

June 5, 2003

COMMISSION VOTING RECORD

DECISION ITEM:       SECY-01-0072

TITLE:                 DRAFT RULEMAKING PLAN: DISTRIBUTION OF  
SOURCE MATERIAL TO EXEMPT PERSONS  
AND TO GENERAL LICENSEES AND REVISION  
OF 10 CFR 40.22 GENERAL LICENSE

The Commission (with Chairman Diaz and Commissioner McGaffigan disapproving and Commissioners Dicus and Merrifield approving in part and disapproving in part) responded to the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 5, 2003.

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

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Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc:   Chairman Diaz  
      Commissioner Dicus  
      Commissioner McGaffigan  
      Commissioner Merrifield  
      OGC  
      EDO  
      PDR

VOTING SUMMARY - SECY-01-0072

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ		X			X	4/9/03
COMR. DICUS	X	X			X	6/18/01
COMR. McGAFFIGAN		X			X	5/16/03
COMR. MERRIFIELD	X	X			X	3/28/02

COMMENT RESOLUTION

In their vote sheets, Chairman Diaz and Commissioner McGaffigan disapproved and Commissioners Dicus and Merrifield approved in part and disapproved in part. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on June 5, 2003.

## Commissioner Comments on SECY-01-0072

### Chairman Diaz

I disapprove staff's recommendation to implement Option 4 in the subject rulemaking plan. Staff states that "the changes presented under this option would increase NRC's ability to maintain safety and protect the environment." The paper does not provide support for this statement, primarily because the staff does not have available information to identify the impacts of the proposed regulatory changes and regulations, i.e, Option 4 is not the tool to gather the information.

When I approved staff developing a rulemaking plan to improve control of the distribution of source material to exempt persons and to general licensees and the incorporation of the resolution of PRM-40-27 to make Part 40 more risk-informed (SECY-99-259), I noted that:

The staff should not include such reporting requirements if their sole purpose is for NRC to obtain knowledge about how people are using material under the exemption or general license. Since additional reporting requirements would add recurring burden to distributors and recipients, the staff should only include reporting requirements necessary for assurance of adequate protection of public health and safety. If the staff believes it needs additional information about products and amounts of material distributed and used by persons exempt and general licensees, the staff should use the information developed as part of the reassessment of exemptions, including comments that will be provided on the draft report, obtain additional information as part of its interactions with EPA, OSHA, and the States, and consider the use of a contractor or survey of users to obtain the information. This will allow the staff to obtain information about all exempt persons and general licensees using material, not simply persons that receive material from specific licensees.

This continues to be my position. Thus, I approve a modified Option 1, leave the provisions of §40.13 and §40.22 unchanged at this time, but develop a plan to obtain the information using interactions and mechanisms such as those proposed in my earlier vote.

I have long been a strong proponent of consistent and reasonable radiation protection for both the public and workers, as I noted in my vote on another proposed Part 40 amendment (SECY-00-0201). While collecting the necessary information prior to proceeding with a rulemaking would delay any Part 40 rulemaking in the near term, I believe that in the long term this is the most prudent course of action to eventually establish a dose-based approach for regulation of source material.

### Commissioner Dicus

I approve the staff proposal to proceed with rulemaking. However, I do not agree with the staff's recommendation to implement Option 4 in the rulemaking plan, but rather recommend that the staff pursue rulemaking in accordance with Option 5. I believe that at best, Option 4 presents an approach that would be overly complicated, extremely difficult and time-consuming to implement. I agree with several of the Agreement States that have experience in this area and believe that a larger effort at data collection would need to be done prior to development of a

proposed rule, which would lead to greatly increased costs and time for final implementation of this rule than was proposed in SECY-01-0072.

If we are truly concerned about the *potential* for members of the public to receive greater than 1 mSv *today* from these licensed activities, then a simpler and direct approach to rulemaking, as proposed by Option 5, needs to be initiated. As the staff points out, this Option would provide an existing method for fee recovery and would be relatively easy and quick to implement, because the specific license conditions are already in place. What is most important, however, is that Option 5 would allow the Commission to better identify users and enforce these requirements much more effectively than the other rulemaking options, which would lead to a greater assurance that generally licensed source material is being used safely, thus maintaining public health and safety while protecting the environment.

### Commissioner McGaffigan

I agree with Commissioner Diaz and approve the staff moving forward with a modified Option 1 which includes collecting more information for PRM 40-27 and granting PRM 40-28.

I understand and agree with the concerns put forth by both the State of Colorado and the Organization of Agreement States in PRM 40-27 and by David Barbour in PRM 40-28. PRM 40-27 outlines a very specific issue associated with 10 CFR 40.22 namely the worker doses, possible improper waste disposal, and facility contamination that result from allowing a general licensee to receive up to 150 pounds of thorium per year while being exempt from 10 CFR Parts 19, 20 and 21. Although the regulations allow general licensees to receive up to 150 pounds per year of source material, which includes uranium and thorium, I suspect that it is the facilities that use relatively pure forms of thorium in significant quantities that are causing most of the problems. The possible worker doses cited by the petition were excessive and the cost to the taxpayers to remove the contamination at the facility after the company left are unacceptable. NRC should modify its regulations to remove this loophole, but the question is how.

My initial thought was to vote to grant both petitions as requested, as the simplest and fastest way to resolve this issue (Option 2). I still believe that is the correct path forward for PRM 40-28 concerning uranium counterweights. This is a very narrow rulemaking and would be relatively straightforward for the staff to implement. Therefore, I approve granting this petition. However, for PRM 40-27, I do not feel that NRC has enough information to go forward with a rulemaking at this time. NRC has no records and only limited information concerning the type and number of facilities where workers could be getting significant doses and significant contamination could be occurring. It is important to fully understand the scope of the issue prior to initiating a rulemaking to ensure that the rulemaking will encompass the facilities of greatest concern. The staff should first collect information on the number and types of facilities receiving exempt quantities of source material, particularly thorium in significant quantities, under 10 CFR 40.22 before initiating the rulemaking. This is one of the reasons that I do not agree with the staff's recommended Option 4 or my fellow Commissioners' recommended Option 5. I do not feel that the staff is ready to go forward with rulemaking because I do not think they have the information needed to develop the criteria on quantities, uses, forms, or concentrations of generally licensed 40.22 source material above which regulatory action is needed. Such criteria are necessary for both Options 4 and 5. I do not want the staff to develop criteria with inadequate information and

then use the rulemaking process to refine the criteria. I think that undermines our credibility.<sup>1</sup> I also do not want the staff to develop the criteria using NUREG-1717 because of its obvious over-conservatism. This NUREG is flawed and should not be used as the basis for a regulatory action. I think the staff must first attempt to gather the information necessary to make sound regulatory decisions.

A disadvantage of not granting PRM 40-27 at this time and instead taking time to collect information is the delay in fixing the problem. While we collect information there may be facilities where workers are receiving up to 1 rem/year without being designated occupational workers, where there are no radiation safety programs, and no waste disposal procedures as stated by Colorado and OAS in their petition. To help resolve this issue I suggest that during the information collection process if the staff or an Agreement State finds a facility with conditions similar to those at the Colorado facility, the staff or the Agreement State should take action, such as issuing an immediately effective Order, to bring the facility under Parts 19, 20, and 21.

I realize that there may be difficulties in collecting information on a voluntary basis from the facilities that distribute source material, such as thorium compounds, to 40.22 general licensees in quantities less than 15 pounds per shipment, and 150 pounds per year; and from the facilities which meet the 40.22 general license criteria. The staff raised this issue in Option 3 and if the staff cannot reasonably collect the information needed, Option 3 may need to be reconsidered. However, I believe the staff should first try to collect the information before resorting to using rulemaking as a tool for gathering the information to set the appropriate criteria for regulatory action. Also, I think the agency should consider issuing Orders to significant source material distributors as a means of collecting information.

Finally, after the staff has completed collecting the necessary information and begins working to determine the quantities, uses, forms or concentrations of source material that will require increased regulation by NRC, I caution the staff to use realistic scenarios and models that represent real life situations. The flaws with NUREG-1717 result from the contractor and staff developing overly conservative and sometimes unreasonable assumptions.

#### Commissioner Merrifield

I agree with Commissioner Dicus' vote in that I disapprove the staff's recommended option 4 and approve option 5 as presented in SECY-01-0072, Draft Rulemaking Plan: Distribution of Source Material to Exempt Persons and to General Licensees and Revision of 10 CFR 40.22 General Use. Either option 4 or 5 would resolve two long standing requests for rulemaking. On the surface, option 4 is very attractive and is probably, in the long term, the more risk informed approach. However, I am not convinced that the staff currently has enough data to adequately develop a multiple tiered approach in the near future. Thus implementing option 4 could, in my opinion, be resource intensive and confusing to our stakeholders. Option 5 is a more simplistic approach in that it establishes a new lower criteria for a general license based on a public health and safety perspective and contains a better defined mechanism for identifying the funding mechanism for this activity. I believe that this more simplistic approach is the better approach at this time.

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<sup>1</sup> I believe that our credibility has been hurt by a previous proposed rule regarding the 40.13(a) exemption, which drew a wide range of negative comments when issued last fall. Chairman Diaz and I opposed issuing that proposed rule (see Commission voting record on SECY-00-0201).

I have no objection at the draft rulemaking stage of asking for public comments on a proposed alternative of a multiple tiered approach similar to option 4, if the staff desires to collect more data on such an approach. In the long term, and in another rulemaking, it may be appropriate to implement this approach.

One concern the staff raised with option 5 was the potential that some current general licensees may now be required to have a specific license. However the current Part 40 general license limits are not based on protection of the public health and safety but are primarily based on common defense and security issues. The Commission now has sufficient data to conclude that there may be some public health and safety issues with our general license criteria and therefore the criteria should be appropriately revised. To correct this historical error may mean that some current general licensees should now have a specific license; and if they do not desire to have a specific license, they may need to shift to a non-nuclear option to conduct their business. If that happens, we are appropriately fulfilling our mission to protect the public health and safety. However, one problem clearly identified in the paper is that the staff does not currently have sufficient data to identify the types and numbers of general licensees potentially affected by this proposed rulemaking. Therefore it is appropriate to obtain public input on the draft rulemaking to determine if other alternatives should be considered.