



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

December 2, 2004

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-04-0194

TITLE: DENIAL OF PETITION FOR RULEMAKING (PRM-40-28) -  
DONALD A. BARBOUR, PHILOTECHNICS

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of December 2, 2004.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR

SECY NOTE: TO BE MADE AVAILABLE TO THE PUBLIC 5 WORKING DAYS AFTER  
DISPATCH OF THE LETTER TO THE PETITIONER.

VOTING SUMMARY - SECY-04-0194

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	11/18/04
COMR. McGAFFIGAN	X				X	12/1/04
COMR. MERRIFIELD	X				X	11/22/04

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on December 2, 2004.

SECY NOTE: TO BE MADE AVAILABLE TO THE PUBLIC 5 WORKING DAYS AFTER DISPATCH OF THE LETTER TO THE PETITIONER.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: CHAIRMAN DIAZ  
SUBJECT: **SECY-04-0194 - DENIAL OF PETITION FOR  
RULEMAKING (PRM-40-28) - DONALD A. BARBOUR,  
PHILOTECHNICS**

Approved xx *dy* Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_  
Not Participating \_\_\_\_\_

COMMENTS:

See attached comments and edits.

*[Handwritten Signature]*  
\_\_\_\_\_  
SIGNATURE  
*Nov 18, 04*  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

**Chairman Diaz's comment on SECY-04-0194  
Denial of Petition for Rulemaking (PRM-40-28) - Donald A. Barbour, Philotechnics**

I approve staff's recommendation to deny the petition for rulemaking (PRM-40-28) and associated documents subject to the attached edits.

The petitioner made several points that suggest a gap may exist between the current regulations and our knowledge of current practices associated with counterweights. In response, the staff provided guidance in Regulatory Issue Summary (RIS) -01-013, and is providing further guidance in this draft RIS. To assure that all aspects of the petition are addressed, staff should specifically caution stakeholders in this draft RIS about inappropriate methods for separating the counterweights from planes, as well as other installed locations. *ew*

metallurgical, or chemical modification of the counterweight is prohibited; therefore, counterweights should not be sent to locations where, in all likelihood, they will <sup>be</sup> altered or modified. Further, the detection and recovery of counterweights inappropriately sent to scrap yards or recyclers can lead to additional costs for the transferor or recipient. Although the NRC could amend the existing exemption to prohibit transfers to recyclers or scrap yards, the NRC does not believe that such an amendment would significantly reduce the number of these inappropriate transfers. The current regulation requires that counterweights held under this exemption must be labeled "Unauthorized Alterations Prohibited." The NRC believes that persons who have inappropriately transferred counterweights to a recycle or scrap yard, despite the existing labeling on the counterweight, may not be aware of the prohibitions listed in the exemption itself. If a regulation requiring reporting of transfers were implemented, the transfer report might make it easier to identify the transferor so that appropriate action to retrieve the counterweight could be taken. However, the NRC believes that if someone were aware of these reporting requirements, they would likely be cognizant that the transfer to a recycler or a scrap yard is not allowed to begin with.

During resolution of the petition, the NRC considered additional options for rulemaking that might clarify the intent of this regulation and increase control over the use of depleted uranium aircraft counterweights. The NRC considered two types of rulemaking actions: (1) specific licensing and (2) development of a general license specifically applicable to aircraft counterweights. In both cases, the NRC's analysis concluded that any benefits of the action were small compared to the costs and potential impacts associated with the action.

In the case of specific licensing, the costs to the industry and government would involve development and review of applications, and inspection of the new licensees. Because the NRC has no evidence to indicate that public health and safety is significantly impacted under

the NRC believes that it may be worthwhile to provide additional guidance related to this aspect of the exemption. Therefore, the NRC plans to address this issue in the proposed RIS by clarifying the intent of the existing regulations related to the restoration and repair of depleted uranium counterweights.

In conclusion, no new information has been provided by the petitioner to support the petitioner's request that additional rulemaking is necessary at this time. Existing NRC regulations provide the basis for reasonable assurance that the common defense and security and public health and safety are adequately protected. Additional rulemaking would impose unnecessary regulatory burden and does not appear to be warranted. However, NRC does believe that some additional clarification, as originally requested by the petitioner, can be provided through guidance. Therefore, the NRC plans to issue a regulatory information summary which will provide clarification of the existing exemption as related to (1) long-term storage of the counterweights, and (2) restoration and repair of the counterweights, and (3) removal of the counterweights.

For the reasons cited in this document, the NRC denies this petition.

Dated at Rockville, Maryland, this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

For the Nuclear Regulatory Commission.

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Luis A. Reyes,  
Executive Director.

"Depleted Uranium;" 3) the counterweight must have durable and legible markings or labels with the identification of the manufacturer, and a statement, "Unauthorized Alteration Prohibited;" and 4) the exemption does not authorize any chemical, physical, or metallurgical treatment or processing of the counterweight, other than repair or restoration of any plating or other covering.

### LONG-TERM STORAGE

Because storage is only permitted to the extent the storage is incidental to installation or removal of the counterweight, long-term storage of the counterweight is not considered to be covered under this exemption. As a result, when the counterweights are no longer to be used for their intended purposes, the end user should transfer the counterweights as discussed in RIS-01-013.

NRC believes that a period of 24 months is sufficient for a person holding a counterweight not installed in an aircraft to either reinstall the counterweight in an aircraft or dispose of the counterweight using an alternative provided in RIS-01-013. After a period of 24 months in storage, the counterweights should be deemed to no longer be stored incidental to installation or removal and the holder should apply for a specific license per 10 CFR 40.31 in order to continue to store the counterweights. Storage for a period of greater than 24 months may be considered allowable under the exemption if: (1) the person storing the counterweight can clearly show an intent to re-use the counterweight in an aircraft; (2) the counterweight has a part tag or some other means of indicating where the counterweight came from per the carrier's maintenance program, and (3) the counterweight is periodically inspected to ensure that the counterweight remains in proper condition (i.e., the plating remains intact) for use in an aircraft.

*Removal of the counterweights must be accomplished in a manner that does not disturb the integrity of the counterweights.*

Similarly, counterweights stored in an aircraft that is no longer planned to be operated should be removed and disposed of using an alternative provided in RIS-01-013. If an aircraft is held for possible future use, but not operated, the holder should maintain the aircraft per its maintenance plan and minimally inspect the counterweights every 5 years to ensure the counterweight remains in proper condition (i.e., the plating remains intact).

### REPAIR AND RESTORATION

In order to maintain the counterweight, 10 CFR 40.13(c)(5)(iv) allows repair or restoration of the plating or covering. However, the exemption does not allow any repair or restoration process that would disturb the integrity of the underlying uranium within the counterweight; such processes would require a specific license. Examples of restoration or repair processes that would not fall under the exemption include acid baths or electroplating, both of which may chemically or metallurgically impact the underlying uranium in the counterweight. Allowable restoration techniques may include painting or placing a new covering over the counterweight (to the extent that the process for installing the new covering does not result in chemical, physical, or metallurgical interactions with the underlying uranium). In addition, any repair or restoration must also maintain the legibility of the impressings, labels, and markings on the counterweight required under 10 CFR 40.13(c)(5)(ii) and (iii).

*NJD edits*

SUPPLEMENTAL MATERIAL

IN SUPPORT OF

SECY-04-0194

DRAFT CONGRESSIONAL LETTERS

GALEPHAM PFC:J

04 OCT 25 AM 9:27





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

The Honorable Ralph M. Hall, Chairman  
Subcommittee on Energy and Air Quality  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

I have enclosed a copy of a notice of denial of a petition for rulemaking submitted by Mr. Donald A. Barbour, Philotechnics. The petitioner requested that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations to provide additional clarity regarding the effective control of depleted uranium aircraft counterweights held under the exemption found in 10 CFR 40.13(c)(5). The petitioner believes that the amendment should address a number of issues concerning the exemption, storage, and disposal of these devices. The petition was docketed as PRM-40-28.

The Commission is denying the petition because we have determined that current NRC regulations provide adequate clarity, and effectively accomplish what the petitioner requests. The NRC believes that additional clarification of the regulation's intent could be useful; however, the NRC believes that this objective can be more efficiently accomplished through the issuance of a Regulatory Issue Summary (RIS), rather than through rulemaking. Issuance of the RIS should effectively accomplish the apparent intent of the petitioner's goals without imposing unnecessary burden on current holders of aircraft counterweights or the government agencies that would be required to develop, implement, and enforce the new regulations.

*and are  
protective  
of public  
health,  
safety and  
the  
environment*

The *Federal Register* notice denying the petition is being transmitted to the Office of the Federal Register for publication.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure:  
*Federal Register* Notice

cc: Representative Rick Boucher



UNITED STATES  
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

The Honorable George V. Voinovich, Chairman  
Subcommittee on Clean Air, Climate Change,  
and Nuclear Safety  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I have enclosed a copy of a notice of denial of a petition for rulemaking submitted by Mr. Donald A. Barbour, Philotechnics. The petitioner requested that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations to provide additional clarity regarding the effective control of depleted uranium aircraft counterweights held under the exemption found in 10 CFR 40.13(c)(5). The petitioner believes that the amendment should address a number of issues concerning the exemption, storage, and disposal of these devices. The petition was docketed as PRM-40-28.

The Commission is denying the petition because we have determined that current NRC regulations provide adequate clarity, and effectively accomplish what the petitioner requests. The NRC believes that additional clarification of the regulation's intent could be useful; however, the NRC believes that this objective can be more efficiently accomplished through the issuance of a Regulatory Issue Summary (RIS), rather than through rulemaking. Issuance of the RIS should effectively accomplish the apparent intent of the petitioner's goals without imposing unnecessary burden on current holders of aircraft counterweights or the government agencies that would be required to develop, implement, and enforce the new regulations.

*and are protective of public health, safety, the environment.*

The *Federal Register* notice denying the petition is being transmitted to the Office of the Federal Register for publication.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure:  
*Federal Register* notice

cc: Senator Thomas R. Carper

NOTATION VOTE  
RESPONSE SHEET

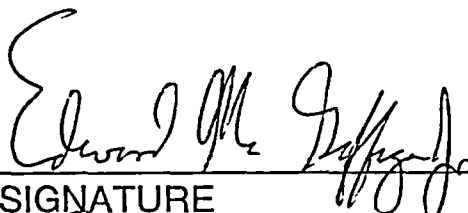
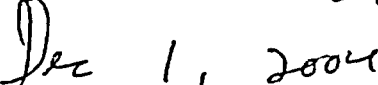
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MCGAFFIGAN  
SUBJECT: **SECY-04-0194 - DENIAL OF PETITION FOR  
RULEMAKING (PRM-40-28) - DONALD A. BARBOUR,  
PHILOTECHNICS**

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

See attached comments.

  
\_\_\_\_\_  
SIGNATURE  
  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

Commissioner McGaffigan's Comments on SECY-04-0194

I approve the staff's recommendation to deny a petition for rulemaking (PRM-40-28) regarding the use of uranium counterweights under the exemption in 10 CFR 40.13 (c)(5), subject to edits, as noted. I agree with the staff that additional rulemaking is not necessary and that the RIS issued in July 2001 (RIS-01-013) and the draft RIS to be issued in connection with this denial provide adequate guidance and clarity with respect to the issues raised by the petitioner. These RIS address the disposal, storage, and repair of uranium counterweights.

I wish to raise one matter that appears in the 2001 RIS for the staff to re-examine. The 2001 RIS lists four acceptable ways for a possessor of counterweights to transfer them, one of which is to transfer them to an unlicensed disposal facility that accepts exempt radioactive material. The exemption from regulatory licensing for counterweights, however, does not cover the life cycle of the product and is thus unlike most other exempt materials. The exemption covers "uranium contained in counterweights installed in aircraft . . . or stored or handled in connection with installation or removal of such counterweights . . ." The petition denial and the draft RIS further state that the exemption does not include long term storage unless it can be shown that such storage is related to an intent to reuse the counterweight. Therefore, it appears inconsistent for the exemption not to apply to long term storage while it is acceptable for a possessor to transfer the exempt material to an unlicensed disposal facility. The staff should re-examine transfer option #4 in the 2001 RIS in light of the guidance developed in the draft RIS and in the petition denial. Should option #4 not prove to be acceptable, the staff should address this matter in the draft RIS.

*EMG*

NOTATION VOTE

RESPONSE SHEET


TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MERRIFIELD  
SUBJECT: **SECY-04-0194 - DENIAL OF PETITION FOR  
RULEMAKING (PRM-40-28) - DONALD A. BARBOUR,  
PHILOTECHNICS**

Approved 1/ Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

*I concur with the vote of Chairman  
Diaz.*

  
\_\_\_\_\_  
SIGNATURE

*11/22/01*  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes ✓ No \_\_\_\_\_