



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

September 22, 2000

Mr. Ralph Morgenweck
Regional Director
U.S. Fish and Wildlife Service
Post Office Box 25486
Denver Regional Center
Denver, Colorado 80225-0486

SUBJECT: FISH AND WILDLIFE SERVICE REQUEST TO REINITIATE CONSULTATION

Dear Mr. Morgenweck:

This letter is in response to the U.S. Fish and Wildlife Service (FWS) letter of June 28, 2000 to John Greeves, responding to Mr. Greeves letter of May 25, 2000. As a result of a reorganization, I am now the Division Director within the U.S. Nuclear Regulatory Commission (NRC) responsible for regulation of uranium recovery activities in general, and NRC's regulatory activities at the Moab Mill site.

In your April 25, 2000 letter you stated that you believe the NRC should reinitiate formal consultation regarding the biological opinion issued by FWS on July 29, 1998. Before we responded to your April 25 letter, we received a letter from the attorney for our licensee at the Moab Mill site. Their May 16, 2000 letter raises several significant issues regarding the reinitiation of consultation. Because NRC has the responsibility to request reinitiation of formal consultation and there appeared to be disagreement as to whether the requirements for reinitiation have been met, and because the licensee also raised the issue of its perceived increased risk of liability, we want to be sure that reinitiation of consultation is indeed appropriate, before making a formal request to FWS. Although your June 28 letter reaffirmed FWS' view that the NRC should reinitiate formal consultation, the letter did not specifically address the justification for reinitiating consultation or the liability concerns that the licensee raised in its May 16 letter, which we attached to our letter.

With respect to the issue of whether reinitiation of formal consultation is required, 50 CFR 402.16 requires reinitiation when at least one of four specified criteria are met. Furthermore, the Endangered Species Consultation Handbook (March 1998 final version) states that "When consultation needs to be reinitiated but the action agency neither agrees or responds, the Services should send a letter...[that] presents a clear case for why the Services have determined that one or more of the four general conditions for reinitiating consultation have been triggered." Our May 25 letter, in which we deferred agreeing to reinitiate consultation, requested that FWS present that clear case, taking into account the arguments made by the licensee in its May 16 letter. The June 28 FWS letter repeats the assertion that reinitiation is required under Section 402.16; however, it does not provide the Services' basis for that assertion. Furthermore, it does not address the legal and technical arguments made in the licensee's May 16 letter.

September 22, 2000

-2-

Mr. R. Morgenweck

After receipt of the FWS June 28 letter, I received a letter, dated August 7, 2000, from the licensee (copy enclosed), that argues that the FWS letter was not responsive to the concerns in the licensee's May 16 letter. It also raises additional concerns and issues. One new issue the licensee raised is that it is unclear whether FWS now believes that the extent or amount of take considered in the biological opinion is being exceeded and whether that would require the licensee to cease all work during the reinitiation of consultation. Additionally, except for the statement that FWS disagrees with the licensee's conclusion, the June 28 FWS letter is silent with respect to the licensee's concern regarding potentially increased legal liability, should consultation on the existing biological opinion be reinitiated.

Therefore, we request that FWS address, in detail, the issues raised in the previous correspondence with respect to whether one or more of the criteria identified in 50 CFR 402.16 for reinitiation of consultation have been met. We also request that you consider the licensee's arguments on the liability issue and provide the legal basis for your apparent conclusion that the licensee would not incur any additional risk of liability if consultation were reinitiated.

NRC must consider all relevant concerns and make a decision in accordance with the controlling legislation and regulations. We would appreciate your specific response to each of the issues and concerns raised by the licensee, so that we have the benefit of your insight in support of our decision on this issue.

We will await your response before we make a decision with respect to requesting a reinitiation of consultation. We will be happy to meet with you to discuss the specific issues associated with this decision. If you have any questions or would like to arrange a meeting, please contact me at (301) 415-7212 or Myron Fliegel, NRC's Project Manager for the Moab Mill Site at (301) 415-6629 or mhf1@nrc.gov.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Sincerely,



Michael F. Weber, Director
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards

Enclosure: August 7, 2000 letter from licensee

cc: See attached list

After receipt of the FWS June 28 letter, I received a letter, dated August 7, 2000, from the licensee (copy enclosed), that argues that the FWS letter was not responsive to the concerns in the licensee's May 16 letter. It also raises additional concerns and issues. One new issue the licensee raised is that it is unclear whether FWS now believes that the extent or amount of take considered in the biological opinion is being exceeded and whether that would require the licensee to cease all work during the reinitiation of consultation. Additionally, except for the statement that FWS disagrees with the licensee's conclusion, the June 28 FWS letter is silent with respect to the licensee's concern regarding potentially increased legal liability, should consultation on the existing biological opinion be reinitiated.

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
Sincerely,

MS
Michael F. Weber, Director
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards

Enclosure: August 7, 2000 letter from licensee
cc: See attached list

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* See previous concurrence

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Therefore, we ~~again~~ request that FWS address, in detail, the issues raised in the previous correspondence with respect to whether one or more of the criteria identified in 50 CFR 402.16 for reinitiation of consultation have been met. We also request that you consider the licensee's arguments on the liability issue and provide the legal basis for your apparent conclusion that the licensee would not incur any additional risk of liability if consultation were reinitiated.

~~As a responsible regulatory agency, NRC must consider all relevant concerns and make a decision in accordance with the controlling legislation and regulations. As FWS is the expert agency with respect to the applicable law and regulations (and is the party that requested NRC to take the action under consideration), we would appreciate your specific response to each of the issues and concerns raised by our licensee, so that we can make a sound decision.~~

We will await your response before we make a decision with respect to requesting a reinitiation of consultation. We will be happy to meet with you to discuss the specific issues associated with this decision. If you have any questions or would like to arrange a meeting, please contact me at (301) 415-7212 or Myron Fliegel, NRC's Project Manager for the Moab Mill Site at (301) 415-6629 or mhf1@nrc.gov.

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Michael F. Weber, Director
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards

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DATE	09/6/00	09/7/00	09/7/00	09/ /00	09/22/00

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Therefore, we again request that FWS address, in detail, the issues raised in the previous correspondence with respect to whether one or more of the criteria identified in 50 CFR 402.16 for reinitiation of consultation, have been met. We also request that you consider the licensee's arguments on the liability issue and provide the legal basis for your apparent conclusion that the licensee would not incur any additional risk of liability if consultation were reinitiated.

As a responsible regulatory agency, NRC can not ignore apparently valid concerns raised by one of our licensees with respect to an action that we are considering that will affect that licensee. Rather, we must consider those concerns and make a decision in accordance with the controlling legislation and regulations. As FWS is the expert agency with respect to the applicable law and regulations (and is the party that requested NRC to take the action under consideration), we need you to provide us with reasonable responses to the issues and concerns raised by our licensee, so that we can make a sound decision.

We will await your response before we make a decision with respect to requesting a reinitiation of consultation. If you have any questions, please contact me at (301) 415-7212.

Sincerely,

Michael F. Weber, Director
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards

Enclosure: August 7, 2000 letter from licensee

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**Re: Moab Mill Reclamation Trust: Opposition to Request for Consultation
Under the Endangered Species Act**

Dear Mr. Weber:

In response to the U.S. Fish and Wildlife Service's (FWS) letter dated June 28, 2000 to Mr. John T. Greeves, Director, Division of Waste Management, the Trust respectfully continues to question the reasoning and legal basis for seeking reinitiation of consultation under section 7 of the Endangered Species Act ("ESA") regarding the reclamation efforts at the Moab uranium mill site.

In a letter from NRC dated May 25, 2000 with accompanying letter dated May 16, 2000 by Mr. Anthony Thompson, counsel for the Trust, a number of serious concerns were raised regarding the wisdom and legal necessity for reinitiating consultation again at this time. In the NRC's letter, it asked that FWS address these and other collateral issues, including the potential for the Trust's exposure to legal liability under section 9 of the ESA during the period of consultation. Unfortunately, FWS has not done so adequately in its June 28 letter. Indeed, FWS's letter further confuses these matters.

FWS continues to raise essentially two grounds for reinitiating consultation. The first is the "interim report" ("Report") on bioassay studies showing high concentrations of ammonia adjacent to the tailings pile and certain mortality rates of fathead minnows in shoreline habitats. The second is the so-called "delay" as a result of short extensions of time requested by the Trust in which to prepare and submit the revised groundwater corrective action plan (GWCAP). Neither appears to satisfy that criteria to trigger reinitiation of consultation under 50 C.F.R. § 402.16.

FWS' June 28 letter asserts that the Report and the underlying studies qualify as "new information" because of the "significant understanding as to the type and extent of take." In his

Enclosure

May 16 letter, counsel for the Trust previously raised a number of issues relating to this study, and questioned the validity of its use as a basis for "new information" under 50 C.F.R. § 402.16. Those concerns need not be reiterated here, but the Trust notes that FWS has chosen not to address them in its June 28 letter. Instead, FWS implies that the use of the Report in *pending* legislation in the State of Utah renders the study "neither 'preliminary' nor lacking in any other respect even though describing the Report as an "interim report". Giving such unqualified endorsements to what must be considered a *preliminary* Report seems premature at best. *In its present form* it is so deficient that it could not withstand peer review as a *final* report based on the study protocols the Report itself cites as applicable.

Indeed, with respect to the Report, the deviations from the study's QA/QC plan, significant data omissions and errors in the reported data render its value as "best available scientific information" more than a little questionable. (See the Trust's letter dated July 24, 2000 to Phillip Ting, Chief, Fuel Cycle Licensing Branch of your Division with attachments – including "Review of Preliminary Results of USGS and FWS Quick Response and Off Refuge Sampling Reports" (Sheperd Miller, Inc. (SMI) July 21, 2000); "Moab Interim Fish Protection Measures" (SMI, July 21, 2000)). In any event, however, the Report appears to revise *downward* the scope of the area where acutely toxic conditions may occur under low flow conditions from an area 1.5 miles long and up to 40 feet wide (approximately 5 acres) to an area 300m² (3,200 ft.² or 0.07 acres); and where conditions may be above background values during low flow conditions to an area 0.4 miles in length and less than 30 feet in width (or 1.6 acres). This is a significantly smaller area than that assumed in reaching the jeopardy finding in the 1998 Final Biological Opinion ("FBO").

Moreover, as set forth in the FBO, the Service issued a "jeopardy" determination in part because of the *lack of data* on ammonia concentrations associated with leachate from the tailings pile. See, e.g., RPA No. 2, pg. 87 (noting the "fact that the proposed action did not specifically address ammonia, and that initially during consultation it was uncertain what levels of ammonia in the water would remain after the proposed action was implemented, it was not possible for the Service to conclude that ammonia concentrations would be reduced to levels that would remove jeopardy to the endangered fish"). The Service therefore adopted stringent standards for acute and chronic toxicity, with the ability to refine these standards through the future bioassay studies. See RPA No. 2, pg. 88.

The Service noted, the studies would be conducted in order to determine *cleanup* levels required to remove jeopardy to the listed species. See RPA No. 3, pg. 89. To assure that cleanup actions were coordinated with the appropriate standards to remove jeopardy, "[a]ny change to these [ammonia] standards will be made when [NRC] reinitiates consultation with the Service on the revised groundwater corrective action plan." See RPA No. 2, pg. 88. Accordingly, the ammonia data in the report are not an adequate basis for reinitiating consultation outside of the context of clean-up activities, and in the absence of considering changes to the applicable ammonia standards and a revised GWCAP. See also RPA No. 4, pg. 89 (requiring reinitiation with the Service before establishing *alternative* concentration standards based on the future studies).

FWS also continues to assert that the degree and rate of mortalities shown by the interim report qualify as "new information" for purposes of 50 C.F.R. § 402.16. In addition to the points raised by counsel for the Trust questioning the validity of this position, the Trust asks that FWS further explain its claim and the collateral consequences that appear to flow therefrom. FWS letters of June 28 and April 25, argued that mortality data in the Report is "new information" because the data shows an exceedance of the type and extent of take previously considered in the FBO. Is the Service really saying that the extent and amount of take is beyond that contemplated by the FBO and its incidental take statement ("ITS")? If so, as FWS states on page 2 of its June 28 letter "if the Service possesses evidence that mortality of endangered species exceeds that considered under an existing biological opinion, the Service must advise the action agency to reinitiate formal consultation, as required by the applicable regulations and Endangered Species Act." FWS then inexplicably cites section 9 liability in conjunction with stopping the ongoing reclamation activities at the Moab site.

The Trust is seriously concerned and asks immediate clarification of what in fact FWS is asserting. As you know, the extent of the ITS covers *all* take "anticipated to occur whenever ammonia levels in the river exceed the acute and chronic levels identified as necessary to remove jeopardy to the listed fishes." See ITS, pg. 95. Accordingly, the Trust does not believe that take has exceeded the levels currently authorized in the ITS and considered in the FBO. On the one hand, however, if FWS is asserting that the extent or amount of take considered in the FBO and authorized in the ITS is being exceeded, then 402.16(a) compels reinitiation and all work must cease during the reinitiation in accordance with section 9 and the FBO. See FBO's Reinitiation – Closing Statement, pg. 104. Again, on the other hand, FWS has warned that there may be liability under the ESA if work is stopped. FWS must clarify its position on these issues.

As further regards section 9 of the ESA, the Trust notes that FWS has still provided no assurances that there will be no incidental take liability during any period of consultation. Surely it is within FWS' prosecutorial discretion to do so. Instead, FWS simply maintains that the ITS in the FBO "would remain in effect during the reinitiation" even though it provides no legal basis or authority for that proposition. As noted by counsel for the Trust, FWS has also stated in the past that modifications to the ITS may be necessary after reinitiation of consultation, thereby rendering the ITS ineffective for that period of consultation. The Trust continues to be concerned that there may be "take" liability for operations in the habitat should the FBO and its ITS be reopened. FWS's continuing assertion that the ITS will remain in effect offers precious little comfort.

With respect to the "delays" constituting "new information", as was previously explained, this is not a legal basis for reinitiation of consultation. In FWS' letter of June 28, the Service does not provide any detailed explanation for its position, nor has it responded adequately to the issues raised by both the Trust and NRC in the prior correspondence.

Finally, the Trust also disagrees with FWS' assertion that the Trust and NRC "have been less than helpful" in identifying the earliest possible date to remove threats to the species. The Trust is within the timeframes established by the Service in the FBO. As has been the case consistently throughout this proceeding, NRC has worked closely with FWS and the Trust to

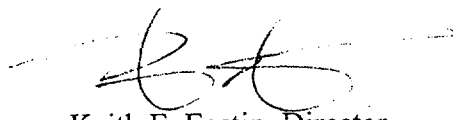
Michael F. Weber
August 7, 2000

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address all ESA-related issues. Indeed, as noted above, on July 24, 2000 the Trust has submitted an analysis of potential *interim* measures prepared by SMI to address NRC's and FWS's inquiries regarding such potential measures. It is in the spirit of cooperation that the Trust is seeking to continue a constructive dialogue on the points FWS has raised without the unnecessary and inappropriate burdens of reinitiating consultation and the potential exposure of the Trust to liability.

Should you have any questions, do not hesitate to contact me. Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Keith E. Eastin', with a horizontal line extending to the right.

Keith E. Eastin, Director
Moab Mill Reclamation Trust

cc: John Cordes
Marjorie Nordlinger
Paul Boudreaux
Robert Wiygul