

# H.R. 515, THE RADIOACTIVE IMPORT DETERRENCE ACT

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## HEARING BEFORE THE SUBCOMMITTEE ON ENERGY AND ENVIRONMENT OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS FIRST SESSION

OCTOBER 16, 2009

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**H.R. 515, THE RADIOACTIVE IMPORT  
DETERRENCE ACT  
FRIDAY, OCTOBER 16, 2009**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ENERGY AND ENVIRONMENT,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 9:35 a.m., in Room 2123, Rayburn House Office Building, Hon. Edward J. Markey [chairman of the subcommittee] presiding.

Present: Representatives Markey, Matheson, and Upton.

Also Present: Representative Gordon.

Staff Present: Jeff Baran, Counsel; Melissa Bez, Professional Staff Member; Caitlin Haberman, Special Assistant; David Kohn, Press Secretary; Earley Green, Chief Clerk; Matt Eisenberg, Staff Assistant; Mary Neumayr, Minority Counsel; Aaron Cutler, Minority Counsel; Andrea Spring, Minority Professional Staff Member; and Sam Costello, Minority Legislative Analyst.

**OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS**

Mr. MARKEY. The Subcommittee on Energy and the Environment will come to order.

There are many Italian imports that I would welcome to U.S. soil: Lasagna, great. Ferrari, absolutely. Prosciutto, delicious. And let's not forget Prada, Versace, and Giorgio Armani. But Italian nuclear waste makes me say, *Mama mia*.

H.R. 515, the Radioactive Import Deterrence Act, was drafted in response to the proposed importation of 20,000 tons of Italian low-level radioactive waste into the United States to be processed in Tennessee and disposed of in Utah.

[The discussion draft follows:]



I

111TH CONGRESS  
1ST SESSION

# H. R. 515

To prohibit the importation of certain low-level radioactive waste into the  
United States.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 2009

Mr. GORDON of Tennessee (for himself, Mr. TERRY, Mr. MATHIESON, Mrs. CAPPS, Mr. COHEN, Mr. CHAFFETZ, Mr. CONYERS, Mr. CARSON of Indiana, Mr. CHANDLER, Mr. DOYLE, Ms. ESHOO, Mr. FILNER, Mr. HILL, Mr. BARROW, Mr. CARNAHAN, Mr. MELANCON, Ms. LEE of California, Ms. GIFFORDS, Ms. WOOLSEY, Ms. HIRONO, Mr. MOORE of Kansas, Mr. HINCHY, Mr. WHITFIELD, Mr. WEXLER, Mr. KUCINICH, Mr. INSLEE, Mr. PITTS, Mr. FORTENBERRY, Mrs. MYRICK, Mr. LIPINSKI, and Mr. BUTTERFIELD) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To prohibit the importation of certain low-level radioactive  
waste into the United States.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Radioactive Import  
5 Deterrence Act”.



1 **SEC. 2. PROHIBITION OF IMPORTATION.**

2 (a) AMENDMENT.—Chapter 8 of the Atomic Energy  
3 Act of 1954 (42 U.S.C. 2111 et seq.) is amended by add-  
4 ing at the end the following new section:

5 “SEC. 85. IMPORTATION OF LOW-LEVEL RADIO-  
6 ACTIVE WASTE.

7 “a. Except as provided in subsection b. or c., the  
8 Commission shall not issue a license authorizing the im-  
9 portation into the United States of—

10 “(1) low-level radioactive waste (as defined in  
11 section 2 of the Low-Level Radioactive Waste Policy  
12 Act (42 U.S.C. 2021b)); or

13 “(2) specific radioactive waste streams exempt-  
14 ed from regulation by the Commission under section  
15 10 of the Low-Level Radioactive Waste Policy Act  
16 (42 U.S.C. 2021j).

17 “b. Subsection a. shall not apply to—

18 “(1) low-level radioactive waste being returned  
19 to a United States Government or military facility  
20 which is authorized to possess the material; or

21 “(2) low-level radioactive waste resulting from  
22 the use in a foreign country of nuclear material ob-  
23 tained by the foreign user from an entity in the  
24 United States that is being returned to the United  
25 States for management and disposal.

1       “c. The President may waive the prohibition under  
2 this section and authorize the grant of a specific license  
3 to import materials prohibited under subsection a., under  
4 the rules of the Commission, only after a finding that such  
5 importation would meet an important national or inter-  
6 national policy goal, such as the use of waste for research  
7 purposes. Such a waiver must specify the policy goal to  
8 be achieved, how it is to be achieved, and the amount of  
9 material to be imported.

10       “d. A license not permitted under this section that  
11 was issued before the date of enactment of this section  
12 may continue in effect according to its terms, but may  
13 not be extended or amended with respect to the amount  
14 of material permitted to be imported.”.

15       (b) TABLE OF CONTENTS AMENDMENT.—The table  
16 of contents for the Atomic Energy Act of 1954 is amended  
17 by inserting at the end of the items relating to chapter  
18 8 the following new item:

“Sec. 85. Importation of low-level radioactive waste.”.

○

Mr. MARKEY. Introduced by Congressmen Gordon, Terry, and Matheson, along with many other members of the Energy and Commerce Committee, this bipartisan bill would prevent the importation of low-level radioactive waste into this country.

The State of Utah, along with the Northwest Compact of which Utah is a member, said, no, we won't take the Italian waste. Today, a case is making its way through the courts to determine whether the States and the compacts have the right to say "no" to other countries' radioactive waste.

I have worked on low-level radioactive waste issues for many years. I was on the committee in 1980 when we established the compact system to deal with the issue. And in 1985, when I chaired the Subcommittee on Energy, long ago and far away, we passed the amendments to the Act to both consent to a number of compacts and to ensure that States without disposal sites would be able to access those critical facilities.

Let me state very clearly that when we established the compact system we did so to ensure that low-level waste in this country would be able to be safely disposed of. In order to encourage new disposal facilities to be established, we allowed the States to enter into compacts to dispose of their waste regionally, and we further granted them authority to exclude waste from places outside of their respective compacts. The purpose of the compact system was to empower the States and not the compacts. But today some argue that the compacts do not have the authority to say "no" to waste from other countries.

To me, from a plain-language reading of the statute and the legislative history, this position is obviously incorrect. We did not intend for foreign waste to be allowed special privileges to be disposed of within the compacts even against the wishes of the compacts and the States.

The compact system, the result of a painstaking compromise, has provided access for critical low-level radioactive waste disposal for almost three decades. Today, I am very concerned that the compact system itself is under assault. I disagree with those who argue that this bill is antinuclear. In fact, this bill would actually preserve waste disposal capacity for domestic use.

Careful stewardship of our U.S. nuclear waste disposal capacity is more important than ever. In this context, it is important to examine the current state of low-level waste disposal in other countries. Do other countries allow importation and disposal of waste from, say, the United States? The answer, no. Not Germany, not Canada, not Switzerland, and, no, not Italy either. Not a one. No other nuclear waste-generating country allows low-level waste importation for disposal. In fact, many countries with nuclear programs do not even have disposal facilities for their own low-level waste. That includes Italy.

If the U.S. remains the one country that allows for the disposal of foreign waste, then nothing stops those other countries from using us as their nuclear dumping grounds. If we do not protect the low-level waste compact system, what were supposed to be the disposal sites for U.S. waste could be turned into global nuclear waste dumps. We could end up in a position where many States are unable or unwilling to participate in these compacts at all and compa-

nies could have nowhere to go to dispose of their radioactive waste. That would not be a good development for the nuclear industry or for the Nation.

[The prepared statement of Mr. Markey follows:]

Chairman Edward J. Markey  
Subcommittee on Energy and the Environment  
Opening Statement  
“H.R. 515, The Radioactive Import Deterrence Act”  
October 16, 2009

The Subcommittee on Energy and the Environment will come to order.

There are many Italian imports I would welcome to US soil.

Lasagna? Great!

Ferrari? Absolutely!

Prosciutto? Delicious!

And let's not forget Prada, Versace, and Giorgio Armani.

But Italian nuclear waste makes me say, “Mamma mia!!”

H.R. 515, the Radioactive Import Deterrence Act, was drafted in response to the proposed importation of 20,000 tons of Italian low-level radioactive waste into the United States, to be processed in Tennessee and disposed of in Utah. Introduced by Congressmen Gordon, Terry, and Matheson, along with many other members from the Energy and Commerce Committee, this bipartisan bill would prevent the importation of low-level radioactive waste into this country.

The State of Utah, along with the Northwest Compact, of which Utah is a member, said “no, we won't take the Italian waste.” Today, a case is making its way through the courts to determine whether the States and the Compacts have the right to say “no” to other countries' radioactive waste.

I have worked on low-level radioactive waste issues for many years. I was on the Committee in 1980, when we established the

Compact System to deal with the issue. And in 1985, when I chaired the Subcommittee on Energy Conservation and Power, we passed the Amendments to the Act to both consent to a number of Compacts and to ensure that states without disposal sites would be able to access these critical facilities.

Let me state very clearly that when we established the Compact System, we did so to ensure that low-level waste in this country would be able to be safely disposed of. In order to encourage new disposal facilities to be established, we allowed the States to enter into Compacts to dispose of their waste regionally, and we further granted them authority to exclude waste from places outside of their respective compacts.

The purpose of the Compact System was to empower the States and the Compacts. But today some argue that the Compacts do NOT have the authority to say “no” to waste from other countries. To me, from a plain-language reading of the statute and the legislative history, this position is obviously incorrect. We did NOT intend for foreign waste to be allowed special privileges to be disposed of within the Compacts even against the wishes of the Compacts and the States.

The Compact System, the result of a painstaking compromise, has provided access for critical low-level radioactive waste disposal for almost three decades. Today, I am very concerned that the Compact System itself is under assault.

I disagree with those who argue that this bill is anti-nuclear. In fact, this bill would actually PRESERVE waste disposal capacity for domestic use. Careful stewardship of our US nuclear waste disposal capacity is *more important than ever*.

In this context, it is important to examine the current state of low level waste disposal in other countries. Do other countries allow importation and disposal of waste from, say, the United States?

The answer: “No.” Not Germany, not Canada, not Switzerland, and no – not Italy either. Not a one. No other nuclear waste-generating country allows low-level waste importation for disposal.

In fact, many countries with nuclear programs do not even have disposal facilities *for their own low level waste*. That includes Italy. If the US remains the one country that allows for the disposal of foreign waste, then nothing stops these other countries from using us as their nuclear dumping ground.

If we do not protect the Low-Level Waste Compact System, what were supposed to be disposal sites for U.S. waste could be turned into global nuclear waste dumps. We could end up in a position where many states are unable or unwilling to participate in these compacts at all, and companies could have nowhere to go to dispose of their radioactive waste. That would not be a good development for the nuclear industry, or for the nation.

I would like to now recognize my good friend, the Ranking Member.

Mr. MARKEY. Now I would like to turn and recognize my good friend, the gentleman from Michigan, Mr. Upton, for an opening statement.

**OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. UPTON. Well, thank you, Mr. Chairman.

Before I begin, I would like to put into the record two statements, the nuclear agreements that were signed just this month between Department of Energy Secretary Chu and the Italian Minister for Economic Development.

Mr. MARKEY. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. UPTON. It seems to me that any movement on the bill that we are looking at today would violate the spirit of those agreements, and I would like to submit that court ruling from the case EnergySolutions for Northwest Interstate Compact, and I thank you for allowing that to be entered into the record.

[The information appears at the conclusion of the hearing.]

Mr. UPTON. As a strong supporter of nuclear power, I hope today's hearing on importing low-level nuclear waste will lead to discussing the larger issues of long-term storage of spent nuclear fuel or nuclear fuel recycling as a whole. The issue of waste disposal and the new nuclear power plants are, in fact, directly related.

I see the bill that we are looking at today is anti nuclear power. This bill some would view as a political NIMBY issue.

Direct from the NRC's written testimony: "The regulatory authorities in both Tennessee and Utah have informed the NRC that the material can safely go to EnergySolutions' facilities in their respective States. The Southeast Compact Commission expressed no objection to this application. The executive branch expressed no objection to the application and provided the NRC with the Italian Government's views that the application is consistent with the joint convention obligations."

Also from the NRC: "There appears to be ample available disposal capacity for the foreseeable future, particularly at the EnergySolutions facility in Utah."

So why are we debating the bill? Well, a court has made a ruling, and the Appeals Court is reviewing the case. EnergySolutions has voluntarily agreed to limit the disposal of foreign-generated waste to no more than 5 percent of its licensed capacity or 10 years, whichever comes first. This is just 4.3 acres on a 640-acre site. And EnergySolutions has offered to make this a legally binding condition of its license.

Congress should not be interfering here. We should, instead, have hearings on building new nuclear power plants, recycling spent fuel, and what happens now that the administration has scrapped Yucca Mountain.

While I have great respect for my friends on the other side who introduced this legislation, I am concerned that it will be used by the opponents of nuclear power to delay new plants from coming online, causing further roadblocks to the recycling and safe disposal of spent fuel and low-level waste.



The bill is a continuation of the attacks on the nuclear industry. The first attack was on the disposal of spent fuel at Yucca. This bill is attacking the safe disposal of a small amount of low-level waste and is being used by those who would like to stop nuclear energy to attack the disposal of domestic-generated depleted uranium, or DU.

NRC has stated that the disposal of DU is safe. If we can't dispose of DU, then we can't enrich uranium for fuel. If we don't have the fuel, then we are unable to power the source of 70 percent of our Nation's zero-emission electricity generation.

Sponsors of the bill may not believe that it is antinuclear, but the antinuclear groups attempt to stop nuclear energy by attacking the waste, not the generation. Despite what the proponents of the legislation may claim, this isn't just about importing waste from Italy, what happens to be identical to the domestic waste safely being processed and disposed of today. This is the camel's nose under the tent, and that is shutting down all of our domestic processing and disposal capabilities and eventually mothballing all of our zero-emissions nuclear power plants.

Low-level radioactive material from nearly 104 domestic nuclear sites is sent to the Bear Creek facility for processing and on to the Clive facility in Utah for its safe disposal. We cannot compete on a global scale if we shut down our domestic facilities.

Members of this very subcommittee represent 18 different States that send waste to be processed and disposed of by EnergySolutions at their facilities. I have two nuclear power plants in my district, literally miles from my doorstep, that send their low-level nuclear waste across State lines for processing and disposal. These services are essential to the success of nuclear power.

Now I know that there are some concerns about importing Italian waste to the Clive, Utah, site and how it will impact the compact system. I don't believe that it will. The compact system remains unaffected. The court has already unequivocally ruled on the issue, and I expect that the Appeals Court will affirm the ruling. We should let the process move forward.

The judge's ruling in *EnergySolutions v. Northwest* stated that the Clive facility is not a regional disposal facility and not part of the Northwest Compact. Two quotes are important. Under the 1980 Act, Northwest would have no authority to exclude out-of-region waste from the Clive facility; and the second quote, the Clive facility is not a regional disposal facility as defined by the '85 Act.

It is imperative that clean, safe nuclear power is at the forefront as we seek to solidify our Nation's energy supply and foster a new era of energy independence and reduced emissions. As applications for nearly 30 new nuclear plants are expected over the next couple of years, we are on our way to fulfilling our commitment to safe, clean nuclear power. Not only will our environment be better off for it, our national security will also be bolstered. Millions of households are powered by clean, zero-emission nuclear power, and our Nation's economy will be powered by nuclear as well. This is the right course, and we will be better for it.

I yield back the balance of my time.

Mr. MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Utah, Mr. Matheson.

**OPENING STATEMENT OF HON. JIM MATHESON, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH**

Mr. MATHESON. Well, thank you, Chairman Markey, for holding this hearing.

As the committee knows, I have been working on this bipartisan legislation with my friends, Bart Gordon of Tennessee and Lee Terry of Nebraska, for the past 2 years. The subcommittee held a similar legislative hearing last year, and it was clear to those of us who attended that hearing that the policy for low-level radioactive waste in this country, as created by the Federal Government in the legislation in 1980 and 1985, has some gaps, and there are some questions, and Congress ought to relook at this policy, and that is why we are here today.

I would say that it is hard to see why the U.S. would ever want to import radioactive waste from other countries. Simply put, we have very few locations in this country where this waste can go.

Given the fact—and I agree with Mr. Upton—that we are facing a future with an additional amount of nuclear power in this country—and I support the creation of new nuclear power plants—it seems to me as we focus on carbon-free energy sources and nuclear power seems to grow in the U.S. over the next few years that we would want to preserve the U.S. capacity for low-level radioactive waste.

Some have said this is an antinuclear bill, and nothing could be further from the truth, that this is a pro-domestic nuclear power bill. I challenge anyone to show me in this legislation what is going to inhibit the development of domestic nuclear power. So I want to get that on the record right away in this opening statement, because that just isn't the case.

Now, as we said, the compact system, which oversees the low-level radioactive waste, Utah's part of what is called the Northwest Compact, the compact says that while the Clive facility is authorized to take waste from outside compact States, the compact also said it had never considered or viewed the issue of adopting an arrangement that would provide low-level radioactive waste generated in foreign countries access to the region for disposal at the EnergySolutions facility in Clive, Utah.

As illustrated in the testimony of Mr. Slosky from the Rocky Mountain Compact, when EnergySolutions applied to the NRC for an import license for waste from Canada—because we have had some waste come into this country, some small amounts in the past—it was listed as only needing to be processed at the Bear Creek facility. In fact, the waste was processed, then it was redesignated as U.S. waste, and it was openly stored in Utah without the knowledge of the Northwest Compact or without the knowledge of the State of Utah.

So we can talk about some foreign waste that has come in and stayed here. The compact and the State didn't even know it happened, and those were all pretty small amounts. Now we are talking about a lot and greater volume of radioactive waste.

You will hear some discussion in the hearing today about do we have enough capacity in this country. You will hear reference to a GAO study from 2004. We talked about this in the hearing last

year. They took one data point and projected it out from there. It happened to be a low year.

You know, when I was a first-year MBA student, a professor tricked all of us with a case where he had us take some data, and we projected it out. Then he pointed out the other data, and we all learned a good lesson. The GAO made that same first-year MBA mistake. I hope we don't when we look at the amount of capacity that we have got.

Again, I don't see a lot of other States lining up to create new sites to take this waste. In last year's hearing, EnergySolutions just randomly came to the agreement to self-limit foreign waste to a storage capacity of 5 percent. But, at the same time, in the testimony from the company today, they are suggesting they want to increase the license capacity of the site when just 2 years ago they voluntarily said to our Governor, we won't apply for an application to increase our site. So these voluntary commitments may not have a lot of meaning.

Mr. Chairman, I know my time has expired. I have a written statement that I would like to submit for the record. I do thank you for the hearing, and I look forward to the questions.

[The prepared statement of Mr. Matheson follows:]

**House Energy and Commerce Committee  
Subcommittee on Energy and Environment Hearing  
H.R. 515, the Radiation Importation Deterrence Act  
Rep. Jim Matheson  
Talking Points  
October 16, 2009**

- Thank you, Chairman Markey, for holding this legislative hearing on H.R. 515. As the committee knows, I have been working on this bipartisan legislation with my friends Bart Gordon of Tennessee and Lee Terry of Nebraska for the past two years.
- Last year, this subcommittee held a similar legislative hearing. It was clear to those of us who attended that there are some serious policy gaps with respect to nuclear waste storage in the U.S. I hope today's hearing will affirm the need to pass this bill as soon as possible.
- In 1980, Congress passed the Low-Level Radioactive Waste Policy Act in order find adequate disposal space for low-level radioactive waste generated in the U.S. Low level nuclear waste is a byproduct of nuclear power production and includes debris and contaminated soils from decommissioned power plants.
- The 1980 law and the 1985 Amendment allowed the States to form interstate compacts to manage low level nuclear waste disposal. States can determine and control access to the disposal sites via a regional compact system. The compact also has the authority to limit access to a disposal site to membership in a compact or they could choose to grant wider access, as needed.
- The question before us concerns a problem that wasn't anticipated in the 1980s: Does the current system provide the federal government or the States the authority to oversee the importation of foreign-generated nuclear waste?

- It's hard to see why the U.S. would ever want to import radioactive waste from other countries. Simply put, we have a lot of our own commercial waste to dispose of and given the likelihood that the U.S. will focus on carbon-free energy sources in the future, nuclear power seems to grow in the U.S. over the next 50 years.
- Some have said this is an anti-nuclear bill. Nothing could be farther from the truth. This is a pro-nuclear power bill.
- The Nuclear Regulatory Commission has before it a pending application to allow 20,000 tons of low-level nuclear waste from Italy to be imported into this country, processed in Tennessee, and disposed of in Utah. From press reports, we have also learned that the company that owns the disposal site in Utah has also entered into agreements with the UK and Brazil to import waste, process it and store it in the U.S.
- We have two challenges to deal with: limited disposal capacity for low-level waste and an unclear regulatory process for overseeing the disposal of international waste.
- First of all, there are only three places in the U.S. where low-level waste can be disposed of—Richland, WA; Clive, UT; and Barnwell, SC. Although there have been efforts to site more storage locations, the process is complicated and requires a long lead time and a willing local community.
- On the regulatory front, the NRC says that it does not have the authority to prohibit the importation of waste into the United States, even though the State of Utah and the Northwest Compact are strongly opposed to bringing more waste to the Clive facility.
- The NRC says that rejecting the waste is up to the State—on health and safety grounds only—or to the Northwest Compact. At the same time, the State of Utah says that although it does not want the waste to come in, it is also powerless to actually stop this effort, even as Utahns stand united against the

proposal. 72 % of Utahns oppose allowing EnergySolutions to accept low level waste, according to a poll released in the *Deseret News* in March 2009.

- And then we have the Northwest Compact—which oversees waste for Utah, Alaska, Hawaii, Washington, Oregon, Idaho, and Wyoming. The Compact says that while the Clive facility is authorized to take waste from outside the Compact states, the Compact had “*never* considered or reviewed the issue of adopting an arrangement that would provide low-level radioactive wastes generated in foreign countries access to the region for disposal at the EnergySolutions facility in Clive, Utah.”
- Now, we are going to hear that small amounts of international waste have already come to this country.
- As is illustrated in the testimony of Leonard Slosky from the Rocky Mountain Compact, when EnergySolutions applied to the NRC for an import license for waste from Canada it was listed as only needing to be processed at the Bear Creek facility. In fact, the waste was processed, redesignated as U.S. waste, and was ultimately stored in Utah without the knowledge of the Northwest Compact or the State of Utah.
- Another important issue is disposal capacity. Last year, there was some discussion about a 2004 GAO study of the capacity of the Clive site which EnergySolutions believes is a blank check to import as much waste as it likes. GAO admitted that its 30-year projection was based on an unusually low intake year and it only covered domestic waste storage. Furthermore, the agency admitted that there is currently no comprehensive study of the low level disposal needs of the U.S., let alone our future needs.
- In last year’s hearing, EnergySolutions randomly agreed to self-limit foreign waste storage to 5 percent of capacity. At the same time, the company has taken steps to increase the size of the facility and it is trying to secure large quantities of depleted

uranium, which would be stored in the same cells as low level waste.

- This is not a small issue. Remember, there are only three places in the U.S. where low-level waste can be disposed of. Two of the sites I mentioned: Richland and Barnwell are compact sites and out of compact waste can't be stored there.
- This year, we're faced with an even more dangerous problem. A recent District Court ruling said that the Clive facility can't be regulated by the Northwest Compact because it isn't a regional compact disposal site.
- This issue is being appealed by the Northwest Compact, the State of Utah, and others who are concerned about the implications of this decision on not just foreign waste, but also on the entire compact system.
- If the compacts do not have the authority to regulate all the sites within their member states, then any private facility can simply operate without any state regulation, which would defeat the entire meaning of federal low level radioactive waste policy.
- The record clearly indicates that the establishment of the compact system was to find a way to dispose of domestic LLRW. However, along the way, foreign waste was also allowed into the country in very small amounts, for specific purposes.
- We're here now because the lack of clear policy has provided companies with an opportunity to import huge quantities of low level waste and it's just not clear what we're supposed to do with the rest of the domestic waste the U.S. needs to be able to store.
- I hope my colleagues will support H.R. 515. Thank you, Mr. Chairman.

Mr. MARKEY. We thank the gentleman very much. His time has expired, and perhaps he could give the name of that professor so that we could send him over to the Congressional Budget Office so that they could have his insight as to how long-term projections are made.

By unanimous consent, I would request that the gentleman from Tennessee, who is cosponsor of the legislation with Mr. Matheson, Mr. Gordon, be allowed to participate in this hearing and to be recognized for making an opening statement.

Without objection, so ordered.

The gentleman is recognized for an opening statement.

**OPENING STATEMENT OF HON. BART GORDON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE**

Mr. GORDON. Thank you, Mr. Chairman, for that request and also thank you for having this hearing today.

When the Nuclear Power Waste Policy Act and the low-level waste policy amendments were passed in the 1980s, the United States was facing a critical problem: Where were we going to put low-level radioactive waste generated by our own nuclear power plants?

We established a compact system under which the States in each compact would be responsible for establishing disposal sites and taking care of their own waste. As the legislative history clearly shows, a witness from the NRC testified in a hearing before this subcommittee last year, no one anticipated that other countries would try to dump their radioactive waste in the United States.

The NRC stated when it drafted regulations allowing the importation of nuclear waste that it did not anticipate—and I quote—appreciable U.S. import or export traffic in low-level radioactive waste. And that was true for more than a decade until EnergySolutions applied for the NRC license in 2007 to import 20,000 tons of low-level radioactive waste from Italy for treatment in Tennessee and disposal at the site in Utah. Italy does not have a disposal site, nor has it been successful in obtaining public approval for a future site.

Italy is not the only country that doesn't have a waste site or enough capacity for its waste. Britain is running out of room and looking for places to put its waste. Germany, Canada, Belgium, Switzerland, Mexico, and Denmark don't have sites either.

If I were a public official in Italy or Britain, I would jump at the chance to send my low-level waste to the United States and be rid of the responsibility. But no one can claim that this is in the best interest of the United States to take on decades of responsibility for another country's nuclear waste and also taking away the incentive for those countries to do the responsible thing by providing storage for their own waste. So we should ask why the United States needs Italy's waste, which has been safely stored on site for over 20 years and can safely be stored for another 20 years or more or the waste of any other country when EnergySolutions plans overseas disposal sites.

As it now stands, the NRC is powerless to prevent foreign import of waste even as space for our domestic waste dwindles. It is clear that only a legislative prohibition will stop the wholesale importa-



tion of foreign nuclear waste into the United States. The RID Act provides the prohibition, while allowing the President to make exceptions if it is in the national interest.

The United States is the only country in the world that allows imports and disposals of low-level radioactive waste from other countries. The fact is, we have limited space for this kind of waste; and it should be reserved for domestic industries that generate it—medical facilities, universities, research labs, and utilities.

There are 36 States with no other alternative but to ship their waste to Utah. Michigan, Texas, and 34 other States have no other place. That is what the RID Act will do.

By banning the importation of radioactive waste for disposal, we also send the world the right message. If you are going to produce low-level radioactive waste, you are going to have to build the necessary facility to dispose of it.

And, finally, with all due respect to my friend from Michigan, this is not an anti-nuclear waste bill by any means. It is a pro-domestic nuclear industry. Michigan, as you pointed out, those two facilities near you, if the facility in Utah runs out of capacity, there will be no place for them to send their waste.

Thank you, Mr. Chairman.

Mr. MARKEY. I thank the gentleman.

The gentleman's time has expired.

We will now turn to our witnesses.

**STATEMENTS OF MARGARET M. DOANE, DIRECTOR, OFFICE OF INTERNATIONAL PROGRAMS, U.S. NUCLEAR REGULATORY COMMISSION; LEONARD C. SLOSKY, EXECUTIVE DIRECTOR, ROCKY MOUNTAIN LOW-LEVEL WASTE BOARD; AND VAL CHRISTENSEN, PRESIDENT, ENERGYSOLUTIONS**

Mr. MARKEY. Our first witness is Margaret Doane, the Director of the Office of International Programs at the Nuclear Regulatory Commission. This office provides overall coordination for the NRC's international activities.

Ms. Doane, whenever you are ready, please begin.

**STATEMENT OF MARGARET M. DOANE**

Ms. DOANE. Good morning, Mr. Chairman and members of the subcommittee.

My office is responsible for reviewing import and export license applications and issuing licenses pursuant to the NRC's import and export licensing regulations. My focus today will be on the NRC's regulatory framework for licensing the import of low-level radioactive waste. I would like to thank you for providing the NRC with the opportunity today to discuss our import licensing process.

As requested, we provide prepared testimony for the record that describes in detail the NRC's regulatory framework for licensing the import of low-level radioactive waste. At this time, I will highlight key elements of that testimony.

The NRC reviews import and export license applications against the criteria defined in its regulations. Specifically, the NRC bases its licensing actions on the following three criteria: One, the proposed import will not be inimical to common defense and security; the import will not constitute an unreasonable risk to public health

and safety; and an appropriate facility has agreed to accept the waste for management and disposal.

The NRC has exclusive jurisdiction within the United States for granting or denying licenses to import foreign radioactive waste. The NRC determines whether to issue an import license for radioactive waste based on its own health and safety and common defense and security evaluation.

The NRC's evaluation is formed after consulting with the executive branch through the Department of State, the applicable host State, and the applicable low-level radioactive waste compact and consideration of public comments. The NRC consults with the applicable host State regulatory officials for their health and safety views on the proposed import and to confirm that the proposed import of radioactive waste is consistent with the State-issued possession license for the disposal facility.

Likewise, the NRC consults with the applicable low-level radioactive waste compact commission to determine whether the compact will accept out-of-compact waste for disposal in a regional facility. To ensure that no radioactive waste imported into the United States becomes orphaned waste, the NRC will not grant an import license for waste intended for disposal unless it is clear from these consultations that the waste will be accepted at an applicable host agreement State and, where applicable, the low-level radioactive waste compact.

As requested by the subcommittee, I would like to turn to questions regarding disposal capacity for low-level waste in the United States.

In the short term, the NRC has not identified any capacity issues with regard to Class A disposal at EnergySolutions' Clive, Utah, facility. The agency as a regulator would have the authority to address future domestic disposal capacity issues if there were a public health and safety or common defense and security concern. There do not appear to be any such concerns about capacity for disposal of Class A material, which has been the classification for all waste import cases today.

In reviewing import licensing applications, our review focuses on whether there is an appropriate facility that has agreed to accept the waste for management or disposal. In making its determination, we obtain the views of the affected low-level waste compact States and the executive branch.

The pure policy question of whether, as a general matter, foreign waste should be permitted to take up space in U.S. disposal facilities would necessarily involve interests that are beyond the traditional role of a regulator to consider. These would include foreign and interstate commerce, entrepreneurial interests, the State's concerns and expectations under the Low-Level Radioactive Waste Policy Act. However, the NRC would be pleased to share its views on the effect of the proposed H.R. 515 on import and export licensing and contribute its technical expertise to those decision makers that are situated to decide the questions the draft legislation involves.

In conclusion, the NRC's role in evaluating a low-level waste import application is a regulatory one, limited to ensuring that the proposed import can be accomplished safely and securely and in accordance with all applicable legal requirements.

Mr. Chairman and members of the subcommittee, this concludes my statement; and I would be happy to answer your questions.  
[The prepared statement of Ms. Doane follows:]

**WRITTEN TESTIMONY**  
**OF MARGARET M. DOANE, DIRECTOR**  
**OFFICE OF INTERNATIONAL PROGRAMS**  
**UNITED STATES NUCLEAR REGULATORY COMMISSION**  
**TO THE**  
**COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
  
**H.R. 515, THE RADIOACTIVE IMPORT DETERRENCE ACT**

**OCTOBER 16, 2009**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to participate in this hearing today. As Director of the NRC's Office of International Programs, I am pleased to have this opportunity to discuss NRC's licensing requirements for importation of low-level radioactive waste. My focus today will be on NRC's regulatory framework for licensing the import of low-level radioactive waste.

Framework for Export and Import of Radioactive Waste

I want to describe the NRC's process in detail so that the Subcommittee has an understanding of the complete framework in which the specific case in question, that of the import of low-level radioactive waste from Italy, is taking place. The Atomic Energy Act of 1954, as amended, grants the NRC exclusive jurisdiction to license exports and imports of source, special nuclear, and byproduct materials to and from the United

States. The Act authorizes the import of radioactive material if domestic health and safety and common defense and security criteria are satisfied. The NRC's regulations governing such exports and imports are set forth in Title 10 of the Code of Federal Regulations, Part 110, "Export and Import of Nuclear Equipment and Material." The NRC's role in evaluating a low-level radioactive waste import application is a regulatory one, limited to ensuring that the proposed import can be accomplished safely and securely in accordance with all applicable legal requirements.

It is important to be clear at the outset regarding the nature of NRC import licensing. The only permission granted by an NRC import license is permission to bring radioactive material across the border into the United States to a specified destination. The import license itself does not in any way regulate what is done with the material after it enters the country and becomes domestic material. Rather, a condition of all import licenses, specific or general, is that once the radioactive material enters the United States, the licensee must comply with domestic laws and regulations applicable to the material. For low-level radioactive waste imports, the federal domestic scheme includes compliance with NRC and Agreement State requirements on safety and security, the Low-Level Radioactive Waste Policy Act regarding the Compact system, and Department of Transportation regulations.

Prior to 1995, the NRC's regulations did not include a separate category for radioactive waste imports or exports. NRC import and export licensing regulations for source, special nuclear, and byproduct materials are applied to radioactive waste depending on the waste's composition. In light of the nature of import licensing, which again simply lets material cross the border into the United States upon the condition that the licensee will comply with applicable domestic laws, the NRC permitted most radioactive material

to be imported into the United States under general licenses (a license that is effective without the filing of a specific application) promulgated in 10 CFR Part 110. NRC's regulations in Part 110 required specific licenses (a license issued to a named person upon approval of a specific license application) only for certain imports that could have nuclear weapons proliferation significance.

In the late 1980s, the United States joined with the international community in establishing better controls for transboundary movement of radioactive waste. The impetus for this decision was concern about the major industrialized nations "dumping" their radioactive waste in countries which did not have the appropriate administrative or technical infrastructure to safely dispose of it. This effort ultimately led to the International Atomic Energy Agency's (IAEA) adoption in September 1990 of the Code of Practice on the International Transboundary Movement of Radioactive Waste (the Code). The Code, which had strong U.S. Government support, established a set of principles to guide countries in the development and harmonization of policies and laws on the transboundary movement of radioactive waste to ensure its safe management and disposal. A basic principle of the Code is that international movements of radioactive waste should take place only with prior notification and/or consent of the sending country, receiving country, and countries through which waste transits. The Code also provides that no receiving country should permit the receipt of radioactive waste for management or disposal unless it has the administrative and technical capacity and regulatory structure to manage and dispose of the waste in a manner consistent with international safety standards. The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Joint Convention), which the United States subsequently ratified, is consistent with the Code.

In 1995, the NRC amended its regulations in Part 110 to conform NRC regulatory requirements for the import and export of radioactive waste to the guidelines of the Code. Since a basic principle of the Code is to require countries to track movements of radioactive waste across their borders so as to prevent radioactive waste from ending up in a country ill-equipped for safe management and disposal, the NRC amended its regulations to require, with limited exceptions, specific licensing of both imports and exports of radioactive waste.

#### Regulatory Review of Applications for the Export and Import of Radioactive Waste

I will now turn to how the NRC processes applications for the export and import of radioactive waste.

The NRC reviews import/export license applications against the criteria defined in Part 110. The NRC determines whether to issue an import license for radioactive waste based on its own health and safety and common defense and security evaluation. The NRC reaches its conclusions on an application after consulting with the Executive Branch, the applicable State, and the applicable Low-Level Radioactive Waste Compact, and after considering public comments. The NRC bases its licensing decisions on the following criteria found in 10 CFR § 110.43: (1) the proposed import will not be inimical to the common defense and security; (2) the proposed import will not constitute an unreasonable risk to the public health and safety; and (3) an appropriate facility has agreed to accept the waste for management or disposal.

An applicant seeking to import (or export) radioactive waste must specify the maximum quantity of material in grams or kilograms (or terabequerels for byproduct material) and its chemical and physical form, the volume, waste classification (as defined in 10 CFR § 61.55 of NRC's regulations), the physical and chemical characteristics, the route of transit of shipment, and the ultimate disposition including forms of management of the waste. The applicant must also specify the industrial or other processes responsible for generation of the waste, and the status of the arrangements for disposition, for example, any agreement by a Low-Level Radioactive Waste Compact or host State to accept the material for management purposes or disposal. In some cases, bounding values for the amounts of waste and for the classification may be provided, and in no case can the maximum amount specified result in the licensee exceeding the limits of its existing domestic materials possession license. The description must be sufficiently detailed so that the NRC staff can be assured that transportation, management and disposal requirements in the U.S. will be met for ensuring protection of public health, safety, and security.

NRC's regulations and practices provide for significant coordination with the Executive Branch through the U.S. Department of State (DOS) and the host State and Low-Level Radioactive Waste Compacts where the waste would be processed and/or disposed. The NRC also consults with the U.S. Environmental Protection Agency regarding applications that include mixed waste, in other words, radioactive waste mixed with other hazardous wastes. All license applications for the import and export of radioactive waste are made available to the public through the NRC Web site. The NRC publishes a notice in the *Federal Register* to provide the public with an opportunity to comment on the application and to request a hearing or petition for leave to intervene.



Early in the review process, the NRC forwards the application to the DOS. That agency is responsible for coordinating review by interested Federal agencies. To either provide notice or obtain consent in accordance with the Joint Convention obligations, DOS also contacts the foreign government in the nation where the material originated or is destined to go. If necessary to satisfy the Joint Convention obligations, DOS may also consult with foreign governments of nations through which the material may transit. For proposed imports of radioactive waste, DOS contacts the government of the exporting nation and seeks acknowledgement they are aware of the proposed transaction and requests any comments they might wish to provide.

The NRC has exclusive jurisdiction within the United States for granting or denying licenses to import radioactive waste. The NRC, however, recognizes that the relevant host State and Low-Level Radioactive Waste Compact each have some authority with respect to disposal or management of low-level radioactive waste within the compact region. Accordingly, the NRC consults the applicable host Agreement State regulatory officials for their health and safety views on the proposed import and to confirm that the proposed import of radioactive waste is consistent with the state-issued possession license for the disposal facility. Likewise, the NRC consults the applicable Low-Level Radioactive Waste Compact Commission to determine whether the compact will accept out-of-compact waste for disposal in a regional facility. To ensure that no radioactive waste imported into the United States becomes orphaned waste, the NRC will not grant an import license for waste intended for disposal unless it is clear from these consultations that the waste will be accepted by the applicable host Agreement State and, where applicable, Low-Level Radioactive Waste Compact.

Implementation Experience

Since the 1995 rule was promulgated, the NRC has issued 14 licenses authorizing the import of radioactive waste. Of these, eight have authorized import for disposal in the United States; of those eight, four have authorized import of U.S.-origin waste, and the other four have authorized import of waste originating outside the United States. The remaining six licenses authorized import for processing and return of the processed waste to the country of origin. For additional information on waste import licenses issued by the NRC since 1995, please see the attached table.

EnergySolutions Low-Level Radioactive Waste Import/Export Application

The NRC has before it a request from EnergySolutions, Inc. for a license to import low-level radioactive waste from Italy. The application requests the import of up to approximately 20,000 tons of radioactively contaminated material from nuclear power facility operations in Italy. The contaminated material include: metals, graphite, dry activity material (for example, wood, paper, and plastic), liquids (for example, aqueous and organic-based fluids), and ion exchange resins. After characterization in Italy, the contaminated materials would be inspected, sorted and processed at EnergySolutions' facilities in and licensed by the State of Tennessee, for recycling and beneficial reuse. The applicant estimates that, after the processing in Tennessee, approximately 1,600 tons of material would be sent for disposal at EnergySolutions' Clive, Utah disposal facility, which is licensed by the State of Utah. According to the application, no hazardous or mixed waste would be imported, and EnergySolutions would review and approve the content of each prospective shipment from Italy to the U.S. to ensure compliance with its domestic materials possession limits.

EnergySolutions also requested a radioactive waste export license that would allow it to return any nonconforming materials, that is, material received under its import license and identified at the processing facility in Tennessee that does not meet the waste acceptance criteria for the Clive, Utah disposal facility, to the generator in Italy for appropriate disposition in accordance with Italian requirements.

The NRC solicited views from the states of Tennessee and Utah, the Southeast Compact Commission and Northwest Interstate Compact, and the Executive Branch (through the Department of State). The regulatory authorities in both Tennessee and Utah have informed the NRC that the material can safely go to the EnergySolutions facilities in their respective states. The Southeast Compact Commission expressed no objection to this application. The Executive Branch expressed no objection to the application and provided the NRC with the Italian Government views that the application is consistent with the Joint Convention obligations.

The NRC also offered members of the public the opportunity to submit comments or request a hearing on this application. The Commission received requests for hearing from the State of Utah as well as a consortium of public interest groups and an environmental group, and over 2,900 comments on the application.

On May 8, 2008, members of the Northwest Interstate Compact unanimously adopted a resolution stating that the existing compact procedures do not address the import of foreign waste, and that such waste would need Compact approval before disposal at the EnergySolutions facility in Utah. The Northwest Compact notified the NRC by letter on May 15, 2008, that "should it choose to issue the import license, it is doing so with the

understanding there is no facility within the Northwest Compact region that is authorized to legally accept this waste for disposal."

Prior to the Compact's resolution, EnergySolutions filed a lawsuit in Federal district court against the Northwest Compact challenging the compact's authority over the proposed import. By order dated October 6, 2008, the Commission held in abeyance the proceedings pertaining to EnergySolutions' application for a license to import low-level radioactive waste from Italy for ultimate disposal at EnergySolutions' disposal facility in Clive, Utah (as well as the accompanying application for a license to export low-level radioactive waste back to Italy). In its abeyance order, the Commission stated that, "until the dispute over the authority of the Northwest Compact is resolved or EnergySolutions outlines an alternative plan for disposal of the imported [low-level radioactive waste]," it will not be clear whether "an appropriate facility has agreed to accept the waste for management or disposal," a key criterion under the NRC's regulations for issuance of a radioactive waste import license. The Commission concluded that "devot[ing] further adjudicatory (and NRC Staff) resources to this proceeding now" would "be inefficient" and, accordingly, held further proceedings on EnergySolutions' license applications in abeyance until further notice, directing EnergySolutions to provide the Commission with status reports every six months "until there is a judicial resolution of the pending lawsuit or the jurisdictional dispute is otherwise resolved."

On May 15, 2009, the federal district court in Utah issued an order finding that the Northwest Compact has no authority to restrict the flow of low-level radioactive waste generated outside the compact region to EnergySolutions' facility in Clive, Utah, because that facility was not established by the Northwest Compact, nor is it run by the Compact. The Commission thereafter sought the views of the potential parties to the proceeding

on EnergySolutions' applications regarding how it should proceed in light of the court's decision. EnergySolutions expressed the view that Commission review of its license application should continue in light of the District Court's decision. In their responses to the Commission's order, Utah and the Northwest Compact gave notice that they, along with another party to the federal court lawsuit, the Rocky Mountain Low-Level Radioactive Waste Management Board, planned to appeal the Utah district court's decision to the Court of Appeals for the 10th Circuit. The State of Utah, the Northwest Compact, and the Rocky Mountain Low-Level Radioactive Waste Compact filed timely appeals of the district court's decision to the 10th Circuit Court of Appeals. Eight low-level radioactive waste compacts and the Council of State Governments are supporting the appeal, either as parties or as *amici curiae*. The parties completed briefing on September 28, 2009, and await the court's scheduling of oral argument.

At the present time, the proceedings on EnergySolutions waste import/export applications remain in abeyance, as the NRC continues to receive status reports every six months and monitors pertinent developments.

#### National Waste Disposal Capacity and Foreign Waste

I would now like to turn to questions regarding disposal capacity for low-level waste in the United States. In the short-term, the NRC has not identified any capacity issues with regard to Class A waste disposal at EnergySolutions' Clive, Utah facility. We note that according to a report issued by the General Accounting Office in 2004, under current conditions there appears to be ample available disposal capacity for the foreseeable future for Class A low-level radioactive waste, particularly at the EnergySolutions facility in Utah, which accepts waste from other regions. The present EnergySolutions import

application, as well as all other import applications to date, involves only Class A waste for disposal in the United States.

The disposal capacity for Class B, C, and greater-than-Class-C waste is limited and in short supply, in part because the States have not developed new sites under the Low-Level Radioactive Waste Policy Act, and the decisions of two Low-Level Waste Compacts to bar out-of-compact waste disposal in their regional facilities. The availability of storage capacity for Class B and C waste has not arisen in the context of the import of low-level radioactive waste.

The agency, as a regulator, has the authority to address future domestic disposal capacity if there were public health and safety or common defense and security concerns. There do not appear to be any such concerns currently with Class A material. In reviewing waste import applications, the NRC focuses on whether there is an appropriate facility that has agreed to accept the waste for management or disposal. In making its determination, the NRC obtains the views of the affected low-level waste compacts and States and the Executive Branch. The pure policy question of whether as a general matter foreign waste should be permitted to take up space in U.S. disposal facilities is a foreign commerce issue which is best addressed by Congress in conjunction with the Departments of State and Energy. Accordingly, the NRC takes no position on H.R. 515.

#### Conclusion

The Atomic Energy Act authorizes the import of radioactive material only if domestic health and safety and common defense and security criteria are satisfied. Overall, the

Act does not distinguish between domestic and foreign waste. The NRC's role in evaluating a low-level waste import application is a regulatory one, limited to ensuring that the proposed import can be accomplished safely and securely in accordance with all applicable legal requirements.

Again, I appreciate the opportunity to testify today and look forward to answering any questions that the Subcommittee may have.



The maximum volume authorized for importation was normalized based on volume using a conversion factor of 40lb/ft<sup>3</sup>. These tables should not be relied on as an official agency record. The official files for each license are located in NRC's Agencywide Documents Access and Management System (ADAMS) accessible through the NRC's public web site.

Import License Number	Maximum Volume Authorized for Importation (ft <sup>3</sup> )	Action	Countries	Disposal site	Issue date	Expiration date
IW002	66	Waste returned after processing	Germany		07/03/96	12/31/06
IW004	826,750	Waste returned after processing	Canada		04/24/98	12/31/08
IW006	3,885	Disposal after processing*	Taiwan	US Ecology, Hanford, WA	09/08/98	12/31/00
IW008	6,000	US Origin- Disposal after processing*	Ukraine		08/25/00	08/31/04
IW009	66	Disposal after processing*	Germany	US Ecology, Hanford, WA & EnergySolutions, Clive, UT	10/16/03	12/31/10
IW010	1,375	Disposal after processing*	UK	Waste Control Specialists, Andrews County, Texas	11/8/00	06/30/03
IW012	10,417	Waste returned after processing	Canada		03/22/01	03/31/10
IW016	2,080 per shipment	Disposal after treatment and processing*	Mexico	EnergySolutions, Clive, UT	11/01/06	12/31/09
IW017	300,000	Waste returned after processing	Canada	Some disposed as domestic waste	10/10/06	06/30/11
IW018	30	US Origin- Disposal after processing*	France		12/14/07	12/31/09
IW019	5,000 per shipment	Waste returned after processing	Canada		04/19/07	03/31/10
IW021	10,875	US Origin- Disposal after processing*	Canada		06/13/07	06/30/13
IW022	275,000	Waste returned after processing	Canada		09/25/07	08/30/12
IW024	7	US Origin- Disposal after processing*	France		05/11/09	12/31/09

\* The actual quantity of waste disposed is unknown, but it should run between 10% to less than 1% of the volume imported.

Pending Applications	Maximum Volume that would be Authorized for Importation (ft <sup>3</sup> )	Action	Countries	Disposal site
IW023	1,000,000	80,000 might be disposed	Italy	EnergySolutions, Clive, UT
IW025	24,960	500 might be disposed	Brazil	EnergySolutions, Clive, UT
IW026	187,200	3,744 might be disposed	Mexico	EnergySolutions, Clive, UT



Mr. MARKEY. Thank you, Ms. Doane, very much.

Our second witness is Leonard Slosky, the Executive Director of the Rocky Mountain Low-Level Radioactive Waste Board. This board is responsible for implementing the Rocky Mountain Low-Level Radioactive Waste Compact.

Mr. Slosky, welcome. Whenever you are ready, please begin.

#### STATEMENT OF LEONARD C. SLOSKY

Mr. SLOSKY. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to present our views with you today.

On a personal note, I would like to note that it is nice to be back here, as I appeared before the chairman's subcommittee in 1985 when the compacts were first going through Congress. So I have been rejuvenated since then and am glad to return.

While I am officially representing the Rocky Mountain Board, I have discussed these issues with the Northwest Compact—

Mr. MARKEY. Were you a witness on this subject at that time?

Mr. SLOSKY. I am afraid so.

Mr. MARKEY. Unbelievable. So you and I—

Mr. SLOSKY. We go way back.

Mr. MARKEY. We go way back. Wow, yes. I remember those hearings.

Mr. SLOSKY. That won't count against my time?

Mr. MARKEY. No, it will not count.

Mr. SLOSKY. While I am officially representing the Rocky Mountain Compact today, I have discussed these issues with the Northwest Compact and they are in agreement with this testimony.

The primary message that I would like to leave with you is the importance of the compacts exclusionary authority. That is, the authority of the compacts to control what waste can be brought into and taken out of the compact.

In 1979, the Governors of the three States of low-level waste disposal facilities stated that they no longer were willing to carry the entire burden of disposing of the Nation's low-level waste. To resolve this crisis and to keep the existing facilities open, the States proposed to Congress that they be responsible for low-level waste within their regions in exchange for the authority to exclude waste from outside their regions.

As you know, this led to the passage of the 1980 Act. The 1985 Federal Act embodied a compromise that allowed Congress to consent to the original seven compacts in return for the three sited States and compacts agreeing to keep their disposal facilities open for another 7 years. The consent of Congress was necessary for the compacts' authorities over interstate commerce to be effective.

One of the primary purposes of the 1980 and 1985 Acts was to achieve greater equity in low-level waste disposal. When compacts were drafted and during congressional consent, there was no expectation that foreign low-level waste would be disposed of in these sites. However, 10 compacts have been enacted as Federal law, and all contain exclusionary authority over outer region waste.

It is inconceivable to me that Congress intended to authorize the compacts to exclude waste from States outside their regions but not from foreign nations. It is the exclusionary authority of the com-

pacts that allows the existing disposal facilities to continue to operate and enables new facilities such as the WCS facility in Texas, which has recently been licensed and will soon begin construction, to come about.

As no State is willing to host a disposal facility unless it has authority through a compact to ensure that it does not become the dumping ground for the Nation's or the world's low-level waste, the States and compacts do not object to foreign waste being imported for treatment or recycling so long as the resulting waste has a viable disposal pathway and is not reattributed as domestic waste. However, the threat of foreign waste disposal places the entire compact system and the existing and planned low-level waste disposal sites in jeopardy.

Utah would not have licensed the Clive facility if it did not believe that it had the ability through the compact to control out-of-region waste. Under the Northwest Compact, no facility located in a member State may accept out-of-region waste without prior approval of an arrangement by the Compact Committee. The Compact Committee adopted a clarifying resolution that the existing arrangement does not provide access for foreign waste but does provide access for waste from throughout the United States.

This is not a NIMBY issue. It is a matter of national importance. As stated by Utah in a hearing last year on similar legislation, the State of Utah has done its fair share and more in disposing of most of the Nation's low-level waste.

In terms of the litigation that is ongoing, the status has been briefly reported, I would note that the amicus briefs in support of the appellant's position have been filed and that this extraordinary coalition of compacts and States is due to the far-reaching implications of the district court's decision. While the litigation began over the import of Italian waste, the decision is much broader and will affect every low-level waste compact. If the district court's decision stands, the compact system could be destroyed because of a very narrow interpretation of the compact.

It is interesting to note that eight of the ten low-level waste compacts in the Nation are either defendants or amici in this litigation in addition to the councils, State governments, and the State of New Mexico.

[The prepared statement of Mr. Slosky follows:]

**TESTIMONY OF**  
**LEONARD C. SLOSKY**  
**EXECUTIVE DIRECTOR OF THE**  
**ROCKY MOUNTIAN LOW-LEVEL RADIOACTIVE WASTE BOARD**  
**TO THE**  
**COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**REGARDING H.R. 515**  
**A BILL TO PROHIBIT IMPORTATION OF CERTAIN**  
**LOW-LEVEL RADIOACTIVE WASTE INTO THE UNITED STATES**  
**OCTOBER 16, 2009**

Mr. Chairman and Members of the Subcommittee, I am Leonard Slosky, Executive Director of the Rocky Mountain Low-Level Radioactive Waste Board ("Rocky Mountain Board"). Thank you inviting me to present the views of the Rocky Mountain Board on the importation of low-level radioactive waste (LLW). The Board is responsible for implementing the Rocky Mountain Low-Level Radioactive Waste Compact ("Rocky Mountain Compact"). While I am here today officially representing the Rocky Mountain Board, I have discussed these issues with the Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact") and they are in agreement with the testimony that I am providing today. Most of the perspectives that I will present are also shared by the other LLW compacts and states in which LLW treatment and disposal facilities are located. The primary message that I would like to leave with you with today is the importance of the compacts' exclusionary authority – the authority of compacts to control what waste can be brought into and removed from the compact regions.

**Background**

By way of background, I have been involved in LLW issues since 1979. I was on the staff advisory council of the National Governors' Association (NGA) Nuclear Power Subcommittee when the NGA recommended the idea of LLW compacts to Congress in 1980. While on the Governor of Colorado's staff, I chaired the committee of governors'

representative that negotiated the Rocky Mountain Compact in the early 1980s. I became the Executive Director of the Rocky Mountain Board in 1983 when it was first formed. I was closely involved in negotiating the compromise with the states and Congressional staff that led to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Act").

I was a founding officer and I am now Chair-Elect of the Low-Level Radioactive Waste Forum, Inc ("LLW Forum"). The LLW Forum is the national association of states and compacts on LLW. We count among our members all 10 LLW compacts, 11 host and unaffiliated states, 5 federal agencies, and private companies engaged in LLW generation, treatment, and disposal.

### **History of the Compact System**

By 1979, only three non-federal LLW disposal facilities remained in operation in the United States (in Nevada, South Carolina, and Washington). During 1979, the Nevada and Washington facilities temporarily closed due to irregularities in waste shipments received, and the Governor of South Carolina announced that he was reducing by 50 percent the volume of LLW that would be accepted at its facility. The governors of these three states were very clear in refusing to continue to shoulder the entire burden of disposing of the Nation's LLW.

The states, largely through the NGA, proposed to Congress that they would be willing to accept responsibility for LLW in exchange for the authority to prohibit the importation of waste from outside compact regions. This proposal led to the passage of the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act").

By 1985, however, there was an impasse. Seven compacts, including the compacts of the three "sited" states, had been submitted to Congress for consent. The consent of Congress was necessary for the compacts' authorities concerning interstate commerce to become effective. Congress was justifiably concerned that if it consented to the sited states' compacts they would exercise their exclusionary authority, thereby depriving the majority of the LLW generators in the nation of a place to dispose of their waste.

The compromise that was struck allowed Congress to consent to the seven then-existing LLW compacts in return for the three "sited" states and compacts agreeing not to restrict access to the operating LLW disposal facilities up to certain limits for a seven year transition period. In exchange for continuing to accept LLW from outside their compact boundaries, the generators in non-sited compacts had to pay "surcharges" to the sited states and meet specific milestones toward the development of new LLW disposal facilities.

This compromise was embodied in 1985 Act (Pub Law 99-240). Title I of Pub Law 99-240 set forth the compromise (in addition to other provisions). Title II of Pub Law 99-240 (the Omnibus Low-level Radioactive Waste Interstate Compact Consent Act) consented to seven compacts (adopting those compacts as federal law), including the

three compacts with operating disposal facilities – the Northwest Compact, the Rocky Mountain Compact, and the Southeast Interstate Low-Level Radioactive Waste Compact (“Southeast Compact”).

Subsequent to 1985, Congress has consented to three additional LLW compacts bringing the total number of LLW compacts to ten. The ten compacts now include 42 states. All compacts approved by Congress are federal law.

As demanded by the governors of the three sited states, one of the primary purposes of the 1980 Act and 1985 Act was to achieve greater equity in the burden of LLW disposal. Besides the milestones and surcharges in the 1985 Act, the ultimate “hammer” is the authority of the compacts to exclude out-of-region LLW from facilities within the compacts.<sup>1</sup>

When the compacts were being drafted and during the Congressional consent process, there was no expectation that foreign LLW would be disposed at non-federal LLW facilities in the United States. However, all of the compacts that have received Congressional consent contain exclusionary authority over out-of-region LLW, regardless of the source of that waste. There is no question that foreign LLW is out-of-region waste. It is inconceivable that Congress intended to authorize the compacts to exclude LLW from states outside their compact regions, but not from foreign nations.

While not as many new LLW disposal facilities have been developed as envisioned in 1985, the compact system has facilitated the development of three new commercial facilities – the Clive, Utah facility in the Northwest Compact; the Andrews County, Texas facility in the Texas-Vermont Compact (construction is planned to begin in January 2010; and the Clean Harbors Deer Trail (Colorado) facility in the Rocky Mountain Compact (which receives only certain NORM wastes). Most importantly, the compacts have provided for the disposal of nearly all of the LLW that was designated a state responsibility nearly 25 years ago.

In the early 1990s when the Rocky Mountain Compact facility in Beatty, Nevada was approaching closure and our waste generation rates were very low, the Rocky Mountain Compact entered into a contract with the Northwest Compact and the State of Washington for our generators to dispose of certain quantities of LLW at the Richland, Washington facility.

#### **Authority of the Rocky Mountain Board**

The role of the Rocky Mountain Board is primarily to: (1) control the flow of LLW into the compact region; (2) control the flow of LLW out of the compact region; and (3) approve of facilities within the compact region for the disposal of LLW. These three

<sup>1</sup> The 1985 Act contained a so called “take title” provision that required a state which had not provided for disposal of all its LLW by January 1, 1993, upon the request of a generator, to take title to and possession of the generator’s LLW (42 USC 2021e(d)(C)). The “take title” provision was ruled to be unconstitutional by the United States Supreme Court (*New York v. United States*, 505 U.S. 767 (1992)).

functions are authorized by Article VII the compact statute as consented to by congress (99 Stat. 1907-1908):

(a) It shall be unlawful for any person to dispose of low-level waste within the region, except at a regional facility . .

(b) After January 1, 1986, it shall be unlawful for any person to export low-level waste which was generated within the region outside the region unless authorized to do so by the board . . .

(c) After January 1, 1986, it shall be unlawful for any person to manage any low-level waste within the region unless the waste was generated within the region or unless authorized to do so both by the board and by the state in which said management takes place.

The Rocky Mountain Compact statute established procedural requirements and criteria for approval of regional facilities. The Rocky Mountain Compact statute establishes criteria to be used by the Rocky Mountain Board in acting on applications to export and bring LLW into the region under sections (b) and (c), respectively. The Rocky Mountain Compact statute also establishes civil penalties for violations of these provisions. The Rocky Mountain Board has adopted rules that implement these authorities.

#### **The Challenge Posed by Foreign LLW Disposal**

The threat of foreign waste disposal places the entire compact system and the existing and planned LLW disposal facilities in peril. Foreign waste disposal is one of the most serious threats to the compacts in their 25-year history.

The Northwest Compact was adopted by the State of Utah and received Congressional consent before the Clive, Utah facility, originally owned and operated by Envirocare, was licensed by the state of Utah to accept LLW. The State of Utah has made clear that it would not have licensed the Clive facility for LLW if it did not believe that it had the ability, through the Northwest Compact, to control out-of-region LLW going to the facility.

The importation of foreign waste became a significant issue following *EnergySolutions'* submission of an import license application (IW023) to the United States Nuclear Regulatory Commission (NRC) requesting authorization to import 20,000 tons of LLW from Italy. *EnergySolutions* estimated that, following processing, approximately 1,600 tons or 80,000 cubic feet of Italian waste would require disposal at their Clive, Utah facility in the Northwest Compact.

Under Article IV, Section 2 of the Northwest Compact, no facility located in any member state may accept any out-of-region LLW without prior approval of an arrangement by the Northwest Compact Committee (the entity that implements the Northwest Compact). The current arrangement (Third Amended Resolution and Order) does not provide access for foreign LLW. Therefore, the Committee would have to adopt a new arrangement prior to foreign waste being provided access to the Northwest Compact region. Under Article V of the Northwest Compact, such an arrangement requires a two-thirds affirmative vote of the Committee members as well as the affirmative vote of the Committee member from the state in which the affected facility is located. Once the Governor of Utah announced that he had directed his representative to vote against such an arrangement, it became clear that the State of Utah had no interest in having foreign waste disposed within the state.

On May 8, 2008, the Northwest Compact Committee adopted a resolution clarifying that the current arrangement only provided that other states and compacts could dispose of waste at the Clive facility and that a new arrangement would be required before *EnergySolutions* could dispose of foreign waste at the Clive facility.

This is not a “Not In My Back Yard” (NIMBY) issue. It is a matter of national importance. As stated by the Chair of the Utah Radiation Control Board on similar legislation last year: The State of Utah has done its fair share and more in disposing of LLW within the state. The Clive facility provides an important national service as it accepts approximately 2.5 million cubic feet of commercial Class A LLW annually. This amounts to approximately 98 percent, by volume, of the “commercial” LLW disposed annually in the United States. By comparison, the Barnwell, South Carolina facility accepts 10,000 to 15,000 cubic feet of LLW per year, and the Richland, Washington facility accepts 25,000 to 30,000 cubic feet of LLW annually. The Clive facility also accepts mixed LLW (that is both hazardous and radioactive) as well as millions of cubic feet of LLW annually and other waste from the United States Department of Energy.

In a March 10, 2008 letter to the Chairman of the NRC, the Utah Radiation Control Board Chair added: “We recognize that there are legitimate reasons why radioactive materials cross international borders. One country may have more skill than another in reducing the volume or contamination level of wastes. In these cases, countries may agree that wastes can be processed by the country with the expertise and returned to the country of origin for disposal. We also recognize that under certain circumstances it may be beneficial for two or more countries to share a waste disposal site where all contribute to the financing and operation of the facility and when it is acceptable to the host community. None of these situations exist for the proposed importation of Italian waste.”

While the State of Utah and the Northwest Compact have been willing to allow the vast majority of the Nation’s LLW to be disposed of at the Clive facility, a broad reaching concern is that as *EnergySolutions* attempts to continue to expand the wastes it receives, public sentiment will grow against Utah becoming a dumping ground for LLW. While the citizens of Utah are now firmly opposed to the acceptance of foreign LLW, this

opposition could expand to threaten the continued operation of the Clive facility all together – to the serious detriment of the entire country.

It is also important to remember that the capacity at the Clive facility is not unlimited. It could be exhausted within 30 years at the current waste disposal rate WITHOUT foreign waste imports. Thirty years is not a long period of time when one considers the difficulty in developing new LLW disposal sites. The United States LLW capacity is an important and limited national resource. The Federal Government needs to conserve the Nation's capability to safely dispose of our own future LLW.

The most important issue to the compacts is to maintain the compacts' authority to control the out-of-region (including foreign) LLW. While the 1985 Act and the compacts are silent on the issue of foreign waste, it is inconceivable that Congress would have authorized the compacts to control out-of-region LLW from within the United States but not the authority to prevent foreign waste from being brought into the compacts.

In addition to the Northwest Compact's and the State of Utah's opposition to the disposal of Italian LLW at the Clive facility, officials of the Atlantic Compact and the State of Washington have stated that efforts to require the Barnwell, South Carolina or Richland, Washington sites to take non-regional waste (including foreign-generated waste), either through change in federal law or litigation, would most likely result in the complete closure of both facilities.

While many aspects of LLW have changed over the last 30 years, one has remained constant – states are unwilling to host LLW disposal facilities unless they have the ability, through compacts, to control the flow of waste to the disposal sites.

Thus, the greatest threats to the LLW disposal system are those that jeopardize the ability of states and compacts to control the wastes to be received by the disposal facilities. The most imminent of these threats is the lawsuit by *EnergySolutions* challenging the exclusionary authority of the Northwest Compact over the Clive, Utah disposal facility.

#### **Status of Italian Waste Import to the NWC**

As mentioned above, *EnergySolutions* has applied to the NRC for a license to import certain LLW from shutdown nuclear power plants and other fuel cycle facilities in Italy. On October 6, 2008, NRC issued an order holding in abeyance until further notice further review of *EnergySolutions*' application – as well as requests for a hearing on the application and petitions by the State of Utah and other interested stakeholders to intervene in the proceeding. The Northwest Compact and the State of Utah have requested that the NRC not act on the application until after the *EnergySolutions* lawsuit against the Northwest Compact, et al. is finally adjudicated.



Energy Solutions, LLC v. the Northwest Compact, et al.

Shortly before the May 8, 2008 meeting of the Northwest Compact Committee, EnergySolutions filed suit against the Northwest Compact in the United States District Court for the District of Utah claiming, among other things, that the Northwest Compact does not have the authority to control foreign LLW from coming to the Clive, Utah facility in the Northwest Compact. The State of Utah and the Rocky Mountain Compact intervened as defendants. In May 2009, the District Court issued a Memorandum and Order granting, in part, EnergySolutions motion for summary judgment. In June 2009, the District Court entered judgment on Count I, ruling that the Northwest Compact does not have the authority to control out-of-region LLW going to the Clive, Utah facility. The District Court completely disregarded explicit language in the Northwest Compact that was approved by Congress as federal law. Instead, the District Court ruled that the only authority over interstate commerce that Congress granted to the Northwest Compact is the authority to control the disposal of out-of-region waste at “regional disposal facilities” which, according to the District Court, the Clive facility is not.

The Northwest Compact, the State of Utah, and the Rocky Mountain Compact all appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit (“Tenth Circuit”). The three Appellants filed Opening Briefs in August 2009. EnergySolutions filed its Response Brief in September 2009. The three Appellants also filed their Reply Briefs in September 2009. All parties have requested oral argument. At this point, we are waiting for the Tenth Circuit to take action on the requests for oral argument.

Of particular note is that Amicus Curiae Briefs in support of the Appellants’ position were filed in the Tenth Circuit by the Atlantic Interstate Low-Level Radioactive Waste Compact, the Central Interstate Low-Level Radioactive Waste Compact, the Central Midwest Low-Level Radioactive Waste Compact, the Southeast Compact, the Texas Low-Level Radioactive Waste Disposal Compact, the Midwest Interstate Low-Level Radioactive Waste Management Commission, the State of New Mexico, and the Council of State Governments. Thus eight of the ten LLW compacts (representing a total of 34 states) are Defendants or Amici Curiae in this case.

This extraordinary coalition of compacts and states is due to the far-reaching implications of the District Court decision. While the litigation began with the controversy over EnergySolutions’ proposal to import the Italian waste, the decision of the District Court is broader than merely a ruling on disposal of foreign waste and it will affect every LLW compact and may affect interstate compacts created for other purposes as well. H.R. 515, if passed, could address some of the questions faced by compacts related to the disposal of foreign waste but the bill, as currently drafted, does not address all the issues raised for compacts by the District Court ruling.

If the District Court’s decision stands, the compact system could well be destroyed because of the District Court’s very narrow interpretation of compact authority. The

following are a few examples of how, if the District Court's decision stands, the compact system would be eviscerated.

- It is very unlikely that any new LLW disposal facilities will be developed, due to uncertainty as to whether the "host" compact will have the authority to control out-of-region waste in order to avoid becoming the dumping ground for the Nation's and the world's LLW.
- A private company could develop a disposal facility on private land in any compact and the compact would be powerless to control out-of-region waste, including foreign waste, from coming to such a facility.

While the State of South Carolina has worked since 1979 to limit the amount of LLW disposed in the state, a privately owned and operated LLW disposal site could be developed in the State and the Atlantic Compact (of which South Carolina is now a member) would be powerless to control out-of-region waste, including foreign waste from coming to such a facility.

- Compacts may no longer be able to control out-of-region LLW (including foreign LLW) other than for disposal at a "regional disposal facility" placing into question the compacts' authority over processing and storage facilities, which could become de facto disposal facilities for out-of-region and foreign waste.
- The authority in any compact to control the *out-flow* of waste including, for example, the authority to prohibit removal of waste from the compact in order to ensure the economic viability of a facility in the compact region would be effectively repealed.

The State of Texas has worked for more than two decades to develop a facility to dispose of LLW within the Texas-Vermont Compact region. In September 2009, Texas issued the final license for a facility that will accept Class A, B, and C LLW. If the Texas Compact is unable to control the removal of waste from the region, the Clive facility could simply set its disposal rates below those of the Texas facility, thereby enticing generators located in the Texas-Vermont Compact region to instead dispose of their Class A waste at Clive. As a result, the Texas facility could become economically unviable (as the majority of waste is Class A), and Texas and Vermont would have no place to dispose of their more-radioactive Class B and C LLW.

These issues are more fully explained in the Appellants' and Amici Curiae Briefs that have been filed in the Tenth Circuit.

### Comments on H.R. 515

While the Rocky Mountain Board has not taken a position on the proposed legislation we would like to offer several observations relative to H. R. 515.

1. H.R. 515 should not preempt the authority contained within LLW compacts. Whether or not Congress requires the NRC to ban or allow the import of foreign LLW, any legislation it adopts should reaffirm that the authority within federally-approved compacts to exclude out-of-region waste will remain intact. To that end, we would propose the addition of a savings clause as follows:

***Nothing herein shall be interpreted to abrogate, impair, or preempt the authority in any Congressionally-approved LLW compact over the flow of LLW into or out of a compact region.***

2. The current federal system for approving LLW import applications is lacking a policy component. The NRC has indicated that it does not have authority to make policy decisions about importing radioactive waste. NRC is limited to conducting a technical evaluation of whether: (1) the proposed import is inimical to the common defense and security; (2) will constitute an unreasonable risk to public health and safety; and (3) an appropriate facility has agreed to accept the waste (10 CFR Part 110.43). Thus, the current system does not address the question of whether it is in the best interest of the United States and the states to dispose of LLW from other nations.

3. The Subcommittee should be aware that even if H.R. 515, as presently drafted, were to become law, it would not resolve the compacts' and states' issues in the *EnergySolutions* lawsuit against the Northwest Compact, et al. As discussed above, if the District Court's decision stands, many authorities within individual compacts that have been approved by Congress would be voided in addition to the authority to restrict the disposal of foreign LLW.

4. Most LLW compacts and states do not have a problem with foreign LLW being imported for treatment or recycling, so long as several conditions are met: (1) there is a viable pathway for disposal; (2) wastes from the treatment or recycling of the foreign LLW not be attributed as domestic waste; and (3) if their exclusionary authority remains intact.

5. Historically, foreign LLW has been imported into this country for processing. Any wastes remaining contaminated following processing were to be shipped back to the country of origin. However, in at least one case, foreign LLW was disposed at the Clive, Utah facility without the knowledge of the State of Utah or the Northwest Compact. Under NRC-approved Import License IW017, LLW from Monserco Limited in Ontario, Canada was processed at the Duratek facility in Tennessee (now owned by *EnergySolutions* and known as the Bear Creek facility). The ash resulting from the incineration of the Canadian waste was attributed to Duratek and shipped to the Clive facility as Tennessee waste. In considering the import license application, the NRC

sought comments only from the State of Tennessee and the Southeast Compact. The NRC did not provide the State of Utah or the Northwest Compact with the opportunity to comment on the import license application even though the Canadian waste was ultimately disposed in the State of Utah. It is totally unacceptable to the host states and compacts for foreign LLW to be disposed as domestic waste.

The NRC has a rulemaking underway to revise the waste import regulation (10 CFR Part 110). It appears that NRC is proposing to increase consultation with the host states and compacts. However, consultation is not enough. If LLW is to be imported into the United States for treatment/recycling or disposal, approval for import should not be granted unless all the compacts and states in which the treatment/recycling and disposal would occur, formally approve of the foreign LLW being treated/recycled and/or disposed with the compact/state.

6. The Subcommittee should consider expanding the definition of LLW in H. R. 515 to include Naturally Occurring Radioactive Material (NORM).

Thank you for the opportunity to present this testimony. I will be happy to respond to questions.

Board/Congress/HR515Oct09Hearing/TestimonyOfLeonardSlosky

Mr. MARKEY. Thank you very much.

Who did you represent in 1985, Mr. Slosky?

Mr. SLOSKY. I represented the Rocky Mountain Compact, also.

Mr. MARKEY. That is unbelievable.

The third witness is Val Christensen. He is the President of EnergySolutions, a nuclear services company headquartered in Salt Lake City, Utah.

Mr. Christensen, welcome. Please begin.

#### STATEMENT OF VAL CHRISTENSEN

Mr. CHRISTENSEN. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am grateful for the opportunity to appear today to provide testimony on this very important issue.

As has been mentioned, EnergySolutions is headquartered in Salt Lake City, Utah. We are a world leader in environmental cleanup and providing a wide range of technical support services to the nuclear industry. We also provide critical nonproliferation services under the Global Threat Reduction Initiative.

I would like to address some of the concerns about safety, because that is the underlying concern when we talk about importing nuclear waste.

We have been safely disposing of Class A low-level nuclear materials from within the U.S. and from abroad, internationally, for over 9 years. These materials include shoe covers, lab coats, cleaning cloths, paper towels, and other kinds of materials that are used in areas where radioactive materials are present.

Class A low-level radioactive waste contains the lowest concentration of radiation in the low-level waste classification scheme. To put it in perspective, exit signs and smoke detectors that you find in your home have radioactive sources that are more radioactive than the Class A designation and are not allowed to be disposed of in our Clive facility.

Both the State and Federal regulators have concluded that the processing and disposal of Class A low-level radioactive waste poses no health or safety issues. It is important to note for Congressman Gordon from Tennessee that no internationally generated waste would ever be disposed of or orphaned in Tennessee. We have never processed international material in Tennessee that was non-conforming and had to be returned to the generating country.

We and others have been, as I mentioned, importing foreign waste for many years from countries such as Germany, the U.K., Mexico, Canada, and Taiwan. And I would note that the NRC has issued import licenses that specifically identify the Northwest Compact disposal site in Richland, Washington, as the final resting place for some of that international waste; and I can provide examples to you off the record. There really is no domestic disposal capacity issue in the United States.

Reference was made to the GAO testimony. The GAO noted that Class A waste volumes have declined by two-thirds, principally because the DOE has completed several large cleanup projects. This wasn't a 1-year event. The trends are going down. Both commercial and Federal disposal volumes are decreasing. Additionally, since

May of 2008, a license was issued for the construction of another waste disposal site in Texas.

Although the GAO and the NRC have testified that there is a domestic capacity issue with respect to Class B and Class C waste, they have concluded that there is no Class A disposal capacity issue. We need to remember that the Clive facility is licensed to take only Class A waste.

The final point I wish to make with respect to the capacity issue is that the 5 percent volunteer license amendment that we have presented publicly relates to 150 million cubic feet of remaining licensed capacity, and we have also made the 10-year limit publicly a part of our license amendment.

Now, with respect to the compact litigation, the court's ruling is very narrow. It simply concluded that the Clive facility, which was never constructed or intended to be a compact disposal facility outside of the compact scheme, but the court emphasized that compacts still have the authority to restrict waste coming domestically or internationally into their compact facility. The Clive facility is simply not a compact facility. It is privately owned, and there are no other facilities like it. So the precedent that people are concerned about from the court's ruling simply has no application on any other facility.

All compact facilities, according to the judge's ruling, continue to be able to exclude waste and control waste within the compact system. Again, there is ample disposal capacity. The court's ruling does not interfere with the compact system. It does not turn America into a dumping ground. It is hard to conceive that 4.3 acres in one location would turn the United States into the dumping ground for the world.

We are also concerned that this bill would violate the spirit of the administration's policy of nuclear cooperation as evidenced by the U.S.-Italian joint declaration referred to earlier, which was signed by Secretary Chu and his Italian counterpart, which advances cooperation in the nuclear sector, including advanced waste treatment and disposal technologies. We believe the proposed legislation would prevent American companies from playing an international role in the global nuclear industry largely based on perceptions rather than on facts and sound science.

I am happy to take any questions. Thank you.

[The prepared statement of Mr. Christensen follows:]

**Testimony of Val Christensen  
President, EnergySolutions  
Energy and Environment Subcommittee  
House Energy and Commerce Committee  
October 16, 2009**

Mr. Chairman, Members of the Subcommittee, I am Val Christensen, President of EnergySolutions. I appreciate the opportunity to appear before the subcommittee to provide testimony on this very important issue.

EnergySolutions, headquartered in Salt Lake City, Utah, is a nuclear services company with operations throughout the United States and around the world. We are a world leader in providing safe and responsible integrated services and solutions to the nuclear industry, the federal government, doctors, hospitals, and research facilities. The company specializes in recycling radioactive materials, decommissioning nuclear power plants, transporting radioactive material, managing spent fuel, processing and disposing of low level radioactive waste (LLRW) and cleaning up the environment. EnergySolutions also provides critical non-proliferation services under the National Nuclear Security Administration's Global Threat Reduction Initiative (GTRI).

One of our missions is to help the United States achieve energy independence, reduce carbon emissions and protect the environment by cleaning up contaminated sites. Nuclear energy, a safe and non-carbon emitting source of energy, plays a key role in addressing the energy crisis that the world faces today and EnergySolutions plays a vital role in managing nuclear material in order to make that possible.

*EnergySolutions* believes H.R. 515 is unnecessary and problematic for two principal reasons: First, there is not, as has been asserted, a Class A LLRW waste disposal capacity problem in this country; and second, the bill erects an anti-nuclear/anti-business trade barrier that hinders American companies from competing with foreign owned companies participating in nuclear new build around the world and restricts U.S. companies from helping the United States reassert its leadership role in the nuclear renaissance.

Proponents of the legislation have argued that the bill is necessary because there is a domestic disposal capacity problem. At the hearing before this subcommittee in May 2008 on the issue of the importation of internationally generated material, the General Accountability Office (GAO) testified that “disposal availability for domestic class A waste is not a problem in the short or longer term.”<sup>1</sup> The GAO also testified that the volume of Class A waste disposed had declined by two-thirds primarily due to the Department of Energy (DOE) completing several large cleanup projects. As a result of the general decrease in the disposal Class A waste, the projected disposal capacity of the Clive facility in Utah, at the time of the GAO testimony, had been extended to over 30 years. When we testified before this subcommittee in May 2008, the projected remaining licensed capacity of the Clive facility was 150 million cubic feet and we anticipated future annual volumes to be 5 to 6 million cubic feet. Due to decreased commercial disposal volumes, along with the declines in DOE waste, we now expect future annual volumes to be 4 to 5 million cubic feet.

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<sup>1</sup> Statement of Gene Aloise, Director Natural Resources and Environment, Before the Subcommittee on Energy and Air Quality, May 20, 2008, page 4.



The total remaining overall site capacity of Clive is over 485 million cubic feet, with 140 million cubic feet currently licensed. Based on current waste generation rates, the site has a potential remaining capacity of over 120 years should the site be licensed to utilize its maximum capacity. Whether we will seek to utilize additional potential capacity will depend largely on the volumes of LLRW generated in the years to come. Another factor impacting domestic disposal capacity is the recent granting of a license to a company in Texas to construct a disposal facility which, if all of the license conditions are met, could accept Class A, B and C LLRW from both compact and non-compact generators.

While the GAO and the Nuclear Regulatory Commission (NRC) have stated previously that there is a domestic disposal capacity issue for Class B and Class C disposal, they concluded, as stated above, that there is no Class A LLRW disposal capacity issue. The Clive facility only accepts Class A waste for disposal and there is ample Class A domestic disposal capacity for many decades.

Some have expressed fear that “the United States is destined to become the world’s dumping ground for foreign nuclear waste.” *EnergySolutions* has stated very clearly, including in Mr. Creamer’s testimony here in May 2008, that it will preserve Clive’s capacity principally for the domestic nuclear industry and the federal government. We committed to this Subcommittee, and the citizens of Utah, that we will use no more than five percent of Clive’s remaining licensed capacity for the disposal of internationally generated material. The remaining licensed capacity at the time this commitment was made was 150 million cubic feet. We stand by that commitment and have stated our willingness to make this an express condition of our license at the Clive facility. Using

4.3 acres of disposal capacity for internationally generated material will not turn the United States into “the world’s dumping ground.” In addition, I make the further commitment today that we will not dispose of internationally generated material at Clive for a period of greater than 10 years, which will give us ample time to establish, or assist in the establishment of, LLRW disposal facilities abroad. We are exploring opportunities with several European and Asian countries to site LLRW facilities.

For more than nine years, internationally generated materials, such as booties and gloves and other articles of clothing worn by workers at nuclear power plants, as well as metals, paper, and plastics used in the nuclear industry, have been safely processed at our state-of-the-art facilities in Tennessee with the residuals safely disposed at Clive. This international material is identical to the domestic material we process and dispose of each day. The NRC has confirmed that there is no difference between domestic and internationally generated Class A LLRW. Our own highly trained staff is on hand at the point of origin of the internationally generated material to characterize the material to ensure that it meets the processing and disposition requirements set forth in our licenses. Only material that meets our license requirements is imported. It is important to recognize that there simply are no health or safety issues associated with the importation, processing, and disposal of LLRW. State and federal regulators have concluded that the processing and disposal of domestic or internationally generated material by *EnergySolutions* poses no health or safety issues. Once again, Class A LLRW, the only type of waste disposed at Clive, is the lowest in radioactivity. Smoke detectors from your homes and exit signs in this building are not disposed at Clive because they contain a

sealed source of radioactive material that exceeds Class A. Ironically, these products are often disposed in commercial landfills in your districts.

I would also like to clarify another point on which there has been some confusion. No internationally generated waste will ever be disposed or orphaned in Tennessee. In the many years that the company has been processing and disposing of internationally generated material, no waste ever has been orphaned in Tennessee. We have never imported material that was non-conforming and had to be returned to the generating country. Any material we have imported has been properly processed in Tennessee with the residuals safely disposed of in Utah.

We understand the concern that some have to one country managing and disposing of even a limited amount of another country's waste. In today's global economy, however, hazardous and radioactive materials cross our nation's borders on a daily basis.

Computer screens and other computer components containing mercury, toxic metals and other hazardous waste, plastic bottles and other waste materials are shipped from the United States to other countries for recycling and disposal. Over 80 percent of the nuclear fuel and uranium used in domestic nuclear reactors is imported. Spent nuclear fuel, which represents over 99% of the aggregate radioactivity in the nuclear power industry, crosses the borders into the United Kingdom (UK) and France from other European countries. After the recycling process, unusable spent fuel is stored in the UK and France for decades.

We live in an era in which the United States is trying to knock down trade barriers rather than erect them, as evidenced by the recently signed Joint Declaration and Agreement between the governments of the United States and Italy concerning industrial and commercial cooperation in the nuclear energy sector. The Declaration and Agreement states that the two countries will cooperate, among other things, in the construction of nuclear power plants, overcoming economic obstacles to the expanded peaceful use of nuclear energy, and advanced waste treatment, storage and disposal technologies.

Finally, I would like to address suggestions that the recent decision by the U.S. District Court for the District of Utah threatens the overall compact system created by the Low Level Radioactive Waste Disposal Act. This simply is not the case. On May 15, 2009, the District Court ruled, consistent with the Act, that the Clive facility, a privately owned commercial facility that was not created as a compact "regional disposal facility," is not part of the compact system. The court therefore concluded that the Northwest Compact does not have the authority to restrict the Clive facility's receipt of waste generated outside of the Northwest Compact region. The court's ruling neither weakens nor undermines the compact system. In fact, the court affirmed, consistent with the Act, that a compact has the right to exclude out-of-compact waste from its own regional disposal facility. The court also affirmed a compact's right to regulate the disposal of waste generated within the compact's boundaries. The compact system and all compact regional disposal facilities created under the compact system are unaffected by the court's ruling.

We respectfully suggest that H.R. 515, by restricting the issuance of import licenses for the safe and responsible handling of small quantities of international nuclear materials, would violate the spirit of the Administration's policy of nuclear cooperation as evidenced by the U.S. - Italian Joint Declaration. It would restrict the opportunities of U.S. companies to participate globally in reasserting America's worldwide leadership role in the nuclear field. It would erect a trade barrier to an essential industry in the global nuclear field.

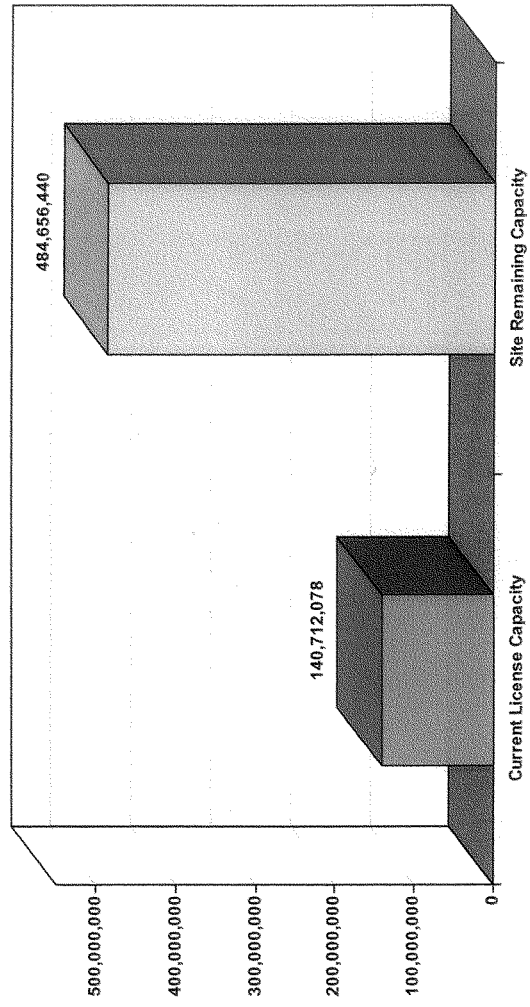
There is ample disposal capacity for domestic Class A LLRW in the short and long term despite the importation of a small amount of international material for processing and disposal. All activities associated with the management of Class A LLRW are effectively regulated by the U.S Nuclear Regulatory Commission and state licensing agencies.

There are no health or safety issues related to the management of international or domestic waste. There are no advantages gained by erecting this barrier to international trade. The legislation would prevent American companies from playing an international role in a vital part of the nuclear fuel cycle that is essential to the global nuclear energy industry, and would be doing so based on emotions and perceptions, rather than on facts and sound science.

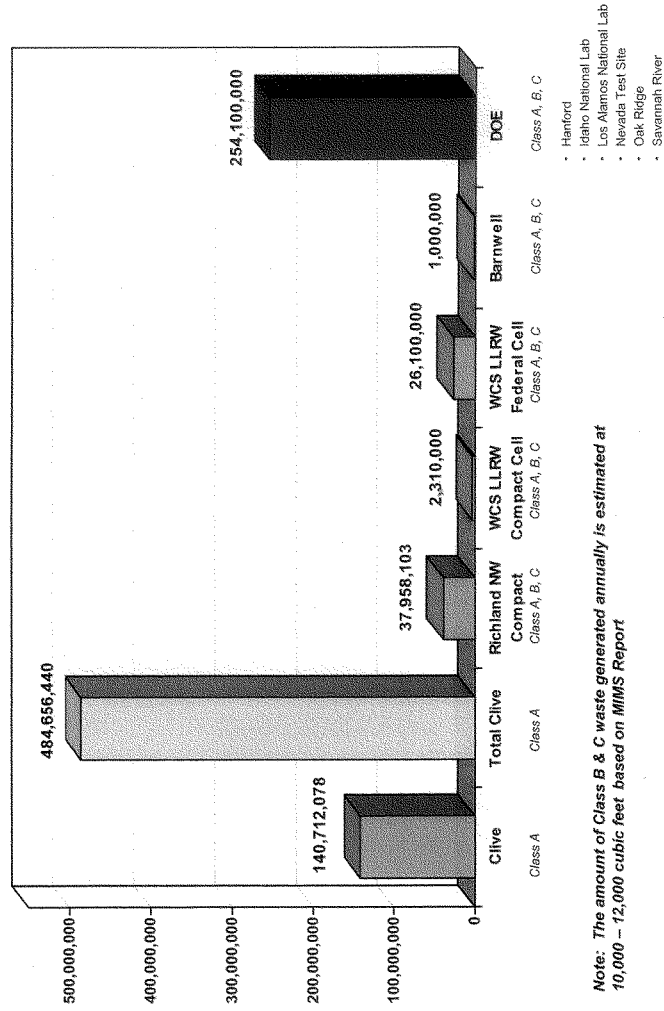
I am happy to answer your questions. Thank you.

Attachments

# Clive Remaining Disposal Capacity (cubic feet)



# U.S. Remaining Disposal Capacity (cubic feet)



### Myths vs Facts on International Waste

**Myth:** We should not grant import licenses because it would represent an unprecedented reversal in this nation's approach to disposal of its own LLRW.

**Fact:** The NRC has issued import licenses to companies including *EnergySolutions*, Perma-Fix, Westinghouse, Areva, and Eastern Technologies for many years. Contaminated metals have been imported into the U.S. for over a decade.

**Myth:** No other country in the world takes another country's nuclear waste.

**Fact:** The United Kingdom and France take spent fuel, which contains over 99 percent of the radioactivity, from other countries. Taking a small amount of material that contains far less than 1 percent of the radioactivity allows *EnergySolutions* to compete against government owned companies from these countries.

**Myth:** The U.S. has limited disposal capacity of domestic waste.

**Fact:** The GAO stated on May 20, 2008 that "disposal for the nation's class A waste does not appear to be a problem in either the short or long term.." The *EnergySolutions'* Clive facility only disposes of Class A waste. However the GAO has stated that there is in fact a disposal capacity problem regarding Class B and C low-level waste, but the problem does not relate to the kind of waste at which H.R. 515 is directed. Since the GAO made the statement about Class A waste, the State of Texas granted a license to a private enterprise to construct a new compact regional disposal facility that intends to dispose of both compact and non-compact Class A, B, and C waste, thus creating additional domestic disposal capacity. *EnergySolutions* has been processing and disposing low-level radioactive waste for over 20 years. There are not technical issues with treating and disposing radioactive waste.

**Myth:** Allowing the NRC to issue an import license despite the objection of the Northwest Compact will destroy the compact system.

**Fact:** The Federal District Court in Utah ruled that the Compacts have the authority to restrict or prohibit the importation of out-of-region waste to the region's compact facility. However, the Court ruled that the Northwest Compact could not restrict waste at the Clive facility because it is not a regional disposal facility and therefore not part of the compact system.

**Myth:** The United States will become the world's nuclear dumping ground.

**Fact:** *EnergySolutions* has voluntarily restricted the amount of internationally generated material to be disposed at Clive to up to 5 percent (4.3 acres of a 640 acre site) of its remaining capacity. Disposing of a small amount of material enables a U.S.



owned company to compete internationally against foreign government owned companies.

**Myth:** Some have stated that waste would be disposed in Tennessee.

**Fact:** Materials imported from Italy will be processed and recycled in Tennessee with all residual waste being disposed of at the Clive disposal facility in Utah. No waste will be orphaned in Tennessee.

**Myth:** This material is very harmful stuff that requires it to be stored with a big fence and lots of dogs.

**Fact:** The material that will be disposed at the Clive facility is the lowest of low-level radioactive waste. Exit signs and the source in smoke detectors are too radioactive to be disposed at the Clive facility. Should this material be recycled in Europe, it would be free released for use in products such as automobiles.

**No Impact on the Compact System**  
***EnergySolutions v. Northwest Interstate Compact***

On May 15, 2009, the U.S. District Court for the District of Utah issued an order granting in part the plaintiff's motion for summary judgment in *EnergySolutions, LLC v. Northwest Interstate Compact on Low-Level Radioactive Waste Management, et al.* ("the Order"). The Order concludes that, because the low-level radioactive waste ("LLRW") disposal facility owned by EnergySolutions in Clive, Utah ("Clive Facility") is not a "regional disposal facility," as defined by the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021b *et seq.* ("LLRW Act"),<sup>1</sup> the Northwest Compact lacks authority to restrict the Clive Facility's receipt of waste generated outside the Northwest Compact region. As explained below, the Court's Order does not weaken the authority of interstate compacts to exclude from their own regional disposal facilities LLRW generated *outside* their respective compact regions. Moreover, the Court's Order does not undermine the authority of interstate compacts to channel to their own regional disposal facilities all LLRW generated *within* their respective compact regions or disrupt the compact system generally.

The Order acknowledges that "[a]ll parties [to this litigation] agree that the [LLRW] Act granted [the] Northwest [Compact], and every other compact [approved by Congress], the authority to restrict or prohibit the importation of out-of-region [waste] to the compact's regional disposal facilities." Thus, the Order does not weaken the unchallenged, firmly established authority of an approved compact to exclude out-of-region waste from the compact's own regional disposal facilities.

The Order does not undermine the authority of compacts to channel all in-region waste to their own regional disposal facilities. To the contrary, the Order concludes that compacts *have such authority*, explaining that the LLRW Act contains an "unambiguous expression of Congressional intent to allow [the] Northwest [Compact] to regulate the disposal of waste generated within [the Compact's] regional boundaries." This holding—which EnergySolutions does not challenge on appeal—should be welcomed by LLRW compacts.<sup>2</sup>

The Order cannot fairly be characterized as weakening or undermining the compact system generally. The Order does, of course, clarify that the Northwest Compact lacks authority to restrict the flow of out-of-region waste to the Clive Facility because Clive is not a "regional disposal facility" under the LLRW Act. But that clarification does not amount to a change in law; it simply acknowledges what was already true, based on statutory text adopted by Congress nearly 25 years ago.

The Order will have *no* impact on the LLRW compact system because, as the district court properly concluded, the Clive Facility is not (and never has been) a "regional disposal facility" and therefore does not operate within the compact system. In other words, the Order leaves the compact system completely intact.

<sup>1</sup> The LLRW Act defines "regional disposal facility" as any "non-Federal low-level radioactive waste disposal site in operation on January 1, 1985, or subsequently established and operated under a compact." 42 U.S.C. § 2021b(11). The Clive Facility falls outside that definition because it (1) "was not in operation in 1985," (2) "was not established" by a compact, and (3) "is not operated under" a compact.

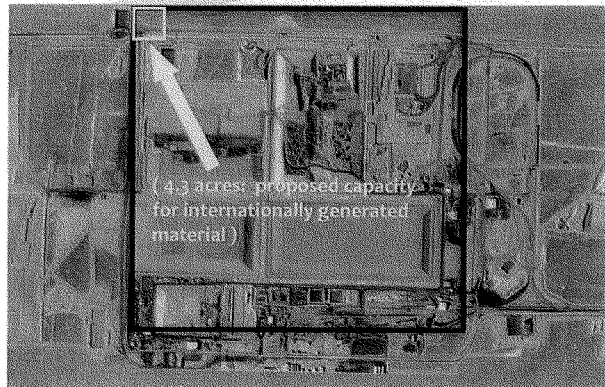
<sup>2</sup> Even if the district court had not concluded that Congress authorized compacts to channel in-region waste exclusively to their own regional disposal facilities, such channeling would be deemed non-discriminatory under the dormant Commerce Clause (and thus lawful even in the absence of congressional authorization) under *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Auth'y*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1786 (2007). See *id.* at 1795.

## FACT SHEET

- EnergySolutions, a world leader in the recycling, processing and disposal of nuclear material, is committed to U.S. energy independence, reduced carbon emissions, environmental protection and safety.
- EnergySolutions employs more than 5,500 dedicated professionals worldwide. Safety is EnergySolutions first priority - safety for our employees, safety for the environment, and safety for our communities. EnergySolutions has been recognized for safety excellence and transports nuclear material safely over 8 million miles per year.
- EnergySolutions recognizes that energy security is essential to our nation's national security. Our nation must reduce its dependence on foreign oil and diversify its energy supply. Nuclear power is a clean, safe, reliable source of energy that must play a vital part in helping the United States achieve this important national objective.
- EnergySolutions has a pending application with the Nuclear Regulatory Commission (NRC) to import up to 20,000 tons of low-level radioactive waste from Italy, process it at the state-of-the-art Bear Creek facility and dispose of a small amount of residual waste (approximately 8 percent) at the Clive disposal facility in Utah.
- The NRC has granted several licenses similar to this request in the past. In fact, EnergySolutions was granted one in 2006 to import up to 6000 tons of similar material from Canada.
- The Bear Creek facility has been processing internationally generated material for over 12 years. This material – metals, paper, plastic, resins – is identical to the material that EnergySolutions processes and disposes each day from the domestic nuclear industry.
- The NRC issues an import license if it deems that the material would be handled in accordance with its regulations to protect public health, safety and the environment, and an appropriate facility is able to accept the material.
- The Utah Division of Radiation Control informed the NRC on March 26, 2008 that "Utah Radiation Control Rules do not prohibit the disposal of low-level radioactive waste from foreign generators."
- In a letter dated March 4, 2008, the Tennessee Division of Radiological Health, Department of Environment and Conservation, informed the NRC that the "Division finds no technical reason to prohibit processing of [the] described waste at the Duratek [EnergySolutions] facilities in Tennessee."
- On May 15, 2009, the U.S. District Court of Utah ruled that the Northwest Compact lacks authority to restrict EnergySolutions' receipt of waste generated outside the Compact region. The Northwest Compact has appealed the Court's ruling.
- If EnergySolutions uses just 4.3 acres of the 640 acre Clive facility for disposal of internationally generated material, it will help America reestablish its leadership in the global nuclear renaissance. It also shows countries that low-level waste can be handled in a safe manner thus creating opportunities to site low-level waste disposal facilities abroad.
- The company is self-imposing a 5% limit and a 10 year timeframe for disposal of internationally generated waste at Clive. Even without this limit, Clive would have more than enough capacity to dispose of all of the low-level radioactive waste from the operations and eventual decommissioning of the 104 U.S. nuclear reactors.

- In 2008, The General Accountability Office (GAO) testified that there was no short-term or long-term disposal issue with Class A LLRW disposal. In fact, the GAO stated that since 2005 the capacity of the Clive facility had extended from 20 years to 33 years. This is due in part to the reduced levels of LLRW that are being generated and increased operational efficiencies achieved by EnergySolutions.
- On September 29, 2009, the U.S. Secretary of Energy and the Italian Minister for Economic Development signed a nuclear declaration and an agreement that lay out areas of cooperation between the two countries. The parties included the following objectives in the declaration:
  - Encourage the nuclear industry to seek contractual opportunities for the construction of nuclear power plants, and for the provision of supporting services and infrastructure.
  - Seek elimination of obstacles to the development of bilateral industrial and commercial cooperation
  - Advance the principle that contractual awards for the construction of nuclear power plants, and the provision of related parts and services, should be based on the commercial and technical merits of the different proposals and industrial partnerships

### Clive Facility



- 640-acre Utah facility (above) safely disposes of only Class A low-level material

**JOINT DECLARATION**  
**BETWEEN**  
**THE GOVERNMENT OF THE UNITED STATES OF AMERICA**  
**AND**  
**THE GOVERNMENT OF THE ITALIAN REPUBLIC**  
**CONCERNING INDUSTRIAL AND COMMERCIAL COOPERATION IN THE**  
**NUCLEAR ENERGY SECTOR**

The Government of the United States of America and the Government of the Italian Republic, hereinafter the "Participants,"

ACKNOWLEDGING the need to consider an appropriate mix of environmentally sustainable, safe, and secure sources of energy, including nuclear power, to meet the needs of their respective countries' populations;

RECOGNIZING the need to address challenges of growing energy needs facing both Participants' countries, as well as the broader international community, in a manner that contributes to reducing the harmful effects of greenhouse gases on climate;

OBSERVING that both Participants are parties to the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, and strongly support the safeguards system of the International Atomic Energy Agency (IAEA), including the Additional Protocol;

NOTING that both Participants are signatories to the Convention on Supplementary Compensation for Nuclear Damage (CSC);

HAVING REGARD to the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community of November 7, 1995, and in particular to the scope of cooperation set out in Article 1 of that Agreement; and

RECOGNIZING both countries' role in the development of nuclear power,

**HAVE REACHED THE FOLLOWING UNDERSTANDING:**


The Participants intend to cooperate, subject to their respective national laws and regulations, to:

- encourage nuclear industry to seek contractual opportunities for the construction of nuclear power plants, and the provision of related supporting infrastructures and services;
- seek the elimination of obstacles to the development of such bilateral industrial and commercial cooperation;
- promote fair, open, and transparent contract bid and award processes for nuclear energy industrial entities in their respective countries;
- advance the principle that contractual awards for the construction of nuclear power plants, and the provision of related parts and services, should be based on the commercial and technical merits of the different proposals and industrial partnerships;
- encourage the establishment of the CSC as a global nuclear liability treaty regime to which both countries are parties;
- promote the establishment of international arrangements that would help future civilian light water reactors deployed in Italy obtain access to reliable nuclear fuel supply and services; and
- encourage the development of civilian nuclear energy infrastructure, including training and human resource development, as well as appropriate application of civilian nuclear energy and related energy technology, in accordance with evolving IAEA guidance and standards on infrastructure development.


Either Participant may cease cooperation under this Joint Declaration, but should endeavor to provide at least 30 days advance written notice to the other Participant.

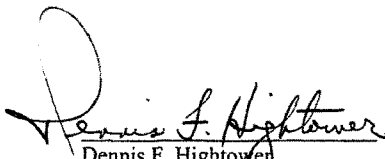
Signed at Washington, in duplicate, on the twenty-ninth day of September, 2009, in the English and Italian languages.

**FOR THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA:**

  
\_\_\_\_\_  
Steven Chu  
Secretary of Energy

**FOR THE GOVERNMENT OF THE  
ITALIAN REPUBLIC:**

  
\_\_\_\_\_  
Claudio Scajola  
Minister of Economic Development

  
\_\_\_\_\_  
Dennis F. Hightower  
Deputy Secretary of Commerce

**AGREEMENT  
BETWEEN  
THE DEPARTMENT OF ENERGY OF THE UNITED STATES OF AMERICA  
AND  
THE MINISTRY OF ECONOMIC DEVELOPMENT  
OF THE ITALIAN REPUBLIC  
FOR COOPERATION IN CIVILIAN NUCLEAR ENERGY RESEARCH AND  
DEVELOPMENT**

The Department of Energy of the United States of America (DOE) and the Ministry of Economic Development of the Italian Republic (MISE) (hereinafter collectively the "Parties");

NOTING the Agreement between the Government of the United States of America and the Government of the Italian Republic for Scientific and Technological Cooperation of April 1, 1988, as amended and extended (the "S&T Agreement");

NOTING their mutually beneficial cooperation in the field of energy research and development;

DESIRING to facilitate joint activities of common interest in the field of advanced nuclear systems, the fuel cycle and nuclear safety, including proliferation-resistant nuclear materials and technologies; promote collaboration between United States and Italian agencies and research organizations to advance the development of nuclear energy; develop advanced concepts and scientific breakthroughs in nuclear fission and reactor technology to address and overcome the principal technical, societal, and economic obstacles to the expanded peaceful use of nuclear energy; and promote and maintain the nuclear science and engineering infrastructure of each Party's country to sustain the capabilities necessary for the development and utilization of nuclear energy;

SEEKING to advance achievement of the goals of the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the European Atomic Energy Community and the United States of America of November 7, 1995;

NOTING the Generation IV International Forum, a framework for international cooperation in research and development for the next generation of nuclear energy systems, whose membership includes DOE and the European Atomic Energy Community (Euratom); and



NOTING FURTHER that MISE will implement this Agreement in close co-ordination with Euratom, which harmonizes participation in Generation IV International Forum activities of the European Union Member States,

Have agreed as follows:

#### **Article 1 Objective**

The objective of this Agreement is to establish a framework for collaboration between the Parties on research and development (R&D) focused on advanced technologies for improving the cost, safety, waste management, and proliferation-resistance of nuclear power systems for civil use. All cooperative activities carried out under this Agreement shall involve peaceful uses of nuclear energy, exclusively.

#### **Article 2 Areas of Cooperation**

- 2.1 The technical areas of collaboration under this Agreement may include, but are not limited to, the following:
  - 2.1.1 Next-generation reactor power plant designs with higher efficiency, lower cost, and improved safety and proliferation resistance;
  - 2.1.2 Innovative nuclear plant design, manufacturing, construction, operation, maintenance, and decommissioning technologies;
  - 2.1.3 Advanced nuclear fuels;
  - 2.1.4 Fundamental nuclear science areas;
  - 2.1.5 Advanced waste treatment, storage, and disposal technologies;
  - 2.1.6 Nuclear safety analysis, standards and criteria; and
  - 2.1.7 Such other areas as the Parties may agree to in writing.
- 2 Sensitive nuclear technology is specifically excluded from cooperation under this Agreement. As used herein, sensitive nuclear technology means any information, including information incorporated in equipment or an important component, that is not available to the public and is important to the design, construction, fabrication, operation or maintenance of any facility designed or used primarily for uranium enrichment, reprocessing of irradiated nuclear material, heavy water production, or fabrication of nuclear fuel containing plutonium.

**Article 3**  
**Forms of Cooperation**

The forms of cooperation carried out under this Agreement may include:

- 3.1 Exchange of scientists, engineers and other specialists for agreed periods of time for participation in agreed research, development, analysis, design and experimental activities conducted in research centers, laboratories, engineering offices and other facilities and enterprises of each Party, each Party's contractors or each participating institution. Such exchanges of personnel shall be conducted in accordance with Article 6 of this Agreement;
- 3.2 Exchange or loan of equipment, samples, materials, instruments and components for testing, as set forth in Articles 7 and 8;
- 3.3 Exchange, on a current basis, of unclassified scientific and technical information, and results and methods of research and development in accordance with Article 9 of this Agreement;
- 3.4 Organization of, and participation in, seminars, workshops, and other meetings on specific mutually agreed topics in the fields listed in Article 2 of this Agreement;
- 3.5 Joint projects in which the Parties agree to share the work and/or costs;
- 3.6 Such other forms of cooperation as may be mutually agreed by the Parties in writing.

**Article 4**  
**Project Annexes**

- 4.1 Cooperative activities under this Agreement may be undertaken by the Parties or, as appropriate, laboratories or contractors of the Parties. Each cooperative activity that may involve the sharing of costs or that may give rise to the creation of intellectual property shall be described in writing in a Project Annex, which shall be subject to approval by the Bilateral Steering Committee (as provided for in Article 5).
- 4.2 Each Project Annex shall include detailed provisions for carrying out the specified forms of cooperation, including such matters as technical scope, work plan, exchange of business-confidential information, management, total costs, cost sharing and schedule. Each Project Annex shall be subject to and shall refer to this Agreement.

**Article 5**  
**Bilateral Steering Committee**

- 5.1 The Parties hereby establish a Bilateral Steering Committee (BSC) to provide programmatic direction and oversight of the bilateral cooperative program. Each Party will appoint up to two representatives to serve on the BSC. The general duties of the BSC are to:
  - 5.1.1 Establish procedures to identify, review and select joint cooperative tasks and associated schedules;
  - 5.1.2 Determine criteria and organize reviews to evaluate tasks;
  - 5.1.3 Monitor progress of all selected tasks;
  - 5.1.4 Issue periodic/annual status reports for tasks; and
  - 5.1.5 Propose to the Parties either continuation of selected tasks, programmatic modifications as appropriate, or termination of a task if warranted by lack of reasonable progress.
- 5.2 Decisions of the BSC shall be made on the basis of consensus.
- 5.3 The BSC shall meet once each year, alternately in the United States and in Italy, or at such other times and places as agreed. At its meetings, the BSC shall evaluate the status of cooperation under this Agreement. This evaluation shall include a review of the past year's activities and accomplishments and of the activities planned for the coming year. In addition, the BSC shall consider and act on any major new proposals for collaboration.

**Article 6**  
**Assignment and Exchange of Personnel**

Each Party agrees to ensure that, whenever an assignment or exchange of staff is contemplated under this Agreement:

- 6.1 Each Party shall endeavor to ensure that qualified staff with skills and competence necessary to conduct the activities planned under this Agreement are selected for exchanges or assignments to the host institution. Each such exchange or assignment shall be agreed in advance by an exchange of letters between the Parties referencing this Agreement.
- 6.2 Each Party shall be responsible for the salaries, insurance, and allowances to be paid to its staff or its contractors.

- 6.3 Each Party shall pay for the travel and living expenses of its staff or contractors while on assignment to the host Party, unless otherwise agreed in writing.
- 6.4 The host Party shall help identify adequate accommodations for the other Party's staff or contractors (and their families) on a mutually agreeable, reciprocal basis.
- 6.5 The host Party shall provide all necessary assistance to the staff of the other Party or its contractors (and their families) as regards administrative formalities, such as assistance in making travel arrangements and visa applications.
- 6.6 The staff and contractors of each Party shall conform to the general and special rules of work and safety regulations in force at the host establishment.
- 6.7 The host Party shall grant assigned staff of the other Party access to unclassified information to the extent necessary to allow the staff to perform assigned duties.

#### **Article 7 Exchange of Equipment**

By mutual agreement, a Party may provide equipment to be utilized in a joint activity. In that event, the following provisions shall apply:

- 7.1 The sending Party shall supply, as early as possible, a detailed list of the equipment to be provided, together with the relevant specifications and appropriate technical and informational documentation related to use, maintenance, and repair of the equipment.
- 7.2 Title to the equipment and necessary spare parts supplied by the sending Party for use in joint activities shall remain with the sending Party, and the equipment shall be returned to the sending Party upon completion of the joint activity, unless otherwise agreed.
- 7.3 Equipment provided pursuant to this Agreement shall be brought into operation at the host establishment only by mutual agreement of the Parties.
- 7.4 The host establishment shall provide the necessary premises and shelter for the equipment; utilities such as electric power, water and gas; and normally, shall provide materials to be tested, in accordance with all technical requirements, which shall be as mutually agreed upon.
- 7.5 Responsibility for expenses, safekeeping, and insurance during the transport of equipment from the original location in the country of the sending Party to the place of entry in the country of the receiving Party shall rest with the sending Party. If the sending Party elects to have the equipment returned, it shall be responsible for expenses, safekeeping, and insurance during the transport of the

equipment from the original point of entry in the country of the receiving Party to the final destination in the country of the sending Party.

- 7.6 Responsibility for expenses, safekeeping, and insurance during the transport of equipment from the place of entry in the country of receiving Party to the final destination in the country of the receiving Party shall rest with the receiving Party. If the sending Party elects to have the equipment returned, the receiving Party shall be responsible for expenses, safekeeping, and insurance during the transport of the equipment from the final destination in the country of the receiving Party to the original point of entry in the country of the receiving Party.
- 7.7 Responsibility for expenses, safekeeping, and insurance during the time period that the equipment is in use in the country of the receiving Party shall rest with the receiving Party unless otherwise agreed in writing.
- 7.8 Equipment provided by the sending Party for use in carrying out joint activities shall be considered to be scientific, not having a commercial character, and the receiving Party shall work toward obtaining duty free entry.

#### **Article 8 Samples and Materials**

Unless otherwise agreed in writing, the following provisions shall apply to the transportation and use of samples and materials provided by one Party to the other Party under this Agreement:

- 8.1 All samples and materials provided by the sending Party to the receiving Party shall remain the property of the sending Party, and shall be returned to the sending Party on request.
- 8.2 Where one Party requests that the other Party provide a sample or material, the Party making the request shall bear all costs and expenses associated with the transportation of the sample or material from the location of the sending Party to the final destination.
- 8.3 Each Party shall promptly disclose to the other Party all information arising from the examination or testing of samples or materials exchanged under this Agreement. The Parties agree that business-confidential information (as defined in Section III of the Intellectual Property Annex attached as Annex I to the S&T Agreement), which was developed prior to or outside the scope of this Agreement, shall remain business-confidential even though it is contained in the results of an examination or testing of samples or materials. Such information shall be identified as business-confidential by the Party asserting its business-confidential nature as soon as possible after disclosure of all information arising from the examination or testing is made to such Party and the other Party shall be

immediately advised of that identification. All information identified as business-confidential shall be controlled as provided in Section III of Annex I to the S&T Agreement.

- 8.4 A Party providing samples or materials to the other Party may also provide a partial or complete list of the types of information that may result from the examination or testing of such samples or material and which are to be treated as business-confidential as defined in Section III of Annex I to the S&T Agreement. All such business-confidential information is to be controlled as set out in Section III of that Annex.

## **Article 9**

### **Transfer of Information and Equipment**

- 9.1 The Parties may exchange, as agreed on a mutually beneficial basis, scientific and technical information, documents, and results of research and development of work carried out under this Agreement. Such information shall be limited to that which the Parties have the right to disclose, either in their possession or available to them, relating to the areas of cooperation described in Article 2.
- 9.2 Seminar proceedings and reports of joint activities carried out under this Agreement shall be published as joint publications, as agreed by the Parties.
- 9.3 The Parties agree that information developed and exchanged under this Agreement should be given wide distribution. Except as provided in Section III of Annex I to the S&T Agreement, such information may be made available to the public by either Party through customary channels and in accordance with normal procedures of the Parties.
- 9.4 Any information transmitted by one Party to the other Party under this Agreement and any related Project Annexes shall be accurate to the best knowledge and belief of the transmitting Party. Any equipment transferred by one Party to the other Party under this Agreement shall be suitable for its intended use to the best knowledge and belief of the transmitting Party. The transmitting Party does not warrant the suitability of the information or equipment transmitted for any particular use or application by the receiving Party or by any third party.
- 9.5 Information developed jointly by the Parties shall be accurate, and jointly developed information shall be suitable for its intended use, to the best knowledge and belief of both Parties. Neither Party warrants the accuracy of the jointly-developed information or the appropriateness of equipment, nor its suitability for any particular use or application by either Party or by any third party.
- 9.6 Information and equipment protected for national security reasons shall be governed by Annex II (Security Obligations) of the S&T Agreement.

**Article 10**  
**Intellectual Property; Business-Confidential Information**

The protection and allocation of intellectual property and the treatment of business-confidential information created or furnished in the course of cooperative activities under this Agreement shall be governed by the provisions of Annex I (Intellectual Property) to the S&T Agreement.

**Article 11**  
**Funding**

- 11.1 Unless otherwise agreed, all costs resulting from cooperation pursuant to this Agreement shall be the responsibility of the Party that incurs them.
- 11.2 Each Party shall conduct the activities provided for in this Agreement and its Project Annexes subject to its applicable laws and regulations. Activities under and pursuant to this Agreement and related Project Annexes shall be subject to the availability of appropriated funds.

**Article 12**  
**Additional Organizations**

By mutual agreement, the Parties may invite other organizations in the public and private sectors to participate in cooperative activities under this Agreement, at their own expense and upon such terms as the Parties jointly decide.

**Article 13**  
**Contracts**

In the event a Party awards contracts for the acquisition of articles and services to implement this Agreement, such contracts shall be awarded in accordance with the laws and regulations of that Party's country.

**Article 14**  
**Dispute Resolution**

Except as provided in Section II.D. of the Intellectual Property Rights Annex, any question or dispute arising under this Agreement shall be resolved by consultation between the Parties.

**Article 15**

**Entry into Force, Duration, Amendment and Termination**

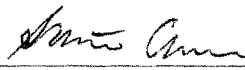
- 15.1 This Agreement shall enter into force upon signature, shall remain in force for five years, and shall be automatically renewed for additional five-year periods unless terminated pursuant to Article 15.3.
- 15.2 This Agreement may be amended by written agreement of the Parties.
- 15.3 The Parties may terminate this Agreement by mutual written agreement. Either Party may terminate this Agreement at any time after providing six months written notice to the other Party.
- 15.4 Joint activities not completed upon termination of this Agreement may continue until completion under the terms of this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

DONE at Washington , in duplicate, this twenty-ninth day of September, 2009.

**FOR THE DEPARTMENT OF ENERGY  
OF THE UNITED STATES OF AMERICA:**

**FOR THE MINISTRY OF ECONOMIC  
DEVELOPMENT OF THE ITALIAN  
REPUBLIC:**

  
\_\_\_\_\_  
Steven Chu  
Secretary of Energy

  
\_\_\_\_\_  
Claudio Scajola  
Minister of Economic Development



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**From:** Dane Finerfrock [mailto:DFINERFROCK@utah.gov]  
**Sent:** Wednesday, March 26, 2008 3:29 PM  
**To:** Stephen Dembek  
**Cc:** Brooke Smith  
**Subject:** License Application IW023

Dear Mr. Dembek:

This refers to your letter dated February 19, 2008. I appreciate the opportunity to comment on the EnergySolutions license application to import radioactive materials, some of which is expected to be disposed of at the EnergySolutions disposal site in Utah as low-level radioactive waste (LLRW).

We are providing the following comments:

- \* The Utah Radiation Control Rules do not prohibit the disposal of low-level radioactive waste from foreign generators.
- \* All LLRW sent to EnergySolutions for disposal must meet the license conditions of the current Radioactive Materials License, #UT2300249, issued by the Utah Division of Radiation Control.
- \* Please be aware that the Utah Radiation Control Board and Utah Governor Jon Huntsman wrote to Commissioner Klein requesting the NRC license deliberations take into account several national policy issues relating to the application.

Please contact me at 801-536-4250 if you have any questions.

Sincerely,

Dane Finerfrock, Director  
Utah Division of Radiation Control



STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION  
DIVISION OF RADIOLOGICAL HEALTH  
L&C ANNEX - THIRD FLOOR  
401 CHURCH STREET  
NASHVILLE, TENNESSEE 37243

March 4, 2008

Mr. Stephen Dembek, Branch Chief  
Export Controls and International Organizations  
Office of International Programs  
United States Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Dear Mr. Dembek:

SUBJECT: Applications for NRC Import License IW023 and NRC Export License XW013

This letter acknowledges your letter dated February 19, 2008, with attachments, concerning the import and export license applications from EnergySolutions for the transfer of radioactive waste from Italy to Duratek (EnergySolutions) facilities in Tennessee.

Upon review of this information and the references to the authorizations granted by the Tennessee Radioactive Material Licenses issued to Duratek, the Division finds no technical basis to prohibit the processing of this described waste at Duratek facilities in Tennessee.

Thank you for the opportunity to comment on these applications.

Sincerely,

A handwritten signature in black ink, appearing to read "Johnny C. Graves", with a long, sweeping horizontal line extending to the right.  
Johnny C. Graves  
Licensing, Registration, & Planning Manager  
Division of Radiological Health  
Department of Environment and Conservation

Mr. MARKEY. Thank you, Mr. Christensen, very much.

Now we will turn to questions from the subcommittee.

Mr. Slosky, you are an expert on the compact system. You have spent your life working on it. Are you concerned that if Utah and the Northwest Compact are forced to take the Italian waste that the compact system itself would be damaged?

Mr. SLOSKY. Yes, I am very much so concerned.

Mr. MARKEY. Could this lead to other States refusing to open low-level waste disposal sites?

Mr. SLOSKY. Yes, I believe it could. The ruling from the court—

And let me first give you a disclaimer. I am not an attorney; and since it is ongoing litigation, I am not going to discuss the merits of the case, but I am happy to discuss its implications. The implication is that there could be a very detrimental effect on the development of any new facilities in the U.S. because it will be uncertain under this ruling whether the compacts in which those facilities would be located would have exclusionary authority or not.

Mr. MARKEY. So this could send us back to 1980 before we passed the legislation out of this committee.

Mr. SLOSKY. Yes, sir.

Mr. MARKEY. Let me turn to you, Ms. Doane.

Has the NRC ever denied an import application for low-level waste because the importation would pose an unreasonable risk to the common defense and security?

Ms. DOANE. No. I don't believe we have ever denied an application because of common defense and security concerns.

Mr. MARKEY. You were listing the reasons that you could reject. So you have never rejected?

Ms. DOANE. We have not, no.

Mr. MARKEY. Has the NRC ever denied an import application for low-level waste because it would pose an unreasonable risk to the public health and safety?

Ms. DOANE. Yes. We have returned without action applications that have come in where they haven't been able to satisfy us that public health and safety would be protected.

Mr. MARKEY. Were those applications ultimately modified that made them acceptable? Or was it just a flat-out rejection?

Ms. DOANE. Some were modified, but others were, no, didn't submit them again. We raised a lot of questions, and they weren't re-submitted.

Mr. MARKEY. So how many applications have been denied over the years?

Ms. DOANE. We have returned without action I would say maybe five or so. There might be more, but offhand that is what I would say.

Mr. MARKEY. And how many actual denials have you ever issued?

Ms. DOANE. I don't believe we have actually denied them. Because, in those cases, that is the same effect. The return without action has the same effect. We return them with what they would have to do to put them back in, and they aren't returned. So if they can't meet the request that we had, we return them without action. So it has the exact same effect as a denial.

Mr. MARKEY. So it is rarely used, though?

Ms. DOANE. The return without action is rarely used?

Mr. MARKEY. Yes.

Ms. DOANE. It is more rare now. It was in the beginning. After the 1995 rule where we required licenses, it was more common. It is getting less common as people start to understand the regulations. They don't come in where they know they are not going to meet them.

Mr. MARKEY. So if the regional compacts do not have the ability to say no and the NRC very rarely says no, then it is unlikely that there would be many instances where low-level nuclear waste would be blocked from coming into our country.

Ms. DOANE. The regional compacts can say no over the facilities that they have control. And, in fact, in one of the first cases that we had, the applicant was unable to show that Barnwell would accept the waste, and that was the reason for their return without action.

Mr. MARKEY. Now let me go over to you, Mr. Slosky. Do you agree with her that it will have no impact on the compact States?

Mr. SLOSKY. No, I do not agree with her.

Mr. MARKEY. Could you expound on your answer, please?

Mr. SLOSKY. Well, I think in looking at the NRC regs it is unclear to me what the role is of the States and compacts in the NRC decision making. It has a consultation provision, but it is not explicit in the regulations if the States and compacts, as in this case, comment back that the waste is not acceptable what the NRC does with that consultative information.

Mr. MARKEY. The Chair's time has expired. The gentleman from Michigan, Mr. Upton, is recognized.

Mr. UPTON. Thank you, Mr. Chairman.

The question that quickly comes to mind is, Mr. Slosky, how does the storage of only 4 acres—in this particular case, the Clive, Utah, has what, 640 acres, is that right, Mr. Christensen?

Mr. CHRISTENSEN. Yes, sir.

Mr. UPTON. How does an agreement to limit it to only 4.3 acres undermine the compacts across the rest of the country? Knowing that that is it. The stop sign is up. Put it in the amendment. The courts have said it is OK up to this point and waiting for an appeal which—see what happens.

Mr. SLOSKY. The reason it has large implications is the court's ruling goes well beyond 4 acres. The court's ruling undermines the fundamental authority of the compacts.

Mr. UPTON. But this is a private—I mean, this is a private facility, right?

Mr. Christensen, do you want to comment on that?

Mr. CHRISTENSEN. As I mentioned, the court's ruling is narrow. There aren't any other facilities in the United States like the Clive facility, and the court went on to emphasize that compacts retain their authority under the Low-Level Radioactive Waste Policy Act to exclude waste from the compact facilities and to control the waste within the compact borders.

Mr. SLOSKY. Can I respond?

Mr. UPTON. Sure.

Mr. SLOSKY. I would just point out that the WCS facility in Texas that recently received a license and is about to begin con-

struction is also a privately owned and privately operated low-level waste site but is intended to serve the Texas compact. But, under the court's ruling, the exclusionary authority of the Texas compact over that facility could also be brought into question.

Mr. UPTON. Mr. Christensen, do you want to respond?

Mr. CHRISTENSEN. Yes. I am a lawyer by training, so I don't want to get into too much technicality on this. But the WCS facility is a compact facility and would be controlled by the compact board in the State of Texas, and the court ruling would have no impact whatsoever on the Texas compact authority over the WCS facility. There is no other facility like the Clive facility, which is outside of the compact system.

Mr. UPTON. Thank you.

Ms. Doane, how many waste import licenses has the NRC actually granted over the years?

Ms. DOANE. Fourteen.

Mr. MARKEY. And you have granted the import license to EnergySolutions, is that right?

Ms. DOANE. Other import licenses, yes.

Mr. UPTON. And are they currently importing waste pursuant to that license? Were you aware of any violations?

Ms. DOANE. No, we are not aware of any violations.

Mr. UPTON. Mr. Christensen, does the Clive facility have enough capacity to meet the disposal requirements in the domestic nuclear industry and other customers?

Mr. CHRISTENSEN. We do. We have remaining about 140 million cubic feet, which for our operational purposes is adequate and projected to go out to about 30 years. That includes using 5 percent of that capacity for international waste. We certainly have—we have other capacity that is not yet licensed that is accessible through the licensing process if capacity ever became a national issue.

Mr. UPTON. And there is no real difference, right, between Class A waste between different countries, right? It is, in essence, the same.

Mr. CHRISTENSEN. No, sir, there isn't. The NRC has concluded that there is no difference between Class A low-level waste coming from domestic sources and from international sources.

Mr. UPTON. And, Mr. Slosky, at least in your opinion, we haven't seen any violations, right, in the Clive facility. I mean, are you aware of any trouble that has been there at all?

Mr. SLOSKY. Well, there are, on occasion, regulatory violations that are assessed against the company by the State of Utah. But, for the most part, the facility is in compliance with the agreement of State regulations.

However, that is not the issue. The issue is a policy issue of whether it is appropriate to manage foreign nations' waste in this country. We know we have the technical capability. We know the disposal facilities can accept the waste from a technical standpoint. The issue is really a policy issue.

Mr. UPTON. I yield back. Thank you.

Mr. MARKEY. The gentleman's time has expired.

The Chair recognizes the gentleman from Utah, Mr. Matheson.

Mr. MATHESON. Thank you, Mr. Chairman.

I don't know if there was ever a citing of a violation. But when waste went to Bear Creek and then went to the Utah facility and neither the State of Utah nor the Northwest Compact were ever made aware of it, I think that was a violation. Just for what that is worth.

Mr. CHRISTENSEN. Could I respond to that?

Mr. MATHESON. No, I have got only 5 minutes; and I am going to my questions.

Mr. Slosky, when the compact system was being drafted and created in the 1980s, was there any discussion of foreign waste importation and storage at low-level radioactive waste facilities?

Mr. SLOSKY. I can recall none, other than discussions with the Department of Defense in terms of returning to the U.S. U.S.-origin materials the Department of Defense utilized abroad.

Mr. MATHESON. And I would note that the legislation as drafted allows for foreign waste created at U.S. Department of Defense facilities overseas to return to this country. It has an exception for that type of waste.

Was there any expectation that foreign waste is considered out-of-region waste during that discussion?

Mr. SLOSKY. We always considered foreign waste to be out of region, yes.

Mr. MATHESON. Mr. Slosky, in your testimony, you said foreign waste disposal is one of the most serious threats to the compacts in its 25-year history. Can you explain that statement?

Mr. SLOSKY. Yes. The whole history of the compact system, going back to 1980 and really to 1979, was the State's desire to be able to control the flow of waste to their sites. So if you look at South Carolina, Washington State, Nevada at the time we had a disposal site there, and now Utah and Texas, the issue is being able to control the waste that goes to those sites. And if we lose control of foreign waste going to those sites, then the system is undermined, and it is very likely that all of those sites in time will close to all generators.

Mr. MATHESON. We have heard about the issue of the nuclear cooperation agreement with Italy. What would happen if we start importing waste from all the countries we have nuclear cooperation agreements with? We have agreements with India, Japan, United Arab Emirates, Jordan, most of Europe, China. It seems to me that there is a significant volume out there if you start expanding it out there to all those states. Is that a threat to the compact system?

Mr. SLOSKY. I believe it is.

Mr. MATHESON. Since the compact system was intended to allow States to self-manage low-level radioactive, do you think any State or compact would have authorized the creation of a new low-level radioactive waste site if the State thought it did not have the authority to regulate its site?

Mr. SLOSKY. No, they would not. In fact, Utah has stated that they would not have licensed Clive for low-level waste if they did not believe they had the authority through the compact to control the flow of all out-of-region waste, including foreign waste.

Mr. MATHESON. Mr. Slosky, EnergySolutions has told us that, as a result of the district court ruling in Utah earlier this year, the company is not regulated by the Northwest Compact because it is

not a regional disposal facility. In your testimony you said the district court completely disregarded explicit language in the Northwest Compact that was approved by Congress as Federal law. Can you expand on this point?

Mr. SLOSKY. Yes. The Northwest Compact does not use the term "regional facility". The Northwest Compact bars any facility and any of their member States from receiving low-level waste without the approval of the compact. That language was disregarded, and the court reverted to the much more narrow definition of regional disposal facility.

Mr. MATHESON. Mr. Slosky, 2 years ago, the Utah State legislature moved to enact legislation. They were working on enacting legislation that would have removed local government legislative and gubernatorial approval for expansion of the Clive site.

As was noted in the September, 2007, low-level radioactive waste management report, former Governor Huntsman threatened to notify the Northwest Compact to limit the volume of waste that can be disposed to the current levels. In response, Governor Huntsman and EnergySolutions reached an agreement that the company would withdraw its application for additional disposal capacity and the Governor agreed to refrain from seeking to limit disposal capacity at the facility. Two years later, it now seems, based on this court ruling, that EnergySolutions does not believe it is under the authority of the compact system. So what are your thoughts about this?

Mr. SLOSKY. Well, this has been a little bit of a surprise. Because for, I believe, 15 or 17 years EnergySolutions has been operating under the compact system, appearing at the compact meeting, submitting reports, coming to the committee and requesting approval to accept waste. Then suddenly, when this dispute arose, EnergySolutions took the position that they are not actually regulated by the compact.

Mr. MATHESON. Last question, Mr. Chairman. I know my time is running out.

Is this a question that they are saying, the Northwest Compact has the authority to regulate the disposal capacity but not the material which is disposed there? Is there a distinction they are making in that sense?

Mr. SLOSKY. Well, there is a distinction between what the agreement states the State of Utah regulates and what the compact regulates. The State of Utah regulates the health and safety and capacity of the site. The Northwest Compact regulates where waste can come from to the site.

Mr. MATHESON. Thank you, Mr. Chairman. My time has expired.

Mr. MATHESON. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Gordon, is recognized.

Mr. GORDON. Thank you, Mr. Chairman.

Mr. Christensen, going back to your statement, you started off by saying that the major issue here was safety. Yet I will point out that no one here has raised safety as an issue. One major issue, though, is the capacity. We might have different arguments about how long it can be there, but there can be no argument that capacity is finite.

Now also in your testimony you said that allowing Italian waste to be dumped in the U.S. would violate the spirit of the U.S.-Italian joint declaration concerning industrial and commercial cooperation in the nuclear energy section.

Let me point out that the United States has a similar agreement with 40 other States. So by inference then you are saying that we would break our agreement in the spirit with 39 other countries. So, to me, that does two things: One, it opens a big door for those countries to ship their radioactive waste here; and, secondly, it sends a message to them that they don't have to be responsible, that they can build whatever they want and not look at taking care of it.

So here are my questions for you: Does EnergySolutions have an enforceable contract with the Italians to dispose of the waste or suffer damages regardless of whether it gets a license from the NRC?

Mr. CHRISTENSEN. No.

Mr. GORDON. Hmm. You say you are a lawyer, right?

Mr. CHRISTENSEN. I am.

Mr. GORDON. Are you a lawyer of the company?

Mr. CHRISTENSEN. I was formerly general counsel of the company and am currently president of the company.

Mr. GORDON. So were you general counsel on June 19?

Mr. CHRISTENSEN. Yes.

Mr. GORDON. All right. I am trying to understand this.

In a formal submission to the NRC on June 19, 2009, in response to the NRC's May 20, 2009, order for comment on how to proceed on your license application, EnergySolutions stated—and I assume this is what you wrote—EnergySolutions stated that a delay in issuing this license—and I quote—would cause EnergySolutions substantial economic harm because it is unable to perform work under its contracts for waste without the requested license.

Now can you sort of help me on this?

Mr. CHRISTENSEN. Well, your earlier question was whether we would be exposed to damages—

Mr. GORDON. No, my question was very specific. My question was this: Does EnergySolutions have an enforceable contract with the Italians to dispose of its waste or suffer damages regardless of whether it gets a license from the NRC? That was my question. Your answer was, as I recall, no.

Mr. CHRISTENSEN. That is correct. We don't have a contract concluded with the Italian Government or the Italian sources that would expose us to damages if it weren't fulfilled.

Mr. GORDON. Then why did you write to the NRC that if you did not get that license you would, and I quote, would cause EnergySolutions substantial economic harm because it is unable to perform under its contract for the waste without the requested license. Page 8 on June 19, 2009, submission to the NRC.

Mr. CHRISTENSEN. I would have to go back and look at it, but we would suffer economic harm by not being able to fulfill contracts that we are in the process of negotiating. We don't have signed final contracts—

Mr. GORDON. OK. So just help me here. Help me here. This is what you wrote to the NRC, a Federal agency, that if you did not



get the license you would cause EnergySolutions substantial economic harm because it is unable to perform work under its contracts for this waste without the requested license.

Mr. CHRISTENSEN. That is right.

Mr. GORDON. So did you have any contracts on June the 19th?

Mr. CHRISTENSEN. We didn't have any final, binding contracts.

Mr. GORDON. Then why would you tell a Federal agency—this is what he wrote to you. Where would you write to this lady in a Federal capacity that you did have contracts?

Mr. CHRISTENSEN. Because contract negotiations were under way, and the contracts we are referring to are the potential contracts with the Italian Government which we would not be able to secure or perform without the license.

Mr. GORDON. Well, I will let that go, but NRC may not.

Now, Mr. Slosky, let me ask you something. Is it true that when EnergySolutions said they were going to bring this Italian waste into Utah that the Governor said no and then EnergySolutions sued the State?

Mr. SLOSKY. Actually, what transpired is that the Governor of Utah instructed his member on the Northwest Compact to vote against bringing the waste in; and since Utah is the host State they have essentially a veto power over the compact's agreement to bring any waste in.

Mr. GORDON. So EnergySolutions sued them to be able to do this?

Mr. SLOSKY. Yes. Actually, shortly before the meeting in the Northwest Compact, EnergySolutions filed suit in Federal District Court.

Mr. GORDON. And, Ms. Doane, if I could, is it proper to summarize your testimony or portions of your testimony by saying that it really is a policy issue of whether radioactive waste should be brought into this country or not?

This is not NRC. You don't have the authority other than on the safety issues to say whether it can come in or not. So if we are going to allow the United States to be the only country in the world that would accept radioactive waste from other nations then a policy decision has to be made by the Congress.

Ms. DOANE. That is right.

Mr. GORDON. Thank you.

Mr. MARKEY. That completes the first round of questions from the subcommittee. Are there members seeking recognition for the purpose of asking questions on a second round?

The gentleman from Michigan.

Mr. UPTON. Let me just ask unanimous consent. We were originally going to have votes today, and they cancelled them yesterday afternoon. So that is one of the reasons there are only four of us here. I might just ask that all members of the subcommittee may have the opportunity to submit written questions within the next week or so and if you could respond in a timely basis. I am not sure what the chairman—

Mr. MARKEY. Without objection, so ordered.

Mr. UPTON. Thank you.

Mr. MARKEY. Other questions?

The gentleman from Utah is recognized.

Mr. MATHESON. I have just got a couple more questions I didn't get to ask.

Ms. Doane, I wanted to ask—one of the arguments made by EnergySolutions is the NRC has already issued import licenses to other companies and materials have been imported for several years. Has the NRC ever previously approved a license to allow for anything close to 20,000 tons of waste from a foreign country?

Ms. DOANE. No. Not this volume of ultimate disposal, no.

Mr. MATHESON. I saw the table you included with your testimony at the end of your testimony which lays out the volumes of what have been allowed to come into this country. I see five where the waste was ultimately disposed in this country. All the rest have been processed here and then returned back to the originating country; and all of them are quite small, from my view, in terms of the volume. Is that a fair statement?

Ms. DOANE. The ultimate disposal volume, right.

Mr. MATHESON. Last year when you testified before this committee, I expressed a concern about the lack of regulatory accountability for foreign-generated waste. At the time, you indicated that the NRC does not currently have the authority to prohibit the importation of nuclear waste, as you just had the discussion with Mr. Gordon. Or you weren't here. It was—

Ms. DOANE. Can I clarify that for the record?

Mr. MATHESON. Sure.

Ms. DOANE. We absolutely have the authority to reject waste that would pose a health and safety issue, a common defense and security issue.

Mr. MATHESON. Yes, that is a correct statement. The criteria you use to evaluate it are not whether or not it is foreign waste or not; it is the issues you—

Ms. DOANE. That is right.

Mr. MATHESON. Thank you.

We have also heard that the company believes that neither the State of Utah nor the Northwest Compact has the right to prohibit this material from coming into the United States, and you still believe you lack the authority to prohibit the waste from coming into the United States based on simply where it comes from.

Ms. DOANE. That is right. Just based on its foreignness, that is right.

Mr. MATHESON. So it seems to me that no one has the authority to make the call on whether or not foreign waste should come from a regulatory standpoint. It is really—to reiterate what Mr. Gordon said, this is a policy issue about whether or not this country is going to allow this to happen.

Ms. DOANE. Well, I won't speak for Mr. Slosky. I think the compacts believe they do have the authority to keep waste out because of its foreignness. So I won't speak to him. And if they have control of a facility, as happened with the Barnwell case, the very first case, and they say waste can't come in, we would not have the third criterion met, which is that an appropriate facility has agreed to accept the waste.

Mr. MATHESON. Has the NRC done any additional work to determine national disposal capacity for low-level radioactive waste?

Ms. DOANE. Not the—we haven't actually done the studies, no.

Mr. MATHESON. Is that an agenda item that is being considered at NRC? Would it make sense to make a decision about what our capacity is in terms of approving applications for waste?

Ms. DOANE. I probably shouldn't just hypothesize about that, but where capacity issues could raise a health and safety concern, then, yes, we look into them. But we look to the proper authorities that also make those decisions.

Mr. MATHESON. OK. Thanks, Mr. Chairman. I yield back.

Mr. UPTON. Can I ask one follow-up question?

Mr. MARKEY. The gentleman is recognized for that purpose.

Mr. UPTON. Since you all approved the import license—right?

Ms. DOANE. What import license?

Mr. UPTON. I mean, you all gave the license to the facility in Clive. Do you actually check with the State?

Ms. DOANE. Well, we haven't approved the Italian. I know that is not what you mean. But we haven't approved the Italian import license. We have approved licenses in the past; and, yes, we do check—

Mr. UPTON. And you do check—that is part of the checklist—

Ms. DOANE. Absolutely. The host States, the compacts, yes. And our process is very public. We also publish all materials, and we do get comments from other compacts that might be also interested. We take all of that into consideration.

Mr. UPTON. Thank you.

Mr. MARKEY. Are there other questions?

The gentleman from Tennessee.

Mr. GORDON. Just one last quick question to Ms. Doane.

Does EnergySolutions currently have pending import license applications to bring radioactive waste in from Brazil and Mexico?

Ms. DOANE. There are two pending applications for Brazil and Mexico. I know that one is of them is energy. The material will ultimately go to the Clive, Utah, site. I am not sure they are their applications.

Mr. GORDON. So that Mexico and Brazil have also asked to be able to export to us some radioactive waste. It would wind up in Utah; is that correct?

Ms. DOANE. Applicants in the United States have applied to get waste from, yes, Brazil and Mexico to ultimately have some material disposed of in Clive, Utah.

Mr. GORDON. Thank you.

Mr. MARKEY. The gentleman's time has expired.

Other questions from members?

What we will do then is give each one of the witnesses 1 minute to summarize their position to the committee. In reverse order from the original statements, we will begin with you, Mr. Christensen.

Mr. CHRISTENSEN. Thank you, Mr. Chairman.

Just to set the record straight with respect to the contract issue, the company had signed memoranda of understanding, which I don't—as a lawyer don't consider to be the final definitive agreement on these—on the Italian arrangement. There is no license and there is no contract at this point in time, obviously; and I just—

Mr. GORDON. So are you going to amend your submission to the NRC?

Mr. CHRISTENSEN. No. The submission to the NRC is accurate.

The only other comment I want to make is that we have a legitimate business that is lawful, it is highly regulated. We deal with these materials safely, and it is critical to the nuclear industry in the United States. The opportunity to handle a small amount of international waste gives us an opportunity to play on a global stage.

What is at stake here is not just Italian waste to be disposed of in Utah. Helping them solve a small part of their Class A low-level waste issues allows us to deal with site selection and development in Italy and a lot of other technical areas. We are competing with other foreign companies to participate as a leader from America in the nuclear renaissance. And we have as our secret sauce, in attempting to compete with other world competitors, the ability to dispose of a small amount of their waste, and it is limited.

Now, the 4.3 acres in the private site doesn't bar all of the other compact facilities from excluding waste from their facilities. So there is a finite amount that would come into the United States. All the other compacts can exclude foreign waste under the court's ruling and under the compact law.

Mr. MARKEY. The gentleman's time has expired.

Mr. Slosky.

Mr. SLOSKY. Thank you.

There is one issue that came up that I would like to clarify. The implication was brought up that the compacts believe that they have the authority to control waste coming into the United States. That is not correct. The decision of whether waste comes into the United States is a Federal decision currently resting with the NRC. The compacts have the authority to control whether it comes into their compact regions. That is, I think, a very important distinction.

The other issue that we have touched on but may not have been adequately focused on, and that is that there has been foreign waste brought in in the past. It has been recycled or processed, which is just fine, but the States are very concerned, the compacts are concerned in cases where that foreign waste gets reattributed and disposed of as domestic waste and its foreign origin gets obscured.

The last thing I would like to say is that eight of the ten low-level waste compacts representing 34 States are involved in the EnergySolutions litigation, and I think that is ample proof of the potential broad-reaching implications of that lawsuit.

Mr. MARKEY. Thank you, Mr. Slosky.

And Ms. Doane.

Ms. DOANE. Thank you again for the opportunity to speak to you this morning.

I think I just want to make sure that it is clear that the third criterion that we consider about whether an appropriate facility has agreed to take the waste considers the views of the compacts and where that decision is left to rest and there is not a facility—so not like the case here where there is review going on—we would take that into consideration and would not permit the waste to come in, and we have done so in the past.

We do understand the roles and actually have a very good working relationship with both the States and the compacts. We depend on their advice on issues that they have—their responsibility—they are responsible for. We depend on their advice, and we do seek that out.

And I also want to point out we have a very public process that takes a very deliberate and very considerate view of all the technical, safety, common defense, and security issues that would come up with these waste imports.

Mr. MARKEY. Thank you, Ms. Doane.

We thank each of our witnesses very much.

I ask that the members be given 5 business days to submit any questions for the record.

Without objection, that will be ordered.

Again, we thank you. We welcome you back, Mr. Slosky. Good to see you again. See you in 25 more years, and I will still be here.

This hearing is adjourned. Thank you.

[Whereupon, at 10:45 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

**AGREEMENT**  
**BETWEEN**  
**THE DEPARTMENT OF ENERGY OF THE UNITED STATES OF AMERICA**  
**AND**  
**THE MINISTRY OF ECONOMIC DEVELOPMENT**  
**OF THE ITALIAN REPUBLIC**  
**FOR COOPERATION IN CIVILIAN NUCLEAR ENERGY RESEARCH AND**  
**DEVELOPMENT**

The Department of Energy of the United States of America (DOE) and the Ministry of Economic Development of the Italian Republic (MISE) (hereinafter collectively the "Parties");

NOTING the Agreement between the Government of the United States of America and the Government of the Italian Republic for Scientific and Technological Cooperation of April 1, 1988, as amended and extended (the "S&T Agreement");

NOTING their mutually beneficial cooperation in the field of energy research and development;

DESIRING to facilitate joint activities of common interest in the field of advanced nuclear systems, the fuel cycle and nuclear safety, including proliferation-resistant nuclear materials and technologies; promote collaboration between United States and Italian agencies and research organizations to advance the development of nuclear energy; develop advanced concepts and scientific breakthroughs in nuclear fission and reactor technology to address and overcome the principal technical, societal, and economic obstacles to the expanded peaceful use of nuclear energy; and promote and maintain the nuclear science and engineering infrastructure of each Party's country to sustain the capabilities necessary for the development and utilization of nuclear energy;

SEEKING to advance achievement of the goals of the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the European Atomic Energy Community and the United States of America of November 7, 1995;

NOTING the Generation IV International Forum, a framework for international cooperation in research and development for the next generation of nuclear energy systems, whose membership includes DOE and the European Atomic Energy Community (Euratom); and

NOTING FURTHER that MISE will implement this Agreement in close co-ordination with Euratom, which harmonizes participation in Generation IV International Forum activities of the European Union Member States,

Have agreed as follows:

## **Article 1**

### **Objective**

The objective of this Agreement is to establish a framework for collaboration between the Parties on research and development (R&D) focused on advanced technologies for improving the cost, safety, waste management, and proliferation-resistance of nuclear power systems for civil use. All cooperative activities carried out under this Agreement shall involve peaceful uses of nuclear energy, exclusively.

## **Article 2**

### **Areas of Cooperation**

- 2.1 The technical areas of collaboration under this Agreement may include, but are not limited to, the following:
  - 2.1.1 Next-generation reactor power plant designs with higher efficiency, lower cost, and improved safety and proliferation resistance;
  - 2.1.2 Innovative nuclear plant design, manufacturing, construction, operation, maintenance, and decommissioning technologies;
  - 2.1.3 Advanced nuclear fuels;
  - 2.1.4 Fundamental nuclear science areas;
  - 2.1.5 Advanced waste treatment, storage, and disposal technologies;
  - 2.1.6 Nuclear safety analysis, standards and criteria; and
  - 2.1.7 Such other areas as the Parties may agree to in writing.
- 2 Sensitive nuclear technology is specifically excluded from cooperation under this Agreement. As used herein, sensitive nuclear technology means any information, including information incorporated in equipment or an important component, that is not available to the public and is important to the design, construction, fabrication, operation or maintenance of any facility designed or used primarily for uranium enrichment, reprocessing of irradiated nuclear material, heavy water production, or fabrication of nuclear fuel containing plutonium.

**Article 3**  
**Forms of Cooperation**

The forms of cooperation carried out under this Agreement may include:

- 3.1 Exchange of scientists, engineers and other specialists for agreed periods of time for participation in agreed research, development, analysis, design and experimental activities conducted in research centers, laboratories, engineering offices and other facilities and enterprises of each Party, each Party's contractors or each participating institution. Such exchanges of personnel shall be conducted in accordance with Article 6 of this Agreement;
- 3.2 Exchange or loan of equipment, samples, materials, instruments and components for testing, as set forth in Articles 7 and 8;
- 3.3 Exchange, on a current basis, of unclassified scientific and technical information, and results and methods of research and development in accordance with Article 9 of this Agreement;
- 3.4 Organization of, and participation in, seminars, workshops, and other meetings on specific mutually agreed topics in the fields listed in Article 2 of this Agreement;
- 3.5 Joint projects in which the Parties agree to share the work and/or costs;
- 3.6 Such other forms of cooperation as may be mutually agreed by the Parties in writing.

**Article 4**  
**Project Annexes**

- 4.1 Cooperative activities under this Agreement may be undertaken by the Parties or, as appropriate, laboratories or contractors of the Parties. Each cooperative activity that may involve the sharing of costs or that may give rise to the creation of intellectual property shall be described in writing in a Project Annex, which shall be subject to approval by the Bilateral Steering Committee (as provided for in Article 5).
- 4.2 Each Project Annex shall include detailed provisions for carrying out the specified forms of cooperation, including such matters as technical scope, work plan, exchange of business-confidential information, management, total costs, cost sharing and schedule. Each Project Annex shall be subject to and shall refer to this Agreement.



**Article 5**  
**Bilateral Steering Committee**

- 5.1 The Parties hereby establish a Bilateral Steering Committee (BSC) to provide programmatic direction and oversight of the bilateral cooperative program. Each Party will appoint up to two representatives to serve on the BSC. The general duties of the BSC are to:
  - 5.1.1 Establish procedures to identify, review and select joint cooperative tasks and associated schedules;
  - 5.1.2 Determine criteria and organize reviews to evaluate tasks;
  - 5.1.3 Monitor progress of all selected tasks;
  - 5.1.4 Issue periodic/annual status reports for tasks; and
  - 5.1.5 Propose to the Parties either continuation of selected tasks, programmatic modifications as appropriate, or termination of a task if warranted by lack of reasonable progress.
- 5.2 Decisions of the BSC shall be made on the basis of consensus.
- 5.3 The BSC shall meet once each year, alternately in the United States and in Italy, or at such other times and places as agreed. At its meetings, the BSC shall evaluate the status of cooperation under this Agreement. This evaluation shall include a review of the past year's activities and accomplishments and of the activities planned for the coming year. In addition, the BSC shall consider and act on any major new proposals for collaboration.

**Article 6**  
**Assignment and Exchange of Personnel**

Each Party agrees to ensure that, whenever an assignment or exchange of staff is contemplated under this Agreement:

- 6.1 Each Party shall endeavor to ensure that qualified staff with skills and competence necessary to conduct the activities planned under this Agreement are selected for exchanges or assignments to the host institution. Each such exchange or assignment shall be agreed in advance by an exchange of letters between the Parties referencing this Agreement.
- 6.2 Each Party shall be responsible for the salaries, insurance, and allowances to be paid to its staff or its contractors.

- 6.3 Each Party shall pay for the travel and living expenses of its staff or contractors while on assignment to the host Party, unless otherwise agreed in writing.
- 6.4 The host Party shall help identify adequate accommodations for the other Party's staff or contractors (and their families) on a mutually agreeable, reciprocal basis.
- 6.5 The host Party shall provide all necessary assistance to the staff of the other Party or its contractors (and their families) as regards administrative formalities, such as assistance in making travel arrangements and visa applications.
- 6.6 The staff and contractors of each Party shall conform to the general and special rules of work and safety regulations in force at the host establishment.
- 6.7 The host Party shall grant assigned staff of the other Party access to unclassified information to the extent necessary to allow the staff to perform assigned duties.

#### **Article 7 Exchange of Equipment**

By mutual agreement, a Party may provide equipment to be utilized in a joint activity. In that event, the following provisions shall apply:

- 7.1 The sending Party shall supply, as early as possible, a detailed list of the equipment to be provided, together with the relevant specifications and appropriate technical and informational documentation related to use, maintenance, and repair of the equipment.
- 7.2 Title to the equipment and necessary spare parts supplied by the sending Party for use in joint activities shall remain with the sending Party, and the equipment shall be returned to the sending Party upon completion of the joint activity, unless otherwise agreed.
- 7.3 Equipment provided pursuant to this Agreement shall be brought into operation at the host establishment only by mutual agreement of the Parties.
- 7.4 The host establishment shall provide the necessary premises and shelter for the equipment; utilities such as electric power, water and gas; and normally, shall provide materials to be tested, in accordance with all technical requirements, which shall be as mutually agreed upon.
- 7.5 Responsibility for expenses, safekeeping, and insurance during the transport of equipment from the original location in the country of the sending Party to the place of entry in the country of the receiving Party shall rest with the sending Party. If the sending Party elects to have the equipment returned, it shall be responsible for expenses, safekeeping, and insurance during the transport of the

equipment from the original point of entry in the country of the receiving Party to the final destination in the country of the sending Party.

- 7.6 Responsibility for expenses, safekeeping, and insurance during the transport of equipment from the place of entry in the country of receiving Party to the final destination in the country of the receiving Party shall rest with the receiving Party. If the sending Party elects to have the equipment returned, the receiving Party shall be responsible for expenses, safekeeping, and insurance during the transport of the equipment from the final destination in the country of the receiving Party to the original point of entry in the country of the receiving Party.
- 7.7 Responsibility for expenses, safekeeping, and insurance during the time period that the equipment is in use in the country of the receiving Party shall rest with the receiving Party unless otherwise agreed in writing.
- 7.8 Equipment provided by the sending Party for use in carrying out joint activities shall be considered to be scientific, not having a commercial character, and the receiving Party shall work toward obtaining duty free entry.

#### **Article 8 Samples and Materials**

Unless otherwise agreed in writing, the following provisions shall apply to the transportation and use of samples and materials provided by one Party to the other Party under this Agreement:

- 8.1 All samples and materials provided by the sending Party to the receiving Party shall remain the property of the sending Party, and shall be returned to the sending Party on request.
- 8.2 Where one Party requests that the other Party provide a sample or material, the Party making the request shall bear all costs and expenses associated with the transportation of the sample or material from the location of the sending Party to the final destination.
- 8.3 Each Party shall promptly disclose to the other Party all information arising from the examination or testing of samples or materials exchanged under this Agreement. The Parties agree that business-confidential information (as defined in Section III of the Intellectual Property Annex attached as Annex I to the S&T Agreement), which was developed prior to or outside the scope of this Agreement, shall remain business-confidential even though it is contained in the results of an examination or testing of samples or materials. Such information shall be identified as business-confidential by the Party asserting its business-confidential nature as soon as possible after disclosure of all information arising from the examination or testing is made to such Party and the other Party shall be

immediately advised of that identification. All information identified as business-confidential shall be controlled as provided in Section III of Annex I to the S&T Agreement.

- 8.4 A Party providing samples or materials to the other Party may also provide a partial or complete list of the types of information that may result from the examination or testing of such samples or material and which are to be treated as business-confidential as defined in Section III of Annex I to the S&T Agreement. All such business-confidential information is to be controlled as set out in Section III of that Annex.

#### **Article 9**

##### **Transfer of Information and Equipment**

- 9.1 The Parties may exchange, as agreed on a mutually beneficial basis, scientific and technical information, documents, and results of research and development of work carried out under this Agreement. Such information shall be limited to that which the Parties have the right to disclose, either in their possession or available to them, relating to the areas of cooperation described in Article 2.
- 9.2 Seminar proceedings and reports of joint activities carried out under this Agreement shall be published as joint publications, as agreed by the Parties.
- 9.3 The Parties agree that information developed and exchanged under this Agreement should be given wide distribution. Except as provided in Section III of Annex I to the S&T Agreement, such information may be made available to the public by either Party through customary channels and in accordance with normal procedures of the Parties.
- 9.4 Any information transmitted by one Party to the other Party under this Agreement and any related Project Annexes shall be accurate to the best knowledge and belief of the transmitting Party. Any equipment transferred by one Party to the other Party under this Agreement shall be suitable for its intended use to the best knowledge and belief of the transmitting Party. The transmitting Party does not warrant the suitability of the information or equipment transmitted for any particular use or application by the receiving Party or by any third party.
- 9.5 Information developed jointly by the Parties shall be accurate, and jointly developed information shall be suitable for its intended use, to the best knowledge and belief of both Parties. Neither Party warrants the accuracy of the jointly-developed information or the appropriateness of equipment, nor its suitability for any particular use or application by either Party or by any third party.
- 9.6 Information and equipment protected for national security reasons shall be governed by Annex II (Security Obligations) of the S&T Agreement.

**Article 10**  
**Intellectual Property; Business-Confidential Information**

The protection and allocation of intellectual property and the treatment of business-confidential information created or furnished in the course of cooperative activities under this Agreement shall be governed by the provisions of Annex I (Intellectual Property) to the S&T Agreement.

**Article 11**  
**Funding**

- 11.1 Unless otherwise agreed, all costs resulting from cooperation pursuant to this Agreement shall be the responsibility of the Party that incurs them.
- 11.2 Each Party shall conduct the activities provided for in this Agreement and its Project Annexes subject to its applicable laws and regulations. Activities under and pursuant to this Agreement and related Project Annexes shall be subject to the availability of appropriated funds.

**Article 12**  
**Additional Organizations**

By mutual agreement, the Parties may invite other organizations in the public and private sectors to participate in cooperative activities under this Agreement, at their own expense and upon such terms as the Parties jointly decide.

**Article 13**  
**Contracts**

In the event a Party awards contracts for the acquisition of articles and services to implement this Agreement, such contracts shall be awarded in accordance with the laws and regulations of that Party's country.

**Article 14**  
**Dispute Resolution**

Except as provided in Section II.D. of the Intellectual Property Rights Annex, any question or dispute arising under this Agreement shall be resolved by consultation between the Parties.

**Article 15**

**Entry into Force, Duration, Amendment and Termination**


- 15.1 This Agreement shall enter into force upon signature, shall remain in force for five years, and shall be automatically renewed for additional five-year periods unless terminated pursuant to Article 15.3.
- 15.2 This Agreement may be amended by written agreement of the Parties.
- 15.3 The Parties may terminate this Agreement by mutual written agreement. Either Party may terminate this Agreement at any time after providing six months written notice to the other Party.
- 15.4 Joint activities not completed upon termination of this Agreement may continue until completion under the terms of this Agreement.

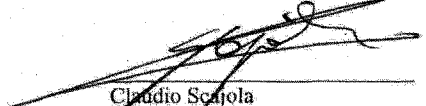
IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

DONE at Washington , in duplicate, this twenty-ninth day of September, 2009.

**FOR THE DEPARTMENT OF ENERGY  
OF THE UNITED STATES OF AMERICA:**

**FOR THE MINISTRY OF ECONOMIC  
DEVELOPMENT OF THE ITALIAN  
REPUBLIC:**

  
\_\_\_\_\_  
Steven Chu  
Secretary of Energy

  
\_\_\_\_\_  
Claudio Scajola  
Minister of Economic Development

**JOINT DECLARATION**  
**BETWEEN**  
**THE GOVERNMENT OF THE UNITED STATES OF AMERICA**  
**AND**  
**THE GOVERNMENT OF THE ITALIAN REPUBLIC**  
**CONCERNING INDUSTRIAL AND COMMERCIAL COOPERATION IN THE**  
**NUCLEAR ENERGY SECTOR**

The Government of the United States of America and the Government of the Italian Republic, hereinafter the "Participants,"

ACKNOWLEDGING the need to consider an appropriate mix of environmentally sustainable, safe, and secure sources of energy, including nuclear power, to meet the needs of their respective countries' populations;

RECOGNIZING the need to address challenges of growing energy needs facing both Participants' countries, as well as the broader international community, in a manner that contributes to reducing the harmful effects of greenhouse gases on climate;

OBSERVING that both Participants are parties to the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, and strongly support the safeguards system of the International Atomic Energy Agency (IAEA), including the Additional Protocol;

NOTING that both Participants are signatories to the Convention on Supplementary Compensation for Nuclear Damage (CSC);

HAVING REGARD to the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community of November 7, 1995, and in particular to the scope of cooperation set out in Article 1 of that Agreement; and

RECOGNIZING both countries' role in the development of nuclear power,

**HAVE REACHED THE FOLLOWING UNDERSTANDING:**

The Participants intend to cooperate, subject to their respective national laws and regulations, to:

- encourage nuclear industry to seek contractual opportunities for the construction of nuclear power plants, and the provision of related supporting infrastructures and services;
- seek the elimination of obstacles to the development of such bilateral industrial and commercial cooperation;
- promote fair, open, and transparent contract bid and award processes for nuclear energy industrial entities in their respective countries;
- advance the principle that contractual awards for the construction of nuclear power plants, and the provision of related parts and services, should be based on the commercial and technical merits of the different proposals and industrial partnerships;
- encourage the establishment of the CSC as a global nuclear liability treaty regime to which both countries are parties;
- promote the establishment of international arrangements that would help future civilian light water reactors deployed in Italy obtain access to reliable nuclear fuel supply and services; and
- encourage the development of civilian nuclear energy infrastructure, including training and human resource development, as well as appropriate application of civilian nuclear energy and related energy technology, in accordance with evolving IAEA guidance and standards on infrastructure development.



Either Participant may cease cooperation under this Joint Declaration, but should endeavor to provide at least 30 days advance written notice to the other Participant.

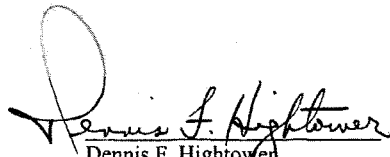
Signed at Washington, in duplicate, on the twenty-ninth day of September, 2009, in the English and Italian languages.

**FOR THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA:**

  
\_\_\_\_\_  
Steven Chu  
Secretary of Energy

**FOR THE GOVERNMENT OF THE  
ITALIAN REPUBLIC:**

  
\_\_\_\_\_  
Claudio Scajola  
Minister of Economic Development

  
\_\_\_\_\_  
Dennis F. Hightower  
Deputy Secretary of Commerce

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

ENERGYSOLUTIONS, LLC,

Plaintiff,

vs.

NORTHWEST INTERSTATE COMPACT  
ON LOW-LEVEL RADIOACTIVE WASTE  
MANAGEMENT AND MICHAEL  
GARNER, SOLELY IN HIS OFFICIAL  
CAPACITY AS THE EXECUTIVE  
DIRECTOR OF THE NORTHWEST  
INTERSTATE COMPACT ON LOW-  
LEVEL RADIOACTIVE WASTE  
MANAGEMENT, THE STATE OF UTAH,  
AND ROCKY MOUNTAIN LOW-LEVEL  
RADIOACTIVE WASTE COMPACT,

Defendants.

MEMORANDUM DECISION AND  
ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT

Case No. 2:08-CV-352 TS

This matter is before the Court on Plaintiff EnergySolutions, LLC's Motion for Summary Judgment on Count I of the First Amended Complaint, a Cross Motion for Summary Judgment on Count I of Plaintiff's First Amended Complaint, filed by Defendants Northwest Interstate Compact on Low-Level Radioactive Waste Management and Michael Garner's (collectively, "Northwest") and Intervenor Defendant Rocky Mountain Low-Level Radioactive Waste Compact ("Rocky

Mountain”), and a second Cross Motion for Summary Judgment filed by Defendant State of Utah (the “State”). On February 26, 2009, all parties were present at a hearing, at which time oral arguments were presented.

EnergySolutions claims that Northwest has unlawfully prohibited importation of low level radioactive waste (“LLRW”) from international sources. Specifically, EnergySolutions argues that Northwest has attempted to exercise greater authority over the disposal of LLRW than is allowed under the current statutory regime. EnergySolutions also argues that, in exceeding its statutory authority, Northwest’s actions are in violation of the Dormant Commerce Clause. Northwest and the State respond that Northwest acted under express authority granted to Northwest by Congress to regulate LLRW.

The parties agree, and the Court concurs, that the motions do not involve any genuine issues of material fact. Instead, the cross motions for summary judgment present the Court with a single question of law: what did Congress intend when it enacted statutes in 1980 and 1985 addressing the disposal of LLRW? To answer the question presented, the Court has reviewed the well-crafted memoranda submitted by the parties, along with the excellent oral arguments presented by all parties at the February 26, 2009 hearing. The Court recognizes that strong arguments exist on both sides of this issue. However, the Court concludes, for the reasons set forth below, that Congress has not expressed its unambiguous intent to waive Dormant Commerce Clause restrictions on regulation by regional compacts of private LLRW facilities not covered by the compact system, but which operate in interstate commerce. The Court also concludes that Congress has expressed its unambiguous intent to waive Dormant Commerce Clause restrictions on the ability of regional compacts to regulate the disposal of LLRW generated within the compact boundaries. The Court will, therefore, grant in part and deny in part the parties’ motions, consistent with those conclusions.

## I. CONSTITUTIONAL QUESTIONS

Although the question presented in this case is predominantly one of statutory interpretation, there are certain constitutional principles which provide a necessary foundation for interpreting the statute. The first constitutional principle, the Compacts Clause, states that “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .”<sup>1</sup> Northwest incorrectly asserts that “[t]he authority to enter into compacts stems from the Compact Clause of the United States Constitution . . . .”<sup>2</sup> “The Compacts Clause . . . is not a grant of power either to the states or to Congress. On the contrary, it is a prohibition . . . with an exception.”<sup>3</sup> States are therefore prohibited from entering into compacts that purport to authorize the states to exercise powers they could not exercise in its absence,<sup>4</sup> unless Congress grants formal consent to the compact within constitutional limits on congressional legislation, which formal consent “transforms the State’s agreement into federal law.”<sup>5</sup>

The second constitutional principle at play in this case is the Commerce Clause, which states that Congress has the power “to regulate . . . Commerce among the several States.”<sup>6</sup> “[T]he Commerce Clause has long been understood to limit the States’ ability to discriminate against

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<sup>1</sup>U.S. Const. art. I, § 10, cl. 3.

<sup>2</sup>Docket No. 41 at 11.

<sup>3</sup>*Seattle Master Builders Ass’n v. Pac. Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1374 (9th Cir. 1986).

<sup>4</sup>*United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978).

<sup>5</sup>*Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

<sup>6</sup>U.S. Const. art. I, § 8, cl. 3.

interstate commerce.”<sup>7</sup> This “dormant”<sup>8</sup> Commerce Clause acts to limit the ability of states to impede commerce between the states, and may be lifted only by “an expression of ‘unambiguous intent’ of Congress.”<sup>9</sup> “Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress’ approval, the States can clearly do so *with* Congress’ approval.”<sup>10</sup> It is undisputed that Congress has granted approval, but the parties strongly dispute the scope and duration of that approval.

As noted, the Court is presented with only one question of law, determining the intent of Congress when it enacted statutes in 1980 and 1985 addressing the disposal of LLRW. Specifically, the Court must determine the intent of Congress: (1) in 1980 and 1985 when it enacted statutory language establishing a framework for national regulation of LLRW disposal; and (2) in 1985 when it enacted statutory language consenting to a number of compacts for the regulation of LLRW disposal. More specifically, the Court must determine what, if any, reservations or limitations Congress intended to be placed on its consent to Northwest’s organizational documents (the “Northwest charter”).<sup>11</sup> The Court must also determine to what extent Congress intended to lift dormant Commerce Clause restrictions on the ability of states, and by derivation the compacts, to

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<sup>7</sup>*New York v. United States*, 505 U.S. 144, 171 (1992).

<sup>8</sup>*Dep’t of Revenue v. Davis*, 128 S.Ct. 1801, 1808 (2007).

<sup>9</sup>*New York*, 505 U.S. at 171 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)).

<sup>10</sup>*Id.* (emphasis in original).

<sup>11</sup>In their memoranda, Northwest and the State have both objected to the use of the word “charter” by EnergySolutions to refer to Northwest’s organizational documents included in the Consent Act, arguing that it minimizes the import of Congressional approval. *See* Docket No. 46 at x, ¶ 10-12. The Court finds this to be a needless disagreement, and will use the term “charter” to refer to Northwest’s organizational documents included in the Consent Act.

regulate the flow of LLRW in interstate commerce and to regulate the operation of private LLRW disposal facilities operating in interstate commerce, keeping in mind that such intent must be unambiguously expressed.

## II. FACTUAL BACKGROUND

The following facts are undisputed by the parties. In the era of the 1960's and 1970's, as certain radioactive materials began to be used more frequently in non-power generating ways, for example in medical procedures, there arose a need to dispose of these low-level radioactive materials. They could not be safely disposed of in traditional landfills, but they were not as dangerous as spent nuclear fuel and other highly radioactive waste. Six facilities were established in the 1960's to dispose of LLRW but, by the late 1970's, three of the original six sites had been permanently closed, two due to serious environmental concerns and one because it had reached its capacity. No new sites had been opened. That left only three LLRW disposal sites in operation: Beatty, Nevada; Richland, Washington; and Barnwell, South Carolina. The situation was further complicated by the temporary closing of the Nevada and Washington sites in order to correct some irregularities. Thus, for a time, the South Carolina site became the destination for the vast majority of all LLRW produced in the United States.

South Carolina politicians complained that they were being forced to be the "dumping grounds" for the rest of the country. Potential solutions were extremely limited, as South Carolina politicians believed themselves to be constrained by the dormant Commerce Clause from interfering with interstate commerce by discriminating against out-of-state LLRW. Faced with a choice of remaining the destination for the nation's LLRW or closing the facility completely, South Carolina's governor chose the latter, and informed national politicians that there would soon be no site available for the nation's LLRW unless a national solution was devised.

The fear that the nuclear power, medical, and other related fields would be severely hampered in their development if there were no LLRW disposal sites was enough to spur action in the halls of Congress. In 1980, Congress passed the Low Level Radioactive Waste Policy Act of 1980 (the "1980 Act"),<sup>12</sup> which declared that it was the responsibility of each state to provide for the disposal of the LLRW generated within its boundaries. The 1980 Act allowed for the formation of regional compacts to manage disposal of LLRW, subject to express Congressional approval of each compact, and declared that, beginning in 1986, all regional compacts which had been approved by Congress would be allowed to close their regional disposal facilities to out-of-region LLRW.

It was hoped that the 1980 Act would be sufficient to resolve the dilemma faced by the nation with regard to disposal of LLRW, but those hopes were in vain. By 1985, 37 states had joined seven regional compacts. One of those compacts was Northwest, with the State of Utah as a founding member, the Utah legislature having ratified Northwest's charter in 1982.<sup>13</sup> Unfortunately, the successful creation of regional compacts was not accompanied by a corresponding increase in the number of LLRW disposal sites. No new disposal facilities were developed, and Northwest and the other sited compacts were prepared to begin excluding out-of-compact waste as soon as Congress approved their charters. Those preparations were stalled, however, when it became apparent that politically powerful states outside of the sited regions were prepared to prevent Congressional approval of the compact charters, which would again leave sited states without authority to exclude, or discriminate against, out-of-state waste.

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<sup>12</sup>P.L. 96-573.

<sup>13</sup>Utah Code Ann. § 19-3-201, et seq.

The governors of Nevada, Washington, and South Carolina refused to accept a return to the circumstances that existed prior to the 1980 Act and again threatened to close their disposal sites unless Congress acted to give greater control to those states with disposal sites. In 1985, a compromise was achieved by two separate, but interrelated, bills: (1) the Low Level Radioactive Waste Policy Amendments Act of 1985 (the “1985 Act”),<sup>14</sup> which amended the 1980 Act; and (2) the Omnibus Low Level Radioactive Waste Interstate Compact Consent Act (the “Consent Act”),<sup>15</sup> which granted Congressional consent to all compacts ratified by the states up to that point.

A. PROVISIONS OF THE 1985 ACT

The 1985 Act clarified certain ambiguities of the 1980 Act. Specifically, the 1980 Act had declared that, after January 1, 1986, a compact would be allowed to “restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.”<sup>16</sup> The 1980 Act had not defined the term “regional disposal facilities,” an omission corrected by the 1985 Act, which defined a regional disposal facility to be “a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or *subsequently established and operated* under a compact.”<sup>17</sup> The 1985 Act also provided a transition period, in which states and regions without disposal sites would be provided with incentives to develop their own disposal sites.

Specific provisions of the 1985 Act relevant to the present case include the following:

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<sup>14</sup>P.L. 96-573.

<sup>15</sup>P.L. 99-240 § 201 et seq.

<sup>16</sup>P.L. 96-573, § 4(a)(2)(B).

<sup>17</sup>42 U.S.C. § 2021b(11) (*emphasis added*).



- (1) a definition of “compact” which included only agreements entered into between two or more states “pursuant to” the 1985 Act;<sup>18</sup>
- (2) a declaration of federal policy that each state would be responsible, by itself or in cooperation with other states, for the disposal of all LLRW generated within its own boundaries, with the exception of certain specified federal LLRW;<sup>19</sup>
- (3) a requirement that each state with a disposal facility provide access to that facility during a transition period, and in the case of emergency;<sup>20</sup>
- (4) a declaration that no regional disposal facility could be required to accept material other than LLRW;<sup>21</sup>
- (5) a declaration that the policies of the 1985 Act were “most safely and effectively managed on a regional basis,” and that, in order to carry out those policies, “the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste;”<sup>22</sup>

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<sup>18</sup>*Id.* § 2021b(4).

<sup>19</sup>*Id.* § 2021c(a)(1). The 1985 Act also required any state that did not provide access to a disposal facility would be required to take title to all LLRW produced within their state, a provision which was declared unconstitutional by the United States Supreme Court as being violative of the Tenth Amendment. *New York*, 505 U.S. at 177.

<sup>20</sup>42 U.S.C. § 2021c(a)(1)(C).

<sup>21</sup>*Id.* § 2021c(a)(2).

<sup>22</sup>*Id.* § 2021d(a).

- (6) a declaration that nothing within the 1985 Act was to be “construed to limit the applicability of any Federal law or to diminish or otherwise impair the jurisdiction of any Federal agency” unless “expressly provided” in the 1985 Act;<sup>23</sup> and
- (7) a declaration that “[a]ny authority in a compact to restrict the use of the regional disposal facilities under the compact to disposal of low-level radioactive waste generated within the compact region” would not take effect until January 1, 1986, if Congress had already consented to the compact.<sup>24</sup>

B. PROVISIONS OF THE CONSENT ACT

The Consent Act was passed simultaneous to the 1985 Act, and was comprised primarily of the full text of the charters of the compacts which had been created and ratified by the party states previous to passage of the Consent Act. Certain general provisions were also included, including: (1) a Congressional finding that each of the charters, including Northwest’s charter, was “in furtherance” of the 1985 Act;<sup>25</sup> a statement that consent of Congress to the compacts was granted “subject to the provisions” of the 1985 Act and “only for so long as the regional commission, committee, or board established in compact complies with all the provisions of such Act.”<sup>26</sup> Referencing Northwest’s charter, the Consent Act also stated that “[t]he consent of Congress is hereby given to the states of Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and

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<sup>23</sup>*Id.* § 2021d(b)(4).

<sup>24</sup>*Id.* § 2021d(c).

<sup>25</sup>P.L. 99-240 § 211.

<sup>26</sup>*Id.* § 212(2)-(3).

Wyoming to enter into the Northwest Interstate Compact on Low-Level Radioactive Waste Management, and to each and every part and article thereof.”<sup>27</sup>

Northwest’s charter was then included in the text of the Consent Act, which by consent of Congress became federal law.<sup>28</sup> The charter granted Northwest regulatory power over disposal “facilities” and defined facility broadly, to include “any site, location, structure, or property used or to be used for the storage, treatment or disposal of low-level waste, *excluding* federal waste facilities.”<sup>29</sup> The charter also stated that the purposes of the compact were the protection of health and safety of the citizens of the party states and the economic management of LLRW “through . . . minimizing the amount of handling and transportation required to dispose of such wastes and through . . . providing facilities that serve the region.”<sup>30</sup> Under the Article titled “Regional Facilities,” the charter also prohibited any facility in any party state from accepting any LLRW generated outside the region unless consent was granted by Northwest.<sup>31</sup>

#### C. HISTORY OF THE CLIVE FACILITY

In 1988, Envirocare, a predecessor of EnergySolutions, obtained a Utah radioactive materials license to receive and dispose of “naturally occurring radioactive waste,” materials not classified as LLRW. These materials were disposed of by Envirocare at a disposal facility in Tooele County, Utah known as the “Clive Facility.” In 1990, the Nuclear Regulatory Commission (“NRC”)

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<sup>27</sup>*Id.* § 221.

<sup>28</sup>*See Cuyler*, 449 U.S. at 440.

<sup>29</sup>P.L. 99-240 § 221, Art. II(1) (emphasis added).

<sup>30</sup>*Id.* § 221, Art. I.

<sup>31</sup>*Id.* § 221, Art. IV(2). As part of Northwest, the State had access to the existing Washington disposal site.

delegated authority to Utah to license LLRW disposal facilities within the State. Also in 1990, Envirocare applied for a license to dispose of Class A LLRW,<sup>32</sup> and that license was issued by the State in 1991. However, Condition 9 of the license required Envirocare to obtain approval from Northwest before Envirocare could begin disposal. Northwest granted consent, but the State amended the license to also require the consent of the compact that governed the state or region where the LLRW originated.

Over the years, Northwest has passed several resolutions defining the precise types of LLRW which Envirocare, and later EnergySolutions, was allowed to accept at the Clive Facility. Some of these resolutions were passed at the request of Envirocare, while others were instigated by Northwest itself. At no time did Northwest assume any authority for licensing or operating the Clive Facility, but Northwest claims to have “retained the right to modify or rescind the access authorization [granted in 1991].”<sup>33</sup>

In 2000, Envirocare applied for a new license to dispose of Class B and Class C LLRW. Technical approval was granted by the Utah Division of Radiation Control, but the Utah legislature and governor did not grant the approval required by Utah Code Ann. § 19-3-105(3) before the license could be issued. Therefore, only Class A LLRW may be disposed of at the Clive facility.

EnergySolutions’ current license, which was granted on May 16, 2008, and is set to expire in 2013, requires that transfer of LLRW to the Clive Facility from outside the Northwest Compact area be approved by the compact of origin, and it further requires approval by Northwest if the Clive Facility is to receive LLRW generated within the boundaries of Northwest. However, the original

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<sup>32</sup>LLRW is classified according to the level of radioactivity. Class A waste is the least radioactive, followed by Class B waste, with Class C waste being the most radioactive.

<sup>33</sup>Docket No. 44 ¶ 30d.

Condition 9, which required approval of Northwest to import LLRW from *outside* Northwest's boundaries, is not present in EnergySolutions' current license.

#### D. THE CURRENT DISPUTE

On May 1, 2006, Northwest issued its Third Amended Resolution and Order (the "Third Resolution").<sup>34</sup> The Third Resolution, among other things: (1) expressly granted access to the Clive facility for LLRW "allowed under" the license granted by the State;<sup>35</sup> (2) required consent by the compact from which the LLRW originated;<sup>36</sup> (3) imposed certain reporting requirements on EnergySolutions;<sup>37</sup> and (4) retained the right by Northwest to rescind or modify approval "at any time."<sup>38</sup>

On September 14, 2007, EnergySolutions applied for a license from the NRC to import LLRW from nuclear facilities in Italy. Those portions of the LLRW which could be classified as Class A LLRW (the "Italian LLRW") would be disposed of at the Clive Facility.<sup>39</sup>

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<sup>34</sup>Docket No. 44, Ex. E at 12-13.

<sup>35</sup>*Id.* ¶ 2.

<sup>36</sup>*Id.* ¶ 5.

<sup>37</sup>*Id.* ¶ 6.

<sup>38</sup>*Id.* ¶ 7.

<sup>39</sup>EnergySolutions alleges, in the Amended Complaint, that the Italian LLRW is "scientifically indistinguishable from material that EnergySolutions currently receives from US and international generators of LLRW." Docket No. 12, ¶ 15. Northwest concedes that the Italian LLRW is classified as Class A LLRW, but argues that it has insufficient information to admit or deny that the Italian LLRW is "scientifically indistinguishable" from the LLRW currently disposed of at the Clive Facility. Docket No. 22, ¶ 15. The State, likewise, argues that it has insufficient evidence to admit or deny EnergySolutions claims. Docket No. 33, ¶ 15.

On February 19, 2008, the NRC solicited the comments of Northwest regarding the proposed importation of the Italian LLRW. Northwest responded that it would review EnergySolution's license and determine whether it would approve the Italian LLRW. On May 8, 2008, Northwest's governing body met and, at the request of the State, amended the Third Resolution to prohibit the Clive Facility from importing the Italian LLRW, as well as any other international LLRW.

The text of the resolution issued by Northwest after the May 8, 2008 meeting purported to merely clarify that the existing license did not allow for the importation of foreign generated LLRW, and that specific approval for such would be required under the Northwest charter. However, there is no language in the license issued to EnergySolutions by the State which restricts the Clive Facility to receive only domestically generated LLRW. Thus, the Court finds that the May 8, 2008 resolution cannot be considered merely a clarification, but is, instead, an amendment of the approval previously granted by Northwest.

Unwilling to accept the regulatory denial by Northwest, EnergySolutions filed this lawsuit seeking declaratory judgment that Northwest has no statutory or other authority to regulate the importation of out-of-region LLRW to the Clive Facility. Thus, EnergySolutions, for the first time since it's initial license in 1991, and after apparently accepting Northwest authority to regulate for nearly seventeen years, challenges any requirement to abide by the wishes of Northwest.

#### IV. STANDARD OF REVIEW

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.<sup>40</sup> In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return

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<sup>40</sup>See Fed. R. Civ. P. 56(c).

a verdict for the nonmoving party in the face of all the evidence presented.<sup>41</sup> The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>42</sup>

#### V. DISCUSSION

In order to answer the issue of law before the Court in this case, namely the intent of Congress in passing legislation in 1980 and 1985 regulating the disposal of LLRW—specifically the 1980 Act, the 1985 Act, and the Consent Act—the Court must address three questions of statutory interpretation: (1) whether the Clive Facility is a “regional disposal facility” as defined in the 1985 Act; (2) the scope of authority to discriminate against out-of-region LLRW granted by (i) the 1985 Act and (ii) the Consent Act; and (3) whether the respective grants of authority are contradictory and, if so, how those contradictions are to be resolved.

##### A. IS THE CLIVE FACILITY A “REGIONAL DISPOSAL FACILITY?”

All parties agree that the 1985 Act granted Northwest, and every other compact, the authority to restrict or prohibit the importation of out-of-region LLRW to the compact’s regional disposal facilities. In the 1985 Act, a regional disposal facility is defined as “a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or subsequently established and operated under a compact.”<sup>43</sup> It is undisputed that the Clive Facility was not in operation in 1985. Northwest claims that the Clive Facility is nonetheless a regional disposal facility because it has been “established and operated under a compact” by virtue of the requirement, imposed by Utah in

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<sup>41</sup>See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008).

<sup>42</sup>See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1200 (10th Cir. 2007).

<sup>43</sup>42 U.S.C. § 2021b(11).

1991, that approval be granted by Northwest before LLRW would be allowed at the Clive Facility.

EnergySolutions responds that the Clive Facility is, and has always been, a private, for profit enterprise, and cannot be considered to be operated and established under Northwest. Northwest disputes the relevance of this argument, pointing out that all LLRW facilities currently in operation are commercial, for profit enterprises. Moreover, between 1991 and 2008, Northwest acted in a manner consistent with a regulatory body which had authority to impose restrictions on the Clive Facility and EnergySolutions has complied with requests by the State and Northwest regarding the Clive Facility.

Northwest and the State argue that seventeen years of compliance is evidence that even EnergySolutions believed themselves to be subject to Northwest's authority. This argument is premised on the implicit assumption that the State could transform the Clive Facility into a regional disposal facility by conditioning approval of the Clive Facility license on consent by Northwest and compliance by EnergySolutions. However, the Court concludes that the State cannot delegate to Northwest authority which the State does not possess, and because discrimination against out-of-state LLRW implicates the Dormant Commerce Clause, neither EnergySolutions' actions nor belief in Northwest's alleged authority to regulate is sufficient to bestow actual legal authority on Northwest. Only Congress may grant that authority under the Commerce Clause and the Interstate Compacts Clause. Therefore, designation of the Clive Facility as a regional disposal facility must be founded upon the 1985 Act, which defined the term.

Moreover, if past conduct may be taken as evidence of the parties' understanding, the Court notes that Northwest has argued in prior court proceedings<sup>44</sup> that the Clive Facility is not a regional

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<sup>44</sup>*United States Ecology, Inc. v. Northwest Interstate Compact, et al.*, No. C92-5091B (W.D. Wash. filed Mar. 10, 1992).



disposal facility. While the Court agrees with Northwest that statements by Northwest made in the prior proceeding are not binding, the Court also does not consider EnergySolutions' prior acquiescence to Northwest's prior assertions of authority as dispositive of whether Northwest has the authority it has claimed in the past.

Northwest operates, through a private contractor, a disposal site north of Richland, Washington, on the federal Hanford Nuclear Reservation (the "Richland Facility"). There is no question that the Richland Facility is a regional disposal facility, for it has been the repository of LLRW generated by Northwest's party states since the creation of the compact, and was in operation prior to 1985, bringing it within the 1985 Act's definition of regional disposal facility. Moreover, the Richland Facility sits on land leased from the State of Washington for the express purpose of operating a disposal facility for Northwest.<sup>45</sup> In contrast, the Clive Facility was not established by Northwest or by the State, nor is it currently operated by Northwest or the State. From the beginning, the Clive Facility has been operated solely for the benefit of Envirocare and, later, EnergySolutions, albeit under the regulatory auspices of the State. However, Defendants all argue that both the Richland and Clive Facilities are privately run and operate ostensibly by the consent of Northwest. Thus, Defendants imply that, if the Richland Facility is a regional disposal facility, so is the Clive Facility.

As previously noted, the 1985 Act clarifies the 1980 Act's ambiguous reference to regional disposal facility, which is evidence that Congress understood that there would be some LLRW disposal facilities that would not be considered regional disposal facilities. This fact is further

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<sup>45</sup>See Docket No. 42, Attachment M at 2, ¶ 4 (Sublease between the State of Washington and U.S. Ecology Washington, Inc.); *id.* at 9, ¶ 2 (granting right to terminate the sublease "should [Northwest] lose the authority provided by [the 1985 Act] to exclude access to the subleased premises for the disposal of out-of-compact region low-level radioactive waste.").

supported by the Committee Report from the House Committee on Interior and Insular Affairs (the "IIA Report"),<sup>46</sup> which states that "[n]either low-level waste disposal facilities which were in operation prior to [1985] but which have terminated commercial operations, nor low-level waste disposal facilities established by a state or private concern but not under the auspices of a compact region, would be included."<sup>47</sup> The parties agreed, during oral arguments, that Congress, in passing the 1985 Act, understood that not all facilities would be considered regional disposal facilities.

Northwest argues that the language of the IIA Report proves that a facility need not be operated *by* a compact in order to be a regional disposal facility, but only that it be operated *under the auspices of* a compact. While a fine distinction, it is not an insignificant one. As noted above, the Richland Facility is a regional disposal facility, by nature of its operation as an LLRW disposal facility in 1985. Even if it had not been in operation in 1985, however, the Richland Facility clearly operates *under* Northwest in a way that the Clive Facility does not. Most importantly, it is facility which is operated with the express purpose of serving Northwest and its member states. It is also operated on land leased from the State of Washington for the express purpose of providing a disposal site for the region's LLRW. The Clive Facility, on the other hand, is allowed to receive only limited amounts of LLRW from Northwest member states, and must, therefore, rely entirely upon shipments of LLRW from outside the state in order to operate profitably.

When questioned at the February 26, 2009, hearing, Northwest initially claimed that there were no fundamental differences between the Richland Facility and the Clive Facility. However,

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<sup>46</sup>H.R. Rept. 99-314, pt. 1 (1985).

<sup>47</sup>*Id.* at 24.

upon further questioning, and the fact that the State conceded that the State had always considered the two facilities to be different, Northwest also conceded the point.

Even though the Clive Facility was not established by Northwest and is not run by Northwest, Northwest and the State essentially argue that the State, by means of its licensing requirements, transformed the Clive Facility into a regional disposal facility by requiring it to operate *under* Northwest. That argument is without merit. Either the site is a regional disposal facility by virtue of its establishment and operation or it is not—state regulatory action cannot make it so in the absence of clear statutory language allowing such a designation. The Court finds that the Clive Facility was not established by Northwest, that it is not operated *under* Northwest, as required by the 1980 and 1985 Acts, and that the State's regulatory requirements are insufficient to designate the Clive Facility as a regional disposal facility under the 1985 Act.

**B. SCOPE OF AUTHORITY OVER OUT-OF-REGION WASTE**

The Court is faced with a difficult task in determining whether Congress intended to grant Northwest the authority and power to exclude out-of-region waste only from regional disposal facilities or from all LLRW facilities. The difficulty arises from the existence of three separate acts—the 1980 Act, the 1985 Act, and the Consent Act—all of which remain in effect<sup>48</sup> and define, to a greater or lesser extent, the scope of authority granted to Northwest and other compacts. Taken separately, each Act would pose certain problems of interpretation for the Court, but the conflicts arising from the combination of all three Acts pose special difficulties associated with identifying

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<sup>48</sup>At the February 26, 2009 hearing, EnergySolutions stated its belief that the 1980 Act is no longer in effect, but that it must be looked to for the context of the 1985 Act. The Court does not agree. As discussed in further detail below, neither the text nor the legislative history of the 1985 Act evidences an intent by Congress to entirely supplant the 1980 Act. Therefore, the Court finds that those provisions of the 1980 Act not amended by the 1985 Act are still in effect.

which provisions from each Act are retained as Congress enacts new legislation. The Court will, therefore, examine each subsequent piece of legislation in order of passage, in order to determine if and how the scope of authority over out-of-region waste has been modified by Congressional action.

1. *The Low Level Radioactive Waste Policy Act of 1980*

The 1980 Act gave authority to the states to enter into interstate compacts, subject to ratification by Congress, and declared that Congressionally-ratified compacts would have authority to “restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.”<sup>49</sup> The 1980 Act did not expressly define regional disposal facility, but it did authorize states to enter into “such compacts as may be necessary to provide for the establishment and operation”<sup>50</sup> of regional disposal facilities. In a similar vein, the 1980 Act, in granting the right to limit access, does so with respect to “regional disposal facilities under the compact.”<sup>51</sup>

These statements, along with the history LLRW disposal which led to passage of the 1980 Act, imply a narrow definition of regional disposal facility and a narrow scope of authority to

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<sup>49</sup>P.L. 96-573, § 4(a)(2)(B). Northwest cites to The Low-Level Waste Handbook, a guide produced by the National Governor’s Association, which states that the “overriding objective” of governors in pushing for passage of the 1980 Act was to allow regions to “exclude waste generated outside their borders.” Docket No. 64, Ex. 1, at iii. The Low-Level Waste Handbook, however, is not federal law and the text of the 1980 Act restricts discriminatory authority to the operation of regional disposal facilities. Moreover, the document cited by Northwest contradicts its own argument, for it states that the “primary motivation” of the governors was a general concern for the health and safety of their citizens, and that excluding out-of-region waste was “also indicated” as a motivation.

<sup>50</sup>*Id.* § 4(a)(2)(A).

<sup>51</sup>*Id.* § 4(a)(2)(B) (emphasis added).

exclude out-of-region waste. A narrow definition is also required by the fact that regulation of LLRW implicates interstate commerce in its production, transportation, and even disposal, and that any waiver of the Dormant Commerce Clause must be in unambiguous terms. Therefore, even without the express definition of regional disposal facility, contained in the 1985 Act, the Clive Facility would not have been considered a regional disposal facility, as it was not established *under* Northwest, nor was the existence of Northwest necessary to the establishment and operation of the Clive Facility. Therefore, under the 1980 Act, Northwest would have had no authority to exclude out-of-region waste from the Clive Facility.

2. *The Low Level Radioactive Waste Policy Amendments Act of 1985*

The 1985 Act added some clarity to the issues before the Court, by expressly defining regional disposal facility as “a non-Federal low-level radioactive waste disposal site in operation on January 1, 1985, or subsequently established and operated under a compact.”<sup>52</sup> The Court has already found that the Clive Facility is not a regional disposal facility, as defined by the 1985 Act.

Unfortunately, the 1985 Act did not eliminate all ambiguity.<sup>53</sup> For example, the 1985 Act does not contain language authorizing exclusion of out-of-region waste by Congressionally-approved compacts, as did the 1980 Act, but neither does it contain language abolishing the authority granted by the 1980 Act. Certain provisions of the 1985 Act describe a period of transition, in which the compact would be entitled to restrict access to the regional disposal facilities to states and compacts

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<sup>52</sup>42 U.S.C. § 2021b(11).

<sup>53</sup>Representative Lujan, then Ranking Member of the House Committee on Interior and Insular Affairs, stated the following regarding the 1985 Act’s complexity: “Andrea Dravo, the Energy and Environment staff member who has literally spent years working on this legislation, may be the only living human being who completely understands exactly how [the 1985 Act] will operate.” 131 Cong. Rec. H11403-02, 1985 WL 205225 (Dec. 9, 1985).

which had made progress towards development of their own LLRW disposal facilities.<sup>54</sup>

EnergySolutions also points to the following language:

Any authority in a compact to restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the compact region shall not take effect before each of the following occurs: (1) January 1, 1986; and (2) the Congress by law consents to the compact.<sup>55</sup>

EnergySolutions argues that this subsection, when viewed in context of the 1980 Act, further supports its claim that Congress intended only to provide the compacts with authority to exclude out-of-region waste from regional disposal facilities. Rocky Mountain argues that any limitations on the compacts' ability to restrict access to disposal facilities within the compact boundaries were intended to be temporary only. After the transition period, described above, the compacts' discriminatory authority would be constrained only by their own organizational documents.

The provision of the 1980 Act which authorizes compacts to exclude out-of-region waste from their regional disposal facilities is not supplanted by any language in the 1985 Act, nor has it ever been repealed, so the Court finds that the 1985 Act confers upon Northwest and other compacts the same authority granted in the 1980 Act, namely the authority to exclude out-of-region waste from the compacts' regional disposal facilities.

Regulation of a LLRW disposal site which operates in interstate commerce is an exercise of interstate commerce power and requires, therefore, an expression of unambiguous intent by Congress to waive Dormant Commerce Clause restrictions. As noted previously, the NRC delegated licensing authority for LLRW disposal sites to the State of Utah, waiving Dormant Commerce Clause restrictions for the limited purpose of licensing disposal sites. The 1985 Act contains an

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<sup>54</sup>42 U.S.C. § 2021e.

<sup>55</sup>42 U.S.C. § 2021d(c).

unambiguous expression of Congressional intent to waive Dormant Commerce Clause restrictions on the regulation of regional disposal facilities. However, the Court concludes that the 1985 Act contains no unambiguous expression of Congressional intent to further waive Dormant Commerce Clause restrictions on regulation of LLRW disposal sites that are not regional disposal facilities.

Because the Clive Facility is not a regional disposal facility, the Court finds that the 1985 Act does not grant to Northwest the authority to exclude out-of-region waste from the Clive Facility. However, even if the 1985 Act does not grant the authority claimed by Northwest and Rocky Mountain, however, the Court must consider whether such authority is granted by the Consent Act.

3. *Omnibus Low Level Radioactive Waste Interstate Compact Consent Act*

The Consent Act provides much greater discriminatory authority than the 1985 Act. Rather than constrain its discriminatory authority to regional disposal facilities, the Northwest Charter, adopted by Congress in the Consent Act, requires Northwest's approval before out-of-region LLRW is accepted by any "facility" within a party state.<sup>56</sup> Facility is defined as "any site, location, structure, or property used or to be used for the storage, treatment, or disposal of low-level waste, excluding federal waste facilities."<sup>57</sup> EnergySolutions concedes that the Northwest charter, as adopted by the Consent Act, provides sufficient discriminatory authority to allow Northwest to regulate the flow of out-of-region LLRW to the Clive Facility.

While the Northwest charter was not drafted by Congress, its ratification by Congress transforms it into federal law. Defendants argue that the Court need go no further, that authority under the Consent Act is sufficient to establish, as a matter of law, that Northwest has the legal

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<sup>56</sup>Docket No. 46, Ex. 1, at 4 (Northwest charter, § 2).

<sup>57</sup>*Id.* at 3 (Northwest charter, § 1).

authority to exclude out-of-region waste from the Clive Facility. In support of their argument, they point to language in the Consent Act, that “[t]he Consent of Congress is hereby given to the states of Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming to enter into the Northwest Interstate Compact on Low-level Radioactive Waste Management, *and to each and every part and article thereof.*”<sup>58</sup> EnergySolutions argues, in response, that the 1980 Act and 1985 Act were intended to be the source of all compact authority, and that the Consent Act was the method by which that authority would be officially bestowed upon individual compacts.

The 1980 and 1985 Acts required that compacts gain express consent from Congress before compacts would have any regulatory authority,<sup>59</sup> as a statutory and constitutional prerequisite to the operation of the interstate compact system. The Court therefore finds that the 1980 Act, as amended by the 1985 Act, is the source of authority for states to enter into interstate compacts pursuant to the Compacts Clause. However, both the 1980 Act, as amended by the 1985 Act, and the Consent Act, may provide Congressional authority for the states, through compacts, to discriminate against interstate commerce.

As discussed previously, the 1980 Act expressed Congress’ unambiguous intent to lift the restrictions on state action imposed by the dormant Commerce Clause, but only insofar as necessary to allow compacts to restrict access to regional disposal facilities. Nothing in the 1985 Act expresses an unambiguous intent by Congress to modify the regime established by the 1980 Act.

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<sup>58</sup>42 U.S.C. 2021d note, § 221 (emphasis added).

<sup>59</sup>P.L. 96-573, § 4(a)(2)(B) (“A compact entered into . . . shall not take effect until the Congress has by law consented to the compact.”); 42 U.S.C. § 2021d(c) (“Any authority in a compact to restrict the use of the regional disposal facilities . . . shall not take effect before . . . the Congress by law consents to the compact.”). *See also* U.S. Const. art. I, § 10, cl. 3.



Provisions of the Consent Act imply an intent by Congress to lift Commerce Clause restrictions on state action, but other provisions in the Consent Act counter those implications. As noted, the Consent Act grants Congressional consent to the Northwest charter, and “to each and every part and article thereof.”<sup>60</sup> However, the Consent Act also states that consent of Congress to the compact charters was granted “subject to the provisions” of the 1985 Act, and that consent is granted “only for so long” as the governing body of the compacts complied “with all of the provisions” of the 1985 Act.<sup>61</sup> The Consent Act also clearly states that the compacts are “in furtherance” of the 1980 Act as amended by the 1985 Act.<sup>62</sup> The 1980 Act, in turn, approves the establishment of “such [interstate] compacts *as may be necessary to provide for the establishment and operation of regional disposal facilities* for low level radioactive waste.”<sup>63</sup>

The language of the Consent Act indicates Congressional intent to place some restrictions on the scope of authority bestowed by Consent Act approval of the compact charters. The language of the 1980 Act also indicates that Congress did not intend to grant the charters unlimited authority. It is therefore unclear that Congress intended to grant the broad authority contained in the Consent Act.

#### 4. *Legislative History and Congressional Intent*

As the plain language of the Acts is insufficient to resolve the issue before the Court, the Court will turn to other sources to determine if it is possible to clarify how much exclusionary

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<sup>60</sup>42 U.S.C. 2021d note, § 221 (emphasis added).

<sup>61</sup>P.L. 99-240 §§ 212(2)-(3), 99 Stat. 1859.

<sup>62</sup>42 U.S.C. 2021d note, § 211.

<sup>63</sup>P.L. 96-573 § 4(a)(2)(A) (emphasis added).

authority Congress intended to grant Northwest and other compacts under the Acts. The history of LLRW disposal in the United States was discussed in greater detail previously. LLRW disposal sites were declining in number, and those states with disposal sites had declared their intention to close the existing sites, since they were prohibited from excluding out-of-state waste. The 1980 Act was intended to provide a time period in which states could enter into compacts and develop their own disposal sites. Once that time period had expired, the states and regions with existing disposal sites would be entitled to shut them to outside waste. Under that plan, compacts could regulate importation of LLRW into their region by regulating regional disposal facilities. However, it became clear, as 1985 approached, that Congress had underestimated the time necessary to overcome the political, technical, and other barriers to establishing a viable LLRW disposal site system.

Some states had organized themselves around existing disposal sites, establishing compacts and submitting the charters for Congressional approval. Those states did so, however, without the additional clarification offered by the 1985 Act on ambiguous terms contained in the 1980 Act. All other states faced the bleak prospect of having no place to dispose of their LLRW once Congressional approval had been given to the compacts. Those states without a disposal site threatened to hold up Congressional approval, leading the country right back to the pre-1980 position of uncertainty regarding the future of LLRW disposal. It was only through the establishment of a period of transition, restrictions on access to existing disposal sites during that period, and the promise that compacts could exclude out-of-region LLRW from their regional disposal sites at the end of the transition that charter states and non-charter states were able to reach a compromise regarding a national policy for LLRW disposal. That compromise took the form of passage of the 1985 Act jointly with ratification of the compact charters in the Consent Act.

As noted, however, there are potential conflicts between the Consent Act and the 1980 Act, as amended by the 1985 Act. The issue presently before the Court is not the only potential conflict, however, as two additional conflicts were specifically addressed during debate on the Acts. First, Senator Leahy, on the floor of the Senate, stated the following regarding a judicial review provision contained in one of the compact charters:

I would have preferred it if the [judicial review] language . . . had not been ratified by the States that are parties to this compact. At worst it is unconstitutional. At best it is confusing. Although I would not support it myself, I believe that rather than delete this section and thereby require the States to repeat the lengthy ratification process, it is best to pass this legislation together with the judicial review amendment to the congressional transition legislation . . .<sup>64</sup>

Second, the House Report on the Consent Act noted that:

Interstate compacts or states may develop definitions of low-level radioactive waste which are not identical to this definition of state responsibility. Such definitions may be used by the compacts or states for their own administrative purposes, but those definitions do not affect the definition of the kind of radioactive material for which states are responsible for providing for disposal.<sup>65</sup>

Congress also understood that there might be other, unforeseen, conflicts.<sup>66</sup> The IIA Report states: "It is the conclusion of the committee that Congress can condition its consent to low level radioactive Waste compacts without necessitating formal re-ratification of the compacts by the

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<sup>64</sup>131 Cong. Rec. S18102-01, 1985 WL 699020 (Dec. 19, 1985) (Statement of Sen. Leahy).

<sup>65</sup>H.R. Rept. 99-315, Part I, at 6.

<sup>66</sup>See 131 Cong. Rec. S18102-01, 1985 WL 699020 (Dec. 19, 1985) (Statement of Sen. Simpson) ("No amendments have been made in the compacts, per se, in an effort to avoid the potential need for subsequent State reratification. Nevertheless, if any such compact is implemented in a manner inconsistent with any of the provisions set forth in this bill, the entire compact shall be deemed to be invalid . . .").

states.”<sup>67</sup> Considering that the compact charters were drafted by the states, with only sparse guidance from the 1980 Act, it was almost assured that there would arise conflicts, either in language or in implementation. This is especially true with the question of the scope of compacts’ authority to exclude out-of-region LLRW, for while the 1980 Act implied certain parameters for what would qualify as a regional disposal facility, and therefore be subject to restrictions by compacts, individual compacts and their party states may not have recognized or accepted those implications. Thus, compacts may have, in their charters, greatly expanded the scope of their discriminatory authority in good faith, without any intent to violate the 1980 Act.

Unfortunately, a resort to the legislative history of the 1985 Act and Consent Act to determine Congressional intent regarding the scope of compacts’ exclusionary authority yields very little in the way of clarification. The IIA Report, for example, states that compacts are granted “the authority to control import or export of waste to or from compact regions,”<sup>68</sup> indicating broad discriminatory authority, but also states that:

In order to encourage states to form regional organizations to provide for low-level radioactive waste disposal, [42 U.S.C. § 2021d] describes certain conditions under which states would be authorized by Congress, with specific additional Congressional ratification required of any compact, to exclude radioactive waste generated outside regional disposal groups *from use of facilities established and operated by the compact*.<sup>69</sup>

Representative Edward Markey stated his belief that “a key element” of the 1980 Act was that which allowed compacts “to exclude waste from outside their compact regions as of January 1,

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<sup>67</sup>H.R. Rept. 99-314, pt. 1 at 21.

<sup>68</sup>H.R. Rept. 99-314, pt. 1 at 15.

<sup>69</sup>*Id.* at 26 (emphasis added).

1986,”<sup>70</sup> and Representative Butler Derrick stated that the 1980 Act would allow Congressionally approved compacts, “beginning January 1, 1986, . . . [to] exclude from disposal all waste generated outside the compact region.”<sup>71</sup> However, Representative Morris Udall, Chairman of the Committee which considered the 1985 Act, also stated that under the 1985 Act, “States which operate disposal facilities under the auspices of a regional compact ratified by Congress will be authorized to close *those facilities* to waste not generated within the compact region.”<sup>72</sup> Likewise, Senator Alan Simpson stated that “[u]pon enactment of [the 1985 Act and the Consent Act], each such compact region may restrict the use of a regional disposal facility located within such compact regions . . . to the disposal of a low-level radioactive waste generated within such region.”<sup>73</sup> Depending on the speaker, the 1985 Act was described as granting either power to exclude LLRW from the region or to exclude it only from regional disposal facilities.

These seeming contradictions may be explained somewhat by concerns expressed during debate on Acts that, without Congressional action, there would soon be no LLRW disposal facilities operating in the United States. The State stated, at the February 26, 2009 hearing, that it only authorized the Clive Facility’s disposal of LLRW, conditional upon approval by Northwest, because it believed that Northwest’s discriminatory authority over out-of-region waste would protect it from becoming a “dumping ground.” It is likely that similar decisions are regularly made by states and compacts, and that Congress intended to create the incentives that would result in increased LLRW

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<sup>70</sup>131 Cong. Rec. H11403-02, 1985 WL 205255 (Dec. 9, 1985).

<sup>71</sup>*Id.*

<sup>72</sup>131 Cong. Rec. E5408-03, 1985 WL 722250 (Dec. 4, 1985) (emphasis added).

<sup>73</sup>131 Cong. Rec. S18102-01, 1985 WL 699020 (Dec. 19, 1985).

disposal capacity. It is not improbable, then, that denying compacts the right to exclude out-of-state waste would lead to states losing confidence in the compact system created by the Acts, and the country returning to the circumstances which led to the need for the Acts.

It is undisputed that the primary purpose of the Acts was to assure the continued provision of LLRW disposal capacity, to encourage an increase in the total disposal capacity, and to spread the burden of providing disposal capacity more broadly. Granting blanket discriminatory authority to compacts, however, may also go contrary to that purpose by creating substantial disincentives to the development of purely private LLRW disposal capacity, such as the Clive Facility. For example, if the 1985 Act is intended to grant full discriminatory authority over LLRW disposal facilities, a compact would be well within its authority to effectively shut down any LLRW facility within its boundaries, simply by denying it the right to receive LLRW from inside or outside of the compact region.

Upon questioning at the February 26, 2009, hearing, Northwest admitted that, under its interpretation of the 1985 Act, it had authority to do just that, although it disclaimed any such intention. The Court accepts Northwest's representation that it has no intention of depriving EnergySolutions of the ability to import domestic LLRW, but is troubled by the potential for abuse if private LLRW disposal facilities were to be left so completely at the whims of the compacts. Uncertainty thus created may be sufficient to deter private efforts to increase LLRW disposal capacity, and thereby frustrate, in part, the intent of the Acts. Furthermore, the potential to regulate a private LLRW facility out of existence is the potential to severely interfere with interstate commerce and is not, in this case, accompanied by an unambiguous expression of Congressional intent to permit such interference.

After careful consideration of the Constitutional policy reflected in the Dormant Commerce Clause, the text of the Acts, and the legislative history and policy objectives of the Acts, the Court finds that the Consent Act does not express an unambiguous intent by Congress to grant the nearly unlimited exclusionary authority over LLRW disposal within the compact boundaries which is claimed by Defendants. The Court finds that the 1980 Act is the only unambiguous expression of intent by Congress to lift dormant Commerce Clause restrictions on state regulation of interstate commerce in LLRW. The Court also finds that, as it pertains to importation of LLRW from outside Northwest's regional boundaries, Northwest has authority only to restrict access to its regional disposal facility. Because the Court finds that the Clive Facility is not a regional disposal facility, the Court finds that Northwest has no authority to restrict the flow of out-of-region waste to the Clive Facility and EnergySolutions' Motion for Partial Summary Judgment will be granted in part.

The Court notes, however, that the request for relief on Count I of Plaintiff's First Amended Complaint is declaratory judgment that Northwest "lacks authority to restrict the flow of LLRW to the Clive Facility."<sup>74</sup> The evidence presented by the parties in their memoranda and during oral arguments centered solely around the question of whether Northwest has authority to restrict the flow of out-of-region LLRW to the Clive Facility. There is little evidence presently before the Court regarding the authority of Northwest to regulate in-region waste. The 1980 Act, however, does declare that "low level radioactive waste can be most safely and efficiently managed on a regional basis."<sup>75</sup>

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<sup>74</sup>Docket No. 3 at 11.

<sup>75</sup>P.L. 96-573, § 4(a)(1)(B).

While the Court does not find this to be an unambiguous expression of intent to allow compacts to discriminate against out-of-region waste, the Court does find it, along with similar references in the legislative history, to be an unambiguous expression of Congressional intent to allow Northwest to regulate the disposal of waste generated within Northwest's regional boundaries. Therefore, to the extent that EnergySolutions' Motion for Summary Judgment requests declaratory judgment that Northwest has no authority to regulate the flow of in-region waste to the Clive Facility, it will be denied in part.

#### IV. CONCLUSION

It is therefore

ORDERED that Plaintiff EnergySolutions, LLC's Motion for Summary Judgment on Count I of the First Amended Complaint (Docket No. 35) is GRANTED IN PART AND DENIED IN PART as described above. It is further

ORDERED that Defendants Northwest Interstate Compact on Low-Level Radioactive Waste Management and Rocky Mountain Low-Level Radioactive Waste Board's Cross-Motion for Summary Judgment on Count I of Plaintiff's First Amended Complaint (Docket No. 40) is DENIED. It is further

ORDERED that Defendant State of Utah's Cross Motion for Summary Judgment on Count I of the First Amended Complaint (Docket No. 45) is DENIED.

DATED May 15, 2009.

BY THE COURT:

  
TED STEWART  
United States District Judge



**Ed Whitfield**  
**Opening Statement for the record for the Energy and Environment**  
**Hearing on “H.R. 515, The Radioactive Import Deterrence Act”**  
**October 16, 2009**

Mr. Chairman, I appreciate your holding this hearing on H.R. 515, the Radioactive Import Deterrence Act, of which I am a cosponsor.

I first learned about this issue in November of 2007 when Ranking Member Barton and I sent a letter to the Nuclear Regulatory Commission asking a series of questions about this issue. I primarily had three concerns: how much capacity do we have at the Utah site, what happens *if* waste other than low-level waste makes it into the United States, and what does the United States stand to gain through this transaction. Over the course of several meetings and investigating into this issue, I have learned some interesting, and telling information.

Regarding capacity, it is my understanding that the Utah site currently has 120 years worth of capacity and there is currently a site pending to be built in Texas, which will increase that capacity even further. Additionally, it is my understanding that the company this legislation impacts, Energy Solutions, is willing to amend their license agreement to state that only five percent of their total capacity can come from sources outside the United States. It is also my understanding that the company only wants to use 4.3 acres for international development of the total capacity available, which is over 640 acres. So, I think the capacity issue has been addressed.

We must, however, ensure that the intended substance is the actual material that is coming into the country and not anything that could potentially be harmful or problematic to our nation, which brings me to my next point. The Low-Level Radioactive Waste Policy of 1980 (P.L. 96-573) defined “low-level radioactive waste” as radioactive material that is **not** high-level radioactive waste, spent nuclear fuel, or byproduct material, and radioactive material that the Nuclear Regulatory Commission classifies as low-level radioactive waste. Low-level waste is classified as A, B, C, or Greater than Class C. The waste that is being discussed today is Class A, which is a waste containing the lowest concentration of short-lived and long-lived radionuclides. Examples include personal protective clothing, instruments, tools, and some medical wastes. With those definitions in mind, another one of my major concerns with this material coming into the country is that we could receive substances not intended to be received. However, it is my understanding that receiving substances that are not intended has never happened in the past ten years, since we have been processing an agreement with Canada. Although it is highly unlikely, *should* unwanted substances come into our nation, I also understand there are agreements that the country sending the material will accept the substance back. While I am satisfied that the current applicant has in place protocols to address this concern, I do think it is fair to ask whether other applicants would properly satisfy this need, but I think that is a question that can be properly regulated by the NRC. It may be that we need to enhance the NRC’s authority in that respect, and I would certainly be willing to consider legislation to do so.

Receiving this material still does have some risks involved and so I was concerned with what the United States stands to gain by importing this substance, which brings me to my final concern. Energy Solutions has agreed in their statement today to

only accept waste into our country for ten years, allowing the Italian government and Energy Solutions time to construct a facility in their country similar to ours in Utah. Frequently, in the United States we have fought for efforts to knock down trade barriers and look for ways to create jobs here in the United States by working with other countries. President Obama himself understands this need and recently established a nuclear cooperation agreement called the U.S.-Italian Joint Declaration. By helping foster this cooperation, this opens doors to create jobs in the United States and allows American companies to participate in a nuclear new build program in Italy. Both of these potential gains could reap huge rewards for the United States in the long-run.

With all these concerns recently satisfied, I am comfortable in saying that the Nuclear Regulatory Commission has adequately looked into this issue and I have confidence in their ability and intent to see that it is properly and safely addressed. Consequently, I do not believe it is advisable for Congress to intervene in this matter beyond possibly enhancing the NRC's authority to regulate the matter.

Thank you Mr. Chairman for holding this hearing on this important topic.

HENRY A. WAXMAN, CALIFORNIA  
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ONE HUNDRED ELEVENTH CONGRESS

**Congress of the United States**

**House of Representatives**

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October 23, 2009

Ms. Margaret M. Doane  
Director, Office of International Programs  
U.S. Nuclear Regulatory Commission  
One White Flint North Building  
11555 Rockville Pike  
Rockville, MD 20852-2738

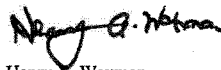
Dear Ms. Doane:

Thank you for appearing before the Subcommittee on Energy and Environment on October 16, 2009, at the legislative hearing entitled "H.R. 515, the Radioactive Import Deterrence Act".

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions and include the text of the question with your response, using separate pages for responses to each Member.

Please provide your responses by October 28, 2009, to Earley Green, Chief Clerk, in Room 2125 of the Rayburn House Office Building and via e-mail to [Earley.Green@mail.house.gov](mailto:Earley.Green@mail.house.gov). Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,



Henry A. Waxman  
Chairman

Attachment

**The Honorable Fred Upton**

**QUESTION 1.**

Has the NRC ever granted a license to import LLRW where the waste was disposed at the Northwest Compact site in Hanford, WA?

**ANSWER.**

Yes, the NRC granted licenses authorizing AREVA (formerly Siemens Power Corporation and Framatome), Allied Technology Group, Inc. and PermaFix Northwest to import radioactive waste, which, in accordance with those facilities' domestic licenses, would have involved some disposal at the Northwest Compact site in Hanford, WA and/or the EnergySolutions site in Clive, Utah.

**QUESTION 2.**

How many LLRW import licenses has the NRC granted and how many have been denied or sent back to the applicant?

**ANSWER.**

As of 10/26/09, the NRC had issued 14 import licenses and 2 import license exemptions. The NRC returned 5 import license applications without action and terminated review of one import license application. Two import license applications were withdrawn by the applicant. Currently, three applications for new import licenses are in abeyance. There are also three import license amendment applications pending.

**QUESTION 3.**

When the NRC receives an application for a license to import LLRW is it the normal practice of the NRC to seek the view of the State in which the material will be disposed as well as the Compact in which the facility is located?

**ANSWER.**

NRC's current practice is to consult with the State and Compact in which the waste will be disposed of, even when the waste is imported to a processing facility in another State. NRC regulations do not explicitly require such consultation. Under domestic regulations, some waste that is processed can be "attributed" to the waste processor, rather than the original generator. In such cases, the identity of the original generator is not maintained after processing, and the processor is considered to be the waste generator. Different generators' wastes are processed in batches (or co-mingled) for efficiency and therefore the processed waste cannot be "attributed" to one generator. For proposals to import foreign waste, NRC staff has nevertheless requested that the ultimate disposal facility states and compacts be identified so that NRC can obtain their views, even though the waste is no longer considered to be foreign under domestic regulations.

NRC published for public comment proposed revisions to its import/export rules in 10 CFR Part 110 on June 23, 2009. Several commenters on the proposed rule asked NRC to ensure that the final rule requires that ultimate disposal facilities be identified and affected States and compacts consulted. The staff is considering this comment.

**QUESTION 4.**

Please provide the subcommittee with copies of all import licenses granted, denied or sent back to the applicant as well as copies of all correspondence regarding these license applications between the NRC and the Compacts, States, State Department and others.

**ANSWER.**

The documents requested for all import licenses (and license exemptions) granted, denied or sent back to the applicant (either withdrawn, returned without action or terminated) will be provided separately.

**QUESTION 5.**

Please list the names of all of the companies that have received or applied for LLRW import licenses.

**ANSWER.**

ALARON Corp.
Allied Technology Group, Inc
AREVA NP Inc.
Chem-Nuclear Systems
Diversified Scientific Services, Inc. (DSSI)/Perma-Fix
Duratek Services, Inc.
Eastern Technologies, Inc.
EnergySolutions
Framatome ANP
GTS Duratek
NEN Life Science Products
Perma-Fix Northwest, Inc.
Philotechnics
RACE
Siemens Power Corp.
Starmet CMI
Sud-Chemie
UniTech Services
US Ecology Idaho, Inc.
Westinghouse

**QUESTION 6**

Please describe, in detail, the process that the NRC goes through when evaluating a LLRW import license application.

**ANSWER:**

Applications for licenses to import radioactive waste must be submitted to the NRC Office of International Programs (OIP), which initiates and coordinates external (Executive Branch) and internal (technical) reviews. In addition to forwarding applications to the various reviewers, OIP arranges for copies to be posted in ADAMS (the agency's electronic recordkeeping system that is available to the public), and for publication of a Federal Register notice. For the technical review, conducted by the Office of Federal and State Materials and Environmental Management Programs (FSME), the staff ensures that the information required by 10 CFR 110.31 and 110.32 is complete. This information required for all export or import license applications (with details for radioactive waste highlighted) is as follows:

**§ 110.31 Application for a specific license.**

(a) A person shall file an application for a specific license to export or import with the Deputy Director of the NRC's Office of International Programs, using an appropriate method listed in § 110.4.<sup>1</sup>

(b) An application for a specific license to export or import must be accompanied by the appropriate fee in accordance with the fee schedule in § 170.21 and § 170.31 of this chapter. A license application will not be processed unless the specified fee is received.

(c) Applications for an export, import, combined export/import, amendment or renewal licenses under 10 CFR Part 110 shall be filed on NRC Form 7.

(d) Each person shall provide in the license application, as appropriate, the information specified in § 110.32. The Commission also may require the submission of additional information if necessary to complete its review.

(e) An application may cover multiple shipments and destinations.

(f) The applicant shall withdraw an application when it is no longer needed. The Commission's official files retain all documents related to a withdrawn application.

**§ 110.32 Information required in an application for a specific license/NRC Form 7.**

(a) Name and address of applicant.

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<sup>1</sup> Prior to 2006, import license applicants were required to file license applications by letter (as opposed to NRC Form 7).

(b) Name and address of supplier of equipment or material.

(c) Country of origin of equipment or material, and any other countries that have processed the material prior to its import into the U.S.

(Note: This is meant to include all obligations attached to the material, according to the definition of obligations in § 110.2. Licensees must keep records of obligations attached to material which they own or is in their possession.)

(d) Names and addresses of all intermediate and ultimate consignees, other than intermediate consignees performing shipping services only.

(e) Dates of proposed first and last shipments.

(f) Description of the equipment or material including, as appropriate, the following:

(1) Maximum quantity of material in grams or kilograms (terabequerels or TBq for byproduct material) and its chemical and physical form.

(2) For enriched uranium, the maximum weight percentage of enrichment and maximum weight of contained U-235.

(3) For nuclear equipment, total dollar value.

(4) For nuclear reactors, the name of the facility and its design power level.

(5) For proposed exports or imports of radioactive waste, and for proposed exports of incidental radioactive material—the volume, classification (as defined in § 61.55 of this chapter), physical and chemical characteristics, route of transit of shipment, and ultimate disposition (including forms of management) of the waste.

(6) For proposed imports of radioactive waste—the industrial or other process responsible for generation of the waste, and the status of the arrangements for disposition, e.g., any agreement by a low-level waste compact or State to accept the material for management purposes or disposal.

(7) Description of end use by all consignees in sufficient detail to permit accurate evaluation of the justification for the proposed export or import, including the need for shipment by the dates specified.

(g) For proposed imports of material listed in Table 1 of Appendix P to this part, a copy of the applicant's authorization to receive and possess the radioactive material to be imported for each recipient.

(h) For proposed exports of material listed in Table 1 of Appendix P to this part, pertinent documentation that the recipient of the material has the necessary authorization under the laws and regulations of the importing country to receive and possess the material. Pertinent documentation shall consist of a copy of the recipient's authorization to receive and possess the material to be exported or a confirmation from the government of the importing country

that the recipient is so authorized. The recipient authorization shall include the following information:

- (1) Name of the recipient
- (2) Recipient location and legal address or principal place of business
- (3) Relevant radionuclides and radioactivity being imported or that the recipient is authorized to receive and possess
- (4) Uses, if appropriate
- (5) The expiration date of the recipient's authorization (if any)

OIP staff also forwards import license applications to Agreement States (if the application involves an Agreement State) and to low-level radioactive compact commissions as appropriate. The staff makes a determination, often in consultation with Agreement States, on whether the proposed material is authorized for the facility that will receive the waste.

**QUESTION 7.**

Has the NRC ever granted a waste import license to *EnergySolutions*?

**ANSWER.**

NRC import license IW017 was issued to Duratek Services, Inc. (the *EnergySolutions* processing facility located in Oak Ridge, Tennessee). Some other import licenses submitted by other companies list the *EnergySolutions* processing facility in Tennessee as the U.S. recipient facility and the *EnergySolutions* facility in Clive, Utah as the U.S. disposal site.

7a. Is *EnergySolutions* currently importing waste pursuant to this license?

**ANSWER.** Yes, Duratek Services, Inc. is authorized to import waste pursuant to IW017, which is valid until June 30, 2011.

7b. Have there been any issues, other than political issues, related to this import license?

**ANSWER.** Commission staff did have questions regarding the license application during the review process. The staff also had questions after the license was issued. Duratek responded to those questions adequately.

**QUESTION 8.**



How many import licenses does EnergySolutions have pending before the NRC?

ANSWER.

One import license application, IW023 is currently in abeyance. Two other license applications submitted by other companies are in abeyance that may involve final disposal at the EnergySolutions facility at Clive: IW025 and IW026.

QUESTION 9.

Is there any difference between domestically generated material and internationally generated material?

ANSWER.

There are no technical differences between the two. The definition of waste and types of materials contained in the waste are the same whether the origin of the material is foreign or domestic, - i.e., imported waste materials could contain source, special nuclear, or byproduct material from nuclear fuel cycle facilities, or users of nuclear byproduct materials, such as universities and hospitals, the same materials produced and disposed of domestically. The types of facilities that generate this waste may include nuclear power plants, fuel fabrication facilities, and uranium enrichment facilities.

**The Honorable Jim Matheson****QUESTION 1.**

The EnergySolutions application for Italian waste is much broader than other import licenses for low level radioactive waste (LLRW). Has the Nuclear Regulatory Commission (NRC) ever approved an import license for such a broad range of waste from decontamination of nuclear reactors, fuel fabrication facilities, and research facilities? Please see License Application, Item 12, at 5 (listing foreign suppliers) for further information.

**ANSWER.**

Some NRC licenses authorize imports of a broad range of contaminated materials, from more than one nuclear power plant (e.g. IW019). However, none have involved such a broad range of waste from "decontamination" of the number of facilities listed on the EnergySolutions Italian waste application.

**QUESTION 2.**

As you know, the European classification system for LLRW does not directly correspond with the U.S. Class A, B, or C low level waste classification. While EnergySolutions continually contends that it will only import waste that it can dispose of in accordance with the Clive license, ES does not plan on classifying the waste until after the waste is processed in Tennessee. See License Application, Item 15 at 6 (stating "imported material cannot be evaluated for Waste Class . . . until it has been inspected and appropriate processing work has been completed). Does the NRC require that imported waste be fully classified before importation or only after processing? Are the only limits on the radioactivity of the LLRW waste from Italy based on 15a, 15b, and 15c of the License Application? Is radioactivity based on NRC waste classification? If not, why not?

**ANSWER.**

NRC's regulation 10 CFR 110.32 requires that an application for a specific license to import radioactive waste identify the classification of the waste, as defined in 10 CFR 61.55. In its application, EnergySolutions states that the incoming waste will meet the requirements of its Bear Creek and Clive facility licenses. For the waste to be imported, EnergySolutions has proposed that the radioactivity limits be those specified in their Bear Creek property facility's license, not NRC's waste classification limits that apply to the Clive disposal facility. The company states that the material will be extensively characterized prior to its importation but "not classified for disposal. Those materials destined for incineration or metal melting are not received in final form for disposal and therefore waste classification at this point in the process would be premature."

NRC's domestic regulations addressing LLW classification in 10 CFR Part 20, Appendix G, do not require classification of the waste until it is ready for shipment to the disposal site. Waste classification, as defined in 10 CFR 61.55, is related to the performance of a disposal site in protecting an inadvertent intruder 100 years after the facility is closed. Thus, the classification of waste at intermediate points in processing is not related to the objective for the classification scheme (i.e., long term performance of a disposal site). NRC's proposed revisions to 10 CFR Part 110, published for comment on June 23, 2009, propose to harmonize the waste import

requirements with domestic regulations covering waste classification, and would require classification only when waste is being shipped directly for disposal in the U.S.

EnergySolutions has proposed that it will characterize (i.e., determine which radionuclides are present and their concentrations and amounts) waste sufficiently before it is imported to assure itself that, after processing, there will be no waste greater than Class A concentrations. The waste classes are defined by radionuclide concentration limits in 10 CFR 61.55. NRC has not made a finding on whether the approach described by EnergySolutions for characterizing the waste before importation, rather than classifying it, is acceptable for the purposes of issuing an import license. Although classification is not required for domestic shipments from generators to processors, and the EnergySolutions approach is consistent with the language in the proposed revisions to 10 CFR Part 110, NRC staff would need to make a finding based on the current requirements in 10 CFR Part 110.

### **QUESTION 3.**

If the pending EnergySolutions license application for Italian waste is approved, does the NRC intend to allow EnergySolutions to blend higher radioactivity waste with lower radioactivity waste so it can be disposed of at the Clive, Utah site under the Clive license, which only allows for Class A waste? Is the NRC allowing EnergySolutions to classify the waste after processing? If so, why is the NRC not requiring waste classification based on the imported material (i.e. why would the NRC permit a potential licensee to classify waste after it has been imported to the U.S. and processed?). Shouldn't the NRC determine the actual risks associated with importing the waste before it makes a license determination, not afterwards? Please cite any relevant statutory authority or regulatory authority in your response.

### **ANSWER.**

The practice of blending is not prohibited nor is it explicitly addressed by NRC regulations. NRC guidance specifically acknowledges that blending of homogeneous wastes is appropriate under certain conditions. In this case, Tennessee would be the regulator for the waste processing facility that would receive the Italian waste. It is our understanding that Tennessee's regulations similarly do not address blending. In addition, Tennessee, as the regulatory agency for the EnergySolutions processing facility, is not required to formally adopt NRC guidance, but frequently uses the guidance in its reviews. By April, 2010, the NRC staff will be providing a paper to the Commission that will discuss issues related to blending. This may result in some changes to NRC regulations or guidance.

As noted in the response to Question 2, the classification of the waste, as defined in 10 CFR 61.55, is related to safety of a disposal site 100 years after its closure. Classification of waste in accordance with 10 CFR 61.55 at intermediate points prior to its final form for disposal does not affect the disposal site facility performance. In addition, such classification is not required at intermediate points in processing.

Although long-term safety of a disposal facility with foreign waste is related to the classification at the time of disposal, there are other safety considerations and criteria applicable to the decision whether to import foreign waste. These include the requirements that the waste will be transported in the U.S. in accordance with NRC and Department of Transportation regulations to ensure transportation safety, and that it will be received and processed at a licensed NRC or Agreement State facility and meet the terms and conditions of the facility's license to ensure protection of public health and safety.

**QUESTION 4.**

Does incineration of LLRW increase concentration of the radioactivity in the ash for materials that include Class A waste and higher levels of LLRW? If so, is this of concern to the NRC? If it is not of concern, why not?

**ANSWER.**

Incineration may or may not increase the concentration of radionuclides in the resulting ash. Some radionuclides, such as carbon 14, are volatilized and not contained in the ash. Others however, such as uranium, may be increased in concentration because of the volume reduction that occurs during incineration.

If waste were incinerated such that the concentration of radionuclides increased above the Class A limits in 10 CFR 61.55, there is no disposal option for these wastes for many U.S. generators, and the processor or generator would have to store them. The lack of a disposal option is an incentive for not producing Class B/C or GTCC wastes during incineration. If such wastes were to be produced, they would have to be stored until a disposal option becomes available. Such storage would entail setting aside space and conducting periodic monitoring.

The concentration of wastes after incineration is affected by a number of variables, including the radionuclide involved and the concentration of the radionuclides in the unprocessed waste. It is likely that a processor can take measures to reduce or eliminate the production of waste in concentrations greater than Class A after incineration. EnergySolutions' December 5, 2007, letter responding to NRC staff questions on the proposed import of Italian waste, states that, "Using routine process controls to limit final ash container dose rates, we can meter flowable Class B or C materials, such as carbon slurry, into the incinerator with the resultant ash being Class A material. EnergySolutions follows the NRC Branch Technical Position on Concentration Averaging for evaluation of final waste forms."

With respect to whether there is a concern with increasing concentrations of radioactivity in the ash from incineration, the appropriate regulator (in this case, Tennessee as the Agreement State) needs to be concerned about all of the means used to process waste in order to make a safety finding to issue a license. If the regulator finds that public health and safety and the environment will be protected, incineration can be authorized.

**The Honorable Ralph Hall****QUESTION 1.**

What criteria does the NRC base its decision to grant a waste import license? Does the NRC take domestic capacity into account when making this decision?

**ANSWER.**

Import licensing criteria are found in 10 CFR Part 110.43 as follows:

**§ 110.43 Import licensing criteria.**

The review of license applications for imports requiring a specific license under this part is governed by the following criteria:

- (a) The proposed import is not inimical to the common defense and security.
- (b) The proposed import does not constitute an unreasonable risk to the public health and safety.
- (c) Any applicable requirements of subpart A of part 51 of this chapter are satisfied.  
[Explanation - 10 CFR Part 51, subpart A contains regulations to implement the Commission's responsibilities under the National Environmental Protection Act. The subpart specifies that it is applicable to the NRC's domestic licensing and related regulatory functions]
- (d) With respect to the import of radioactive waste, an appropriate facility has agreed to accept the waste for management or disposal.
- (e) With respect to proposed imports of radioactive material listed in Appendix P to this part, the NRC shall consider whether the U.S. recipient is authorized to possess the material under a contract with the Department of Energy or a license issued by the Commission or a State with which the Commission has entered into an agreement under Section 274b of the AEA.
- (f) In making its findings under paragraphs (a) and (b) of this section for proposed imports of radioactive material listed in Appendix P to this part, the NRC shall consider:
  - (1) Based upon available information, whether the applicant has been engaged in clandestine or illegal procurement of radioactive material listed in Table 1 of Appendix P to this part;
  - (2) Based upon available information, whether an import or export authorization for radioactive material has been denied to the applicant or whether the applicant has diverted any import or export of radioactive material previously authorized; and
  - (3) Based upon available information, whether a risk of diversion or malicious acts involving the radioactive material listed in Table 1 of Appendix P to this part.

[60 FR 37565, July 21, 1995 as amended at 70 FR 37992, July 1, 2005]

The NRC, as a regulator, would have the authority to address future domestic disposal capacity if there were public health and safety, or common defense and security concerns. There do not appear to be any such capacity concerns currently with Class A material, which EnergySolutions has indicated will be the classification for all waste import materials for disposal.

## ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE BOARD

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October 27, 2009

Mr. Earley Green  
Chief Clerk  
United States House of Representatives  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515-6115

Dear Mr. Green:

In response to the October 23, 2009 letter from The Honorable Henry A. Waxman, please find attached my responses to the questions from The Honorable Jim Matheson concerning the October 16, 2009 hearing of the Subcommittee on Energy and Environment on "H.R. 515, the Radioactive Import Deterrence Act".

Please feel free to contact me know if you have any further questions.

FOR THE ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE BOARD



Leonard C. Slosky  
Executive Director

Attachment

cc: Mr. Jeff Baran



MEMBER STATES: COLORADO, NEVADA, NEW MEXICO  
EXECUTIVE DIRECTOR: LEONARD C. SLOSKY

**Response to Questions from The Honorable Jim Matheson**

1. As you know, the European classification system for LLRW does not directly correspond with the U.S. Class A, B, or C low level waste classification. While EnergySolutions continually contends that it will only import waste that it can dispose of in accordance with the Clive license, EnergySolutions does not plan on classifying the waste until after the waste is processed in Tennessee. How do you feel about the importation of hotter types of waste given that the end product of this waste stream will be deposited in a site within a LLRW Compact state?

Response: At the time that EnergySolutions applied for a license to import low-level radioactive waste from Italy it also applied for an export license (XW013) to return to Italy any waste that does not meet the Clive facility's license requirements. Therefore, if any wastes do not meet the operating license requirements for the Clive facility, the export license would enable these wastes to be exported back to Italy. In acting on the import license, the NRC should ensure that any such wastes can and will be returned to Italy. The compacts would not allow such wastes to be disposed of at the Barnwell, South Carolina or Richland Washington facilities.

2. How would the compacts react to a decision from the NRC allowing EnergySolutions to blend higher radioactivity waste with lower radioactivity waste so it can be disposed under Clive's license? Should the NRC determine the actual risks associated with importing the waste before it makes a license determination, not afterwards?

Response: Based on the District Court ruling, the Northwest Compact's authority does not extend to EnergySolutions' Clive facility. However, the state of Utah has expressed concern with "down blending." The Clive facility is licensed to accept only Class A low-level waste. Under an agreement with Governor Huntsman, EnergySolutions withdrew its license application to also accept Class B and C low-level waste. It is likely the state of Utah would take exception to a NRC decision that enabled either Class B or C waste to be blended so that the resultant blend becomes Class A waste, gaining access to the Clive facility. This applies to both domestic and foreign low-level waste. The state of Texas has voiced similar concerns. If NRC authorizes down blending, it could further erode the public's confidence in how low-level wastes are managed. The NRC should determine the actual risks associated with importing the waste before it makes a license determination.





October 28, 2009

The Honorable Henry Waxman  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman,

I appreciate having had the opportunity to testify at the hearing entitled "H.R. 515, the Radioactive Import Deterrence Act" before the Subcommittee on Energy and Environment on October 16, 2009. I have enclosed the answers to the questions for the record.

Please do not hesitate to contact me or Jill Sigal at 202-355-9330 should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Val Christensen".

Val Christensen

**QUESTIONS FOR THE RECORD**  
**VAL CHRISTENSEN**

**The Honorable Jim Matheson**

**Question 1:** Based on EnergySolutions' license application to the NRC, to import up to 20,000 tons of LLRW from Italy, it remains unclear whether your company intends to import Class B and Class C LLRW for processing in Tennessee at the Bear Creek facility. In a January 11, 2008 letter to the NRC, EnergySolutions stated that, "The material that will be received at Bear Creek will be extensively characterized prior to its importation but not classified for disposal. Those materials destined for incineration and metal melting are not received in final form for disposal and therefore waste classification at this point in the process would be premature." Do you intend to import Classes A, B and C waste? Please answer for each waste class, as the material would be considered under U.S. law prior to processing.

**Answer 1:** Waste that is shipped to a processor is not classified until after it is processed. This is in accordance with guidance provided by NRC in NUREG/BR-0204, *Instructions for Completing NRC's Uniform Low Level Radioactive Waste Manifest*, July 1998. In order to classify waste, one must have knowledge of not only the radioactive content, but also the volume, mass, and other characteristics of the waste in its final form. The waste must meet the waste characteristics requirements contained in 10 CFR 61.56, which include restrictions on liquid content, void space, pyrophoricity, and packaging. Because processing of waste to render it suitable for disposal typically results in changes to waste volume and mass, it is not possible to classify the waste prior to processing. Examples of processing techniques and their effects include: incineration (reduction in volume and mass), compaction (primarily volume reduction), and dewatering of resins (primarily mass reduction).

Based upon our processing experience, we conservatively assess the materials prior to importation to ensure that wastes shipped to Bear Creek will meet the Class A requirements for disposal at the Clive facility when processed into final form.

**Question 2:** In a June 27, 2008 letter from Phillip Gianutsos, radiation safety office at EnergySolutions' Bear Creek facility, to Margaret Doane at the NRC, Gianutsos states that "no material directly attributed to IW017 [import license for Canadian material] . . ." was disposed as radioactive waste in response to a NRC inquiry regarding how much "residual radioactive material" from processing imported material such as floor sweepings, booties, etc. had been disposed of under the IW017 license. The NRC also asked, "Of the material imported under IW017, how much has been disposed at Clive, and 7) how much additional material imported under IW017 will be disposed at Clive?" The Gianutsos letter provided a misleading response which was clarified by EnergySolutions in ML082530 in which your company said an estimate 7,775 lbs of Canadian waste was disposed at the Clive site. Please explain this discrepancy. Why was

neither the State of Utah nor the Northwest Compact notified of your decision to dispose of foreign waste at Clive?

**Answer 2:** The June 27, 2008, letter provided by Mr. Gianutsos to the NRC was correct. Mr. Gianutsos responded correctly in that no waste attributable to the Canadian import was disposed at Clive. Because all incinerator ash is a residual waste, as defined in Appendix G to 10 CFR 20 (U.S. NRC *Standards for Protection Against Radiation*), the ash from waste incinerated at the Bear Creek facility is by definition domestically generated waste. None of the ash is a "foreign waste." This is clearly defined in our Radioactive Materials Licenses by our Regulator, the State of Tennessee and with the knowledge of our Compact officials. In response to a question from the NRC, Mr. Gianutsos estimated how much ash would result from the incineration of the volume of waste imported from Canada. All information reported is in compliance with the regulations of the NRC and the State of Tennessee.

The waste attribution model used for our incineration process is not unique to our facility or to Tennessee licensed operations. As an example, the same licensing positions have been taken by the State of Washington and the Northwest Compact for incineration of radioactive waste from Germany, with subsequent disposal of radioactive ash filtrate authorized at the Northwest Compact's Regional Disposal Facility in Richland. Utah was also advised of the attribution decisions, as the Northwest Compact planned to dispose at Clive any mixed wastes generated as a result of Siemens' incineration of the radioactive waste from Germany.

We did not provide any special notifications to Utah or the Northwest Compact, as there are no additional reporting requirements for disposal of domestically generated wastes. As described above, that was proper and consistent with the rules applied by our regulators.

**Question 3:** In your testimony before Congress, you said that the Italian waste shipment would consist of "booties and gloves and other articles of clothing worn by workers at nuclear power plants, as well as metals, paper, and plastics used in the nuclear industry." However, the license application made to the Nuclear Regulatory Commission indicates there is a more significant list of waste products including not only metal and "dry activity waste such as wood, paper, and plastics" but "graphite waste, . . . liquids such as aqueous and organic based fluids, ion exchange resins (treated and untreated)" [see License Application box 15, at 4]. The imported waste could also include up to 1 million kg of depleted uranium and up to 5 kg of special nuclear material. See FR Vol. 73, No. 28 (2/11/2008) at 7766 and License Application, boxes 15a and 15c at 4. If the maximum allowed transuranic radionuclides were distributed throughout the entire waste content, would this constitute Class C waste? If not, why not?

**Answer 3:** As described above in our answer to question No. 2, waste is not classified until after processing.

**Question 4:** In a June 19, 2009, submission to the NRC, EnergySolutions stated that a delay in issuing a license to import Italian waste “would cause EnergySolutions substantial economic harm because it is unable to perform work under its contracts for this waste without the requested license.” [p. 8 of June 19, 2009, submission] However, at the October 16, 2009 hearing, you testified that EnergySolutions did not have binding contracts to dispose of the Italian waste. Have you taken any steps to correct this statement to the NRC? If not, when do you intend to do so?

**Answer 4:** Yes. The October 23, 2009 notice of clarification to the NRC is attached.

**The Honorable Fred Upton**

**Question 1:** At the hearing you had an exchange with Congressman Gordon on a document submitted to the NRC. Please clarify for the record whether or not *EnergySolutions* has a contract to dispose of the Italian material.

**Answer 1:** *EnergySolutions* does not have a contract with Sogin, the Italian company, to dispose of its waste. *EnergySolutions* entered into a Memorandum of Agreement (MOA) with Sogin in September 2007. The MOA was used as the basis on which the contract to dispose of the waste has been negotiated. After the hearing I reviewed the June 19, 2009 document submitted to the Nuclear Regulatory Commission (NRC) by *EnergySolutions'* counsel that Congressman Gordon referenced during our exchange. I concluded that it would have been more precise to use the phrase "Memorandum of Agreement" rather than "contracts." *EnergySolutions'* counsel submitted a notice of clarification to the NRC on October 23, 2009. (See attached Notice of Clarification)

**Question 2:** During the hearing Mr. Slosky stated that the disposal of foreign material would jeopardize the entire compact system. Do you agree with his statement? If not, why not?

**Answer 2:** No, I do not agree with Mr. Slosky's statements about the compact system. In no way does the disposal of a limited amount of internationally generated material jeopardize the compact system. Using 5% or less of the Clive facility's remaining disposal capacity has no impact on the compact system. It does, however, demonstrate to foreign countries which are restarting or expanding their nuclear programs that nuclear material can be managed safely. This opens up the opportunity to American companies to site new disposal facilities internationally and to compete to build new nuclear plants abroad.

**Question 3:** Does H.R. 515, in your opinion, have any impact on the court's ruling in *EnergySolutions* vs. Northwest Interstate Compact or the compact system?

**Answer 3:** H.R. 515 does not address the court's ruling nor does it have any impact on the compact system. H.R. 515 strips the NRC of its current authority to decide, based on specific criteria, whether or not to grant a low-level radioactive waste (LLRW) import license. The legislation also erects an unnecessary trade barrier and has a negative impact on job creation in the United States as well as on tax revenue on the State and local level.

**Question 4:** How much capacity does the Clive facility have remaining and is this sufficient for the needs of the domestic nuclear industry and your other domestic customers?

**Answer 4:** Currently, the Clive facility has 140 million cubic feet of licensed capacity. Based on our estimates of future disposal of 4 - 5 million cubic feet/year, Clive has over

30 years of licensed capacity remaining. This is sufficient capacity to dispose of the Class A LLRW from the domestic nuclear industry, the U.S. Government and our other domestic customers as well as a limited amount of internationally generated material. The total remaining potential site capacity at Clive is over 485 million cubic feet. Based on current waste generation rates, the site has a potential remaining capacity of approximately 120 years should the site be licensed to utilize its maximum capacity.

**Question 5:** My view of H.R. 515 is that it is anti-business and anti-nuclear in that it prevents companies in the waste disposal business from doing their business and it hinders American companies from competing internationally in the nuclear renaissance. Do you agree with my analysis?

**Answer 5:** Yes. This legislation would prevent American companies from providing nuclear services around the globe using their state-of-the-art processing facilities that are located in the U.S.

**Question 6:** How much of the 20,000 tons of material that *EnergySolutions* would like to import from Italy would be disposed at the Clive facility as Class A LLRW?

**Answer 6:** Approximately one-third of the Italian material is metal that would be recycled and formed into shield blocks that are reused within the nuclear industry. The remaining material would be incinerated and volume reduced. Approximately 1,600 tons of Class A LLRW would be disposed at Clive.

**The Honorable Ralph M. Hall**

**Question 1:** Is there any difference between Class A waste generated in Texas or Michigan and Class A waste generated in Canada or Italy?

**Answer 1:** No. The NRC stated in its Fact Sheet of April 2008 that there is “no significant difference” between domestic and foreign waste.

**Question 2:** Some have stated a concern that the imported material could be orphaned in Tennessee. Is this a valid concern?

**Answer 2:** No. The material would be characterized by *EnergySolutions* personnel in Italy to ensure that no material would be imported to the United States that did not meet the requirements at our licensed facilities. No internationally generated material will ever be disposed or orphaned in Tennessee. In the many years that the company has been processing and disposing of internationally generated material, no waste has ever been orphaned in Tennessee. We have never imported material that was non-conforming and had to be returned to the generating country. Any material we have imported has been properly processed in Tennessee with the residuals safely disposed in Utah.

In the Matter of:	)		
	)		
EnergySolutions, LLC	)	October 23, 2009	
	)		
Radioactive Waste Import/Export Licenses	)	Docket Nos.	110-05711 (Import)
	)		110-05710 (Export)
	)		
	)		

In its Brief in Response to the Commission's May 20, 2009 Order (June 19, 2009) ("June 19 Brief") regarding import of waste from Italy, EnergySolutions alerted the Commission to the fact that "delay would cause EnergySolutions substantial economic harm because it is unable to perform work under its contracts for this waste without the requested licenses."<sup>1</sup> Upon further review, EnergySolutions now recognizes that it would have been more precise to use the phrase "Memorandum of Agreement (MOA)" instead of "contracts." It would have been more precise to state that the MOA is the basis on which EnergySolutions negotiated contracts with Sogin that

DB1/63839577



will be executed when the import license is granted. EnergySolutions reiterates that it is harmed by the delay in the requested regulatory approvals.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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Counsel for EnergySolutions, LLC

Dated in Washington, D.C.  
this 23rd day of October 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATOR COMMISSION

Before the Commission

In the Matter of:

EnergySolutions, LLC

Radioactive Waste Import/Export Licenses

October 23, 2009

Docket Nos.      110-05711 (Import)  
                             110-05710 (Export)

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing EnergySolutions' Notice of Clarification have been served upon the following persons on this date via the Electronic Information Exchange.

**U.S. Nuclear Regulatory Commission**  
**Office of the Secretary of the Commission**  
Mail Stop O-16C1  
Washington, DC 20555-0001

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Respectfully submitted,

*Signed (electronically) by Raphael P. Kuyler*

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