

Utah Division of Radiation Control
Comments on

March 12, 2012 (1:40 pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

January 20, 2012 Draft NRC
Branch Technical Position on the
Import of Non-U.S. Origin Radioactive Sources

March 9, 2012

Utah's comments on the above referenced document are specific to how the NRC's position in the BTP will affect the EnergySolutions disposal site in Clive, Utah and the ability of the Northwest Interstate Compact (NWIC) to ensure that EnergySolutions complies with relevant Compact Resolutions and Orders. These comments also address how the changes in import policy can cause: 1) adverse effects on State agencies that regulate low-level radioactive waste disposal in the U.S., and 2) a potential transfer of responsibility for domestic and international to private enterprise.

1. Change of NRC Support for NWIC Policy – current NRC import / export rulemaking¹ is consistent with the May 12, 2008 NWIC's Resolution Clarifying the Third Amended Resolution and Order², which requires that import of both foreign generated waste and waste by-products from foreign radioactive material (imported for processing in the United States), receive prior Compact approval before access to the EnergySolutions Clive, Utah facility. See for example:

- § 110.2, Radioactive Waste Definition, Exemption 1 – which allows sealed source of U.S. origin to be returned without designation as “radioactive waste”. Conversely, sources not manufactured in the U.S. are not exempted from the waste definition,
- § 110.32(a) through (f) – which requires the import applicant to identify the country of origin, and describe the end use of the device.
- § 110.43(d) – which requires the NRC reviewer to confirm with the host Agreement State and Compact that the proposed radioactive waste is acceptable for disposal.

As a result, an applicant for a “radioactive waste” import license is currently required to show, and the NRC staff confirm that the NW Compact has authorized access of

¹ July 28, 2010 Final NRC Rule for import /export requirements in 10 CFR 110, see July 28, 2010 Federal Register, Vol. 75, No. 144, pp. 44072 – 44093.

² See NWIC Resolution Clarifying the Third Amended Resolution and Order, which states: “The Third Amended Resolution and Order does not serve as an arrangement for disposal of low-level radioactive wastes generated in foreign countries - including foreign, generated waste that is characterized as domestic generated waste by another compact or unaffiliated state, and such an arrangement, as required by Articles IV and V of the Compact statutes, would need to be adopted by the Compact Committee prior to foreign generated low-level radioactive wastes being provided access to the region for disposal at EnergySolutions facility in Clive, Utah.”

these materials to the Clive, Utah facility. In contrast, the proposed BTP would allow an importer to unilaterally declare a foreign device as “domestic”, and under Exemption No. 1, avoid designation as “radioactive waste”. As proposed, the January, 2012 draft BTP appears to cause other changes, including:

- A. Fail to require the U.S. importer to apply for an export license for non-U.S. origin disused sealed sources, when the final disposal pathway was uncertain. Compare the NRC commitment made in the July 28, 2010 Federal Register Notice (FRN) ³;
- B. Allow U.S. importers to unilaterally declare sealed sources of unknown origin to be declared "domestic". All the NRC guidance would require is that the U.S. importer be unable to determine a device's origin under the following "good faith" standard, whereby the U.S. importer need only: a) inform the foreign customer of U.S. import requirements, b) examine a photograph of the proposed sealed source, and c) examine "other relevant information" related to the disused source's origin". As a result, NRC potentially elevates the role of private enterprise by allowing modification of the device's pedigree, over that of the LLRW disposal State regulator or the host Compact – who in turn have no role and receive no notice of this substantive change of origin attribution;
- C. Allow a change to existing regulation through guidance without addressing or balancing potential conflicts of interest U.S. importers may have who sell their product abroad;
- D. Provide a possibility for U.S. device manufacturers, suppliers, and distributors to collaborate with foreign source owners to grant them disposal access at U.S. disposal sites; without prior approval of the LLRW disposal State regulator or host Compact ⁴. Upon unilateral declaration that the device is “domestic”, the U.S. importer is free to either recycle or dispose of the source at will, potentially without prior approval from a host Agreement State or Compact.

As a result, it appears the January, 2012 NRC draft BTP facilitates domestic sales of new devices to foreign customers; and at the same time provides foreign nations a potential "loophole" for disposal access of their disused sources in the U.S.

- 2. Need to Increase Surety Requirements for U.S. Importers – Utah agrees with and endorses the March 5, 2012 comments by NWIC ⁵, that the proposed BTP could result in an increase of orphaned waste in the U.S., where foreign devices are imported and later discovered that all or some cannot be recycled. In order to guarantee that the disposal burden for any orphaned foreign device does not fall on federal agencies, State government, or taxpayers, the NRC should consider increasing the importer's surety and bond requirements.

³ See July 28, 2010, FRN, Vol. 75, No. 144, p. 44079.

⁴ To gain U.S. disposal access, the foreign user need only obscure the source / device , or provide an illegible photograph, and/or submit incomplete written information; in combination with cooperation (negligence) of a U.S. importer. Under these circumstances, all parties avoid application of the 6th exemption to the "radioactive waste" definition, that mandates the device be re-cycled.

⁵ See March 5, 2012 letter from Mike Garner, Executive Director NWIC to Secretary, U.S. NRC on Docket No. NRC-2012-0008, 3 pp.

3. Need to Determine Location of Practical Use – Utah agrees with the NWIC comments that the NRC import review staff must determine the location of the “practical use” of the device to be imported.
4. Determination of “No Further Use” – NRC must also recognize the implications of when and who determines the device to be “no longer of use”. Under Utah Generator Site Access regulations⁶, a “waste generator” has the same definition as Appendix G of 10 CFR 20.1001 to 20.2402 (2006), which is:

*“... an entity, operating under a Commission or Agreement State license, who (1) possesses any material or component that contains radioactivity or is radioactively contaminated **for which the licensee foresees no further use**, and (2) transfers this material or component to a licensed land disposal facility or to a licensed waste collector or processor for handling or treatment prior to disposal. ...”* (emphasis added).

This definition has no restrictions on when the decision is made. Therefore, an imported device becomes “radioactive waste” immediately after an importer determines it to be of “no further use”, regardless of whether this decision is made before import into the U.S. (e.g., after review of a photograph or other documents), or afterwards. Therefore, imported foreign-made devices that are not recycled (for any reason) may be foreign waste. Under the requirements of the NWIC, when such U.S. importers are not located in a member State, prior approval of both Utah and the NWIC is required before land disposal at the EnergySolutions Clive facility.

5. Other Means for Balance of Public Health / Safety and National Security – the January, 2012 draft BTP is clear on the point that the NRC has no jurisdiction over U.S. companies that import disused sealed sources under contract with the DOE⁷. Hence, the proposed BTP would have no regulatory or legal reach on these companies. If the NRC desires to truly balance public health / safety with international policy, it should encourage DOE to expand its contractor pool to include all U.S. sealed manufacturers, distributors, and suppliers that might receive these disused foreign sources. So doing, would allow these companies to import the disused source / device and transfer it immediately to direct federal oversight and control. To do otherwise creates the possibility for private U.S. companies to misrepresent the true origin of sources that are not recycled (see Comment 7, below).

Although the following items fall outside the intended scope of the draft BTP, we offer them as important points for consideration in terms of the potential for enhanced national and international security.

6. Indirect Transfer of Responsibility for Homeland Protection to Private Companies – by creating a possibility for U.S. importers to unilaterally declare foreign devices as “domestic”, and then transfer the foreign sources to U.S. disposal companies; the NRC is essentially transferring the responsibility for homeland security to private

⁶ See Utah Administrative Code, R313-26-2, definition for Waste Waste Generator.

⁷ See January, 20, 2012 FRN, Vol. 77, No. 13, p. 2926.

U.S. enterprise. This activity is the responsibility of the federal government, and should be largely executed by the DOE and those under its control. DOE, rather than private companies, is better suited to provide the level of security, custody, and control needed to fulfill this protection role and prevent terrorism.

7. DOE Control Can Lead to Improved International Responsibility – we recognize the importance of the DOE Global Threat Reduction Program, and its efforts to improve homeland security by acquiring and controlling orphaned or disused sources of radioactive material, both domestically and abroad. However, NRC’s proposal does not foster that goal because NRC proposes to provide a non-regulated avenue for importation of foreign sealed sources into the United States rather than have DOE execute this responsibility. Further, by exercising central control on its staff (and contractors), DOE is able to be informed about the scope and magnitude of the foreign disused source problem. With this information, DOE can work with other U.S. federal agencies to encourage foreign nations that manufacture, distribute, or supply this modern technology, to be responsible for its ultimate fate and disposal. By allowing U.S. private enterprise to import and dispose of these materials, there is a potential that DOE could be left unaware of a growing international problem.

Rulemaking Comments

From: Rusty Lundberg [rlundberg@utah.gov]
Sent: Friday, March 09, 2012 6:39 PM
To: Tobin, Jennifer
Subject: RE: Comments Re Draft BTP on US-origin Sources
Attachments: 3-9-12 Utah DRC Final Comments.DOCX

Jenny,
Please find attached comments from our agency regarding the draft BTP for non-US origin sealed sources.

Thank you very much for your consideration in allowing us to submit these to you.

Rusty

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>>> "Tobin, Jennifer" <Jennifer.Tobin@nrc.gov> 3/8/2012 11:39 AM >>>

Rusty,

Am I to still expect comments from your office?

-Jenny

Jenny (Tobin) Wollenweber
Export Licensing Officer
Office of International Programs
office: 301-415-2328

From: Rusty Lundberg [<mailto:rlundberg@utah.gov>]
Sent: Monday, March 05, 2012 2:11 PM
To: Tobin, Jennifer
Subject: Comments Re Draft BTP on US-origin Sources

Jenny,

This morning I spoke with Mike Garner (WA Dept. of Ecology & Northwest Compact Exec. Dir.) about completing our comments to the draft BTP on US-origin Radioactive Sources. The person on our staff who has been on working on Utah's comments is unexpectedly ill today.

Would it be possible to send in our comments by Wednesday (3/7) at the latest?

- Your consideration of this request would be appreciated.

Thank you,
Rusty

Rulemaking Comments

From: Tobin, Jennifer
Sent: Monday, March 12, 2012 1:33 PM
To: Rulemaking Comments
Subject:
Attachments: RE: Comments Re Draft BTP on US-origin Sources

Jenny (Tobin) Wollenweber
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