

Note to: Doug Broaddus, NMSS

From: Maria Schwartz, OGC, Rulemaking and Fuel Cycle

Date: April 2, 1996

SUBJECT: INFORMAL RESPONSE TO QUESTIONS REGARDING AGENCY RESPONSIBILITY  
FOR SEIZING AND DISPOSING OF A GAUGE ABANDONED BY A BANKRUPT  
LICENSEE

This request involves an NRC-licensee which went bankrupt in 1989 and abandoned a gauge containing licensed material boxed at the site. The gauge was sold several times to scrap dealers and finally set off a radiation monitor when it was being disposed of as scrap. The abandoned gauge is now under the control of a non-licensee scrap dealer who inadvertently bought it with other scrap. As mentioned, the actual licensee went bankrupt and a bank, the trustee, sold the equipment and land. The bank says that the licensee has no assets to pay for disposal of the gauge since any remaining funds have a superior claim.

The questions posed are 1) whether DOE or NRC should take the lead and remove the gauge and dispose of it. To this end, NMSS asked whether the NRC has the authority to hire a contractor to retrieve and dispose of the material. NMSS believes that there may be a "definitive line" and DOE has the sole authority to retrieve and dispose of the gauge pursuant to the AEA and ERA. Pursuant to section 81 of the AEA, the NRC has the authority to retrieve and dispose of the gauge if it is necessary to protect the public health and safety. That section states in pertinent part that

The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission....

However, the NRC and DOE have entered into a MOU which places the responsibility for removing and disposing of the gauge in DOE space. In a letter to Richard Cunningham dated 12/3/92, DOE responded to a similar request (except that instead of actually being bankrupt, the licensee was not financially able to continue to store safely the radioactive material). "Under these circumstances, it is appropriate for DOE to accept the radioactive material under the authority of the AEA." Since that letter, the NRC and DOE entered into the formal MOU signed in 1995 which states that DOE will be responsible for "the recall and recapture of these materials in coordination with NRC, as necessary, where they pose a threat to the health and safety of the public. Responsibility for conducting these recovery operations is assigned to the Office of Environmental Management..." The NRC would be responsible for determining that the material held is an imminent threat to public health and safety and getting all pertinent information together for DOE. The "storage" of this material is not "secure" and could quickly impact public health and safety.

In addition, draft Policy and Guidance Directive 95-xx "Reviewing Efforts to Dispose of Licensed Material and Requesting DOE Assistance" addresses situations in which a licensee is "unable to safely maintain control over the material." In such cases, DOE assistance may be appropriate. Finally NRC Inspection Manual 1303 establishes procedures for requesting emergency assistance from DOE in "retrieving and storing inadequately-controlled radioactive material licensed by NRC or an Agreement State." Examples of this are abandoned sources or devices containing sources that are traceable to a licensee that cannot take control of the material. This seems to be exactly the case at hand. That document (I have it in draft) states that DOE "has only agreed to accept the material when it is clear that the material is causing, or has high potential to cause, a significant threat to public health and safety, and the responsible licensee is not available, or not capable of adequately controlling it."

The TAR also points out that EPA may be responsible for the material pursuant to the Federal Radiological

Emergency Response Plan. EPA could be the lead agency in this situation since it occurred at a facility not licensed by a Federal Agency or an Agreement State. And this would be squarely the case IF the source was from a foreign or unknown entity. In this situation, however, the original general licensee (and the trustee in bankruptcy) is known.

Based on these documents, OGC's opinion is that the NRC could legally hire a contractor to retrieve and dispose of the material but that the situation seems to be one in which DOE should be involved as the agency responsible for this. As to who is legally responsible for reimbursement, the NRC or DOE should look not only to the licensee (now bankrupt) but also to the trustee, the bank which sold the licensee's assets (including the gauge - prohibited by 10 CFR 31.5).



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

MEMORANDUM TO: John P. Potter, Chief  
Licensing and  
Inspection Branch 2  
Region II

FROM: Donald A. Cool, Director  
Division of Industrial and  
Medical Nuclear Safety  
Office of Nuclear Materials Safety  
and Safeguards

SUBJECT: TECHNICAL ASSISTANCE REQUEST:  
FORMER BENAFUELS, INC.  
CONTROL NO. - N/A  
LICENSE NO. - N/A

This is in response to your Technical Assistance Request (TAR) dated February 26, 1996, requesting assistance with an un-licensed gauge located at Urps Iron and Metal, Co., in Davy, WV. The question as to whether to use Nuclear Regulatory Commission contractors for the retrieval and disposal of seized material was raised by Commissioner de Planque in late 1994. Staff response to this issue included a recommendation to not use contractors in this capacity (see attached response dated December 2, 1994). We continue to support this position, and recommend you not proceed with the proposed action to hire a contractor to recover and dispose of the gauge. In addition, we agree that the situation does not fit within the criteria for requesting assistance from the U.S. Department of Energy (DOE) as disposal options remain available and the situation, as described, does not seem to pose an immediate threat to the public's health and safety. However, we disagree that the situation does not fit the criteria for the Environmental Protection Agency (EPA) to take action as the Lead Federal Agency (LFA) for the Federal response under the draft Federal Radiological Emergency Response Plan (FRERP). As the FRERP and the current guidance for requesting DOE assistance seem to cover all plausible situations for dealing with abandoned radioactive material, the development of additional policy for dealing with these types of situations would not be necessary.

The determination of LFA under section II.B.1.c. of the FRERP states that, "The EPA is the LFA for an emergency that occurs at a facility not licensed, owned, or operated by a Federal Agency or an Agreement State." Your recommendation that NRC seize the material to prevent potential harm indicates that the situation may be characterized as an emergency. In addition, as the gauge was not transferred to Urps Iron and Metal Company in accordance with 10 CFR 31.5(c)(8), and as Benafuels, Inc., the former general licensee, is no longer in business and Urps Iron and Metal Company does not hold a specific license to possess the gauge, the material is not licensed and, therefore, meets this criteria.

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J. Potter

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We recommend you contact the appropriate EPA regional office under the provisions of the FRERP and request EPA take action to mitigate the potential threat to the public health and safety as the LFA for the Federal response. Please advise us if the EPA regional office is unresponsive to the request and we will contact EPA headquarters directly.

In addition to these actions, the regional inspection staff should ensure the material is secured such that further loss, transfer, and/or exposure to members of the general public is prevented until such time as EPA assumes responsibility for control of the material. The TAR indicated that the current possessor of the gauge may return it to the scrap peddler from whom it was received. It should be noted that the Department of Transportation exemption that allows this type of return requires the entire shipment of material to be rejected upon identification of the radioactive material. This exemption is administered by the applicable State Department of Transportation upon a request submitted by the person receiving the material.

If you have any questions or need additional assistance with this situation, please contact me at (301) 415-7197 or Mr. Douglas Broaddus at (301) 415-5847.

Attachment: As stated

- Use of a contractor.
  - No legal objection
  - Not a good idea.
- DOE an option?
  - Region II says not a health and safety issue, so DOE is not an option.
  - We agree.
  - Option only if it becomes a H&S issue.
- EPA an option?
  - 3 - Region II says no since former licensee is identified.
  - We disagree.
  - No licensee any more.
  - Historically (in other Regions<sup>and A.S.</sup>), EPA has responded.
  - Historically we have not held scrap dealers or trustees responsible.
  - Bankruptcy was in '89. Trustee <sup>likely</sup> ~~may~~ ~~has~~ disbursed all assets by now.
  - Region feels going back to former licensee or trustee would be unsuccessful.
  - Since a contractor or DOE are not options, EPA seems to be the only option. FRERP indicates EPA is ~~responsible~~ LFA in cases with ~~not~~ not-licensed facilities, as well as ~~from~~ <sup>from</sup> foreign or unknown sources.
- Don't want to have another WEGD.
- Urps can enact the DOT exemption at any time (if approved by the state) to send it back to the first Scrap dealer.

DIALOG(R)File 103:Energy SciTec  
(c)format only 1996 Knight-Ridder Info. All rts. reserv.

02108817 AIX-19-023882; EDB-88-051541

Title: Discovery PV 8603-85

(Device for leak testing of containers for gaseous or liquid radioactive samples.)

Source: Radioisotopy (Czechoslovakia) v 28:1. Coden: RAISB

Publication Date: Mar 1987 p 62

Language: Czech

8/3/24 (Item 24 from file: 103)

DIALOG(R)File 103:Energy SciTec  
(c)format only 1996 Knight-Ridder Info. All rts. reserv.

01994365 AIX-18-057162; EDB-87-122037

Title: Leakage test methods demonstrating integrity of transport packagings, sealed radioactive sources and special form radioactive material: A review of standardization efforts and requirements

Author(s): Kowalewsky, M.

Affiliation: Bundesanstalt fuer Materialpruefung, Berlin, Germany, F.R.

Title: Packaging and transportation of radioactive materials (PATRAM '86).

Proceedings of an international symposium on the packaging and transportation of radioactive materials held in Davos, 16-20 June 1986.  
Vol. 1

Series/Collection Title: Proceedings series

Corporate Source: International Atomic Energy Agency, Vienna (Austria)

Conference Title: International symposium on the packaging and transport of radioactive materials (PATRAM '86)

Conference Location: Davos, Switzerland Conference Date: 16 Jun 1986

Publisher: IAEA, Vienna, Austria

Publication Date: 1987 p vp

Report Number(s): CONF-860604-

Language: English

8/3/25 (Item 25 from file: 103)

DIALOG(R)File 103:Energy SciTec  
(c)format only 1996 Knight-Ridder Info. All rts. reserv.

01901989 AIX-18-013923; EDB-87-029640

Title: Sealed radioisotope sources. Classification and testing methods

Original Title: Uzavrene radionuklidove zarice.. Stupne odolnosti a metody zkouseni

Corporate Source: Urad pro Normalizaci a Mereni, Prague (Czechoslovakia)

Publisher: Vydavatelstvi UNM, Prague, Czechoslovakia

Publication Date: 1985 p 36

Report Number(s): CSN-404302

Language: Czech

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

John Edwards, Acting  
Ford  
Conklin  
(202) 233-9366

4/1/96  
Superfund not  
supposed to be  
used for AEA materials  
(words in CERCLA)  
→ Will check w/Regional  
contacts and call back.

① Ask Sanyard to ship  
to RONA  
- order if necessary  
② - Talk w/State  
- May wish to help  
mediate w/Ronan

MEMORANDUM TO: John P. Potter, Chief  
Licensing and  
Inspection Branch 2  
Region II

FROM: Donald A. Cool, Director  
Division of Industrial and  
Medical Nuclear Safety  
Office of Nuclear Materials Safety  
and Safeguards

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Lead

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J. Potter

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Attachment: As stated



REGIONAL TECHNICAL ASSISTANCE REQUEST FORM

Date: February 26, 1996

Mail or E-Mail to: Donald A. Cool, (DAC) Director, Division of Industrial and Medical Nuclear Safety, NMSS, Mail Stop 8F5-TWEN, If E-mail, cc: CLE (DAC)

From: John P. Potter (JPP), Chief Licensing and Inspection Branch 2, Region II  
Division of Nuclear Materials Safety and Safeguards

Licensee: Former Benafuels, Inc. McComas, WV, [Bankruptcy, 1989]

License No.: General License (10 CFR 31.5)

- ☐ Control No. N/A  
☐ Letter dated: N/A  
☐ Suggested change in licensing procedure: N/A

☐ Problem/Issue: Gauge inadvertently came into the possession of a non-licensee and must be disposed of. 500 mCi Cs-137 gauge was abandoned, sold twice, detected by scrap monitor, and returned to Urps Iron and Metal Co., Davy, WV. Estimated cost to return to Ronan Engr Co. vendor, \$2,000 - \$5,000. Possessor unwittingly bought gauge from scrap peddler and may return to scrap peddler. Benafuels, Inc. bankruptcy trustee claims insufficient funds for disposal, and superior liens on the funds that remain.

☐ Action Required: Develop a policy on disposal of abandoned material, not clearly within the scope of P & GD 9-12 or the Federal Radiological Emergency Response Plan.

Recommended Action: ☐ Approve or ☐ Reject

That NRC hire a contractor to dispose of this category of radwaste and attempt to recover the cost from the original material holder who abandoned it. Continued unwilling possession by a non-licensee poses a potential public threat unless we Order him to obtain a license for material he unwittingly purchased, and may again abandon. Regional Counsel, after consulting with the Deputy Assistant General Counsel for Enforcement, concurs that the original license holder (Benafuels, Inc) can be held accountable, and that the individual in current possession of the gauge cannot be compelled to spend money to dispose of the gauge. However, since it is unlikely that the disposal costs can be fully recovered from Benafuels, Inc., the NRC should seize the material to prevent potential harm.

Remarks: See attached.

Headquarters Reviewer: \_\_\_\_\_

Regional Reviewer: Orysia Masnyk Bailey, Inspector

Inspector Phone No.: (404) 331-2687 FAX No.: (404) 331-5559

TAR Reply Requested by: April, 1996

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Form TAR-10

**Remarks:**

Roan Engineering Company model X90-SA-8 Point Level Gauge ( Serial No. 75691) containing approximately 500 millicuries of Cesium 137 was sold to Benafuels, Inc., McComas WV, in February 1985 as a generally licensed device.

In 1989, Benafuels went bankrupt. Discussions between the RII Materials Licensing/Inspection Branch 1 Chief and Rod Satterfield and Elizabeth Pruitt of the First National Bank of Bluefield West Virginia (304) 325-8181, disclosed the following. The land and equipment at Benafuels were security for bonds issued at the time the company was organized. First National Bank of Bluefield, WV, was the trustee for the bonds. First National sold the assets of Benafuels at public auction in 1989. Benafuels' equipment was purchased by Richard Perservati (304) 325-8195. Apparently, the equipment was removed from the site by several scrap dealers, one of whom sold the gauge to Urps Iron and Metal Co., Davy, WV.

On March 24, 1995, John Lingerfield (703) 326-3466, a former Vice President at Benafuels called the Materials Licensing/Inspection Branch 1 Chief and told him , (at the request of Mr. Urps), that at the time of bankruptcy, Benafuels was attempting to sell the gauge to Georgia Pacific (a holder of a specific license), but the sale did not go through. He had packaged and labeled the box as specified by Roan. The gauge (the only one owned by Benafuels), was still onsite when he left the company.

Urps Iron and Metal Co. purchased the gauge from a scrap dealer and subsequently sold it to Steel of West Virginia. On March 13, 1995, Steel of West Virginia notified Region II that a shipment of scrap from Urps had set off radiation monitors. Fortunately, the gauge was not smelted. Radiation levels on the exterior of the truck were 2.5 mr/hour. Radiation levels on contact with the gauge as measured by Urps were approximately 40 mr/hour. The gauge was returned to Urps.

A Region II Materials inspector went to the Urps Iron and Metal Company on April 20, 1995. The gauge was stored in a barrel inside a locked fenced area. The inspector provided Radiation Material postings and took measurements, which were less than 2 mr/hour at the barrel surface. The inspector contacted the Ronan company and was advised that they use a contractor to recover the gauges and that the minimum cost for this was \$1,200, but that costs could go up to \$5,000. Additionally, the gauge would have to be packaged and shipped. Mr. Urps stated that he could not afford to absorb this cost.

Discussion with Doug Broadus with the Source Containment and Devices Branch disclosed their position that EPA should take responsibility for the gauge. However, the Federal Radiological Emergency Response Plan states that " The EPA is the LFA (Lead Federal Agency) for an emergency that involves radioactive material from a foreign or unknown source that has actual, potential, or perceived radiological consequences". This material is from a known source. Policy and Guidance Directive 9-12, Reviewing Efforts To Dispose of Licensed Material and Requesting U.S. Department of Energy Assistance, dated August 1, 1995 deals with a licensee seeking to divest themselves of material. DOE may be called to take possession of radioactive material in situations involving a defined radiological emergency or that have a high potential to cause a threat to the public health and safety.

It appears that this case does not fit into either category. The material is secured, albeit by an unauthorized individual. The individual came by the source by accident. Since he is an unwitting and unwilling possessor we may not be able to compel him to act in this matter, and he is anxious to divest himself of the gauge. To prevent smelting or dumping, the NRC should hire a contractor to remove the gauge from Urps and attempt cost recovery from the former officers of Benafuels.