



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
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DALLAS, TX 75202-2733

MAY 8 2001

Via Federal Express

Mr. Larry Bush, President
United Nuclear Corporation
P.O. Box 3077
Gallup, NM 87305-3077

40-8907

Re: EPA Administrative Order Docket No. CERCLA-6-11-89

Dear Mr. Bush:

This office has recently reviewed the \$2 million irrevocable Letter of Credit (LOC) issued by Chase Manhattan Bank for the United Nuclear Corporation (UNC) that is on file with the United States Environmental Protection Agency (EPA) in the matter of the referenced EPA Administrative Order (AO). Our review indicates that the LOC, as written, does not comply with the terms of the AO. Since this LOC expires on June 1, 2001, UNC shall ensure that it is corrected, when it is reissued on or before June 1, 2001.

In a nutshell, the current UNC LOC has certification conditions that are contrary to the AO performance guarantee requirements and that contain erroneous and inaccurate provisions and standards. Specifically, Section V.A.14 of the AO requires UNC to maintain the LOC, or utilize another mechanism, in order to "... demonstrate its financial ability to complete the work required herein and to pay all claims arising from performance of the work ... (emphasis added)." Thus, the AO clearly requires the use of a performance guarantee (such as the LOC) in order to establish UNC's ability to complete all work and to pay all claims arising from such work. However, in the LOC, UNC has conditioned any payment to EPA on the completion of the work required by the AO. Thus, EPA would be paid, not for "all claims arising," but only upon completion of all work. UNC then goes on to demand that EPA first pursue a civil action to enforce the AO and obtain a judicial finding of UNC financial inability to comply, in order to collect under the performance guarantee. These conditions effectively turn the performance guarantee on its head and are contrary to the existing judicial finding of UNC liability for site response costs incurred under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* *United States v. United Nuclear Corp.*, 814 F.Supp. 1552, 1565 (D.NM., 1992); C.A. No. 91-0983 JC, Order of Oct. 25, 1993, D.NM.

Further, the certification language has an inaccurate citation to CERCLA that is stated as "42 U.S.C. 967A4A." The correct citation is 42 U.S.C. § 9607 (a)(4)(A), which is where the authorization for recovery of response costs is found that provides only that such expenditures be

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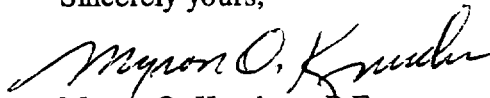
incurred "... not inconsistent with the national contingency plan (emphasis added)." Yet, the LOC also purports to require EPA certification that its costs were incurred "... inconsistent with the record of decision for the Church Rock Site (September 1988)(emphasis added)." The LOC has thus added a payment qualification that does not exist as a legal requirement and that contains a misstated standard.

Accordingly, upon re-issuance of the LOC, UNC shall delete any requirement for civil judicial action from the LOC; and shall correct and amend the certification required of EPA in the third paragraph of the LOC to read substantially as follows:

"I certify that monies shall be paid over to EPA from this Letter of Credit to reimburse EPA for its claim(s) for costs of removal or remedial action incurred by EPA arising from performance of the work under EPA Administrative Order, Docket No. CERCLA-6-11-89, which costs are not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan), 40 CFR Part 300."

Your prompt attention to this matter is requested. If you have any questions, please do not hesitate to contact me at (214) 665-6701, or Greg Lyssy of my staff at (214) 665-8317. Alternatively, you may have your counsel contact Jim Turner of our Office of Regional Counsel at (214) 665-3159.

Sincerely yours,



Myron O. Knudson, P.E.

Director

Superfund Division

cc: Robert Lawrence, Esq.
CT Corporation System
Ken Hooks, U.S. NRC
Juan R. Velasquez, UNC