

EGAN & ASSOCIATES, P.C.

Counselors at Law

2300 N Street, N.W.
Washington, D.C. 20037
Telephone (202) 663-9200
Fax (202) 663-9066

April 21, 1998

Francis X. (Chip) Cameron, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North (M/C 7E4)
11555 Rockville Pike
Rockville, MD 20852-2738

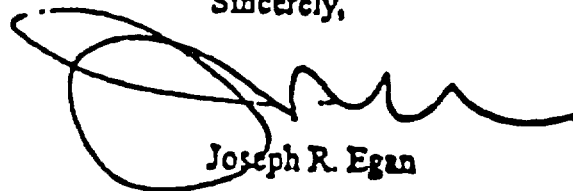
**SUBJECT: Waste Control Specialists Disposal of License-Exempt Materials
Generated Under NRC Jurisdiction**

Dear Mr. Cameron:

As you will see from the enclosed legal analysis, we believe the tentative NRC suggestion that disposal of exempt wastes at the Waste Control Specialists site in Andrews County, Texas, will require NRC approval under 10 CFR § 20.2002 presents serious legal difficulties. The NRC proposal for use of § 20.2002 also raises serious questions of NRC-state relations.

Bill Dornsife and I would like to meet with you and Mr. Paperiello at your earliest convenience to discuss these issues in further detail.

Sincerely,



Joseph R. Egan

JRE/cc

Enclosure record was deleted
in accordance with the Freedom of Information
Act, 5 U.S.C. 552, on 04/21/98.
2002-416

#9 805080093

E11

EGAN & ASSOCIATES, P.C.
Counselors at Law

c: Mr. Carl A. Paperiello (NMSS/OD/NRC) (w/encl)
Mr. Richard L. Bangart (OSP/NRC) (w/encl)

Waste Control Specialists Disposal of License-Exempt Materials Generated Under NRC Jurisdiction

The issue presented is whether NRC approval is required under 10 CFR § 20.2002 for an NRC licensee to transfer source material in low-level radioactive waste (LLW) to the Waste Control Specialists ("WCS") site in Andrews County, Texas (an Agreement State), for purposes of storage and treatment within the scope of a specific Texas Agreement State license, and ultimate disposal at the Texas site pursuant to Texas Agreement State regulations exempting the waste from licensing. The Texas exemption regulation, set forth in 40 TRCR § 40.3(a), Title 25, § 289.251(c)(1), is essentially the same as NRC's regulation in 10 CFR § 40.13(a). Both exemption regulations address the need for a license for mixtures containing source material in concentrations of 0.05% or less. There is a similar exemption for the same concentrations of source material in unrefined and unprocessed ore.

For the reasons set forth below, no NRC approval under 10 CFR § 20.2002 can lawfully be required. Instead, the applicable NRC regulation is 10 CFR § 40.51 which reflects NRC authority only over the transfer within a non-Agreement State, and grants approval to the NRC licensee to transfer material to a specific Agreement State licensee without the need for any case-specific NRC review. Only the Agreement State (Texas) has authority over subsequent disposal, and NRC oversight over the Agreement State's actions is limited under § 274j of the Atomic Energy Act ("AEA").

1. Transfer for Treatment and Storage

Under 10 CFR § 40.51(b)(5) any NRC licensee may transfer source material (including source material in LLW) "to any person authorized to receive such source . . . material under term of a specific license . . . issued by . . . an Agreement State." Since WCS is authorized by a specific Texas Agreement State license to receive the source material LLW in question, 10 CFR § 40.51(b)(5) authorizes the transfer to WCS without the need for any further NRC approval.¹

¹ The same result obtains for transfers to license-exempt persons. Under 10 CFR § 40.51(b)(4) any licensee may transfer source material "[t]o any person in an Agreement State subject to the jurisdiction of that state who has been exempted from the licensing requirements and regulations of that state, to the extent permitted under such exemptions."

2. Ultimate Disposal

Once WCS receives the material, the material becomes subject to the regulatory jurisdiction of Texas under its agreement with NRC under § 274 of the AEA. Accordingly, whether Texas should or will allow WCS as a specific Agreement State licensee to dispose of the material on a license-exempt basis is a matter for Texas rather than NRC to determine. Under § 274b of the AEA "[d]uring the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement" See also 10 CFR § 150.10. Under § 274, NRC may not exercise any approval or oversight function with respect to particular Agreement State licensing and regulatory actions, except to the limited extent permitted by § 274j.³

10 CFR § 20.2002 cannot be construed to allow NRC to evaluate and exercise an approval function with regard to particular storage or disposal actions in an Agreement State because this would constitute, in legal effect, an exercise of dual NRC-Agreement State regulation, something the drafters of § 274 specifically sought to avoid. For example; in explaining § 274, the Joint Committee on Atomic Energy said that "[i]t is not intended to leave any room for the exercise of dual or concurrent jurisdiction The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both." 10 CFR § 20.2002 is consistent with this necessary view of the AEA. The regulation requires, among other things, that each application for approval of alternate disposal procedures include "analysis and procedures to ensure that doses are maintained ALARA and within the dose limits of this part." "[T]his part" refers to 10 CFR Part 20, which applies to NRC licensees, and not to Agreement State licenses. Thus, consistent with the AEA, 10 CFR § 20.2002 must be read to apply only to disposal in non-Agreement States which are subject to NRC regulatory jurisdiction (and Part 20) and not to disposal in Agreement States.⁴

³ Section 274j will allow NRC intervention in specific Agreement State actions (a temporary suspension) only in an "emergency situation." NRC has never adopted the view that a single Agreement State licensing action can call the entire Agreement State Program into question. This is best illustrated by NRC's decision not to revoke the Utah Agreement State Program when Mr. Anderson granted Envirocare an exemption from the governmental land ownership requirement applicable to commercial waste disposal licensees, something NRC had never (and would never) do. See *Hearland Operation to Protect the Environment: Denial of Petition for Rulemaking*, 61 Fed. Reg. 67501, Dec. 23, 1996.

³ 1959 U.S. Code Cong. and Adm. News, Vol. 2 at 2879.

⁴ A contrary view would have drastic effects on NRC-Agreement State relations. If NRC (consistent with § 274 of the AEA) could construe 10 CFR § 20.2002 so as to allow the exercise

This interpretation of 10 CFR § 20.2002 as confined to disposal in non-Agreement States, is confirmed by Commission decisions in promulgating 10 CFR § 150.15(a), which reserves certain matters for NRC jurisdiction. In promulgating § 150.15(a) in 1962, the Commission considered specifically whether it should assert jurisdiction over land disposal of LLW in Agreement States and decided not to do so. The Statement of Considerations provides specifically that "the states will have control over land burial of low-level waste." 27 Fed. Reg. 1351, Feb. 14, 1962.⁵

This interpretation of 10 CFR § 20.2002 is further buttressed by the history of the regulation. The predecessor to 10 CFR § 20.2002 is 10 CFR § 20.302. Until 10 CFR Part 61 took effect in 1983 (47 Fed. Reg. 57,446), § 20.302 served as the only regulation generally providing for waste disposal licenses, and its application was confined to NRC (and AEC)-licensed sites. See generally, U.S. Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), 25 NRC 98, 102-103 (1987). NRC never used § 20.302 to license disposal in Agreement States. Nothing in the history or text of 10 CFR § 20.2002 suggests that the scope of "old" § 20.302 was to be extended to disposal within the jurisdiction of Agreement States.

For proposals to dispose in Agreement States, the applicable NRC regulation is 10 CFR § 40.51, which focuses on the one activity subject to NRC authority—the transfer of the material from the NRC licensee in the non-Agreement state.⁶ As shown above, 10 CFR § 40.51 applies fully to and authorizes for the transfer of the material to WCS without any need for case-specific NRC evaluation of either the transfer or of subsequent treatment, storage, or disposal.

of NRC authority over disposal in an Agreement State, it would logically follow that NRC could exercise authority under the AEA over licensee proposals to dispose of licensed materials in Agreement State licensed commercial disposal sites such as Barnwell, Envirocare, and Hanford. This would immediately involve NRC in safety reviews of these sites. Congress foresaw the possible need for NRC to exercise plenary authority over disposal when it enacted § 274 and provided the exclusive means for doing so in § 274c (4).

⁵ See also 61 Fed. Reg. 36852, May 29, 1996, where the Commission withdrew a proposed rule to reassert jurisdiction in Agreement States over land disposals of LLW pursuant to 10 CFR § 20.302, the predecessor of 10 CFR § 20.2002.

⁶ Even this may be doubtful in some cases since the transaction could be structured so that no actual transfer takes place within the non-Agreement State.

3. 10 CFR § 20.2002 Contemplates a Limited Evaluation

Assuming *arguendo* that, contrary to the above, some form of NRC approval can be required under § 20.2002 for disposal within an Agreement State, such approval can be based on a limited evaluation as opposed to a full-performance assessment of the sort required by 10 CFR Part 61. The criteria specified in § 20.2002 focus on the nature of the waste itself, the manner and conditions of disposal, the nature of the affected environment, and analyses and procedures to assure compliance with ALARA and the dose limits "in this part." There is no mention of the need for a performance assessment such as required by 10 CFR Part 61, and indeed the reference to compliance with the dose limits in "this part" (i.e., Part 20) confirms that no Part 61 performance assessment was contemplated because only Part 61 (not Part 20) includes dose limits applicable to performance assessments.

4. NRC Oversight of Agreement States

10 CFR § 20.2001 provides the general requirements for disposal of NRC-licensed radioactive material. 10 CFR § 20.2001(a)(1) authorizes disposal not only under § 20.2002 discussed above, but also "[b]y transfer to an authorized recipient as provided in . . . the regulations in part . . . 40." Accordingly, no 10 CFR § 20.2002 approval is required if disposal is authorized by transfer to an authorized recipient under Part 40. The regulation in § 20.2001(a)(1) cannot be read to require that disposal be specifically licensed by Part 40, because the specific question of the need for specific disposal licenses is addressed by § 20.2001(b), which requires only that certain enumerated disposal methods be specifically licensed (for example, disposal by incineration), not including the method under consideration here. Thus, license-exempt disposal under Part 40 would qualify as a disposal option under § 20.2001.

As explained above, Texas' authorization to WCS to dispose of the material on a license exempt basis, is based on the Texas regulation 40 TRCR 40.3(a). This regulation is identical in all relevant respects to NRC's exemption regulation in 10 CFR 40.13(a). Since the regulation is identical to NRC's, the regulation itself cannot pose any issue with regard to the adequacy or compatibility of the Texas Agreement State Program. The question here must instead be one of interpretation.

Regulation 10 CFR § 40.13(a) exempts a person from licensing "to the extent that such person receives, possesses, uses, transfers or delivers" source material in the specified low concentration. Neither this regulation nor the Texas counterpart specifically uses the term "disposal." However, the NRC regulation must be read to include an exemption for disposal. The regulation exempts from licensing not only under the regulations in Part 40 but also exempts from licensing under § 62 of the AEA. Insofar

as is relevant here, § 62 of the AEA requires a license in order to "transfer," "receive," "deliver," or "receive possession of or title to" source material. After § 40.13(a) exempts the receipt, possession, transfer and delivery of source material under the AEA, there is nothing left to license under the AEA and so no further license can lawfully be required.⁷ Put another way, under the AEA disposal as such is not licensed; there is nothing in the AEA itself which provides a special licensing scheme for disposal. Disposal is licensed under the licensing requirements of the AEA for receipt and possession in § 62, and if a person is exempted from licensing under § 62 for receipt and possession, that person is necessarily exempted from disposal licensing as well, unless the regulation provides specifically otherwise.⁸

Since the NRC regulation must be construed to include an exemption for disposal, it necessarily follows that no question of adequacy or compatibility can be raised with regard to a Texas interpretation of its counterpart regulation to the same effect.

5. Safety And Precedent

WCS recognizes that its interpretation of 10 CFR § 40.13 can, if applied generally and in different contexts, create a possible safety problem in that abandonment of certain source materials exempted under § 40.13 can create a safety problem. The proper solution is, of course, rulemaking to amend the regulation. However, there are other ways to avoid establishment of a precedent that could cause future problems in other contexts.

As explained above, NRC can and should confine its oversight to that contemplated by 10 CFR § 40.51 in order to avoid prohibited dual regulation. Texas's action in exempting WCS from disposal licensing under 40 TRCR § 40.3 is subject to very limited NRC oversight (does this present an emergency situation). WCS is willing and able to present NRC with sufficient evidence of the safety of its disposal facility to eliminate any NRC concern on this score. Nothing in the WCS proposal resembles, even remotely, the abandonment of LLW without regulatory controls. Assuming NRC agrees

⁷ 10 CFR § 40.13 does not need to exempt receipt of title from licensing because title to source material is generally licensed under 10 CFR § 40.21.

⁸ 10 CFR § 150.10 is consistent with this reading of § 40.13. NRC does not license commercial waste disposal in Agreement States, but the operative exemption from NRC licensing in 10 CFR § 150.12 only exempts a person who "manufactures, produces, receives, possesses, uses, or transfers" materials. Unless, similar to § 40.13, NRC reads the exemption in § 150.13 for receipt and possession to include disposal, statutorily prohibited dual regulation of commercial waste disposal will result.

with WCS that its proposal does not present any question of undue risk or inadequate protection, let alone an emergency situation, then no further action is required of NRC save the exercise of enforcement discretion not to take action against the Texas Agreement State Program. No NRC interpretation of 10 CFR § 40.13 is required, even though as explained above the interpretation of § 40.13 compelled by the AEA and NRC regulations support the WCS proposal. However, it should be clear that any submission by WCS to NRC is to aid in NRC Agreement State oversight, and not in support of an application under 10 CFR § 20.2002.