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February 14, 2000

Via Facsimile

Richard A. Meserve, Chairman
U S Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Re "Pre-1978 versus Post-1978 11e (2) Byproduct Material" Controversy

Dear Chairman Meserve:

It recently came to my attention that International Uranium (USA) Corporation ("IUSA"), failed to cite a very relevant section of the Nuclear Regulatory Commission's ("NRC's") regulations concerning byproduct material in the materials that its President, Mr. Earl E. Hoellen, recently provided to you by letter dated December 22, 1999. Specifically, Mr. Hoellen failed to cite 10 C F R. § 40.2a ("Coverage of inactive tailings sites") of the NRC regulations which states in relevant part

(b) The Commission will regulate byproduct material as defined in this Part that is located at a site where milling operations are no longer active, if such site is not covered by the remedial action program of Title I of the Uranium Mill Tailings Radiation Control Act of 1978. The criteria in Appendix A of this part will be applied to such sites.

This section requires NRC to regulate byproduct material located at sites where milling operations are no longer active, with the only caveat being that the site must not be covered by Title I of UMTRCA. Importantly, the provision does not limit the NRC's authority to byproduct material produced at an NRC *licensed* facility after the effective date of UMTRCA. A plain reading of this provision further supports IUSA's argument that the NRC's current position, as expressed in the Fonner letter, that its jurisdiction under UMTRCA is confined to mill tailings produced at a site where source material was licensed by the NRC as of the effective date of UMTRCA or thereafter, is incorrect. Thus, for example, any Formerly Utilized Sites Remedial Action Program ("FUSRAP"), materials meeting the definition of byproduct material in section 11e (2) of the Atomic

A copy of the regulation is enclosed for your convenience.

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Energy Act of 1954 (42 U.S.C. §§ 2014 *et seq.*, as amended), that were not subject to the Department of Energy's ("DOE's"), control at that time are subject to NRC jurisdiction and Appendix A regulations. Therefore, any FUSRAP materials meeting the definition in section 11e.(2) that leave DOE control now for final disposal must be subject to NRC regulatory oversight.

I hope that you find this information useful in your efforts to resolve the so-called "pre-1978 versus post-1978 11e.(2) byproduct material" controversy. Of course, should you have any questions, or if I can be of service in some other way, do not hesitate to contact me.

Regards,



Anthony J. Thompson

cc: Commissioner Greta Joy Dicus
Commissioner Nils J. Diaz
Commissioner Edward McGaffigan, Jr.
Commissioner Jeffrey S. Merrifield

§40.1

issued under sec. 184, 68 Stat. 264, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec 187, 68 Stat. 265 (42 U.S.C. 2237).

SOURCE: 25 FR 24, Jan. 14, 1961, unless otherwise noted.

GENERAL PROVISIONS

§40.1 Purpose.

(a) The regulations in this part establish procedures and criteria for the issuance of licenses to receive title to, receive, possess, use, transfer, or deliver source and byproduct materials, as defined in this part, and establish and provide for the terms and conditions upon which the Commission will issue such licenses. (Additional requirements applicable to natural and depleted uranium at enrichment facilities are set forth in §70.22 of this chapter.) These regulations also provide for the disposal of byproduct material and for the long-term care and custody of byproduct material and residual radioactive material. The regulations in this part also establish certain requirements for the physical protection of import, export, and transient shipments of natural uranium. (Additional requirements applicable to the import and export of natural uranium are set forth in part 110 of this chapter.)

(b) The regulations contained in this part are issued under the Atomic Energy Act of 1954, as amended (68 Stat. 919), title II of the Energy Reorganization Act of 1974, as amended (88 Stat. 1242), and titles I and II of the Uranium Mill Tailings Radiation Control Act of 1978, as amended (42 U.S.C. 7801).

[56 FR 45497, Oct. 30, 1991, as amended at 56 FR 52997, Oct. 31, 1991]

§40.2 Scope.

Except as provided in §§40.11 to 40.14, inclusive, the regulations in this part apply to all persons in the United States. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of §40.10.

[56 FR 40829, Aug. 15, 1991]

§40.2a Coverage of inactive tailings sites.

(a) Prior to the completion of the remedial action, the Commission will not require a license pursuant to 10 CFR chapter I for possession of residual radioactive materials as defined in this part that are located at a site where milling operations are no longer active, if the site is covered by the remedial action program of title I of the Uranium Mill Tailings Radiation Control Act of 1978, as amended. The Commission will exert its regulatory role in remedial actions primarily through concurrence and consultation in the execution of the remedial action pursuant to title I of the Uranium Mill Tailings Radiation Control Act of 1978, as amended. After remedial actions are completed, the Commission will license the long-term care of sites, where residual radioactive materials are disposed, under the requirements set out in §70.37.

(b) The Commission will regulate byproduct material as defined in this part that is located at a site where milling operations are no longer active, if such site is not covered by the remedial action program of title I of the Uranium Mill Tailings Radiation Control Act of 1978. The criteria in appendix A of this part will be applied to such sites.

[46 FR 55631, Oct. 3, 1981, as amended at 56 FR 45608, Oct. 30, 1991]

§40.3 License requirements.

A person subject to the regulations in this part may not receive title to, own, receive, possess, use, transfer, provide for long-term care, deliver or dispose of byproduct material or residual radioactive material as defined in this part or any source material after removal from its place of deposit in nature, unless authorized in a specific or general license issued by the Commission under the regulations in this part.

[56 FR 45608, Oct. 30, 1991]

§40.4 Definitions.

Act means the Atomic Energy Act of 1954 (68 Stat. 919), including any amendments thereto;

Agreement State means any State with which the Atomic Energy Commission or the Nuclear Regulatory Commission

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