



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 4, 2004

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-04-0128

TITLE: AMENDMENT TO SECTION 274B AGREEMENT
WITH THE STATE OF UTAH AND APPROVAL
OF ALTERNATIVE GROUNDWATER
STANDARDS

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of August 4, 2004.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
 Commissioner McGaffigan
 Commissioner Merrifield
 OGC
 EDO
 PDR

SECY NOTE: THIS SRM, SECY PAPER, AND COMMISSION VOTING RECORD WILL
BE MADE AVAILABLE TO THE PUBLIC AFTER DISPATCH OF THE
LETTER TO THE GOVERNOR AND PUBLICATION OF THE FEDERAL
REGISTER NOTICE.

VOTING SUMMARY - SECY-04-0128

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	7/23/04
COMR. McGAFFIGAN	X				X	7/27/04
COMR. MERRIFIELD	X				X	7/27/04

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on August 4, 2004.

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN DIAZ
SUBJECT: **SECY-04-0128 - AMENDMENT TO SECTION 274b
AGREEMENT WITH THE STATE OF UTAH AND
APPROVAL OF ALTERNATIVE GROUNDWATER
STANDARDS**

w/edits

Approved xx *WJ* Disapproved _____ Abstain _____
Not Participating _____

COMMENTS:

hiffelutz

SIGNATURE

7.23.04

DATE

Entered on "STARS" Yes No _____

DRAFT

The Honorable Olene S. Walker
Governor of Utah
Salt Lake City, Utah 84114-0601

Dear Governor Walker:

I am pleased to inform you that the U.S. Nuclear Regulatory Commission (NRC) has approved the proposed amendment to the Agreement requested by former Governor Michael O. Leavitt. Under the amendment to the Agreement, NRC will discontinue, and the State of Utah will assume, regulatory authority over the possession and use of 11e.(2) byproduct material, including the facilities that generate such material. *In addition, the Amendment to* *

Enclosed are three formal copies of the amendment to the Agreement for your signature. After signature, one copy should be retained by your office, and the other two copies should be mailed to Paul H. Lohaus, Director, Office of State and Tribal Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The Commission appreciates your interest in expanding Utah's participation in the Agreement State Program, and looks forward to continuing the excellent relationship that exists between the NRC and the State of Utah.

Sincerely,

Nils J. Diaz

Enclosures:
As stated

cc: Dane Finerfrock, Director
Division of Radiation Control
Department of Environmental Quality

The Agreement makes the administrative change to the wording reflecting the return of regulatory authority of Sealed Sources and Device Evaluation back to NRC.

ATTACHMENT 6

NOTATION VOTE
RESPONSE SHEET

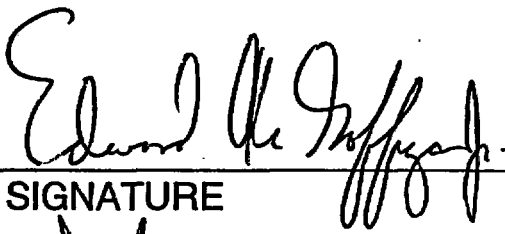
TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-04-0128 - AMENDMENT TO SECTION 274b
AGREEMENT WITH THE STATE OF UTAH AND
APPROVAL OF ALTERNATIVE GROUNDWATER
STANDARDS**

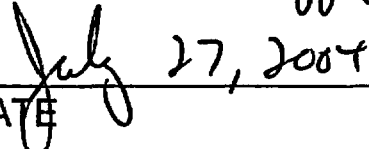
Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

Approved with one minor edit.



SIGNATURE


DATE

Entered on "STARS" Yes No _____

DRAFT

The Honorable Olene S. Walker
Governor of Utah
Salt Lake City, Utah 84114-0601

Dear Governor Walker:

I am pleased to inform you that the U.S. Nuclear Regulatory Commission (NRC) has approved the proposed amendment to the Agreement requested by former Governor Michael O. Leavitt. Under the amendment to the Agreement, NRC will discontinue, and the State of Utah will assume, regulatory authority over the possession and use of 1.1e.(2) byproduct material, including the facilities that generate such material.

Enclosed are three formal copies of the amendment to the Agreement for your signature. After signature, one copy should be retained by your office, and the other two copies should be mailed to Paul H. Lohaus, Director, Office of State and Tribal Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. x

The Commission appreciates your interest in expanding Utah's participation in the Agreement State Program, and looks forward to continuing the excellent relationship that exists between the NRC and the State of Utah.

Sincerely,

Nils J. Diaz

Enclosures:
As stated

cc: Dane Finerfrock, Director
Division of Radiation Control
Department of Environmental Quality

ATTACHMENT 6

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-04-0128 - AMENDMENT TO SECTION 274b
AGREEMENT WITH THE STATE OF UTAH AND
APPROVAL OF ALTERNATIVE GROUNDWATER
STANDARDS**

Approved Disapproved Abstain

Not Participating

COMMENTS:

*Approval subject to the attached
comments + edits.*



SIGNATURE

7/27/04

DATE

Entered on "STARS" Yes No

State for uranium recovery facilities. IUSA has advised the NRC staff that it may have some future comments on the proposed Utah alternative standard once it has had a chance to review the form of groundwater discharge permit that will be proposed by the State for their mill.

NRC Staff Response:

While the State is working with IUSA on the groundwater discharge permit for this mill, the current NRC license including groundwater requirements in license conditions will be transferred to Utah. Utah is required by statute to implement the NRC license requirements until they are specifically modified by Utah. Therefore, the IUSA discharge permit activities and status are independent of the Agreement amendment process.

We should already have the license transferred to Utah. It is offered to them. It will be too late for U.S. A to make meaningful comments.

Commenter:
Willie R. Taylor
(ML032820353)

Affiliation:
Director, Office of Environmental Policy and Compliance, U.S. Fish and Wildlife Service (FWS), U.S. Department of Interior, letter dated September 26, 2003.

Summary of Comments:

The FWS has no comments on the particular issue in that groundwater under direction of Utah Department of Environmental Quality (UDEQ) for uranium mill tailings sites will be regulated in the same manner and under the same standards as groundwater in the remainder of Utah. Therefore, the protection of groundwater should be at least equal to, or better than the protection afforded under NRC standards. Additionally, groundwater protection standards should be equivalent to the Environmental Protection Agency's (EPA) standards for 11e.(2) byproduct material.

The FWS identified other issues: (1) the adequacy of the existing NRC and EPA standards to provide protection for trust resources (such as, migratory birds); (2) loads from discharges are not addressed, only concentrations; and (3) the coordination on issues of concern to FWS under the amended Agreement because Utah is not a Federal partner. FWS stated that these issues can be addressed within the Utah program if Utah consults with FWS when applications for groundwater discharge permits are reviewed for possible impacts on resources.

NRC Staff Response:

FWS comments focused on other issues than the Utah proposed alternative groundwater standard. FWS requested that Utah work cooperatively with FWS in issuing their groundwater discharge permits to ensure that Utah's actions will consider possible impacts to endangered species, migratory birds, and compliance with Section 404 of the Clean Water Act. FWS stated that they believe provisions exist in Utah's regulations to address these problems should they arise, especially if a strong degree of coordination continues between UDEQ and the FWS.

Commenter:
Sarah M. Fields
(ML033420067)

Affiliation:
Nuclear Waste Committee, Glen Canyon Group/Sierra Club, Moab, Utah, letter dated November 21, 2003.

NRC Staff Response:

As discussed in the response to the previous comment, the Moab mill site is a legacy site that experienced groundwater issues prior to the enactment of UMTRCA and NRC's current regulations. Therefore, the Moab site should not be used as a measure of the effectiveness of Criterion 7A.

Like current NRC regulations addressing groundwater protection standards issued pursuant to UMTRCA which have proven to be effective, the Utah groundwater protection program is designed to detect all sources of contamination whether from impoundments or from other sources on the site.

Summary of Comment: 10 CFR Part 40, Appendix A, Criterion 13, Hazardous Constituents. The commenter stated that it should be understood that, when the constituents listed in Criterion 13 were developed, they did not contemplate the receipt, processing, and disposal of wastes from mineral processing facilities (including contaminated soils from other sources) at licensed uranium and thorium mills.

NRC Staff Response:

The basis for the Criterion 13 list was a result of EPA's rulemaking in 1983 as required by Section 275 of the AEA and it is a comprehensive standard. Criterion 13 included the entire list of hazardous constituents in EPA's hazardous waste regulations at that time. The EPA included these constituents because it believed that, if any of these hazardous constituents were present in the ore or added as a result of the processing of the ore for its source material content, the constituents should meet the same standard as a hazardous waste disposal site. The groundwater protection standard issued by EPA uses either the drinking water standard or the hazardous waste environmental standards which are independent of the source of the hazardous material. *The repetitive NRC and EPA Resource Environmental Impact Statement evaluates the processing of any ore for its source material content. Therefore, there is no alternative standard to be applied when alternative processing is approved for processing at a uranium mill.*

Summary of Comment: Conclusion by Commenter. The effective protection of the groundwater from activities at uranium and thorium recovery facilities is greatly dependent upon agency practice. For the State to have a program that successfully implements NRC or alternative groundwater standards, it must develop agency practices that are far more effective than previous NRC agency practices.

NRC Staff Response: The commenter does not raise any comments on the Utah alternative groundwater standards, but commented that Utah needs to do a better job of implementing groundwater standards than NRC has done. The State of Utah plans to work with the current licensees to limit future seepage from existing and new sites and to complete the remediation of any current groundwater contamination.

Other Comments Not Directly on the Utah Alternative Groundwater Standards:

Summary of Comment: (Page 1 and 17 of November 21, 2003 letter) Although the commenter provided the above comments on Utah's Alternative Groundwater Standards, the commenter believes that the NRC has not properly established procedures for providing a

"public hearing" and has not provided an opportunity for a "public hearing" in accordance with the alternative standards provision in Section 274o of the Act.

NRC Staff Response:

The staff proposed and the Commission approved the notice and comment process (a 10 CFR Part 2, Subpart H-like process) as meeting the Section 274o notice and opportunity for public hearing requirement. The staff proposed this process as one which meets the requirement in Section 274o of the AEA based on the fact that alternative standards (either generic or site-specific) must go through a public hearing process in the respective Agreement State under its administrative process that requires a public hearing addressing the basic health, safety and environmental concern with the State standard. The issue to be addressed in the public hearing specified in Section 274o is whether the State's proposed alternative standard is equivalent to or more stringent than the NRC regulations which implement EPA standards as required by UMTRCA. The staff believes that the notice and public comment process appropriately accomplishes these requirements.

Procedural Comments on the Alternative Standards Hearing Process:

Summary of Comment: (Page 2 of November 21, 2003 letter) The commenter sent several submittals to the Commission (September 8, 2003, ML032720672; September 24, 2003, ML032750048 ; and October 28, 2003, ML033140034) in response to the Federal Register notice of August 27, 2003 (68 FR 51516). The initial submittal plus the two supplements were requests for a 10 CFR 2.808 Motion or a 10 CFR 2.802 Petition. The commenter asserts that she has not received a response to the motion/petition. The October 24, 2003 Federal Register notice (68 FR 60885) addressed a few of the issues brought to the Secretary's attention in the September submittals; however, there was no statement in the October 24 notice indicating that it was in any way connected to or responsive to the September submittals. On October 26, 2003, the commenter sent an e-mail to the Contact included in the September 24 Federal Register notice asking for further information. The commenter remarked that she had not received a response by the November 21, 2003 date; therefore, those comments are included in the November 21, 2003 submittal.

The commenter stated that NRC is purposefully and illegally circumventing the provisions of the Administrative Procedure Act by not issuing a rule, regulation, or order announcing the establishment of procedures implementing the alternative standards provision of Section 274o and by not providing an opportunity for the public to comment on the notice of such rule, regulation, or order. The commenter asserted that this causes public trust in the NRC to go down another notch.

X

NRC Staff Response:

The staff addressed the specific questions listed in Section 1.2 of the commenter's November 21, 2003 letter in our December 19, 2003 response to her October 29, 2003 e-mail to Dennis Solienberger (ML040560195).

The staff proposed and the Commission approved the use of a 10 CFR Part 2, Subpart H-like process (notice and comment) to collect the public's view on the adequacy of a State's

* proposed alternative standard. The Commission's determination required in Section 274o of the Act is a rulemaking-like approval. Since the Subpart H process is a public hearing process and the determination to be made is a rulemaking-like decision, no change to the existing rule was necessary to accomplish this action. The NRC staff separately addressed the issues of the 2.802 Petition and the 2.808 Motion and sent the commenter a letter dated June 21, 2004 (ML041770014).

Environmental Analysis:

Summary of Comment: (starting on page 4 and running through page 13) The commenter focused on the references used in the Federal Register notice and their applicability to the proposed alternative groundwater standards proposed by Utah. The question raised is whether the generic environmental analyses contemplate the type of activities at licensed uranium recovery facilities that the State of Utah proposes to regulate under the proposed alternative groundwater standards. The commenter went on to discuss in detail issues with processing alternate feed material at licensee uranium mills.

NRC Staff Response:

The NRC considers alternate feed material to be a type of ore and, as such, when it is processed primarily for its source material content, that process produces 11e.(2) byproduct material. The NRC and the EPA evaluated the processing of any ore for its source material content in their respective Generic Environmental Impact Statements (GEISs). The evaluations were based on the safe levels of contaminants that uranium mills could release from their operations. The NRC approval of alternate feed material requires the uranium mills to maintain their compliance with the limits established based on these analyses. There is no alternative standard being applied when alternate feed material is approved for processing at a uranium mill.

Summary of Comment: (Page 13, Section 2.7) The commenter stated that the State of Utah intends to consider requests to permit the processing of alternate feed materials other than "natural ores" on a site-specific basis. The commenter stated that approval of such activities would constitute the application of site-specific "alternate standards" and would require an NRC notice and opportunity for public hearing under the alternative standards provisions of Section 274o.

NRC Staff Response:

Utah has proposed to conduct its regulatory program consistent with the current NRC program with the exception of the proposal to apply alternative groundwater standards. Whether Utah approves alternate feed material or not is a policy determination by the State of Utah. In either case, Utah's program would be subject to the same standards. The case-specific approval practice is currently being used by NRC to determine that the material being processed will not cause the site to violate the license requirements and to determine the adequacy of the monitoring program given the change in the ore to be processed. Utah has stated that they intend to treat the approval of alternate feed material as a major amendment under Utah's licensing procedures. Amendments to approve alternate feed material are not considered by NRC as an alternative standards action and, therefore, are not subject to the Section 274o

NRC Staff Response:

The State of Utah practice of not noticing minor amendments is consistent with the NRC licensing practice. The clarifications requested in sections 5.23 and 5.24 of the NWC letter involve terms used in the description of major amendments and are appropriately used. The commenter requested clarification for how they would be used for minor amendments and the NRC staff believes that they are not being used by Utah for minor amendments. The State may choose to further document its licensing process, but the existing process is adequate for entering into the amended Agreement. The State's decision on minor and major amendments are subject to appeal under the State's administrative rules and adjudicatory process. X

Summary of Comment: The commenter identified the Velvet Mine Water Treatment Facility as being dropped by the State and NRC from the uranium recovery program. The status of the Velvet Mine and possible 11e.(2) byproduct material at the site should be addressed by the State.

NRC Staff Response:

Mine water treatment facilities are not uranium mills under 10 CFR Part 40. They are considered side stream recovery (the concentration of uranium is a secondary purpose of the facility). Therefore, the waste from the side stream recovery is not 11e.(2) byproduct material. The Mine Water Treatment Facility has been licensed to possess the source material generated in the water treatment process and has been authorized to transfer the source material to the mills mentioned by the commenter for processing in the respective uranium mills. This type of process was one of the first alternate feed processes that were specifically approved by the NRC staff prior to the development of the guidance on alternate feed discussed earlier. Any contamination at the mine site, other than the source material handling equipment which is subject to source material release criteria, would be subject to the State's requirements for mine reclamation, not the requirements for uranium milling. X

Summary of Comment: The commenter requests that the State and NRC make a serious and comprehensive effort to identify past regulatory program mistakes and failures in Utah, identify reasons for these mistakes, and failures, and propose solutions so that future regulatory programs do not lead to another incomplete and ineffective regulatory regime.

NRC Staff Response:

The NRC and the State are implementing the environmental standards established by EPA and public health and safety standards established by NRC. Because the condition at the sites predated the UMTRCA and the standards established thereunder, the concerns discussed by the commenter are issues that NRC has been working on for many years. The decision the Commission is required by statute to make is whether the State of Utah has a regulatory program for 11e.(2) byproduct material that is (1) compatible with the NRC program and (2) adequate to protect public health, safety, and the environment. Although no comprehensive review of past regulatory programs for 11e.(2) byproduct material has been explicitly conducted, NRC has and continues to review operational experience and historical practices and to reflect that experience in our rules, licensing and inspection guidance, and licensing and inspection actions.