

April 9, 2009

The Honorable Edward J. Markey
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Markey:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter of March 10, 2009, in which you express concern about the potential outcome of the pending lawsuit between the Northwest Interstate Compact on Low-Level Radioactive Waste Management (Compact) and EnergySolutions, Inc. The litigation relates to EnergySolutions' application before the NRC to import low-level radioactive waste from Italy for disposal at EnergySolutions' radioactive waste disposal facility in Clive, Utah. You have requested that the Commission provide answers to specific questions regarding the lawsuit as it relates to EnergySolutions' import application and an additional question pertaining to disposal of depleted uranium. The Commission's responses to your questions are provided in the enclosure. I can assure you that the Commission is cognizant of the concerns that you have expressed about importation of foreign waste.

Sincerely,

/RA/

Dale E. Klein

Enclosure:
As stated

Response to questions regarding the lawsuit as it relates to EnergySolutions' import application and an additional question pertaining to disposal of depleted uranium

QUESTION 1. Is it the view of the Commission that the Compact has authority over the Clive facility and may determine which wastes can be disposed of there? Please explain the authorities and responsibilities over the Clive facility of the Northwest Compact, the state of Utah, and the Commission.

ANSWER

Whether the Compact has authority over the Clive facility under the Low-Level Radioactive Waste Policy Amendments Act of 1985 and the Low-Level Radioactive Waste Policy Act of 1980 (LLRW Acts) is the precise issue before the federal district court in Utah. As a health and safety regulator acting under the Atomic Energy Act of 1954 (AEA), the NRC has no particular expertise on issues relating to the scope of the Compact's legal authority over the Clive facility under the LLRW Acts. The Commission therefore has formulated no position on the legal issue, which is now pending before the federal court in Utah and is squarely within that court's province.

Utah is responsible for regulating the Clive facility as an Agreement State pursuant to Section 274 of the AEA. Under AEA § 274, Utah's health and safety regulations must be compatible with the NRC's regulations. In light of Utah's status as an Agreement State, the NRC does not directly regulate the Clive facility.

QUESTION 2. Does the Commission have any statutory authority to differentiate between foreign-generated and domestic low-level waste? If so, what, and what is the Commission doing to assert its authority in this case?

ANSWER

The AEA authorizes the import of radioactive material if domestic health and safety and common defense and security licensing criteria are satisfied, regardless of whether imported material is of foreign or domestic origin. Thus, overall the Act does not distinguish between domestic and foreign waste. The NRC's statutory role in evaluating a low-level radioactive waste import application is a regulatory one, limited to ensuring that the proposed import can be accomplished safely and securely in accordance with all applicable laws, and that the material will be accepted by an authorized recipient. NRC regulations provide that the NRC will issue a license to import low-level waste if it determines that issuance of the license would not be inimical to the common defense and security or constitute an unreasonable risk to the public health and safety and that "an appropriate facility has agreed to accept the waste for management or disposal." See 10 C.F.R. §§ 110.43 and 110.45(b).

QUESTION 3. If the court decides in favor of *EnergySolutions* that the Northwest Compact does not have authority to regulate the Clive facility, could the NRC prevent the importation of foreign commercial nuclear waste to the Clive facility?

ANSWER

EnergySolutions' import application is the subject of hearing requests currently pending before the NRC. In light of the adjudicatory posture of the import application, the Commission cannot now prejudge its decision on the application in the event that *EnergySolutions* ultimately prevails in the courts. The Commission's decision on the import application will depend on whether the domestic health and safety and common defense and security licensing criteria are satisfied, and that the material will be accepted by an authorized recipient

QUESTION 4. If the court decides in favor of *EnergySolutions*, what would prevent any corporation from importing foreign low-level waste for disposal in the United States, in a Compact state or otherwise?

ANSWER

As noted in our response to question 3, the Commission would evaluate each application to determine whether our import licensing criteria have been satisfied.

QUESTION 5. It is my understanding that *EnergySolutions* also seeks to dispose of depleted uranium at the Clive facility. I further understand that the Utah state license under which *EnergySolutions* operates specifies that the facility shall not be allowed to dispose of any radioactive waste greater than Class A, as defined in 10 CFR 61.55. Does depleted uranium pose health or safety risks different in any way from wastes commonly classified as Class A? Over time, would depleted uranium pose health or safety risks different in any way from wastes commonly classified as Class A?

ANSWER

A March 19, 2009 letter, from Representatives Markey and Matheson (copy attached) to the Commission, expressed concerns about the safe and secure disposal of depleted uranium (DU) and the impact any NRC decision may have on other radioactive materials. The response to Question 5 will be included with our response to this March 19th letter, which will also be provided to Representative Gordon.

Identical letter sent to:

The Honorable Edward J. Markey
United States House of Representatives
Washington, D.C. 20515

The Honorable Bart Gordon
United States House of Representatives
Washington, D.C. 20515

The Honorable Jim Matheson
United States House of Representatives
Washington, D.C. 20515

EDO Principal Correspondence Control

FROM: DUE: 03/25/09

EDO CONTROL: G20090159
DOC DT: 03/19/09
FINAL REPLY:

Representative Edward J. Markey
Representative Jim Matheson

TO:

Chairman Klein

FOR SIGNATURE OF :

** PRI **

CRC NO: 09-0104

Chairman Klein

DESC:

Classification of Depleted Uranium as Class A
Waste (EDATS: SECY-2009-0124)

ROUTING:

Borchardt
Virgilio
Mallett
Ash
Ordaz
Cyr/Burns
Cyr, OGC
Schdmit, OCA
Bagley, OEDO
Rivera, OEDO

DATE: 03/19/09

ASSIGNED TO:

FSME

CONTACT:

Miller

SPECIAL INSTRUCTIONS OR REMARKS:

Response should be prepare so that it can be made
public. Non-public information should be
identified and provided under separate cover.
Response due to OEDO by 9:00 a.m., March 25, 2009.

Template: SECY-017

E-RIDS: SECY-01

EDATS

Electronic Document and Action Tracking System

EDATS Number: SECY-2009-0124

Source: SECY

General Information

Assigned To: FSME

OEDO Due Date: 3/25/2009 9:00 AM

Other Assignees:

SECY Due Date: 3/26/2009 5:00 PM

Subject: Classification of Depleted Uranium as Class A Waste

Description:

CC Routing: OGC; OCA

ADAMS Accession Numbers - Incoming: NONE

Response/Package: NONE

Other Information

Cross Reference Number: G20090159, LTR-09-0104

Staff Initiated: NO

Related Task:

Recurring Item: NO

File Routing: EDATS

Agency Lesson Learned: NO

Roadmap Item: NO

Process Information

Action Type: Letter

Priority: Medium

Sensitivity: None

Signature Level: Chairman Klein

Urgency: NO

OEDO Concurrence: YES

OCM Concurrence: NO

OCA Concurrence: NO

Special Instructions: Response should be prepared so that it can be made public. Non-public information should be identified and provided under separate cover. Response due to OEDO by 9:00 a.m., March 25, 2009.

Document Information

Originator Name: Rep. Edward J. Markey/Rep. Jim Matheson

Date of Incoming: 3/19/2009

Originating Organization: Congress

Document Received by SECY Date: 3/19/2009

Addressee: Chairman Klein

Date Response Requested by Originator: 4/2/2009

Incoming Task Received: Letter

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Mar 19, 2009 13:57

PAPER NUMBER: LTR-09-0104 **LOGGING DATE:** 03/19/2009
ACTION OFFICE: EDO

AUTHOR: REP Edward Markey
AFFILIATION: CONG
ADDRESSEE: Dale Klein
SUBJECT: Concerns NRC's action to classify depleted uranium as Class A waste

ACTION: Signature of Chairman
DISTRIBUTION: RF, OCA to Ack...contact Amy Powell

LETTER DATE: 03/19/2009
ACKNOWLEDGED: No
SPECIAL HANDLING: Commission Correspondence

NOTES: Response should be prepared so that it can be made public..
Non-public information should be identified and provided
under separate cover.....Response due NLT April 2

FILE LOCATION: ADAMS

DATE DUE: 03/26/2009 **DATE SIGNED:**

EDO --G20090159

**COMMISSION OFFICE AND STAFF INSTRUCTIONS FOR PROCESSING
CONGRESSIONAL REQUESTS FOR DOCUMENTS**

Congressional Association

- Chairman, Oversight Committee
- Member, Oversight Committee
- Individual Member of Congress
- Committee Staff

Documents to be released:

- Un-redacted Release
- Redacted Release (based on FOIA/Privacy Act procedures)
- Only publicly available documents

Provide documents with the following listing:

- Classified National Security Information
 - Safeguards Information
 - Proprietary Information
 - Privacy Information
 - Sensitive Investigatory Information
 - Sensitive Adjudicatory Information or Attorney-Client Information
 - Sensitive Pre-decisional Information
 - Not Publicly Available, but not of concern if publicly released
 - Publicly Available

Cover Letter

- If documents are to be provided and are not to be made public by the requester, please include a statement in the cover letter that documents are sensitive and not to be publicly released. Mark each page of sensitive documents to be provided with "Not for Public Disclosure".

Response should be prepared that can be made public. Non public

Due Date for Completion of Staff Review: 3/26/09 *information*

OCA Contact: Amy Powell *should be identified and provided under separate cover.*

Congress of the United States
Washington, DC 20515

March 19, 2009

The Honorable Dale E. Klein
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Klein:

We write to you with great concern regarding the Commission's recent action to classify depleted uranium as Class A waste. This decision has been taken in apparent disregard for the fact that depleted uranium poses a risk to health and safety that is greater than other Class A wastes, and, as disturbingly, may undermine long-held policies related to the disposal of radioactive materials.

Through the Atomic Energy Act of 1954 and the Low-Level Radioactive Waste Policy Act and its Amendments, Congress required the Commission to establish clear and effective criteria for the classification of radioactive waste. The fundamental purpose of creating distinct waste classes is to acknowledge that different materials pose different risks to health and safety, and that therefore different materials require different long-term disposal methods. Classification is predicated upon an analysis of both the hazard posed by a given material, and the steps required to dispose of it in a safe and secure manner. Class A waste is meant to be the lowest classification, meaning that the material poses the least threat to health and safety and may be most easily disposed.

While the Commission did not categorize depleted uranium into a specific waste class in the early 1980s during its rule making process, it considered doing so. In fact, the Draft Environmental Impact Statement (DEIS) for 10 CFR 61 established that only depleted uranium below the concentration of $0.05 \mu\text{Ci}/\text{cm}^3$ could be considered Class A. This was removed from the final rule because there was no depleted uranium waste stream in existence, leaving any potential stream of the material in a regulatory limbo. The depleted uranium waste stream which will flow from commercial uranium enrichment facilities is expected to be $0.5 \mu\text{Ci}/\text{cm}^3$, that is, ten times greater than what the Commission believed was safe when the DEIS was written.

The requirements for safe and secure disposal of depleted uranium are much greater than what is required for Class A waste. In fact, the Commission's technical analysis shows that the safe dispose of depleted uranium will require increased waste disposal depth and radon barriers. These requirements are most similar to those common for Class C waste, not Class A.

This arbitrary and capricious mischaracterization of depleted uranium as Class A waste will undermine public confidence in the waste classification system, may increase risks to public health and safety, and raises the possibility that additional, uncharacterized and possibly even more dangerous materials could be similarly treated in the future.

On March 10, 2009, we sent a number of questions to the Commission regarding low-level radioactive waste. Included in that query were questions regarding the classification of depleted uranium. To date, the Commission has neither answered nor responded to these questions. In light of this fact, we respectfully request expedited answers to those questions, and additionally ask you to provide the Energy and Commerce Committee Subcommittee on Energy and the Environment with answers to the following questions:

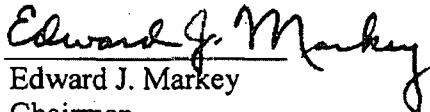
1. The Draft Environmental Impact Statement for 10 CFR 61 proposed that only depleted uranium below the concentration of $0.05 \mu\text{Ci}/\text{cm}^3$ could be considered Class A. Why should depleted uranium at ten times this concentration be treated as Class A waste?
2. What disposal procedures have been required for depleted uranium? Are these different in any way from the disposal procedures commonly required for Class A waste? Are these procedures similar in any way to the disposal procedures commonly required for Class C waste?
3. Could uranium tailings be considered Class A under the actions taken by the Commission?
4. Could any other materials be classified as Class A under the action taken by the Commission?

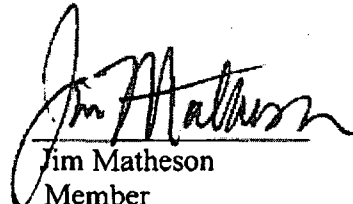
In addition, we also request that within 10 business days, or no later than close of business, April 2, 2009, please provide the Subcommittee with copies of all records (including but not limited to written and electronic communications, phone calls logs or notes, meeting notes or minutes, memoranda, and analyses) relating to the Commission's decision to allow depleted uranium or other materials not currently classified as Class A to be considered as Class A waste, including internal Commission records, all records involving EnergySolutions, Inc., and records involving the Department of Energy.

The Commission's action to classify depleted uranium as Class A even though it poses more severe risks to health and safety, and requires much greater effort for disposal, seems to be unsupportable and inconsistent with the intent of the law. The Subcommittee intends to carefully review the basis for this action.

The Subcommittee looks forward to your prompt response to these questions, and to receipt of the requested information.

Sincerely,


Edward J. Markey
Chairman
Subcommittee on
Energy and the Environment


Jim Matheson
Member
Subcommittee on
Energy and the Environment