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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 050707179-5179-01]

RIN 0694-AD28

Exports of Nuclear Grade Graphite: Change in Licensing Jurisdiction.

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security is publishing this final rule to make nuclear grade graphite intended for non-nuclear end uses subject to the Export Administration Regulations' licensing jurisdiction, and imposes a license requirement for exports and reexports to destinations of concern for nuclear proliferation reasons. The Nuclear Regulatory Commission (NRC) is discontinuing such jurisdiction in a corresponding final rule published in this same issue of the **Federal Register**. This transfer of jurisdiction and the imposition of license requirements only to destinations of concern for nuclear proliferation reasons are intended to remove the licensing burden on exporters of nuclear grade graphite intended for non-nuclear end uses to most destinations.

DATES: This rule is effective: July 21, 2005.

ADDRESSES: Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Jeff Lynch, Office of Exporter Services, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Jeffery Lynch in the Regulatory Policy Division at (202) 482-2440 regarding questions of a general nature; or Steven Clagett in the Nuclear and Missile Technology Controls Division at (202) 482-1641 regarding questions of a technical nature.

SUPPLEMENTARY INFORMATION:

Background

To date, the Nuclear Regulatory Commission (NRC) has controlled all exports of nuclear grade graphite under 10 CFR part 110, pursuant to section 109b of the Atomic Energy Act, which governs "items or substances" that are "especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes," 42 U.S.C. 2139. Due to improvements in technology, most U.S. bulk, non-fabricated graphite is now nuclear grade—*i.e.*, has a purity level of less than 5 parts per million "boron equivalent" as measured according to American Society for Testing and Materials (ASTM) standard C-1233-98. The NRC has determined that the majority of nuclear grade graphite exports are intended for non-nuclear commercial end uses.

The widespread commercial uses of this graphite and the limited proliferation concerns except when it is destined for a nuclear reactor, led the supplier nations to limit their export controls on nuclear grade graphite only when intended "for use in a nuclear reactor." This limitation appears in the definitions of controlled items used by the Nuclear Non-Proliferation Treaty (NPT) Exporters (Zangger) Committee and the Nuclear Suppliers Group (NSG) (International Atomic Energy Agency INFCIRC/209 and 254 respectively). The NRC has determined, in consultation with other agencies, that, consistent with these multilateral definitions of controlled items, exports of nuclear grade graphite intended for uses other than in a nuclear reactor are not significant from a nuclear proliferation perspective. This final rule is published in conjunction with a corresponding final rule published by NRC that revises 10 CFR part 110 and discontinues NRC licensing jurisdiction of nuclear grade graphite intended for non-nuclear uses. Although the NRC's final rule removes the density parameter from its definition of nuclear grade graphite, this final rule retains the density parameter for nuclear grade graphite for non-nuclear end use in conformance with the NSG's definition of "nuclear grade graphite" set forth in INFCIRC/254/Rev. 6/Part 1 of May 2003.

Specifically, this final rule revises Export Control Classification Number (ECCN) 0C005 on the Commerce Control List, which describes graphite that is subject to NRC jurisdiction, by removing the density parameter for nuclear grade graphite, so that nuclear grade graphite is defined only on the basis of its purity, consistent with the NRC definition in its corresponding rule. This final rule also

revises ECCN 0C005 to reflect the NRC scope of jurisdiction for graphite intended for use in a nuclear reactor.

This final rule also adds a new ECCN 1C298 to control the export of nuclear grade graphite with a purity level of less than 5 parts per million "boron equivalent" and a density greater than 1.5 grams per cubic centimeter to countries indicated under NP column 2 on the Commerce Country Chart.

Finally, this final rule adds "related controls" notes to ECCNs 0C005, 1C107 and 1C298 to provide cross-references among all ECCNs that control any type of graphite. ECCN 1C107 controls graphite that meets certain density parameters for missile technology and antiterrorism reasons.

In light of NRC's discontinued jurisdiction over graphite exports not intended for nuclear end use, nuclear grade graphite that is not described in ECCNs 1C107 or 1C298 is classified as EAR99 when intended for a use other than in a nuclear reactor. However, such graphite may require a license for reasons specified elsewhere in the EAR, for example, the end-user/end-use restrictions described in Part 744 of the EAR or the restrictions described in Part 746 of the EAR.

Although the Export Administration Act expired on August 20, 2001, Executive Order 13222 (3 CFR 2001 Comp., p. 783), as extended by **Federal Register** Notice of August 6, 2004 (69 FR 48763, August 10, 2004) continues the Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This final rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves collections of information subject to the PRA. These collections have been approved by the Office of Management and Budget (OMB) under control number 0694-0088, "Multi-Purpose Application," which carries a burden hour estimate of 58 minutes to prepare and submit. This rule is anticipated to increase the number of licenses required but not to increase the range of total burden hours associated with this control number. Send

comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to David Rostker, OMB Desk Officer, by e-mail at david_rostker@omb.eop.gov or by fax to (202) 395-7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

■ Accordingly, part 774 of the Export Administration Regulations (15 CFR parts 730-799) are amended as follows:

PART 774—[AMENDED]

■ 1. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*, 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; Sec. 901-911, Pub. L. 106-387; Sec. 221, Pub. L. 107-56; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 6, 2004, 69 FR 48763, August 10, 2004.

■ 2. In Supplement No. 1 to part 774, Category 0, Nuclear Materials, Facilities and Equipment (And Misc. Items), ECCN 0C005 is revised to read as follows:

0C005 Graphite, having a purity level of less than 5 parts per million “boron equivalent” as measured according to ASTM standard C-1233-98 and intended for use in a nuclear reactor.

License Requirements

Reason for Control:

Control(s): Items described in 0C005 are subject to the export licensing authority of the Nuclear Regulatory Commission (see 10 CFR part 110).

License Exceptions

LVS: N/A

GBS: N/A

CIV: N/A

List of Items Controlled

Unit: N/A.

Related Controls: Graphite intended for a use other than in a nuclear reactor, and that meets certain density parameters, is classified under ECCN 1C107. High-purity graphite with a boron content of less than 5 parts per million and a density greater than 1.5 grams per cubic centimeter, is classified under ECCN 1C298.

Related Definitions: N/A

Items: The list of items controlled is contained in the ECCN heading.

■ 3. In Supplement No. 1 to part 774, Category 1, Materials, Chemicals, “Microorganisms,” and Toxins, ECCN 1C107 is revised to read as follows:

1C107 Graphite and ceramic materials, other than those controlled by 1C007, as follows (see List of Items Controlled).

License Requirements

Reason for Control: MT, AT

<i>Control(s)</i>	<i>Country chart</i>
MT applies to entire entry.	MT Column 1
AT applies to entire entry.	AT Column 1

License Exceptions

LVS: N/A

GBS: N/A

CIV: N/A

List of Items Controlled

Unit: Kilograms.

Related Controls: (1) See also 0C005, 1C004, and 1C298. (2) For commodities that meet the definition of defense articles under 22 CFR 120.3 of the ITAR, see 22 CFR 121.16, Item 8-Category II of the International Traffic in Arms Regulations (ITAR), which describes similar commodities under the jurisdiction of the Department of State, Directorate of Defense Trade Controls.

Related Definitions: N/A.

Items: a. Fine grain recrystallized bulk graphites with a bulk density of 1.72 g/cm³ or greater, measured at 288 K (15° C), and having a particle size of 100 micrometers or less, usable for rocket nozzles and reentry vehicle nose tips as follows:

- a.1. Cylinders having a diameter of 120 mm or greater and a length of 50 mm or greater;
- a.2. Tubes having an inner diameter of 65 mm or greater and a wall thickness of 25 mm or greater and a length of 50 mm or greater;
- a.3. Blocks having a size of 120 mm × 120 mm × 50 mm or greater.
- b. Pyrolytic or fibrous reinforced graphites, usable for rocket nozzles and reentry vehicle nose tips;

c. Ceramic composite materials (dielectric constant is less than 6 at any frequency under 100 MHz to 100 GHz), for use in “missile” radomes; and

d. Bulk machinable silicon-carbide reinforced unfired ceramic, usable for nose tips.

■ 4. In Supplement No. 1 to part 774, Category 1, Materials, Chemicals, “Microorganisms,” and Toxins, is amended by adding ECCN 1C298 immediately following ECCN 1C240.

1C298 Graphite with a boron content of less than 5 parts per million and a density greater than 1.5 grams per cubic centimeter that is intended for use other than in a nuclear reactor.

License Requirements

Reason for Control: NP.

<i>Control(s)</i>	<i>Country chart</i>
NP applies to entire entry.	NP Column 2

License Requirement Note: This entry does not control graphite intended for use in a nuclear reactor. Such graphite is subject to the export licensing authority of the Nuclear Regulatory Commission (see ECCN 0C005 and 10 CFR part 110).

License Exceptions

LVS: N/A

GBS: N/A

CIV: N/A

List of Items Controlled

Unit: N/A.

Related Controls: See also 1C107 and 0C005.

Related Definitions: For the purpose of this entry, graphite with a purity level better than 5 parts per million boron equivalent is determined according to ASTM standard C1233-98. In applying ASTM standard C1233-98, the boron equivalence of the element carbon is not included in the boron equivalence calculation, since carbon is not considered an impurity.

Items: The list of items controlled is contained in the ECCN heading.

Dated: July 14, 2005.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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