated one-time cost of about \$3,600 to \$5,300 per licensee. The NRC further estimates that, in rare circumstances, a licensee may be denied permission to transfer the material and, as a result, incur significant costs above the current (*i.e.*, baseline) regulatory program. However, the NRC estimates that this would happen to about one licensee per year, *i.e.*, less than one percent of all Part 40 licensees.

In sum, because the annual number of licensees submitting an application to NRC is expected to be very small (3-6 licensees annually), the NRC believes that the proposed rule would not impact a substantial number of entities, large or small.

#### Backfit Analysis

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

#### List of Subjects in 10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping 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; and 5 U.S.C. 553; the NRC is proposing to adopt 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. 40.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (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. Section 40.13(a) is revised to read as follows:

**§ 40.13(a) Unimportant quantities of source material.**

(a) Any person is exempt from the regulations in this part and from the requirements for a license set forth in section 62 of the Act to the extent that such person receives, possesses, uses, disposes, transfers, or delivers source material in any chemical mixture, compound, solution, or alloy in which the source material is by weight less than one-twentieth of 1 percent (0.05 percent) of the mixture, compound, solution, or alloy. The exemption contained in this paragraph does not include byproduct material as defined in this part.

3. Section 40.51 is revised to read as follows:

**§ 40.51 Transfer of source or byproduct material.**

(a) No licensee shall transfer source or byproduct material except as authorized pursuant to this section.

(b) Except as otherwise provided in its license and subject to the provisions of paragraphs (c), (d), and (e) of this section, any licensee may transfer source or byproduct material:

(1) To the Department of Energy;

(2) To the agency in any Agreement State that regulates radioactive materials pursuant to an agreement with the Commission or the Atomic Energy Commission under section 274 of the Act;

(3) To any person exempt from the licensing requirements of the Act and regulations in this part, to the extent permitted under such exemption;

(4) To any person in an Agreement State subject to the jurisdiction of that State who has been exempted from the licensing requirements and regulations of that State, to the extent permitted under such exemptions;

(5) To any person authorized to receive such source or byproduct material under terms of a specific license or a general license or their equivalents issued by the Commission or an Agreement State;

(6) To any person abroad pursuant to an export license issued under part 110 of this chapter; or

(7) As otherwise authorized by the Commission in writing.

(c) Before transferring source or byproduct material to a specific licensee

of the Commission or an Agreement State or to a general licensee who is required to register with the Commission or with an Agreement State prior to receipt of the source or byproduct material, the licensee transferring the material shall verify that the transferee's license authorizes receipt of the type, form, and quantity of source or byproduct material to be transferred.

(d) The following methods for the verification required by paragraph (c) of this section are acceptable:

(1) The transferor may have in its possession, and read, a current copy of the transferee's specific license or registration certificate;

(2) The transferor may have in its possession a written certification by the transferee that it is authorized by license or registration certificate to receive the type, form, and quantity of source or byproduct material to be transferred, specifying the license or registration certification number, issuing agency, and expiration date;

(3) For emergency shipments, the transferor may accept oral certification by the transferee that it is authorized by license or registration certificate to receive the type, form, and quantity of source or byproduct material to be transferred, specifying the license or registration certificate number, issuing agency, and expiration date, provided that the oral certification is confirmed in writing within 10 days;

(4) The transferor may obtain other sources of information compiled by a reporting service from official records of the Commission or the licensing agency of an Agreement State as to the identity of licensees and the scope and expiration dates of licenses and registrations; or

(5) When none of the methods of verification described in paragraphs (d)(1) to (4) of this section are readily available or when a transferor desires to verify that information received by one of these methods is correct or up-to-date, the transferor may obtain and record confirmation from the Commission or the licensing agency of an Agreement State that the transferee is licensed to receive the source or byproduct material.

(e) A licensee shall obtain written approval from the NRC before transferring any source material derived from its specifically licensed material to persons exempt under § 40.13(a) or equivalent Agreement State regulations. A licensee seeking NRC approval to transfer such material must submit a dose assessment with information containing the estimated annual total effective dose equivalent to a member of

the public that would result from the transfer, and the parameters and assumptions used in the assessment.

Dated at Rockville, Maryland, this 22nd day of August, 2002.

For the Nuclear Regulatory Commission.

**Annette Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. 02-21887 Filed 8-27-02; 8:45 am]

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

#### Small Business Size Standards Waiver of the Nonmanufacturer Rule

**AGENCY:** Small Business Administration.

**ACTION:** Notice of intent to grant a waiver of the nonmanufacturer rule for hand and edge tool manufacturing.

**SUMMARY:** The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Hand and Edge Tool Manufacturing. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal Government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses or awarded through the SBA 8(a) Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

**DATES:** Comments and sources must be submitted on or before September 9, 2002.

**ADDRESS COMMENTS TO:** Edith Butler, Program Analyst, U.S. Small Business Administration, 409 3rd Street, SW., Washington DC, 20416, Tel: (202) 619-0422.

**FOR FURTHER INFORMATION CONTACT:** Edith Butler, Program Analyst, (202) 619-0422 FAX (202) 205-7280.

**SUPPLEMENTARY INFORMATION:** Public Law 100-656, enacted on November 15, 1988, incorporated into the Small Business Act the previously existing regulation that recipients of Federal contracts set aside for small businesses or SBA 8(a) Program procurement must provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule. The SBA regulations imposing this requirement are found at 13 CFR 121.406 (b). Section 303(h) of the law provides for waiver of