

April 26, 2002

MEMORANDUM TO: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: William D. Travers */RA/*  
Executive Director for Operations

SUBJECT: RESPONSE TO LETTER FROM AMERICAN ECOLOGY  
REGARDING CLASSIFICATION OF FUSRAP MATERIAL AT  
MAYWOOD, NEW JERSEY

Attachment 1 is the staff's proposed response to the December 3, 2001, and March 8, 2002, letters from American Ecology Corporation (Attachments 2 and 3) regarding classification of material at the Formerly Utilized Sites Remedial Action Program (FUSRAP) Maywood, New Jersey, site. Staff has coordinated this response with the U.S. Army Corps of Engineers (USACE).

Staff clarified the classification of byproduct material in section 11e.(2) of the Atomic Energy Act of 1954, in a Director's Decision of December 13, 2000, stating that, among other things, the material had to be possessed by a person licensed by the U.S. Nuclear Regulatory Commission (NRC) on or after the effective date of the Uranium Mill Tailings Radiation Control Act of 1978. In a letter dated January 26, 2001, to Envirocare of Utah (Attachment 4), the staff stated that radioactive tailings material in three pits at the Maywood FUSRAP site was 11e.(2) byproduct material because Stepan Chemical Company held NRC license STC-1333 authorizing possession of that material. However, the letter also concluded that tailings material on the Maywood site, but outside the three pits, was not 11e.(2) byproduct material because it was not included in license STC-1333. In response to a May 16, 2001, request from Envirocare's attorney (Attachment 5), staff further considered the situation with respect to radioactive material outside the three licensed pits at the Maywood site. In its September 20, 2001 (Attachment 6), letter to Envirocare, the staff addressed a number of issues and concluded that tailings material from the entire site is 11e.(2) byproduct material. The basis for that conclusion is discussed in the letter.

American Ecology's December 3, 2001, letter asked the staff to reconsider its position regarding the classification of Maywood tailings, stating that NRC's position restricts the competitive market for disposal of the waste and forecloses other safe, cost-effective options for the disposal of this material. The staff recognizes that low-activity wastes posing similar risks are managed in different ways in the U.S., depending upon their classification as 11e.(2) byproduct material, low-activity source material, or technologically enhanced naturally occurring radioactive material. There are opportunities to more efficiently and consistently manage all these materials, and our support of the National Research Council's study on this topic is aimed at identifying these improvements. As staff prepares recommendations on matters related to 11e.(2) byproduct material, the staff will look for solutions which afford licensees flexibility and cost-effective solutions within the bounds of the Commission's interpretation of the definition of 11e.(2) byproduct material.

CONTACT: Myron M. Fliegel, NMSS/FCSS  
(301) 415-6629

The focus of the definition of 11e.(2) byproduct material is whether the material in question is waste or tailings resulting from processing ore for its source material content and the relationship of the material to licensed activity in the post-1978 time period. The focus is not on what waste disposal facility, or class of waste disposal facilities, may be allowed to, or disqualified from, contracting to dispose of the waste. However, several facts related to the Maywood tailings material may be of interest.

The USACE recently informed the staff that a substantial amount of the tailings outside the three pits contains thorium in concentrations equal to or greater than 0.05 percent and thus cannot be disposed of at American Ecology or any other waste disposal facility that does not have an NRC or Agreement State license. Furthermore, USACE has been in contact with several NRC and Agreement State licensed facilities so as to have competitive bids for the disposal.

American Ecology's March 8<sup>th</sup> letter asserted that NRC does not have jurisdiction over the remedy selection at FUSRAP sites. The staff response agrees with American Ecology's contention; however, the question at hand was not the remediation of materials on site, but the disposition and disposal of licensed materials once they are removed from the site.

We also received a letter from Environmental Rail Solutions, Inc. (ERS), (Attachment 7), dated January 9, 2002, that expressed similar concerns. After issuance of our response to American Ecology, we will respond to ERS with a short letter and include a copy of the American Ecology letter.

We intend to respond to American Ecology after the Commission's approval.

SECY please track.

Attachments:

1. Proposed response to American Ecology
2. American Ecology December 3, 2001, letter
3. American Ecology March 8, 2002, letter
4. January 26, 2001, letter to Envirocare
5. Envirocare May 16, 2001, letter
6. September 20, 2001, letter to Envirocare
7. Environmental Rail Solutions January 9, 2002, letter

cc: SECY  
OGC  
OCA  
OPA  
OCFO

The focus of the definition of 11e.(2) byproduct material is whether the material in question is waste or tailings resulting from processing ore for its source material content and the relationship of the material to licensed activity in the post-1978 time period. The focus is not on what waste disposal facility, or class of waste disposal facilities, may be allowed to, or disqualified from, contracting to dispose of the waste. However, several facts related to the Maywood tailings material may be of interest.

The USACE recently informed the staff that a substantial amount of the tailings outside the three pits contains thorium in concentrations equal to or greater than 0.05 percent and thus cannot be disposed of at American Ecology or any other waste disposal facility that does not have an NRC or Agreement State license. Furthermore, USACE has been in contact with several NRC and Agreement State licensed facilities so as to have competitive bids for the disposal.

American Ecology's March 8<sup>th</sup> letter asserted that NRC does not have jurisdiction over the remedy selection at FUSRAP sites. The staff response agrees with American Ecology's contention; however, the question at hand was not the remediation of materials on site, but the disposition and disposal of licensed materials once they are removed from the site.

We also received a letter from Environmental Rail Solutions, Inc. (ERS), (Attachment 7), dated January 9, 2002, that expressed similar concerns. After issuance of our response to American Ecology, we will respond to ERS with a short letter and include a copy of the American Ecology letter.

We intend to respond to American Ecology after the Commission's approval.

SECY please track.

Attachments:

1. Proposed response to American Ecology
2. American Ecology December 3, 2001, letter
3. American Ecology March 8, 2002, letter
4. January 26, 2001, letter to Envirocare
5. Envirocare May 16, 2001, letter
6. September 20, 2001, letter to Envirocare
7. Environmental Rail Solutions January 9, 2002, letter

cc: SECY  
 OGC  
 OCA  
 OPA  
 OCFO

DISTRIBUTION: G20020031 NMSSr/f FCLBr/f CCain/RIV Kcyr ACNW  
 JMuszkiewicz WTravers CPaperiello SBurns EDOr/f SECY-LTR-02-0058  
 EMerschhoff/RIV CPoland PTressler KValloch NMSS Dir.Off. r/f  
 C:\ORPCheckout\FileNET\ML020910328.wpd **ML020370225** See previous concurrence

<b>OFC</b>	FCLB		FCLB		FCLB		OGC		FCLB		Tech Ed.	
<b>NAME</b>	MFliegel*		MLayton*		GJanosko		JLieberman*		Mleach (GJ)		EKraus*	
<b>DATE</b>	3/29/02		03/27/02		3/29/02		3/27/02		3/29/02		02/07/02	
<b>OFC</b>	DWM		FCSS		NMSS		DEDMRS		EDO			
<b>NAME</b>	LCamper*		MWeber		MVirgilio		CPaperiello		WTravers			
<b>DATE</b>	3/29/02		4/02/02		4/08/02		04/25/02		04/26/02			