



OFFICE OF THE
GENERAL COUNSEL

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

OCT 21 1999

October 19, 1999

Mr. Earl E. Hoellen
President and Chief Executive Officer
International Uranium (USA) Corporation
Independence Plaza, Suite 950
1050 Seventeenth Street
Denver, CO 80265

Dear Mr. Hoellen:

The Commission has received your October 6, 1999 letter "Re: USACE's Statement to Congress Regarding FUSRAP Program and Characterization of FUSRAP Materials". In your letter, you note your views on the status of byproduct material created prior to enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) and urge that the Commission carefully address this issue in response to the August 27, 1999 "Addendum" to a White Paper on uranium recovery issues submitted by the National Mining Association (NMA).

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 and Addendum. However, the Commission most recently reiterated its position regarding Commission jurisdiction over this material in a July 29, 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 29 letter for your information. The Commission is carefully considering the issues you and NMA have raised and anticipates reaching conclusions about them in the near future.

Sincerely,

A handwritten signature in black ink, appearing to read "K. D. Cyr", written over a horizontal line.

Karen D. Cyr
General Counsel

Enclosure: As stated.



INTERNATIONAL
URANIUM (USA)
CORPORATION

Independence Plaza, Suite 950 • 1050 Seventeenth Street • Denver, CO 80265 • 303 628 7795 (main) • 303 359 4125 fax

November 11, 1999

The Honorable John D. Dingell
United States House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515-6115

**Re: NRC Chairman Dicus' July 29, 1999, Response To Your July 12, 1999,
Letter Regarding 11e.(2) Byproduct Material At FUSRAP Sites**

Dear Congressman Dingell:

I am writing with regard to former Nuclear Regulatory Commission (NRC) Chairman Greta Joy Dicus' July 29, 1999 letter (hereinafter, the "Dicus letter") responding to your July 12, 1999 correspondence in which you raised concerns about the NRC's regulation of the disposal of 11e.(2) byproduct material located at various Formerly Utilized Sites Remedial Action Program (FUSRAP) sites. Former Chairman Dicus' response to your inquiry requires clarification.

The Dicus letter's responses to the various questions posed in your letter are apparently based on a single premise: pursuant to Section 83 of the Atomic Energy Act (AEA) as amended, NRC does not have the authority to regulate the cleanup of FUSRAP material if the material was not generated by an activity licensed by the NRC on the effective date of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).¹ Based on this premise, the Dicus letter concludes that, since FUSRAP material was not generated pursuant to an activity licensed by the NRC on the effective date of UMTRCA, NRC lacks the authority to regulate that material.

This conclusion, and the premise upon which it is based, are faulty in several significant respects. First, as discussed in my August 27, 1999 letter to Chairman Dicus (see enclosed) and contrary to the Dicus letter's premise, a plain reading of the AEA reveals that Section 83 in no way limits NRC's authority to license or otherwise regulate pre-1978 byproduct material. Section 83 simply provides that a license for 11e.(2) byproduct material that is in

¹ As a convenient shorthand we refer to material that fits this description (i.e., material that otherwise satisfies the definition of "byproduct material" in Section 11e.(2) of the AEA but that was not generated by an activity that was licensed by NRC as of the effective date of UMTRCA) as "pre-1978" byproduct material. This is distinguished from "post-1978" byproduct material, which is material that was generated either after the effective date of UMTRCA or by an activity that was licensed as of the effective date of UMTRCA.

The Honorable John D. Dingell

November 11, 1999

Page 2

effect on or after the effective date of Section 83 must contain certain provisions pertaining to the transfer of ownership and custody of both the byproduct material produced pursuant to such license and the land used for disposal of that byproduct material. Contrary to the Dicus letter's assertion, Section 83 does not provide that the Commission can only license materials that have been produced pursuant to an already-existing license. In fact, the statute requires the very opposite: under Section 81 of the AEA any person who seeks to possess transfer or receive byproduct material as defined in Section 11e.(2) of the AEA *must* obtain a license to do so, *without regard* to the date when the material was created or whether it was created pursuant to a license.

Next, the Dicus letter ignores the fact that the material present at FUSRAP sites was generated by NRC's predecessors, which undeniably makes it AEA waste, like materials at Title I uranium mill tailings sites and Title II sites with so-called "commingled" Atomic Energy Commission (AEC) and commercial tailings. In light of the fact that the Manhattan Engineering District (MED) and the AEC, the precursors of NRC and the Department of Energy (DOE), were not required to have licenses for the FUSRAP materials they generated,² it makes no sense to treat pre-1978 and post-1978 byproduct materials differently and to assert that NRC is powerless to regulate pre-1978 byproduct material, solely based on the fact that the material was not generated pursuant to an AEA license. Moreover, as discussed in detail in the enclosed Addendum to the National Mining Association (NMA) White Paper on regulation of the uranium recovery industry (August 1999) (the "NMA White Paper Addendum"), the erroneous and unsupported interpretation of Section 83, which seems to underlie the Dicus letter, is inconsistent with the position NRC has taken in the past on this issue and ultimately detracts from public health and safety and inures to the benefit of no one.

If the Commission departs from its previous position, that it has authority to regulate pre-1978 byproduct material, and instead NRC follows the approach suggested by the Dicus letter, this will present a serious threat to the continued protection of public health and the environment, as wastes that satisfy the definition of 11e.(2) byproduct material will be disposed of in a manner that does not provide the protections that Congress intended for such material when it enacted UMTRCA. Specifically, under the approach outlined in the Dicus letter, pre-1978 byproduct material would not have to be disposed of in licensed 11e.(2) disposal facilities, but instead could be disposed of

² Similarly, NRC and DOE are not required to have licenses for AEA material, since they are not considered "persons" under the AEA and as such are not subject to the Act's licensing requirements. See 42 U.S.C. § 2014(s). In fact, DOE only becomes a licensee of NRC in certain statutorily defined circumstances (e.g., as the long-term custodian of uranium/thorium mill tailings disposal facilities pursuant to UMTRCA). Consequently, the presence of FUSRAP material at a DOE site does not implicate the need for an NRC license.

The Honorable John D. Dingell

November 11, 1999

Page 3

in solid or hazardous waste (*i.e.* RCRA) landfills. Consequently, even though pre-1978 byproduct material satisfies the definition and is in all respects the same thing as post-1978 11e.(2) byproduct material, pre-1978 11e.(2) byproduct material, including FUSRAP material, could be disposed of in facilities that are not licensed under the AEA and that do not satisfy the long term stability and other technical criteria set out in NRC's and EPA's regulations under UMTRCA.³ Furthermore, unlike wastes disposed of in licensed 11e.(2) facilities, these pre-1978 byproduct material wastes would *not* be subject to long-term government custody and monitoring, and perpetual licensing following final closure of the sites used for their disposal.⁴

This danger is real. Publicly available information indicates that at least one hazardous waste disposal facility that is not licensed to accept 11e.(2) byproduct material – the Buttonwillow facility in California – has already accepted pre-1978 byproduct material for disposal. In addition, a second hazardous waste facility – the Envirosafe facility in Idaho – has been selected by the U.S. Army Corps of Engineers (USACE) to receive pre-1978 byproduct material from various FUSRAP sites across the country, despite the fact that the facility is not licensed to dispose of 11e.(2) byproduct material. Similarly, Envirocare has requested permission to utilize its LLRW facility, which as a result of a waiver by the State of Utah has no assured long-term governmental custodian, to dispose of pre-1978 byproduct material.

The position set forth in the Dicus letter also poses a threat to public health and the environment by jeopardizing the transfer to DOE of NRC licensed 11e.(2) disposal facilities that, consistent with prior positions articulated by the Commission, accepted pre-1978 byproduct material for disposal in the past. At least one 11e.(2) disposal facility has previously accepted pre-1978 byproduct material (pursuant to an NRC license) that under the Dicus letter may now not be considered 11e.(2) byproduct material. If the interpretation set out in the Dicus letter prevails, material that under the Dicus letter's approach is deemed to be *non-11e.(2)* material will have been commingled with 11e.(2) byproduct material that was already present at the facility.

³ This is precisely the concern that was raised by Senators Hatch and Bennett and Representatives Cannon, Cook and Hansen in their recent letter to the U.S. Army, where the Congressmen state that: "If the [Army Corps of Engineers] follows the ill-advised position of NRC's staff and fails to exercise regulatory control, these radioactive [pre-1978 byproduct] materials could be disposed at landfills which are not designed or operated to handle the unique characteristics of radioactive byproduct material." Letter from Senator Orrin Hatch, Senator Robert Bennett, Representative Chris Cannon, Representative Merrill Cook and Representative James Hansen to Mr. Joseph W. Westphal, Assistant Secretary of the Army – Civil Works (June 23, 1999).

⁴ Moreover, an unlicensed site that disposes of 11e.(2) byproduct material could conceivably be required, after disposing of such material, to comply with the technical criteria and other requirements set out under UMTRCA (to the surprise of the site operator). Even if this were the case, however, DOE presumably would still be reluctant or unwilling to accept title and custody of the site following closure because 11e.(2) and *non-11e.(2)* material would have been commingled at the site.

The Honorable John D. Dingell
November 11, 1999
Page 4

Through its policies governing 11e.(2) disposal facilities, the Commission has consistently sought to prevent this sort of commingling, in order to ensure that 11e.(2) disposal facilities would not be subject to dual regulation and that DOE would be free to accept custody and title to such sites as the long-term government custodian following site closure, consistent with AEA Section 83.⁵ If NRC were to adhere to the position set out in the Dicus letter, it effectively would be sanctioning precisely the sort of commingling that the Commission has struggled so hard to avoid over the years.

We note that even to the sophisticated reader, the Dicus letter remains somewhat unclear as to whether NRC has reached an ultimate determination regarding the status of FUSRAP materials. For example, when former Chairman Dicus suggests that NRC does not have authority to regulate FUSRAP material, it is unclear whether she is referring to authority over the materials *at the FUSRAP site* or material that has left the FUSRAP site and that is to be sent elsewhere for final disposal. As discussed in the enclosed NMA White Paper Addendum, NRC does indeed have jurisdiction over FUSRAP material when it leaves the FUSRAP site for disposal and, as it must, arrives at an NRC licensed 11e.(2) facility. In contrast, NRC may not license the materials *at* a FUSRAP site because DOE, which has title to and custody of the FUSRAP site and the waste materials located there, is not a "person" under the AEA and therefore is not required to have a license. *See n.2 supra.*

Moreover, the Dicus letter appears to be somewhat internally inconsistent. If it is NRC's position that FUSRAP materials are not regulated by the Commission and that legislation would be required to regulate it,⁶ why is it that NRC licensed Envirocare, an NRC 11e.(2) licensee, to receive FUSRAP material for disposal in its 11e.(2) impoundment?⁷ If it is NRC's

⁵ See, e.g., *Uranium Mill Facilities, Notice of Two Guidance Documents: Final Revised Guidance on the Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments; Final Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores*, 60 Fed. Reg. 49,296 (1995).

⁶ On page 4 of Chairman Dicus' letter states:

We believe legislation would be required to give NRC authority to regulate Section 11e.(2) byproduct material in the FUSRAP program.

⁷ On page 1 however, the letter states:

Additionally, there are NRC licensed facilities that have accepted pre-1978 11e.(2) byproduct material for direct disposal or processing and disposal in their mill tailings impoundments. For example, Envirocare of Utah has an NRC license that allows it to accept *some forms* of this material directly for disposal. Pre-1978 11e.(2) byproduct material presented to NRC or

The Honorable John D. Dingell

November 11, 1999

Page 5

position that FUSRAP material is not subject to regulation as 11e.(2) byproduct material (in a similar manner as post-1978 11e.(2) byproduct material), and if it is NRC's policy not to allow *non-11e.(2)* material to be placed directly into an 11e.(2) tailings impoundment without satisfying its "*Non-11e.(2) Policy*" (which requires satisfaction of nine criteria, including State and Compact approval), why did NRC allow FUSRAP materials to go to these licensed 11e.(2) disposal facilities without ensuring the "*Non-11e.(2) Policy*" was satisfied, which in fact it was not?¹

As indicated above, these issues are analyzed extensively in the following enclosed documents:

- National Mining Association (NMA) White Paper Addendum (August 1999);
- Letter from Earl E. Hoellen, President of International Uranium (USA) Corporation (IUC) to Chairman Dicus (August 27, 1999) with attachments; and
- Letter from Earl E. Hoellen to Chairman Dicus (October 6, 1999) with attachments.

For the reasons stated above, and discussed at length in the attached documents, NRC should regulate FUSRAP materials as 11e.(2) byproduct material and require facilities disposing of such materials to have an appropriate NRC license. This would not, of course, require NRC to regulate FUSRAP material at the FUSRAP sites since those sites are regulated by DOE, which is not a "person" requiring a license under the AEA.

Footnote continued from previous page

Agreement State licensed facilities for disposal or processing must comply with all requirements applicable to those facilities.

(Emphasis added). Either the material is 11e.(2) material or it is not. If it is not, it cannot be directly disposed of in an 11e.(2) impoundment without satisfying NRC's "*Non-11e.(2) Policy*." If the material is 11e.(2), it must be disposed of in a NRC licensed 11e.(2) facility.

¹ Similarly, the Dicus letter is misleading in stating that NRC has not said pre-1978 11e.(2) byproduct material may be disposed of at a RCRA facility but rather that "there are no NRC rules or regulations that preclude disposal of the material at a RCRA facility," since, as discussed above at page 2, Section 81 of the AEA provides that "[n]o person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import or export any byproduct material" except as authorized by NRC pursuant to the AEA. 42 U.S.C. § 2111.

The Honorable John D. Dingell
November 11, 1999
Page 6

Finally, please accept my apologies for not providing you with this information at an earlier date, but I only received a copy of your letter to Chairman Dicus a few days ago. If I can provide you with any further information, please have one of your staff call me at 303-389-4150.

Cordially,



Earl E. Hoellen
President and Chief Executive Officer

Enclosures

cc: The Honorable Thomas J. Bliley, Jr.
Chairman Richard A. Meserve
Commissioner Greta Joy Dicus (w/o enclosures)
Commissioner Nils J. Diaz (w/o enclosures)
Commissioner Edward McGaffigan, Jr. (w/o enclosures)
Commissioner Jeffrey S. Merrifield (w/o enclosures)
Dianne R. Nielson, Executive Director, UDEQ (w/o enclosures)
William J. Sinclair, Director, UDEQ Division of Radiation Control (w/o enclosures)
Edgar D. Bailey, Chief, California DHS, Radiological Health Branch (w/o enclosures)
David Eisentrager, Idaho Division of Health and Welfare (w/o enclosures)
Kip R. Huston, USACE (w/o enclosures)
The Honorable Carol M. Browner, Administrator, Environmental Protection Agency
Karen D. Cyr, General Counsel, NRC
William D. Travers, Executive Director for Operations, NRC (w/o enclosures)
Paul H. Lohaus, Director, NRC Office of State Programs (w/o enclosures)
John T. Greeves, Director, NRC Division of Waste Management (w/o enclosures)
John J. Surmeier, Chief, NRC Uranium Recovery and Low Level Waste Branch (w/o enclosures)
Maria E. Schwartz, NRC, Office of General Counsel (w/o enclosures)
Fred G. Nelson, Utah Attorney General's Office (w/o enclosures)
Senator Orrin G. Hatch (w/o enclosures)
Senator Robert F. Bennett (w/o enclosures)
Representative Christopher B. Cannon (w/o enclosures)
Representative Merrill A. Cook (w/o enclosures)
Representative James V. Hansen (w/o enclosures)