

December 19, 2003

Ms. Sarah Fields  
P.O. Box 143  
Moab, UT 84532

Dear Ms. Fields:

I am responding to your e-mail request dated October 29, 2003 sent to Mr. Dennis Sollenberger of my staff. Our responses are presented in the enclosure to this letter.

I trust we have been responsive to your request and questions. If you have any questions on our responses, please contact me at [phl@nrc.gov](mailto:phl@nrc.gov) or Dennis Sollenberger at [dms4@nrc.gov](mailto:dms4@nrc.gov).

Sincerely,

*/RA/*

Paul H. Lohaus, Director  
Office of State and Tribal Programs

Enclosure:  
As stated

Ms. Sarah Fields

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**Responses to Information Request and Questions from  
Ms. Sarah Fields**

By email dated October 29, 2003, you requested information and asked several questions. The Nuclear Regulatory Commission (NRC) staff has prepared the following responses to your inquiry. Your specific questions on the Federal Register notice are grouped and responded to as follows:

Question 1. First, you requested further information on the October 24 Federal Register notice regarding Utah's request to use alternative groundwater standards in lieu of NRC standards for the same purpose. Specifically, you asked:

The October 24 Federal Register Notice (68 FR 60885) is published under the "Proposed Rule" section of the Federal Register. This is confusing because I cannot identify the specific rule or rules or Commission policy or policies that are being proposed. I do not understand why this notice is being published as a "Proposed Rule" pursuant to the Administrative Procedure Act and NRC Management Directive 6.3 (The Rulemaking Process).

Could you please identify what specific proposed rule(s) or proposed policy(ies) is being noticed in the October 24 "proposed rule"?

Response 1: We are sorry the procedure (where to place notices in the FR) is confusing, however, the October 24, 2003 notice (68 FR 60885) as well as the August 27, 2003 notice (68 FR 51516) were published in the Proposed Rules section of the Federal Register to reflect the Office of the Federal Register's long-standing policy of publishing documents that relate to a rule or a rulemaking proceeding in one of the Federal Register's rulemaking publication categories. Because the two notices request public comment on whether Utah's alternative standards are equivalent or more stringent than the Commission's regulations for the same purpose, we determined that the notices related to a rule and the decision was made to publish these documents in the proposed rule section.

These notices provide notice of the Commission's preliminary finding that the Utah alternative groundwater standards are equivalent or more stringent than the NRC groundwater standards for 11e.(2) byproduct material, and notify the public of the opportunity to provide comments to the Commission on this finding. Pursuant to Section 274o of the Atomic Energy Act of 1954, as amended (Act), the Commission has made a determination that this approach to the notice and a public hearing requirement, is appropriate. The Federal Register notices were not intended to, nor did they, request comments on the Commission's decision on how the Commission would fulfill this requirement.

Question 2. The FRN states that "The Commission has the discretion to determine how to implement this requirement in Section 274o of

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Ms. Sarah Fields (continued)**

the Act," and "the Commission has, in its discretion, adopted the notice and comment process in Subpart H of 10 CFR Part 2 to fulfill its notice and hearing requirement in Section 274o of the Act."

You asked: The FRN is published under the "Proposed Rule" section of the Federal Register. Are the statements above an announcement of a proposed rule or regulation with respect the procedures will be used to implement the Alternate Standards Provision of Section 274o?

Are the statements above an announcement of a final rule or regulation with respect the procedures will be used to implement the Alternate Standards Provision of Section 274o?

Are the statements above an announcement of a Commission order with respect the procedures will be used to implement the Alternate Standards Provision of Section 274o?

Are the statements above statements of general policy or interpretations of general applicability?

If they are none of these, what exactly are they?

Response 2: It is none of the above. Please see Response 1 above which provides information on the purpose and intent of the specific Federal Register notice.

Question 3. You asked: If the statements above are not an announcement of a proposed or final rule or regulation, or an order, where has the Commission been given the discretion by statute to establish procedures to implement Section 274o without specifically issuing a rule, regulation, or order to that effect?

Response 3: This question is addressed in our Response 4, that follows.

Question 4. You asked: What is the statutory basis for the Commission's determination that it has complete discretion to determine how to implement the alternate standards notice and hearing provision in Section 274o of the Atomic Energy Act of 1954, as amended?

Response 4: The Uranium Mill Tailings Radiation Control Act of 1978 amended the Act by adding subsection 274o to section 274, "Cooperation With States." Section 274 establishes a cooperative program between the NRC and the States with respect to the control of radiation hazards associated with the use of such materials. Subsection 274o addresses the parameters of this program by including the licensing and regulation of 11e.(2) byproduct material, requiring

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“Agreement States” to meet certain criteria with respect to the ownership of byproduct material and the sites at which 11e.(2) byproduct material has been produced and at which sites such material is disposed. Subsection 274o also sets out a standard that must be met when “Agreement States” adopt alternative standards to the Commission’s regulations. Such alternatives must provide for the protection of the public health, safety and the environment from the hazards associated with 11e.(2) byproduct material and must be equivalent, to the extent practicable, or more stringent than, the standards adopted and enforced by the Commission for the same purpose. This subsection also requires that before adoption of such alternatives, there must be notice and an opportunity for public hearing.

The broad authority granted to the NRC in Section 161 of the Act authorizes the NRC to regulate the processing and utilization of source, byproduct, and special nuclear material in order to protect the public health and safety and the environment. Under that broad authority, Subsection 274o. of the Act requires the Commission to make a determination that an alternative standard to the Commission’s regulations is acceptable. Congress’ intent as to the standard that must be met is explicitly stated, i.e., such alternatives must achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the levels which would be achieved by standards and requirements. However, Congress was silent as to what it intended to constitute notice and a public hearing.

Because Congress was silent with respect to the specific issue of what kind of notice and hearing is required in order to satisfy this requirement, the next step the agency took was to determine if the legislative history regarding the requirement would shed any light on what Congress intended the agency to do. However, the legislative history does not specify the kind of notice and hearing the agency should use. When the language in a statute is silent or ambiguous, and, as in this case, the legislative history does not provide information as to Congressional intent, an agency has the discretion to interpret Congressional intent, as long as the agency’s interpretation is reasonable. Courts, generally, show substantial deference to such administrative constructions (See, Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)). Therefore, as discussed in Response 1, above, the Commission, in its discretion, has determined that the approach to the notice and public hearing required by Section 274o, as discussed in the October 24, 2003, Federal Register notice, is appropriate and consistent with all relevant statutory requirements.