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POLICY ISSUE **(Information)**

May 19, 1999

SECY-99-136

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: STAFF ANALYSIS OF THE PAST USES OF 10 CFR 40.14(a)

PURPOSE:

To respond to the Commission's inquiry regarding the past uses of the specific exemption, 10 CFR 40.14(a), and to present a historical synopsis of the past staff actions associated with the generic exemptions contained in §§ 40.13(a) and 40.51.

BACKGROUND:

In a Staff Requirements Memorandum (SRM) dated December 17, 1998, responding to COMSECY-98-022, the Commission directed the staff to provide an evaluation on the past uses of 10 CFR 40.14(a) and an analysis of its further use. This request came after the Commission's review of a proposal to transfer "unimportant quantities" of source material and to dispose of the material in a hazardous waste facility (see also SRM dated February 2, 1999, to COMSECY-98-022).

DISCUSSION:

The staff has reviewed the licensing actions since 1961 and has found only one exemption request (in 1992) from a licensee pursuant to 10 CFR 40.14(a).¹ Staff believes that specific exemptions to 10 CFR Part 40 have not been typically requested because Part 40 generally

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¹ In 1992, Dow Chemical Company (Dow) requested an exemption pursuant to § 40.14(a) in conjunction with its decommissioning activities pursuant to § 40.42(f). Staff consulted with the Commission on this issue and approved the staff's plans to pursue this exemption request. In 1995, however, Dow withdrew its original request, and instead shipped its waste to Envirocare, a commercial low-level waste disposal facility.

Portions withheld - Ex 5

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sets forth requirements in broad terms, leaving many details to individual licensing actions. Based on this information, the staff does not anticipate future exemption requests from the limited number of licensees subject to the regulations in this Part.

The only area where licensees have recently requested relief from the requirements of Part 40, has been concerning the scheduling of decommissioning activities (as was the case with the Dow exemption request). However, the regulation governing the timeliness of decommissioning activities, 10 CFR 40.42, contains provisions permitting the Commission to approve a request for an alternative schedule for initiating [10 CFR 40.42(f)] or completing [10 CFR 40.42(i)] decommissioning. Accordingly, licensees have not needed to invoke 10 CFR 40.14(a) in this area.

It should be noted that Part 40 contains two generic exemptions to its requirements for source material in unimportant quantities pursuant to §40.13(a) and for transfer to exempt persons pursuant to §40.51(b)(3) and (4). While this paper is intended to respond to the Commission questions with regard to 10 CFR 40.14(a), the staff notes that the issues arising from recent Commission actions in this area are not associated with § 40.14(a), but rather with § 40.13(a), which exempts persons possessing unimportant quantities of source material from the requirements for a license set forth in Section 62 of the Atomic Energy Act of 1954, as amended. Since 1961, a handful of cases and inquiries have raised questions about the generic exemption and transfer to exempt persons of unimportant quantities of source material that are less than 0.05 percent by weight (<0.05 wt%). Although the staff's proposed recommendations for resolution of these issues will be addressed in its September 1999 Commission paper (see SRM to COMSECY-98-022, dated February 2, 1999), the staff believes that the attached historical synopsis provides the Commission with information as to how these questions were resolved.

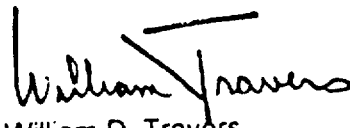
In keeping with the Commission's direction the staff is proceeding with its examination of the source material requirements in Part 40, with specific attention to the definition of source material as it relates to the generic exemption and transfer to exempt persons of unimportant quantities pursuant to §§40.13(a) and 40.51(b), respectively. The staff plans to provide an option paper, for Commission consideration, that will discuss the technical, jurisdictional, and legislative issues associated with rulemaking and legislative alternatives, including possible short-term rulemaking to clarify the notification issues associated with the transfer to exempt persons pursuant to 10 CFR 40.51(b)(3) and (4). In the interim, in accordance with the Shieldalloy Metallurgical Corporation SRM dated February 2, 1999, and the Lake City Army Ammunition Plant SRM dated April 6, 1999, the staff plans to review and approve future licensees' requests to transfer unimportant quantities of source material to unlicensed persons pursuant to §§ 40.51(b)(3) or (4) if the potential projected doses are determined to be less than 1 mSv (100 mrem) per year. If the projected doses from these approvals are greater than 0.25 mSv (25 mrem) per year, then the staff will notify the Commission as directed in these SRMs.

COORDINATION

The Office of the General Counsel has reviewed this paper and has no legal objection.

RESOURCES

Reviewing licensee requests for exemptions and transfers, as proposed in this paper, is not expected to require significant staff resources aside from coordination within Headquarters and Regional staff. Any additional resource considerations for future rulemaking or legislative changes will be presented in the above-referenced September 1999 Commission paper.



William D. Travers
Executive Director
for Operations

Attachment.

Historical Summary of the Uses
of 10 CFR 40.13(a) and 10 CFR 40.51

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HISTORICAL SUMMARY OF THE USES OF §40.13(a) AND §40.51

DATE	LICENSEE/ ENTITY	ISSUES	NRC RESPONSE
04/06/99	LAKE CITY ARMY AMMUNITION PLANT	Licensee requested to ship low-level decommissioning waste containing <0.05 wt% source material to a waste disposal facility under § 40.51(b)(4)	Commission (in considering COMSECY-99-077) approved future proposed transfers of waste if the proposal meets the guidance in the SRM dated 12/17/98 (dose estimates to an individual member of the public are < 100 mrem per year, and if >25 mrem/yr, the Commission would be notified)
02/09/99	SHIELDALLOY, NEW JERSEY	Licensee requested to transfer baghouse dust containing <0.05 wt% source material to exempt persons per § 40.51(b)(3) and § 40.13(a)	Commission (in response to SECY-98-284) approved the transfer to exempt persons (projected dose estimates to an individual member of the public were < 100 mrem per year)
	SHIELDALLOY, OHIO	Licensee requested to transfer baghouse slag containing <0.05 wt% source material to exempt persons	Commission (in response to SECY-98-284) approved the proposed transfer of slag to exempt persons if dose estimates to an individual member of the public were < 100 mrem per year, and if >25 mrem/yr, the Commission would be notified
12/23/98	METCOA/ WASTE CONTROL SPECIALISTS (WCS)	Licensee asked (1) if NRC approval was required under § 20.2002 for them to transfer source material contained in low level radioactive waste, and (2) can <0.05 wt% source material be disposed of other than by transfer pursuant to 10 CFR 40.51(b)(3)?	Commission (in response to COMSECY-98-022) approved the transfer stating that 1 No NRC approval under § 20.2002 is required 2 The material meets the criteria in § 40.13(a), so no NRC authorization to transfer was required 3 The material is not subject to the disposal requirements in Part 20, therefore no manifestation pursuant to § 20.2006 was necessary

DATE	LICENSEE/ ENTITY	ISSUES	NRC RESPONSE
03/20/98	STATE OF UTAH	The State of Utah asked NRC two questions regarding § 40.13(a). First, if NRC had changed its position with respect to HPPOS-190, ¹ which stated that NRC did not support the disposal of source material by transfer of unimportant quantities to persons who do not hold a specific license. The second question was whether it was possible for a licensee to designate their waste streams as naturally occurring radioactive material.	NRC responded to the first question by stating that the NRC had not changed its position and that the Commission believed that a licensee cannot generate and transfer unimportant quantities of source material (<0.05 wt%) to an unlicensed individual for disposal. In answer to the second question, NRC stated that the NRC regulations do not permit a licensee to make such a determination, and since the question being addressed concerned licensed materials, the § 40.13(a) exemption did not apply. Accordingly, NRC advised that the licensed material would need to be transferred to an individual licensed to possess it or dispose of it as low-level waste. This response was provided before the Commission's decision in the WCS case, COMSECY-98-022.
05/18/94	STATE OF WASHINGTON	The State of Washington asked if the exemption in § 40.13(a) would allow generators of such material to dispose of it at facilities other than low-level radioactive waste sites.	NRC stated that the question could be answered considering two separate cases. First is the case of a licensee that is required to dispose of all materials that exceed the restricted release criteria in 10 CFR Part 20, Subpart K, prior to terminating the license. In this case, NRC stated that all materials that could not be decontaminated, including those at or below the <0.05 wt%, must be managed as low-level radioactive waste. The second case, however, was for an individual who never had a specific radioactive materials license, and handled only source material in concentrations <0.05 wt%. In that case, NRC stated that the material would not require disposal under § 20.2001 because the processor is not a licensee subject to Part 20.

¹ Health Physics Position No. 190 (see NUREG/CR-5569, Vol. 1).

DATE	LICENSEE/ ENTITY	ISSUES	Release on appeal / NRC RESPONSE ↓
11/09/93	GAO	GAO asked if the NRC had any authority to regulate the reconcentration of radioactive materials subject to the AEA at a Publically-Owned Treatment Facility if the concentration of such materials were not of a licensable amount	NRC responded See Letter from MMalsch, OGC to M Fitzgerald, GAO by stating that " certain kinds and quantities of radioactive material have been exempted by rule from regulation when possessed by unlicensed persons. For example, § 40.13 establishes exemptions for source material when it does not exceed 0.05% by weight of the compound or mixture. <u>1R</u>
06/14/93	MALLINCRODT	Licensee asserted that since uranyl nitrate was a source material made from non-enriched, naturally-occurring uranium ore, uranyl nitrates may be considered an "unimportant quantity" under § 40.13	
11/30/90	HERITAGE MINERALS EX5		

² The National Environmental Protection Act of 1969, as amended.

³ Naturally-Occurring Radioactive Materials

EX5 -
Attorney -
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DATE	LICENSEE/ ENTITY	ISSUES	NRC RESPONSE
02/18/92	DOW CHEMICAL COMPANY	Licensee requested an exemption pursuant to §40 14(a) from any requirements arising from § 40 42(f) relating to the termination of Dow's license for its thoriated materials. The licensee proposed to dispose of thorium-contaminated slags at a company-owned permitted hazardous waste landfill. The disposal would be authorized pursuant to § 20 302.	The Commission approved the request to pursue Dow's request on 04/28/95. However, 06/06/95. Dow withdrew its exemption request, and instead decided to ship its waste to Envirocare, a commercial low-level waste disposal facility. Released on appeal
03/08/88	ELDORADO RESOURCES	Licensee requested to dispose of certain wastes from its conversion process of yellowcake to hexafluoride at a hazardous waste management facility in the State of Michigan. Michigan then asked whether or not the waste material should be considered source material or byproduct materials and whether the request by this licensee could be approved under Federal law and regulations.	

EX 5 - Attorney-
Client Privilege

DATE	LICENSEE/ ENTITY	ISSUES	NRC RESPONSE
02/17/88	WEST LAKE LANDFILL		
01/20/87	NRC		(This is currently Health Physics Position No 190 in NUREG/CR-5569, Rev 1)
01/03/83	NRC		

*EX. 5 - Attorney -
Client Privilege*

DATE	LICENSEE/ ENTITY	ISSUES	NRC RESPONSE
04/05/65	NRC	<p>OGC overview of the Legislative History of Commission Regulatory jurisdiction over thorium] R</p> <p>↑ Release on appeal</p>	

EX-5 -
Attorney-Client
Privilege

COORDINATION

The Office of the General Counsel has reviewed this paper and has no legal objection.

RESOURCES

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William D. Travers
Executive Director
for Operations

Attachment
Historical Summary of the Uses
of 10 CFR 40.13(a) and 10 CFR 40.51

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justifications and alternatives, would be a better way to proceed with finalization of changes needed for Part 40

RECOMMENDATION

Release on appeal

present issues with the §40.13(a) exemption and (b)(4) transfers as proposed in this paper is not expected to require significant staff resources aside from coordination within Headquarters and Regional staff. Any additional resource considerations for future rulemaking or legislative changes will be presented in the September 1999 Commission paper.

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EX5

COORDINATION

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Executive Director
For Operations

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Historical Summary of the Uses of §40.13(a) and §40.51
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