

New York State Department of Environmental Conservation  
Part 380 Emergency Adoption

Response to Public Comment

Comments were received from the following parties:

CANiT - The Coalition Against Nuclear Materials in Tonawanda,  
submitted by Erie County

CEC - Citizens Environmental Coalition

Corps - US Army Corps of Engineers

Dooley - David Dooley, MJW Corporation

EA - Environmental Advocates

ECIDA - Erie County Industrial Development Agency

EPA - US Environmental Protection Agency

NIRS - Nuclear Information and Resource Service

NRDC - National Resources Defense Council

NYPIRG- New York Public Interest Research Group

Praxair - Praxair, Inc.

Rauch - James Rauch, member of FACTS

Ricciuti - Louis Ricciuti, western New York resident

SC - Sierra Club, Atlantic Chapter

STAR - Standing for Truth About Radiation

Swanick - Charles Swanick, Chair, Erie Co. Legislature

Tonawanda - Town of Tonawanda Commission for Conservation of the Environment

General Comments

Comment: The rule should be adopted to protect the public health and safety and the environment. The long-lived nature of the radiation hazards, the special requirements for disposing of radioactive waste, and potential increase in landfill operation and closure costs require regulation of this material. (CEC, EA, NIRS, NRDC, NYPIRG, Rauch, Ricciuti, SC, STAR)

Response: The Department agrees.

Comment: The Nuclear Regulatory Commission's (NRC) decision not to regulate this material was wrong. There is no technical basis to distinguish between wastes based on the date they were produced. Therefore, the State must regulate this material to protect the public health and safety. (NIRS, NRDC, Rauch) Certain safeguards are needed in the absence of the NRC regulation, and they would be provided under this rule. (EPA)

Response: The Department agrees.

Comment: There is no rational basis for the rule. Disposal of this waste in a landfill would not have an adverse impact on public health and safety. Other radioactive materials that are routinely accepted at landfills demonstrate that this radioactive waste does not need regulation. (CANiT, Corps, Dooley, Praxair, Tonawanda)

Response: This rule regulates the disposal of all uranium and thorium extraction wastes, which are known to exist at sites in New York State, in other States, and in Canada. The radioactive content varies from near background concentrations to highly concentrated forms that present a direct radiation hazard. Without regulations for the disposal of these radioactive wastes, landfills may receive waste containing these radioactive materials at any concentration, and in any form. These wastes could also be used for fill at another site, or simply discarded into the environment.

Congress enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA) in 1978 with a finding "that uranium mill tailings . . . may pose a potential and significant radiation health hazard to the public . . . ." Under UMTRCA, the NRC regulates the disposal of these wastes from mills that are or once were licensed by the NRC.

In 1999 and 2000, the NRC stated that the NRC does not have regulatory authority over mill tailings produced prior to November 8, 1978, but acknowledged that wastes produced prior to that date have the same radiological characteristics as those that are regulated by NRC. The decision was based on legal interpretations, not a scientific study concluding that these wastes posed no radiological hazards.

Where the NRC regulates this type of waste, it must be disposed of in facilities designed and constructed to contain it and specifically authorized, under state or federal regulations, to receive it. State regulations are needed to require similar disposal practices for the same type of radioactive waste where NRC regulations do not apply.

The fact that other radioactive materials are either specifically exempted from regulation, or are not regulated because they are naturally occurring, does not negate the need to regulate these wastes.

Comment: There is no need to exclude from landfills the soils from sites that have been remediated to meet cleanup criteria, such as those set under CERCLA. (CANiT, Praxair, Tonawanda)

Response: This rule applies to residual radioactive contaminants at remediated sites, even though those contaminants may exist at concentrations below the particular cleanup criteria used at the site. It may seem axiomatic that any concentration of radioactive materials that remains once a site has been remediated should not need to be regulated. However, cleanup criteria vary from site to site. They are usually set based on the characteristics of the specific site and for a particular land use. A site remediated to be suitable for industrial uses may have considerably more residual radioactive material than one remediated to allow residential use or farming. Unless the disposal of that residual radioactive material is regulated, soils could be removed from a site and used or disposed of at sites where it is not appropriate to do so. In addition, not all governmental agencies apply the same standards, in the same way. The Department has no control over the cleanup criteria set by federal agencies or other states. To exempt all residual materials at all remediated sites would mean that other states and the federal government would decide what concentration of radioactive materials can be disposed of in DEC regulated landfills.

The Department recognizes that at some remediated sites, the concentrations of residual radioactive material can be so low that further regulation of the radioactive material is not needed to

protect the environment or the public health and safety. In such cases, a variance can be granted, exempting the residual radioactive material from the requirements of Part 380 or allowing disposal of known quantities of those soils in a specific landfill.

Comment: The rule will require the cleanup of sites to background concentrations of radioactive material. Permits or licenses may be required for any work involving soils contaminated with these radioactive wastes. (CANiT, Dooley, Praxair)

Response: Neither is true. This rule only applies to the disposal of this material. The rule does not affect or refer to site cleanup criteria in any way. The only permit required would be for the disposal of this radioactive waste in New York State.

Comment: This rule would stop the remediations currently underway in Tonawanda. (CANiT)

Response: The two sites in Tonawanda that the Corps of Engineers is remediating are Ashland 1 and Linde. Remediation was underway at both on July 30, 2000, when this rule was first adopted on an

emergency basis. In a February 8, 2001 press release, the Corps said that the Linde cleanup is ahead of schedule and that the Ashland 1 cleanup is nearly completed.

Comment: The Regulatory Impact Statement (RIS) did not address the impacts to landowners and tax bases for municipalities. (CANiT, Praxair, Tonawanda)

Response: The RIS has been revised accordingly.

Comment: The rule will increase costs to the owner of one contaminated site. (Praxair, ECIDA, Swanick)

Response: The rule will only increase costs to the extent that the company disposes of contaminated soil off site.

Comment: The RIS did not address transportation costs and impacts, the costs used in the RIS were too low, and there was no basis for the statement in the RIS that landfills would experience increased costs. (CANiT)

Response: The RIS has been revised to address transportation costs.

The transportation impacts from disposal of these wastes are insignificant compared to the impacts of transporting the tens of thousands of cubic yards of contaminated soils that have already been removed from sites in New York State. One contaminated landfill has paid extra costs for additional analyses of leachate, monitoring for radon gas, and managing a greater volume of leachate, due to the radioactive wastes in the landfill.

Comment: CERCLA Section 121(d)(2)(c) provides that when a remedial action is proposed or selected by the President that includes land disposal, any State siting standard or requirement that results in a statewide prohibition of land disposal of the hazardous substances would not apply. If New York proceeds with this proposal, and it may otherwise be either a potential ARAR that would prevent selection of a containment remedy or it would be applicable to off-site disposal of the hazardous substances, this provision of CERCLA appears to prevent the application of the regulation. (Corps)

Response: The proposed regulation does not call for a statewide ban in New York on the land disposal of radioactive materials. It only prohibits the land disposal of the subject radioactive waste at facilities that are not designed to safely manage such waste. The Department acknowledges that there is not currently a facility in New



York that is suitably equipped to receive this waste, with the exception of facilities that may be able to receive low concentration waste under a variance. However, a licensed facility capable of receiving all radioactive materials addressed in this regulation could be constructed in New York, in which event land disposal in New York would be authorized. Since the proposed regulation does not create a statewide ban on land disposal of radioactive waste, CERCLA Section 121(d)(2)(c) does not prevent the application of the proposed regulation.

Comment: The proposed regulation violates the dormant Commerce Clause of the United States Constitution by placing a burden on interstate commerce and directly regulating a federal activity without a rational justification for imposing this burden. (Corps, CANiT)

Response: The proposed regulation applies to the disposal of all uranium and thorium extraction wastes that are not regulated by the NRC. The rule applies equally to anyone seeking to dispose of these materials in New York; it is not limited to federal cleanup activities. To the extent that the rule places any burden on interstate commerce, it does not discriminate against interstate commerce, nor does it impose a burden that is clearly excessive in

relation to the local benefits achieved. The state interest at stake is the health and safety of the citizens of New York. This is a state interest which the Department considers to be extremely weighty, and one which tips the scales in favor of the regulation in any balancing test that may be required under the Commerce Clause.

Comment: The proposed regulation violates the Supremacy Clause of the United States Constitution. (Corps, CANiT)

Response: The proposed regulation applies to the disposal of all uranium and thorium extraction wastes that are not regulated by the NRC. The Department has authority under the Environmental Conservation Law to regulate this material. Any impact on the federal government is indirect and non-discriminatory. The regulation applies equally to anyone seeking to dispose of these materials in New York; it is not limited to federal cleanup activities. For these reasons, the regulation does not violate the Supremacy Clause.

Comment: The proposed regulation violates the equal protection guarantee of the 14<sup>th</sup> Amendment of the United States Constitution by treating landowners of FUSRAP sites differently than owners of sites contaminated by other radioactive material. (CANiT, Praxair)

Response: This regulation is not specific to certain individuals or entities. It applies to the disposal of all uranium and thorium extraction wastes that are not regulated by the NRC. Anyone disposing of this material is equally subject to the requirements of the regulation.

#### Specific Comments

Comment: Delete the words "or an agreement state" from the end of new section 380-1.2(d). (CEC, EA, NIRS, NYPIRG, SC, STAR)

Response The Department agrees that other states have no authority over disposal practices in New York State and the rule has been changed accordingly.

Comment: The term "radioactive material" is too broad. (CANiT)

Response: The term used in the regulation is "radioactive material subject to this part," which is defined in section 380-1.2, "Applicability."

