RULEMAKING ISSUE
AFFIRMATION

April 13, 2010 SECY-10-0044

FOR: The Commissioners

FROM: Margaret M. Doane, Director
Office of International Programs

SUBJECT: REVIEW OF FINAL RULE PACKAGE, "EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL; UPDATES AND CLARIFICATIONS (10 CFR PART 110, RIN 3150-AI16)

PURPOSE:

To request Commission approval to publish a final rule in the *Federal Register* that would amend 10 CFR Part 110, "Export and Import of Nuclear Equipment and Material" (Part 110) (Enclosure 1).

SUMMARY:

This paper requests the Commission's decision to approve for publication in the *Federal Register* a final rule to update, clarify, and correct several provisions of Part 110 to improve the regulatory framework for the export and import of nuclear equipment and material including radioactive waste.

BACKGROUND:

In Staff Requirements Memorandum (SRM) - SECY-09-0013, dated May 26, 2009, the Commission approved the staff's recommendation to publish a proposed rule in the *Federal Register* for a 75-day comment period. On June 23, 2009, the NRC published in the *Federal Register* a proposed rule that would amend Part 110 pertaining to the export and import of nuclear material and equipment (74 FR 29614).

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The NRC is now seeking the Commission's approval to issue a final rule based on the comments received on the proposed rule. This final rule updates, clarifies, and corrects several provisions in Part 110, Export and Import of Nuclear Equipment and Material, to improve NRC's regulatory framework for the export and import of nuclear equipment, material, and radioactive waste. It also clarifies and corrects the regulations addressing the general license for the export of byproduct material. In addition, changes are made to the regulations governing the export and import of Category 1 and Category 2 quantities of radioactive materials listed in Appendix P to Part 110 and the definition of "radioactive waste" in Part 110.

DISCUSSION:

The Commission received 14 letters from the public commenting on the proposed rule. The respondents represented a variety of interests. Comments were received from individuals, Federal and State agencies, and citizen, environmental, and industry groups. The comments addressed a wide range of issues concerning the proposed changes to Part 110. A discussion of the changes made to the rule text in response to comments is found below.

In addition, the staff consolidated the reporting requirements found in §§110.23, General license for the export of byproduct material, and 110.26, General license for the export of reactor components, into §110.54, Reporting requirements.

The Executive Branch (Departments of State, Energy, Commerce, and Defense) has concurred, with comments, on the final rule (Enclosure 2). The Executive Branch provided clarifying comments on the definition of "person" and "obligations" in §110.2 as well as clarifying language for §110.6, Retransfers. The comments provided by the Executive Branch have been taken into consideration in the enclosed *Federal Register* notice.

1. Category 1 and 2 Quantities of Radioactive Material Listed in Appendix P to Part 110

The NRC reevaluated the need for a specific license for the import of Category 1 and 2 quantities of radioactive material to a U.S.-licensed user in light of enhancements made to the NRC's domestic regulatory framework including implementation of the National Source Tracking System and issuance of orders for the enhanced security of this material. As a result, the NRC is amending 10 CFR Part 110 to allow imports of Category 1 and 2 quantities of materials listed in Appendix P under a general license.

Importers of Category 1 and 2 materials under a general license would still be subject to the notification requirements *prior* to shipment as required by §110.50. The advance notification of imports of Category 1 and 2 quantities of material, §110.50 (c) is revised to require the exporting facility name, location, address, contact name and telephone number as part of the pre-shipment notification. Additionally, §110.50 (c) is revised to require advance notifications of imports to be submitted seven days in advance of shipment. This change permits NRC staff adequate time to verify information provided in the advance notification. Moreover, imports of radioactive material into the United States, similar to all other imports of source, special nuclear, and byproduct materials, continue to be contingent on the consignee being authorized to receive and possess the material under a general or specific NRC or Agreement State license.

In response to the proposed rule, several commenters addressed the proposed amendment to §110.50(c) that would require advance notification for imports to be submitted seven days in advance of shipment. Currently, pre-shipment notifications must be submitted at least seven days in advance of shipment, to the extent practical, but in no case less than 24 hours in

advance of each shipment. Commenters questioned the need for pre-shipment notification and their ability to comply with the new seven-day notification requirement. The NRC staff is not recommending any changes to the rule text in response to these comments. The current policy of "no less than 24 hours in advance" is not sufficient time for the NRC staff to verify pre-shipment information. To ensure that potential security gaps are not created by the elimination of the specific license to import Category 1 and 2 quantities of material, OIP is working with the Offices of Nuclear Security and Incident Response and Federal and State Materials and Environmental Management Programs to develop procedures for verifying the authenticity of import documents and transactions. Therefore, the seven-day advance notification period is necessary.

2. Import and Export of Radioactive Waste

In 1995, the NRC promulgated a final rule requiring specific licenses for exports and imports of radioactive waste (60 FR 37555; July 21, 1995). Since that time, based on the staff's extensive experience in implementing the rule, it became clear that the rule warrants revision. Specifically, the definition of radioactive waste is confusing and inconsistent with how the term is used domestically. Likewise, the term "incidental radioactive material" (IRM), as defined in Part 110, is unclear with regard to its scope, applicability, and relationship to radioactive waste. Consequently, the staff is proposing changes to the definition of radioactive waste in §110.2 to address these concerns.

The majority of comments received on the proposed rule addressed the proposed definition of "radioactive waste." As a result of comments received, the staff made several clarifying changes to the exclusions to the definition of "radioactive waste." The definition of "radioactive waste," including the revised exclusions, reads as follows:

> *Radioactive waste*, for the purposes of this part, means any material that contains or is contaminated with source, byproduct, or special nuclear material that by its possession would require a specific radioactive material license in accordance with this Chapter and is imported or exported for the purposes of (1) disposal in a land disposal facility as defined in Part 61, a disposal area as defined in Appendix A to Part 40, or an equivalent facility; or (2) recycling, waste treatment or other waste management process that generates radioactive material for disposal in a land disposal facility as defined in Part 61, a disposal area as defined in Appendix A to Part 40, or an equivalent facility. Radioactive waste does not include radioactive material that is—
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> > (1) Of U.S. origin and contained in a sealed source, or device containing a sealed source, that is being returned to a manufacturer, distributor or other entity which is authorized to receive and possess the sealed source or the device containing a sealed source;
> >
> > (2) A contaminant on any non-radioactive material (including service tools and protective clothing) used in a nuclear facility (an NRC- or Agreement State-licensed facility (or equivalent facility) or activity authorized to possess or use radioactive material), if the material is being shipped solely for recovery and beneficial reuse of the non-radioactive material in a nuclear facility and not for waste management purposes or disposal.
> >
> > (3) Exempted from regulation by the Nuclear Regulatory Commission or equivalent Agreement State regulations.

(4) Generated or used in a U.S. Government waste research and development testing program under international arrangements;

(5) Being returned by or for the U.S. Government or military to a facility that is authorized to possess the material; or

(6) Imported solely for the purposes of recycling and not for waste management or disposal where there is a market for the recycled material and evidence of a contract or business agreement can be produced upon request by the NRC.

In response to comments, the NRC staff clarified that the first exclusion to the definition of "radioactive waste" applies only to sources of U.S. origin. Disused sources that originated in a country other than the United States would be considered "radioactive waste" under Part 110. Exclusion two is revised to clarify that the broader meaning of "nuclear facility" is intended and that the material must be shipped solely for recovery and beneficial reuse of the non-radioactive material. In addition, an illustrative list of activities that would meet the standard set forth in exclusion two is added to the Statement of Considerations. The NRC staff also added a sixth exclusion to address concerns raised in comments on the scope of recycling activities that would not be considered waste under the revised definition of "radioactive waste." In addition, a note has been added to the end of the definition to clarify that, for purposes of Part 110, the definition of radioactive waste does not include spent or irradiated fuel.

In response to comments, the staff revised §§110.43 and 110.45 to clarify that the NRC consults, as applicable, with the Agreement State in which the facility is located and low-level waste compact commission(s).

3. Other Changes in Response to Comments

NRC staff added a clarifying note at the end of §110.26 regarding "U.S. origin." This change is responsive to a concern raised that the general license under §110.26 is limited to "components solely of U.S. origin." With the increasing globalization of the nuclear industry this limitation on the general license is impractical. U.S. origin, for the purposes of §110.26, includes components produced or finished in the United States, even with non-U.S. content unless the foreign content is obligated by supplier government conditions, such as a prior consent for retransfer condition.

Section 110.27(b) has been revised in response to a request for clarification. As revised, this paragraph states that the general license in §110.27(a) does not authorize the import of more than 100 kilograms per shipment of source and/or special nuclear material in the form of irradiated fuel.

AGREEMENT STATE ISSUES:

NRC staff has analyzed the final rule in accordance with the procedures established within Part III of the Handbook to Management Directive 5.9, "Categorization Process for NRC Program Elements." Staff has determined that the proposed rule is classified as Compatibility Category "NRC." The NRC program elements in this category are those that relate directly to areas of regulation reserved to NRC by the Atomic Energy Act of 1954, as amended, as implemented in the provisions of Title 10 of the *Code of Federal Regulations*. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain

requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication, in the *Federal Register*, the final amendments to Part 110 (Enclosure 1).

2. To satisfy the requirement of the Regulatory Flexibility Act, 5. U.S.C. 605 (b), certify that this rule will not have a significant impact on a substantial number of small entities. This certification is included in the attached Federal Register notice.

3. Note:

    a. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b).

    b. That the Executive Branch (Departments of State, Energy, Commerce, and Defense) has concurred on this rule. (Enclosure 2).

    c. That appropriate Congressional committees will be informed of this action.

    d. A press release will be issued by the Office of Public Affairs when the final rulemaking is filed with the Office of the Federal Register, and

    e. Office of Management and Budget approval of the final rule is not required because the information collection burden is determined as insignificant.

RESOURCES:

To complete and implement this rulemaking, 1.25 full-time equivalent positions are budgeted in FY2010 and included in the FY2011 budget.

SENSITIVITY:

This document is "Official Use Only – Sensitive Internal Information" because the views provided by the Executive Branch in Enclosure 2 are considered "Sensitive but Unclassified" by the Department of State. This document is publicly releasable upon removal of the Executive Branch views found in Enclosure 2.

COORDINATION:

The Office of the General Counsel (OGC) has no legal objection to this final rule. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objection. The Office of Information Services has reviewed this final rule and concurs that there will be no information technology impacts.

/RA/

Margaret M. Doane, Director
Office of International Programs

Enclosures:
1. Federal Register Notice
2. Executive Branch views

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