

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

_____)	
In the Matter of)	
ENERGYSOLUTIONS, LLC)	Docket Nos. 110-05711 (Import)
Radioactive Waste Import/Export Licenses)	110-05710 (Export)
_____)	

CLI-08-24

ORDER

By this Order, we hold the above-captioned proceedings pertaining to EnergySolutions' application for a license to import low-level radioactive waste (LLW) from Italy and its accompanying application for a license to export LLW back to Italy in abeyance pending further Commission action. This Order also holds in abeyance Commission action on two requests for a hearing on the applications.

I. BACKGROUND

On September 14, 2007, EnergySolutions applied for an NRC license to import low-level radioactive waste (LLW) from Italy for processing at an EnergySolutions facility in Tennessee. The application indicated that EnergySolutions would dispose of a portion of that LLW at its state-licensed facility in Utah. At the same time, EnergySolutions also applied for an NRC export license to allow any material that cannot be disposed of in Utah to be exported back to

Italy. The State of Utah¹ and a consortium of public interest groups (calling themselves Multiple Organizations)² requested a hearing on EnergySolutions' import and export applications. For the reasons discussed in this Order, we hold review of the EnergySolutions import and export license applications as well as the two hearing requests in abeyance until further notice.

EnergySolutions' license application seeks permission to import up to 20,000 tons of LLW from decommissioned nuclear facilities in Italy.³ These materials would be primarily metals, wood, paper, plastic, liquids and ion-exchange resins that have various levels of radioactive contamination.⁴ According to the import application, EnergySolutions would process and recycle (as shielding blocks for use in nuclear facilities) most of the LLW at its Bear Creek facility in Oak Ridge, Tennessee.⁵ The remaining waste would be sent to EnergySolutions' LLW

¹ "State of Utah's Request for Hearing and Petition for Leave to Intervene," (June 10, 2008) (Utah's Hearing Request).

² "Request from multiple organizations for Hearing in Middle Tennessee," (June 10, 2008) (Multiple Organizations' Hearing Request). The groups are: Nuclear Information and Resource Service, Tennessee Environmental Council, Citizens to ENDIT, Tennessee Conservation Voters, Friends of the Earth, the Sierra Club, Bellefonte Efficiency and Sustainability Team, American Environmental and Health Studies Project, Inc., Southern Alliance for Clean Energy, and Nuclear Watch South.

Also on June 10, 2008, Steven Sondheim (an individual identified as joining in the Multiple Organizations' Hearing Request) submitted a separate e-mail on behalf of the Tennessee Sierra Club (one of the multiple organizations), which duplicated much of the text of the Multiple Organizations' Hearing Request. The only issue raised in Mr. Sondheim's e-mail not addressed in the Multiple Organizations' Hearing Request is his "expect[ation of] a full-fledged Environmental Impact Statement to both investigate alternatives to and impacts of such proposed nuclear material processing." Because both Mr. Sondheim and his organization joined in the Multiple Organizations' Hearing Request and his e-mail raises the same issues, we will consider them as a single hearing request.

³ See "EnergySolutions Request for: (1) Specific License to Import Radioactive Material (from Italy); (2) Specific License to Export Radioactive Material (to Italy)" (Application) (Sept. 14, 2007) (ADAMS Accession No. ML072950080) at 4 of 10.

⁴ *Id.*

⁵ *Id.* at 6 of 10.

disposal facility in Clive, Utah (the Clive facility).⁶ But the Clive facility is only licensed by the State of Utah for disposal of Class A radioactive waste--the lowest level of LLW.⁷

EnergySolutions has proposed that any waste that does not qualify for disposal at the Utah facility (*i.e.* LLW that is greater than Class A) would be returned to Italy under the proposed export license.⁸ In its Answer to Utah's Hearing Request, EnergySolutions informed the Commission that it does not expect to need to use the export license to ship any waste back to Italy.⁹

II. ANALYSIS

Under the Atomic Energy Act (AEA), the NRC is responsible for authorizing the export and import of byproduct, source, and special nuclear material. Under the NRC's regulations governing imports and exports of nuclear materials, the Commission will issue a LLW import license if it finds that: (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; (3) the environmental requirements of Part 51 have been satisfied (to the extent applicable); and (4) an appropriate facility has agreed to accept the waste for management or disposal.¹⁰

The Northwest Interstate Compact on Low-Level Radioactive Waste Management ("Northwest Compact"), of which the State of Utah is a member, is a federally chartered compact of eight states and was authorized by the Low-Level Radioactive Waste Policy

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ "EnergySolutions' Answer Opposing the State of Utah's Request for a Hearing and Petition for Leave to Intervene," (July 10, 2008) at 2.

¹⁰ 10 C.F.R. § 110.45(b).

Amendments Act of 1985 (the Act). The Act announced a federal policy that the states' responsibilities to dispose of LLW could be best handled on a regional basis.¹¹ To carry out that policy, the Act authorized creation of interstate compacts "as may be necessary to provide for the establishment and operation of regional disposal facilities" for LLW.¹² When authorized by Congress, these interstate compacts are allowed to "restrict the use of the regional disposal facilities under the compact to the disposal of [LLW] generated within the compact region."¹³ Congress consented to the creation of the Northwest Compact in Title II of the Act, the "Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act."¹⁴

The Northwest Compact exercises its exclusionary authority granted by Congress in the Omnibus Consent Act; the Compact itself provides that "no facility located in any party state may accept low-level waste generated outside the region comprised of the party states," except under a specific procedure requiring approval of the member states.¹⁵ As the Clive facility is in Utah, a member state of the Northwest Compact, the Northwest Compact has taken the position that the Clive facility may not accept for disposal any LLW generated outside the region without express authorization of the Compact. The Compact has authorized EnergySolutions to accept *domestic* out-of-compact LLW, but made clear in a recent resolution that this existing authorization does not allow disposal of *foreign* LLW at the Clive facility.¹⁶ EnergySolutions

¹¹ Low-Level Radioactive Waste Policy Amendments Act of 1985 § 4(a)(1); 42 U.S.C. § 2021d(a)(1).

¹² *Id.* at § 4(a)(2); 42 U.S.C. § 2021d(a)(2).

¹³ *Id.* at § 4(c); 42 U.S.C. § 2021d(c).

¹⁴ 42 U.S.C. § 2021d(note).

¹⁵ Northwest Interstate Compact on Low-Level Radioactive Waste Management, Article IV (2).

¹⁶ Northwest Compact Resolution Clarifying the Third Amended Resolution and Order (May 12, 2008).

disagrees, arguing that it is not a “regional disposal facility” under the Act and that the Northwest Compact lacks jurisdiction over the Clive facility. EnergySolutions is currently seeking a declaratory judgment from a federal court that its facility is not subject to the restrictions of the Northwest Compact.¹⁷

The NRC will defer action on the pending import license application until the dispute over the authority of the Northwest Compact is resolved or EnergySolutions outlines an alternative plan for disposal of the imported LLW. As we explained in our Statement of Considerations for the Final Rule governing LLW imports, “[t]he NRC will not grant an import license for waste intended for disposal unless *it is clear* that the waste will be accepted by a disposal facility, host state, and compact (where applicable).”¹⁸ This is part of the Commission’s “determination regarding the appropriateness of the facility that has agreed to accept the waste for management or disposal.”¹⁹ In other words, an integral aspect of the Commission’s determination of a facility’s appropriateness for disposal of imported waste is whether the facility can actually accept that waste for disposal.

While both EnergySolutions and the State of Utah briefed this issue, the Commission will not wade into the legal dispute between EnergySolutions and the Northwest Compact now before the federal district court in Utah. A Commission decision on the extent of the Northwest Compact’s exclusionary jurisdiction would not be binding on the courts. Until a court of competent jurisdiction determines that the Northwest Compact cannot exclude foreign waste from the Clive facility, the Northwest Compact itself indicates to the Commission that it chooses not to exercise such authority, or some other basis upon which to address the disposal question

¹⁷ *EnergySolutions, LLC v. Northwest Interstate Compact on Low-level Radioactive Waste Mgmt., et al.*, Case No. 08-00352 (D. Utah filed May 5, 2008).

¹⁸ 60 Fed. Reg. at 37,560 (emphasis added).

¹⁹ *Id.*, see also 10 C.F.R. § 110.45(b).

arises, the Commission is not in a position to determine that the Clive facility is appropriate for disposal of this particular imported LLW as proposed in the application as filed. Therefore, it would be inefficient to devote further adjudicatory (and NRC Staff) resources to this proceeding now.²⁰

III. CONCLUSION AND ORDER

Thus, the Commission hereby holds further proceedings on the EnergySolutions import and export license applications in abeyance until further notice. The Commission directs 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, or earlier if there are pertinent developments that could affect the Commission's decisions on these applications. Because the Commission will not act on the application at this time, it is not yet necessary to determine whether to grant either hearing request, both of which also are hereby held in abeyance until this Order holding the import and export license applications in abeyance is lifted. If future events allow this licensing proceeding to continue, the Commission will then consider the pending hearing requests.²¹

²⁰ See generally *CBS Corp.* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 235 (2007).

²¹ At that time, the Commission will rule on the two pending motions in this proceeding, "EnergySolutions' Motion to Strike Various Organizations' Untimely Second Reply" (July 30, 2008) and "14 Organizations' Motion to File Reply Out Of Time and Response to Motion to Strike" (July 31, 2008).

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of October 2008.