

U.S. House of Representatives
Committee on Commerce
3000 R. Albert House Office Building
Washington, DC 20515-3115

December 23, 1999

The Honorable Richard Meserve
Chairman
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Dear Chairman Meserve:

We write in response to your extraordinary letter of December 20, 1999. It appears that your regulatory agency has abdicated its responsibility to the public in order to justify its failure to follow its implementing act, its own regulations and the directives of Congress. It also appears that your regulatory agency wrote a 75-page "justification" for its lack of regulatory action on the release into interstate commerce of the radioactively contaminated metals and materials without a single citation to law, regulation, legal interpretation, or even an internal memorandum to support its position. In fact, every citation to the Atomic Energy Act, the relevant and regulatory legislative history and the regulations themselves is counter to your position. Nonetheless, you state that the NRC has decided it will not carry out its legislative and regulatory directives because it has not done so in the past and finds it inconvenient to do so now.

As we read your letter, the NRC, instead of developing a national standard for radioactively contaminated metals and materials, intends to sanction the release by Agreement States of millions of tons of such metals and materials that likely will find their way into consumer products in violation of the law, Congressional directives and its own rules without public notice or discussion. The NRC's unique reasoning - heretofore not publicly revealed, although the NRC claims a 40-year history - is that contaminated material sold into interstate commerce that has absolutely no value added by the radioactive material or may be viewed as having a lessened value because of the radioactive content requires less regulation, labeling or warning to the public of its content than products in which the radioactive material has a beneficial effect. Therefore, radioactive materials resulting from contamination during the nuclear processes at the country's reactors and weapons plants are not required to meet NRC's stringent licensing requirements for sale and distribution. Intentionally inserted radiation in commercial products at the same quantity and concentration will, however, continue to be licensed by the NRC with their benefits balanced by their risks and labeling to warn the public of its radioactive content.

This curious position was taken in response to an extensive series of questions posed by the undersigned. We asked why the NRC was not required to license the transfer or sale of 6,000 tons volumetrically contaminated nickel which originated at the Department of Energy's gaseous diffusion

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plant since the product would go to unlicensed parties who purchase it for uses that include manufacture of consumer products. The NRC has responded by stating repeatedly that the nickel was not a "product" or a "commodity" because Manufacturing Science Corporation (MSC), the processor and seller, did not deliberately insert the byproduct material into the nickel, nor was the byproduct material present because of the benefit added by its radioactive properties.

To say that this is a distinction without meaning is an understatement. But this convoluted interpretation of the Atomic Energy Act and implementing regulations – not supported by a single piece of documentation – would have a monumental economic effect on a number of industries. It would allow nuclear utilities, federal weapons sites and other handlers of nuclear materials to release tens of millions of tons of radioactive metal and other materials into interstate commerce before a uniform national standard is established. These materials would find their way into a broad range of products, including many with application to human beings. Moreover, the quantities or concentration of radioactive material could exceed that in products already subject to NRC licensing. The cost of appropriate disposal of this material by its generators is in the billions of dollars. With its action, the NRC has determined that these costs would be passed on to the steel industry and all industries using steel, as well as to the general public.

Contrary to the NRC's assertions, there is no indication that the Congress or the American public ever intended that this artificial distinction should be made so that millions of our products could contain radioactive components because they were not "deliberately" inserted and because they have no benefit. In fact, there is a long legislative and regulatory history which shows that the Congress and the public have directed the NRC to control the manufacture, processing, transfer and use of all commercial products containing these materials, regardless of the source. Every attempt of the NRC to abdicate responsibility has been rejected. Not surprisingly, the NRC, after six weeks' consideration of our letter, could not provide any supporting documentation for its alleged 40-year policy. In fact, every legislative and regulatory action opposes its interpretation.

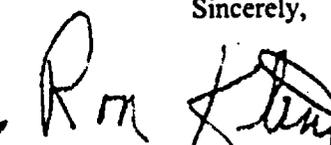
The NRC's position opens the door for a flood of contaminated metal into interstate commerce. Once it is in, we can never get it back – no matter what we later learn about possible health risks, economic costs, metallurgical effect or any other unforeseen effect. What is the benefit to the American consumer and American business from the uncontrolled release of contaminated metal? How does it benefit the American consumer and American business to have the NRC abdicate its statutory responsibility and allow individual states to decide whether or not contaminated metal can or cannot be injected into interstate commerce and with what levels of contamination?

We have further immediate questions (attached) that we wish to have answered by Friday, January 7, 2000. We also asked that you seek independent legal advice on this matter and have the Commission reconsider its position. If the Commission is unwilling to take responsibility, then we may need to look for another forum to protect the public and interstate commerce.

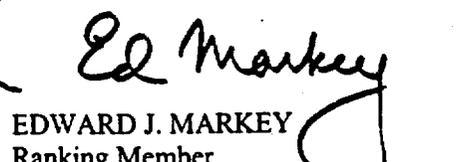
Sincerely,



JOHN D. DINGELL
Ranking Member



RON KLINK
Ranking Member
Subcommittee on Oversight
and Investigations



EDWARD J. MARKEY
Ranking Member
Subcommittee on Telecommunications,
Trade, and Consumer Protection

QUESTIONS TO NRC CHAIRMAN MESERVE

1. In our letter dated October 25, 1999, we requested that you supply documentation to support the answers to the questions asked. We received only two documents, both of which were already in our possession. If there are any additional documents in your possession that provide support for the NRC's position that "equipment, device, commodity or any other product" containing byproduct material not specifically inserted for its radioactive purposes is not subject to the NRC's licensing requirements, please provide them.
2. How does the NRC define "background" levels of radioactivity in Reg. Guide 1.86? Please provide all documentation for the selection of the levels set.
3. Has the NRC ever made an explicit finding that the levels allowed for the release of surface contaminated materials has no "adverse effect on the public health and safety"? Please provide all documentation of that finding. If no finding was made, please explain why.
4. The NRC has promulgated in a rule the explicit levels of contamination that govern the release of buildings and land used for nuclear activities. Are there any promulgated rules for the release of solid materials? If not, please explain why the release of buildings and land, which will remain where they are left, requires a rule but the release of metals and other materials that can be placed in products far away from the source and used by unknowing consumers does not require a rule. Please provide all NRC documents supporting your position.
5. On page 2 of your December 20, 1999, response letter, you indicate that the NRC requires that licensees must survey equipment and material before its release and that "if the surveys indicate the presence of AEA material above natural background levels, then no release may occur." However, the NRC apparently treats the release of radioactively contaminated solid material by a nuclear materials licensee differently, allowing such materials to be released even if AEA material is present above background levels. Please explain the justification for this differing treatment.
6. On Page 4 of your response letter you note that since the advent of the Agreement State program, the NRC has reserved exclusive authority over certain distributions to exempt persons of products containing radioactive material. You further indicate that the "NRC has limited its reservation of authority to the distribution of products into which radioactive material has been intentionally introduced to take advantage of the material's radioactive, physical or chemical properties... (emphasis added)".
 - a) What if the radioactive material has been inadvertently, unintentionally or mistakenly introduced into another material? Why wouldn't the NRC also wish to reserve authority to regulate distribution of the contaminated material?

b) What if radioactive material had been intentionally introduced, but not with the purpose of taking advantage of the material's radioactive, physical, or chemical properties? Why wouldn't the NRC also wish to reserve authority to regulate distribution of such radioactively contaminated materials?

c) What if it cannot be positively determined whether or not the material had been intentionally introduced to take advantage of the material's radioactive, physical, or chemical properties? Would the NRC reserve authority over the distribution of such materials?

d) When did the NRC first announce this policy of only reserving authority over distribution of radioactive materials that had been intentionally introduced? Please supply supporting documentation of that announcement.

7. In your response, you indicate that "NRC Staff reviewed the information from Tennessee on the licensing action and independently calculated potential dose consequences from release of nickel at the levels specified in the MSC license." Please provide a copy of all notes, memoranda, and other documents which relate, in any way, to this review.
8. On page 5 of your response, you also indicate that NRC's review identified some areas needing clarification or additional specific information and that the NRC staff was pursuing resolution of these matters with the State of Tennessee. Please explain the precise nature of the clarifications and additional information being sought. In light of the apparently incomplete information before the NRC, on what basis did you conclude that the actions taken by the State of Tennessee in this matter do not raise any concerns?
9. In your response to question 3 in our letter, the NRC cites Section 274 c. of the Atomic Energy Act as providing the statutory authority to limit its reservation of authority to products involving the intentional introduction of radioactive material to take advantage of the properties of the material. While you state that the legislative history supports this limited use of the NRC's authority, the specific citations from the legislative history that you cite would seem to support a much broader interpretation. For example, the quoted Congressional Committee Report language cited on page 3 of your response does not differentiate between radioactive materials introduced into a product intentionally in order to exploit their radioactive, physical, or chemical properties, and other articles containing byproduct, source, or special nuclear material. On page 5 of your response, the NRC acknowledges that "the Commission recognizes that Section 274 c. could be read to provide the NRC with the discretion to exercise exclusive regulatory control over a broad range of commodities containing radioactive material that may have broad national distribution and use." In light of the fact that the legislative history appears to support a broader reading of the NRC's authority, why has the Commission chosen to adopt an artificially constrained interpretation of the authority conferred under this section?

10. As indicated in Question 42, "radiation control programs should be based on a common regulatory philosophy including the common use of definitions and standards. On page 2 of your response, you state, "low levels of radioactivity are detected". On page 3, you indicate that the NRC allows "the release of material with slight levels of volumetric contamination." While you provide a definition of "low levels" in your answer to Question 42, you do not provide a definition for "slight" levels. Please provide a definition for "slight levels" of contamination. In particular, please specify how this relates to low level and background levels of radiation.
11. According to the definitions in 10 CFR 20.1003, background radiation means "radiation from cosmic sources; naturally occurring radioactive material, including radon...". On page 2 of your response, you indicate an approach in Enforcement Circular 81-07 and Information Notice 85-92 that checks for material "above background" level. In the same paragraph, you indicate "this practice has occasionally created problems in the past when new detectors with greater sensitivity are used and low levels of radioactivity are detected." Since background levels are defined to be an ambient level of radiation, how have levels been detected below "background level?" If some type of shielding is used in these detectors, how do new detectors shield the measured source from background ambient radiation due to sources such as cosmic rays to obtain sensitivities below background?
12. Why does the NRC apparently think that it is more important to regulate the presence of low levels of radioactive materials intentionally introduced into luminous watches, ceramic tableware, glassware, vacuum tubes, and smoke detectors, but it is not important to regulate radioactive nickel that could end up in such products as tableware, caps for baby food jars, cans used for foods or beverages, automobiles, earrings, orthodontic braces, hip replacement joints, and intra-uterine devices?
13. Why does the NRC apparently believe that the intent of the licensee with respect to introduction of a radioactive material into a consumer product is apparently the critical determinant of whether the product should be regulated by the NRC, rather than the presence of the radioactive material in the product itself?
14. Under section 274 c(4) of the Atomic Energy Act, do you believe processors of byproduct material require a license to release or transfer this material to an exempt person?
15. In your response to question 3, you refer to language in S. Rept. 86-870 that indicates the intent of the subsection of section 274 was to "address products that include the intentional introduction." This language refers to manufacturers of radioactive material. However, no restriction is made on the specific products that the Commission may regulate for producers and processors of nuclear material. However, in section 274 c(4), the:

"Commission is authorized by rule, regulation or order to require the manufacturer, processor, or producer of any equipment, device, commodity, or