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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

August 24, 2009

Annette Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemakings and Adjudications Staff

**Subject: Comments on Proposed Rule, Export and Import of Nuclear Equipment and Materials; Updates and Clarifications – 74 FR 29614**

Dear Ms. Vietti-Cook:

Representatives of Energy*Solutions* have reviewed the subject proposed rule. Our comments are contained in the attachment. In general, we find that the proposed rule provides a useful update to the existing regulations in Part 110. Our comments are intended to provide clarification on several items in the regulations.

We appreciate the opportunity to comment on this rulemaking. Questions regarding these comments may be directed to me at (301) 957-3770 or temagette@energysolutions.com.

Sincerely,

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# Comments on Proposed Rule
# Export and Import of Nuclear Equipment and Materials; Updates and Clarifications

1. Section 110.3 provides a new definition for "radioactive waste." Radioactive waste includes material that is imported or exported for purposes of disposal in a land disposal facility as defined in 10 CFR Part 61, Appendix A to 10 CFR Part 40, or an equivalent facility. It also addresses "recycling," waste treatment, or other waste management processes that generate radioactive material for disposal in a land disposal facility as defined in 10 CFR Part 61, Appendix A to 10 CFR Part 40, or an equivalent facility. Both of these provisions should include other disposals that are approved by NRC and agreement states such as alternative disposals under 10 CFR 20.2002 since these disposals require authorization and are not free release. By adding "an alternative disposal site authorized in accordance with 10 CFR 20.2002 or an equivalent authorized site or facility" it will be clear that this regulation addresses the full scope of non-free release disposal circumstances. Included under this addition would be conditionally disposal at an industrial landfill which is authorized by some agreement states. The revised proposed definition with the new language underlined would read:

> Radioactive waste, for the purposes of this part, means any material that contains or is contaminated with source, byproduct, or special nuclear material that by its possession would require a specific radioactive material license in accordance with this Chapter and is imported or exported for the purposes of disposal in a land disposal facility as defined in 10 CFR Part 61, a disposal area as defined in Appendix A to 10 CFR Part 40, an alternative disposal site authorized in accordance with 10 CFR 20.2002, or an equivalent authorized site or facility; or recycling, waste treatment or other waste management process that generates radioactive material for disposal in a land disposal facility as defined in 10 CFR Part 61, a disposal area as defined in Appendix A to10 CFR Part 40, an alternative disposal site authorized in accordance with 10 CFR 20.2002, or an equivalent authorized site or facility. Radioactive waste does not include radioactive material that is--

2. An exception to the new definition of "radioactive waste" is:

> "(1) Contained in a sealed source, or device containing a sealed source, that is being returned to a manufacturer, distributor or other entity which is authorized to receive and possess the sealed source or the device containing a sealed source."

The Statement of Considerations for the final rule should clarify that the purpose of this exception is to return sources to the country that originally exported the source for purposes of disposal, recycling, waste treatment, or other waste management purposes. The exception would not cover importing sources originating in other countries for disposal in the United States.

3. Another exception to the new definition of "radioactive waste" is:

> "(2) A contaminant on any non-radioactive material used in a nuclear facility (including service tools and protective clothing), if the material is being shipped for recovery and beneficial use of the non-radioactive material in a nuclear facility and not solely for waste management purposes or disposal."

The use of the term "recycling" in the basic definition seems to conflict with "recovery and beneficial use" in the exception. Recycling in our view *means* recovery and beneficial use of the recovered material. It seems that the intent of the definition change is to clarify that in general, while radioactive material imported for the purpose of processing and disposal is waste, radioactive material imported for the purpose of beneficial reuse is *not* waste as long as the reused non-radioactive material is used in a nuclear facility. We propose that this conflict be clarified in two ways:

a) Insert "recycling, i.e.," into Exception 2 prior to "for recovery and beneficial use."
b) Include in the Statement of Considerations for the final rule a statement that Exception 2 is intended to provide an exception to the general rule that would permit recycling under the general license where the recycling provides for beneficial reuse of the non-radioactive material in an environment licensed by the NRC or an Agreement State.

4. The closing phrase "not solely for waste management purposes or disposal" in Exception 2 seems to be unnecessary. If the import is for recovery and use of the non-radioactive material then the import would never be "solely" for waste management purposes or disposal. It may be that the NRC intended the language to ensure a good faith intent for recovery and reuse of the material. We recommend that this be addressed by stating that the purpose be "primarily" for recovery and reuse since all recovery efforts will likely have some waste processing and disposal aspects. The term "primarily" is proposed to make it clear that recovery operation produces a product that is in fact useful and that the recovery operation is in good faith and not a pretense for waste management.

To incorporate both this change and our proposed change from comment 3 above, we propose that Exception 2 be rewritten as follows:

> ...if the material is being shipped <u>primarily</u> for <u>recycling, i.e.,</u> recovery and beneficial use of the non-radioactive material in a nuclear facility.

5. "Launderable protective clothing" and "service tools" are the examples provided for Exception 2 to the definition for radioactive waste. Recognizing that this rulemaking is intended, in part, to clarify what previously was "incidental radioactive material," we recommend that the Statement of Considerations for the final rule expand the discussion of examples in order to avoid the confusion related to the use of the term "incidental radioactive material." The examples also help define what satisfies the standard of "primarily for recovery." We recommend including at a minimum the following examples:

a) Importing contaminated metal for the purpose of recovery of the non-radioactive metal for beneficial reuse as shield blocks or other industrial/construction purposes in licensed facilities domestically and abroad is an import not "solely" for waste management or disposal purposes. This example fits the language in the proposed rule even though the recycling process will produce some waste that will need to be sent to a Part 61 disposal site. This is similar to the laundering of protective clothing, which also has a waste stream to a Part 61 facility.

b) Decontamination and repair of contaminated equipment such as pumps, valves, and motors that after recovery would be beneficial reused in a licensed facility.

c) Incinerating contaminated wood or oil to generate steam in a licensed facility for process heat or electricity.

d) Decontaminating shipping containers used to import radioactive material for the purpose of reusing the shipping containers.

e) Importing contaminated magnesium metal and using the recovered magnesium as a neutralizing agent for disposing of mixed waste in a licensed disposal facility.

In addition to the examples provided above, we recommend that the NRC include any other examples that it has found acceptable in the past. If NRC does not agree that these examples fit Exception 2, the reasons for this should be explained in the Statement of Considerations. We also recommend that the NRC maintain a list on its website of examples it has accepted as meeting Exception 2.

6. The usage of the term "nuclear facility" is unclear. Is it being used as in the Atomic Energy Act as a "production" or "utilization" facility or is it intended to have a broader meaning to be any plant or activity which is licensed for use or possession of radioactive material? We recommend that the term "nuclear facility" be defined as "a plant or activity licensed by either the Commission or an Agreement State for possession or use of radioactive material."

7. We propose that Section 110.27 be amended to add a paragraphs (g) that reads:

(g) Persons importing material primarily for recovery and beneficial use under a general license on the basis that the import meets Exception 2 of the definition of "radioactive waste" must submit Form 7 to the NRC seven days prior to the import. The submitted form need only address the provisions of paragraphs (a) – (f) of 10 CFR 110.32. The Form 7 shall be submitted to the Deputy Director, Office of International Programs.

The purpose of this change is to provide a process that would inform NRC of imports under the general license so that it can list acceptable examples on its website as recommended in comment 7. It would also provide NRC an opportunity to give guidance on imports that it does not conclude meet the standard of "primarily for recovery." This provision is solely a notice provision. It does not establish an obligation for the importer to await any NRC action following submittal of the form to the NRC.

8. Sections 110.32 (f)(6),110.43 (d), and 110.45(b)(4) address consultations with states and compacts. NRC should distinguish Agreement States that should be consulted to determine if the site is licensed for disposal and "host" states under the compact system that are consulted to determine if the disposal is allowed under compact rules. For a non-compact site, such as the Energy*Solutions* Clive site, the concepts of host states and compacts do not apply.[1] For a non-compact site, consultation with the state in which the site is located should only address the authorization for disposal under the state's Agreement State authority.

We recommend that Section 110.32 (f)(6) should be changed to include after the "e.g." in the parenthetical: "authorization by an Agreement State or any agreement ..." In addition to that change, Sections 110.43(d) and 110.45(b)(4) should be changed to add the phrase "if applicable." They would then read as follows: "... and is authorized to possess the waste for management or disposal purposes as confirmed by consultations, if applicable, with the state under its Agreement State authority and, if applicable, the low-level waste compact commissions(s)."

[1] *Energy*Solutions, *LLC v. Nw. Interstate Compact on Low-Level Radioactive Waste Mgmt.*, No. 2:08-CV-352, D. Utah, June 17, 2009.