

SECY 99-277

December 2, 1999

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: CONCURRENT JURISDICTION OF NON-RADIOLOGICAL HAZARDS
OF URANIUM MILL TAILINGS

PURPOSE:

To obtain Commission approval of the staff's approach to address concerns raised by the uranium recovery industry on the jurisdiction of non-Agreement States¹ over the non-radiological hazards associated with Atomic Energy Act of 1954 (AEA) 11e.(2) byproduct material.²

BACKGROUND:

On April 23, 1998, the National Mining Association (NMA) submitted a White Paper to the Commission, requesting a policy position on four areas related to the regulation of uranium recovery activities. These four areas covered: 1) concurrent jurisdiction between non-Agreement States and the U.S. Nuclear Regulatory Commission (NRC) over the non-

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¹The term "non-Agreement State" refers to either States without an Agreement State program pursuant to section 274 of the AEA, or Agreement States without a program regulating 11e.(2) byproduct material. An Agreement State with a program regulating 11e.(2) byproduct material has jurisdiction over both the radiological and non-radiological constituents of this material.

²11e.(2) byproduct material is defined in the AEA as the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

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radiological aspects of ground water at uranium mill sites; 2) regulation of ground-water activities at in situ leach facilities; 3) disposal of material other than 11e.(2) byproduct material in tailings impoundments; and 4) processing of alternate feedstock through uranium mills. Three of the issues identified in the White Paper (NRC jurisdiction over in-situ leach facilities, disposal of non-11e.(2) byproduct material in tailings impoundments, and the NRC's alternate feed policy) were addressed by the staff in SECY-99-12 and SECY-99-13. In addition, the Commission was briefed on these issues by staff and other stakeholders on June 17, 1999.

The issue pertaining to concurrent jurisdiction is whether the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), which gives the NRC authority to regulate the non-radiological hazards associated with 11e.(2) byproduct material, preempts a non-Agreement State's authority to regulate the non-radiological hazards associated with this material concurrently with the NRC. The staff first considered this issue soon after promulgation of the UMTRCA. In an April 28, 1980, memorandum from the Executive Legal Director (ELD) to Chairman Ahearne, the ELD concluded that the NRC and non-Agreement States share concurrent jurisdiction over the non-radiological components of 11e.(2) byproduct material at uranium mill sites.

In its April 1998 White Paper, which contained the 1980 ELD memorandum as an attachment to it, the NMA took issue with the arguments and conclusion supporting concurrent jurisdiction presented in that memorandum. The White Paper reviewed the 1980 ELD analysis of the issue, discussed the doctrine of preemption and factors favoring preemption, and concluded that the 1980 opinion was incorrect. Based on its analysis in the White Paper, the NMA urged the Commission to reevaluate the question of concurrent jurisdiction and issue a policy statement overturning the nearly 20 years of staff practice in this area. The new policy statement, in the NMA view, should state that under UMTRCA the Federal Government preempts the regulation of non-radiological hazards associated with 11e.(2) byproduct material.

Shortly after the staff received the NMA White Paper, the NRC staff requested that the Office of the General Counsel (OGC) revisit the 1980 ELD assessment of the concurrent jurisdiction question. By memorandum dated August 12, 1999, the OGC provided the staff with its analysis, which the OGC gave to the Commission under separate cover. In its memorandum, the OGC concluded that there was no legal basis for the staff to reverse its current practice of exercising concurrent jurisdiction with non-Agreement States.

DISCUSSION:

In addition to challenging the 1980 ELD legal analysis of concurrent jurisdiction, the NMA White Paper identified two significant consequences of concurrent jurisdiction:

1. It can lead to impediments to the timely closure and subsequent transfer to government custodial care of mill tailings sites; and

2. It can interfere with the NRC's ability to impose a consistent and efficient regulatory scheme on mill tailings sites.

The staff agrees with the NMA's assessment of the potential consequences of concurrent jurisdiction, notwithstanding the fact that no problems were experienced with the two mill license terminations to date. The staff is particularly concerned with the implications of concurrent jurisdiction with respect to section 83b.(7) of the AEA which requires that a site be turned over at no cost to a long-term custodian³, which is either the State in which the site is located, at the State's option, or the U.S. Department of Energy (DOE). In most, if not all cases, it is anticipated that the DOE will be the long-term custodian for these sites. The staff and the DOE have interpreted the "no cost" requirement in 83b.(7) to mean that, at the time the site is transferred to DOE (or the State), there should not be any unfunded liability associated with the site.

However, the OGC's recent analysis has concluded that there is no legal basis to reverse the 20-year old staff practice of allowing concurrent jurisdiction. The 1980 ELD legal analysis did recognize that the NRC could exercise preemption on a case-by-case basis, if state actions inhibited the implementation of the UMTRCA as intended by Congress. This option still exists under the OGC's recent analysis.

RECOMMENDATIONS:

Based on the OGC legal opinion that no change in the 1980 ELD opinion is warranted, the staff recommends that the Commission formally adopt the current staff practice of acknowledging concurrent jurisdiction.

RESOURCES

There are sufficient resources in the current budget to address this issue within the context of the 10 CFR Part 41 rulemaking (SECY-99-011).

³Section 83b.(7) states in part that "[m]aterial and land transferred to the United States or a State in accordance with this subsection shall be transferred without cost to the United States or a State (other than administrative and legal costs incurred in carrying out such a transfer)."

COORDINATION:

The OGC has reviewed this Commission Paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection.

William D. Travers
Executive Director
for Operations

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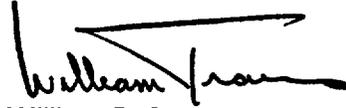
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COORDINATION:

The OGC has reviewed this Commission Paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection.

A handwritten signature in black ink, appearing to read "William Travers". The signature is stylized with a large, sweeping initial "W" and a long horizontal stroke extending to the right.

William D. Travers
Executive Director
for Operations

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The likelihood of obtaining this legislation is low, especially at this time, since Congress appears to be moving away from preemptive legislation. The time for Congress to enact legislation, if it chooses to do so, might be long, and the NRC has no control over the nature of the legislation that might result.

RECOMMENDATIONS:

The staff recommends that the Commission:

Adopt Options 2 and 3 -- pursue preemption on a case-by-case basis, and concurrently pursue clarifying legislation with Congress. Option 2 would be consistent with the doctrine of Federal preemption which provides for this course of action when it is needed in order to implement Federal law and it would be consistent with the long-held agency position on concurrent jurisdiction. Option 3 would pursue legislation from Congress to establish preemption for all activities at uranium mill sites, and, thus, ensure finalization of the issue.

RESOURCES

There are sufficient resources in the current budget to address this issue within the context of the 10 CFR Part 41 rulemaking (SECY-99-011). However, if the Commission adopts Option 2 and elects, in a specific instance, to override a non-Agreement State's authority over the non-radiological hazards associated with 11e.(2) byproduct material, additional staff resources may be required for that specific case.

COORDINATION:

The OGC has reviewed this paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection.

William D. Travers
Executive Director
for Operations

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RECOMMENDATIONS:

The staff recommends that the Commission:

Adopt Options 2 and 3 -- pursue preemption on a case-by-case basis, and concurrently pursue clarifying legislation with Congress. Option 2 would be consistent with the doctrine of Federal preemption which provides for this course of action when it is needed in order to implement Federal law. Option 3 would pursue legislative clarification from Congress to establish preemption for all activities at uranium mill sites, and, thus, ensure finalization of the issue.

RESOURCES

There are sufficient resources in the current budget to address this issue within the context of the 10 CFR Part 41 rulemaking (SECY-99-011). However, if the Commission adopts Option 2 and elects, in a specific instance, to override a non-Agreement State's authority over the non-radiological hazards associated with 11e.(2) byproduct material, additional staff resources may be required for that specific case.

COORDINATION:

The OGC has reviewed this paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objection.

William D. Travers
Executive Director
for Operations

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COORDINATION:

The OGC has reviewed this Commission Paper and has no legal objections to the staff's presentation of these options, although the OGC will be submitting, under separate cover, its own analysis of this issue, which reaffirms the 1980 ELD position supporting concurrent jurisdiction. The Office of the Chief Financial Officer has reviewed this Commission Paper and concurs.

William D. Travers
Executive Director
for Operations

Attachment: Letter to non-Agreement States

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NAME	MFliegel.bg	EKraus		JSurmeier	JGreeves	
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COORDINATION:

The OGC has reviewed this paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this Commission Paper and concurs.

William D. Travers
Executive Director
for Operations

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