



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

October 4, 1999

Ms. Katie Sweeney
Associate General Counsel
National Mining Association
1130 17th Street, N.W.
Washington, D.C. 20036

Dear Ms. Sweeney:

The Commission has received the August 19, 1999 Addendum to the National Mining Associations (NMA) White Paper entitled "Recommendations for a Coordinated Approach to Regulating the Uranium Recovery Industry," which the NMA submitted to the Commission in April 1998. In your cover letter, the NMA requested that the Commission address the status of byproduct material created prior to enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA); specifically, whether that material can be considered as 11e.(2) byproduct material under the Atomic Energy Act (AEA) and whether the Commission has jurisdiction over that material.

As you know, the Commission has before it a number of matters relating to the regulation of the Uranium Recovery Industry, many of which were raised to the Commission by NMA in its original White Paper. However, the Commission most recently reiterated its position regarding Commission jurisdiction over this material in a July 28, 1999 letter to Congressman Dingell in response to questions concerning the Formerly Utilized Sites Remedial Action Program (FUSRAP). I have enclosed a copy of the July 9 letter for your information. We appreciate receiving the analysis set forth in the Addendum. We are carefully considering the issues you have raised and anticipate reaching conclusions about them in the near future. We will respond to the Addendum at that time.

Sincerely,

Edward McGaffigan, Jr.
Acting Chairman

Enclosure: As stated



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October 6, 1999

VIA FACSIMILE
VIA OVERNIGHT EXPRESS

Greta Joy Dicus, Chairman
Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Re: USACE's Statement to Congress Regarding FUSRAP Program and
Characterization of FUSRAP Materials

Dear Chairman Dicus:

I am writing to inform you of recent statements made by the U.S. Army Corps of Engineers (USACE) to Congress concerning its role in the Formerly Utilized Sites Remedial Action Program (FUSRAP). Specifically, on September 29, 1999, Brigadier General Hans A. Van Winkle, Deputy Commander for Civil Works, USACE, testifying before the U.S. House of Representatives, Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure, stated that:

Under CERCLA the Federal lead agency is exempt from licensing and permitting requirements for work done on site, but not from the substantive requirements of such regulations . . . While CERCLA exempts the Corps from license requirements on site, it does not provide such an exemption for sites where the Corps disposes of FUSRAP material. Furthermore, unlike DOE, the Corps is not self-regulating under the Atomic Energy Act (AEA) and cannot establish its own disposal sites. As a result, the Corps utilizes disposal sites licensed by the NRC or permitted under the Resource Conservation Recovery Act.¹

¹ (Emphasis added.) A copy of Brigadier General Van Winkle's statement is attached.

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Thus, it is USACE's position that because the CERCLA exemption for its on-site activities does not apply to off-site disposal facilities, and USACE is not self-regulating under the AEA like DOE, USACE must dispose of FUSRAP wastes at either an NRC licensed facility or a RCRA permitted facility.

General Van Winkle's testimony merely serves to highlight the following critical issue – whether Manhattan Engineering District (MED) and/or Atomic Energy Commission (AEC) wastes that meet the definition of 11e.(2) byproduct material (such as those at Title I sites and Title II sites with “commingled tailings”) are AEA *material* or not? And, if not, why not? In this regard, I am particularly anxious to see the Commission's analysis of the National Mining Association (NMA) White Paper Addendum to explain how Section 83 of the AEA, which on its face contains no temporal limitations on the definition of 11e.(2) byproduct material, limits NRC's authority to regulate “pre-1978 11e.(2) byproduct material that was not generated by an activity licensed by NRC” on November 8, 1978 (the effective date of UMTRCA) or thereafter. The proper characterization of FUSRAP material meeting the definition of 11e.(2) byproduct material is of utmost importance, because if the material is determined to be AEA *material*, USACE must dispose of the material at an NRC licensed facility or a DOE regulated facility. If however, the material is not characterized as such, USACE will likely dispose of the material at a RCRA permitted facility. USACE's recent statements to Congress highlight the confusion associated with the issue.

To the extent that pre-1978 11e.(2) byproduct material generated by the MED and/or the AEC is not an AEA *waste*, then the billion dollar Title I cleanup program and the extremely expensive and conservative Title II regulatory program (for which the government pays part of the cleanup costs at “commingled” tailings sites) can only be considered as gigantic wastes of resources. People are already interpreting the most recent Commission pronouncement (See attached letter dated September 24, 1999 from Paul Lohaus to William Sinclair) to mean that wastes meeting the definition of 11e.(2) byproduct material can safely be sent to a permitted RCRA facility for final disposal. If this is so, let me be the first uranium recovery licensee to ask why is it necessary for NRC licensees to satisfy a 1000 year post-closure regulatory horizon, when it appears that the NRC has concluded that satisfying RCRA's less costly 30 year post-closure regulatory horizon will, contrary to 10 C.F.R. Part 40, Appendix A and 40 C.F.R. §192, be adequately protective of public health, safety and the environment? In addition, the Commission will also have to make the determination that the requirements (applicable to NRC facilities but not RCRA facilities) for transfer of property used for disposal of 11e.(2) byproduct material to a long-term government custodian is somehow necessary to protect public health, safety and the environment for post-1978 11e.(2) but not for pre-1978 11e.(2) material.

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A careless answer to the questions presented in NMA's Addendum has the potential for significant impacts on the entire EPA/NRC 11e.(2) regulatory program. As noted in my August 27, 1999 letter to you, it is very important that the NRC move quickly to resolve these issues. Thank you for your attention to this matter.

Sincerely,



Earl E. Hoellen
President and Chief Executive Officer

cc/atts: Commissioner Nils J. Diaz
Commissioner Edward McGaffigan, Jr.
Commissioner Jeffrey S. Merrifield
William D. Travers, Executive Director for Operations, NRC
Dianne R. Nielson, Executive Director, UDEQ
William J. Sinclair, Director, UDEQ Division of Radiation Control
Edgar D. Bailey, Chief, California DHS, Radiological Health Branch
David Eisentrager, Idaho Division of Health and Welfare
Kip Huston, USACE
Paul Lohaus, Director, NRC Office of State Programs
John T. Greeves, Director, NRC Division of Waste Management
John J. Surmeier, Chief, NRC Uranium Recovery and Low Level Waste Branch
Maria Schwartz, NRC, Office of General Counsel
Fred G. Nelson, Utah Attorney General's Office
Senator Orrin G. Hatch
Senator Robert F. Bennett
Representative Christopher B. Cannon
Representative Merrill A. Cook
Representative James V. Hansen