

April 6, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-049

TITLE: COMPATIBILITY OF AGREEMENT STATE PROGRAMS THAT PROHIBIT THE DISPOSAL OF MIXED WASTE

The Commission (with all Commissioners agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of April 6, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of April 6, 1999.

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Annette Vietti-Cook  
Secretary of the Commission

Attachments: 1. Voting Summary  
2. Commissioner Vote Sheets  
3. Final SRM

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

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VOTING SUMMARY - SECY-99-049

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON		X			X	3/5/99
COMR. DICUS		X			X	3/9/99
COMR. DIAZ		X			X	3/10/99
COMR. MCGAFFIGAN		X			X	3/8/99
COMR. MERRIFIELD		X			X	3/8/99

COMMENT RESOLUTION

In their vote sheets, all Commissioners disapproved the staff's recommendation and provided some additional comments. Commissioners Dicus, Diaz, McGaffigan and Merrifield considered that the decision would be premature at this point. Commissioners Dicus, Diaz, and Merrifield requested additional legal analysis while Commissioner McGaffigan would await further resolution of Federal and State efforts in this area. Chairman Jackson disapproved the staff position that Agreement States that prohibit mixed waste in low-level waste disposal facilities should be found compatible with the NRC regulatory program. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on April 6, 1999.

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**Chairman Jackson**

I commend the diligence of the staff who participated in the North Carolina IMPEP review and identified the compatibility concern associated with the prohibition against mixed waste found in the North Carolina low-level waste regulations. This outcome attests to the thoroughness and objectivity characteristic of the IMPEP reviews. Raising this issue as a generic matter for consideration by the Commission is appropriate.

However, I cannot approve the staff recommendation to find Agreement State programs that prohibit the disposal of mixed waste compatible with the NRC regulatory program. SECY 99-049, based on my review, articulates a clear rationale for finding that the North Carolina low-level waste regulations are not compatible, rather than for concluding, as the paper does, that programs prohibiting mixed waste disposal are compatible.

The Commission Statement of Principles and Policy for the Agreement State Program and the implementing guidance in Management Directive 5.9 were developed through an extensive process that included substantial input from the Agreement States and other stakeholders. The NRC initiated development of the principles and policy in response to concerns that the NRC lacked a systematic, objective, and scrutable process for determining the compatibility and adequacy of Agreement State programs. Indeed, the agency received sharp criticism from Congress and the General Accounting Office for its unclear earlier findings of compatibility. Therefore, I believe it is important that we carefully apply these new principles and policy.

A direct application of the Commission Statement of Principles and Policy for the Agreement State Program to this issue indicates that such programs could not be compatible with the NRC program because they:

(1) preclude or effectively preclude a practice in the national interest without an adequate public health and safety or environmental basis related to radiation protection, and

(2) create conflicts and gaps that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis (e.g., a general prohibition of mixed waste disposal would appear to frustrate the letter and intent of the Low-Level Radioactive Waste Policy Amendments Act for this component of the low-level waste streams generated commercially).

In addition, I am concerned that the finding proposed by the staff in SECY 99-049, could undermine State interest in developing safe disposal capacity for low-level waste. One of the reasons why adequate disposal capacity for mixed waste does not exist today is because of insufficient commercial demand for such capacity. A Commission decision to allow a general prohibition against mixed waste disposal under the Atomic Energy Act could further weaken incentives for developing disposal capacity, forcing generators to continue to rely on indefinite storage of the waste. This outcome would appear to fly in the face of the long-held Commission policy in favor of safe and prompt disposal of radioactive waste. Such a decision also could undermine recent initiatives by the Environmental Protection Agency to work with the NRC in identifying safe, environmentally protective regulations for mixed waste disposal that would pose less of a regulatory burden.

Note that I am distinguishing between a general prohibition against mixed waste disposal in regulations, versus a license prohibition exercised because the applicant did not propose mixed waste as part of the source term or did not include additional measures required under the EPA Resource Conservation and Recovery Act regulations.

Further, what would we do if an Agreement State decided to ban another type of low-level waste without an adequate health and safety or environmental basis under the Atomic Energy Act (e.g., class C waste, waste generated by one group of licensees)? Would we still find that program compatible under the precedent that would be established with the approval of SECY 99-049, even though such a decision would contribute to additional disorder in the national framework for safe radioactive waste management?

For these reasons, I believe that the staff needs to:

1. Find that general prohibitions on mixed waste disposal are not compatible with the NRC regulatory program in accordance with the Commission Statement of Principles and Policy for the Agreement State Program, and
2. Work with the States, the EPA, the Department of Energy, and groups, such as the Low-Level Waste Forum and the Organization of Agreement States, to pursue safe, legal, and commercially viable solutions for mixed waste disposal instead of Agreement State regulations that explicitly prohibit disposal.

**Commissioner Dicus**

Commissioner Dicus disapproves the staff's recommendation to approve the position that Agreement States programs that prohibit the disposal of mixed waste are compatible with NRC's regulatory program. The paper should be returned to the staff without approval because it was submitted to the Commission without a legal analysis of whether the NRC would have the authority to require Agreement States to allow for disposal of mixed waste. The Commission should not have been asked to decide the compatibility question without such an analysis. If the paper is resubmitted, it should include a discussions of the implications of a decision of non-compatibility. Given that the present mixed waste problem is the result of Federal, not State regulations, the NRC should be careful about undertaking any action that might have a detrimental effect upon existing Agreement State programs for the regulation of LLW disposal. For this reason, if the staff resubmits the paper, it should include discussion of the merits of deferring a decision pending a more satisfactory resolution of the mixed waste problem at the Federal level.

**Commissioner Diaz**

I agree with Cmr. Merrifield's comments on SECY-99-049. Before firming up my position, I would like to see OGC's legal analysis of this issue.

**Commissioner McGaffigan**

At this time, I disapprove the staff's proposed position that Agreement State programs that prohibit the disposal of mixed waste be found compatible with the NRC's program. While I commend the staff for attempting to resolve the generic issue--the compatibility of Agreement State programs that prohibit the disposal of mixed waste in low-level waste--such a decision would be premature in view of current Federal and State efforts in this area.

In a January 27, 1999 staff requirements memorandum, the Commission approved the staff's proposal to provide technical assistance to the Environmental Protection Agency (EPA **EXIT**) in its efforts to provide increased flexibility to mixed waste generators by allowing the disposal of some mixed wastes in facilities permitted to accept hazardous waste pursuant to the Resource Conservation and Recovery Act (RCRA). NRC is also assisting EPA in its efforts to allow the disposal of certain mixed wastes in licensed low-level waste facilities. These efforts may necessitate revision of current Part 61 low-level waste disposal requirements and therefore any determination that the Commission may make now on mixed waste compatibility issues would need to be revisited as part of this effort. I am also sensitive to the legal issue briefly mentioned in the staff paper regarding whether NRC has the authority to require Agreement States to allow the disposal of mixed waste since it contains a hazardous component as well as a radiological component. Therefore I suggest that as part of the ongoing staff effort to assist EPA, the Office of the General Counsel should further explore the legal issues and provide input to the Commission as part of the staff's efforts to keep the Commission informed on these matters. With regard to the States' efforts in this area, it is my understanding that the Conference of Radiation Control Program Directors also intends to develop criteria to allow the disposal of mixed waste in RCRA facilities, as envisioned by EPA and NRC, as well as the disposal of RCRA waste in low-level waste facilities. The staff should keep abreast of the CRCPD efforts in this area.

**Commissioner Merrifield**

Without an OGC interpretation of the legal requirements and the potential ramifications of each option, I do not approve the staff proposal that States be allowed to exclude mixed waste in a low level radioactive waste disposal facility by State legislation. The paper should be resubmitted once OGC's input is received. My initial inclination is that in order to ensure a consistent national policy and to prohibit formation of an orphan waste in a compact or State we should not allow States to exclude mixed wastes by State legislation from a low-level radioactive waste repository. Nevertheless, I would like to have the benefit of OGC's analysis prior to making a final decision.