June 21, 2004

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

Dear Ms. Fields:

This letter completes the U.S. Nuclear Regulatory Commission's (NRC) response to your September 8, 2003, letter and supplements filed in response to the NRC's August 27, 2003, *Federal Register* Notice (FRN) (68 FR 51516) regarding the State of Utah's proposed alternative standards for groundwater regulation. The FRN reflected the Commission's decision to use the *Federal Register* to meet the notice and public hearing requirements in Section 274o of the Atomic Energy Act of 1954, as amended (AEA). You requested that the NRC treat your letter and supplements as either a 10 CFR 2.808 motion or a 10 CFR 2.802 petition for rulemaking, to address your concerns with the Commission's decision.

I believe that the concerns raised in your September 8, 2003, letter and supplements were addressed in subsequent emails and letters (attached). However, in your latest correspondence with the NRC, i.e., a March 15, 2004, letter to Michael T. Lesar, you indicated that you did not consider your question on the Commission's decision to use the 10 CFR Part 2 Subpart H-like process to address the specific requirement for a public hearing to have been addressed; therefore, below I provide an explicit response to that concern.

The Uranium Mill Tailings Radiation Control Act of 1978 amended the AEA by revising several subsections of the AEA and adding subsection 274o to section 274, "Cooperation with States." Section 274 of the AEA establishes a cooperative program between the NRC and the States with respect to the control of radiation hazards associated with the use of AEA materials.[1] Subsection 274o addresses the requirements for an Agreement State to license and regulate 11e.(2) byproduct material. This section requires Agreement States to comply with the requirements of subsection b. of Section 83 of the AEA respecting ownership of byproduct material and land, and the standards adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material, which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose. These include the requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 83, 84, and 275 of the AEA. Should an Agreement State propose the use of an alternative to these standards, Subsection 274o requires the Commission to make a determination, after notice and an opportunity for public hearing, that such alternatives will achieve a level of stabilization and containment of the sites at which 11e.(2) byproduct material is disposed, and a level of protection for public health, safety, and the environment from

[1] Through the Agreement State Program, thirty-three States have signed formal agreements with the NRC, by which those States have assumed regulatory responsibility over certain byproduct, source, and limited quantities of special nuclear material.

radiological and nonradiological hazards associated with such sites which is equivalent to, to the extent practicable, or more stringent than the level to be achieved by standards and requirements adopted by the Commission for the same purpose.

Because the statute was silent with respect to the kind of notice and public hearing that Section 274o requires, the staff reviewed the legislative history addressing this section of the AEA to determine if it would provide insight as to Congress' intentions. However, the legislative history does not provide any information that directs the Commission to use a particular notice and hearing process.

Implicit in its grant of authority in the AEA to the NRC is Congress' delegation of authority to devise interpretations rationally aimed at achieving Congress' purpose for enacting this statute.[2] When the agency's interpretation is one of more than one permissible interpretation, it is well established in administrative law that "an agency is free to choose among those interpretations."[3] If the interpretation is challenged, the Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council established a two-step analysis to determine if an agency's interpretation should be given judicial deference. The first step, which the NRC staff took, is to ask whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous with respect to the specific issue, the second question for the court is whether the agency's answer is based on a permissible construction of the statute."[4]

The Commission, in its discretion, determined that the most effective approach to be used, as discussed in the August FRN and again in the October 24, 2003 FRN (68 FR 60885) (published to supplement the August FRN), is one similar to the process provided for in the Subpart H rulemaking process. The Commission concluded that this approach is appropriate and consistent with all relevant statutory requirements. Section 2.805(a) of Title 10 addresses the submission of "statements, information, opinions, and arguments in the manner stated in the notice"; while 10 CFR 2.804(b) also provides that "the Commission may hold informal hearings at which interested persons may be heard, adopting procedures which in its judgement will best serve the purpose of the hearing."

Regarding your request that your September 8, 2003, submittal, be accepted as a 10 CFR 2.808 motion, the instant case involves neither a rulemaking nor litigation; therefore, such a motion is not appropriate. A 10 CFR 2.808 motion is a procedural mechanism which, as its subtitle reflects, delegates authority to the Commission to rule on procedural matters, e.g., paragraph (a) states that such procedural matters include "prescrib[ing] schedules for the filing of statements, information, briefs, motions, responses, or other pleadings where such schedules may differ from those elsewhere prescribed in these rules or where these rules do not prescribe a schedule."

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[2] Morton v. Ruiz, 415 U.S. 199, 231 (1974).

[3] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

[4] Id.

In the alterative, you requested that your September 8 submittal be accepted as a 10 CFR 2.802 petition for rulemaking. Paragraph (a) of that section states that "Any interested person may petition the Commission to issue, amend, or rescind any regulation." However, your letter and supplements do not provide a proposed regulation or amendment; instead, your submittal indicates that you have misconstrued the Commission's decision regarding the use of the August FRN and opportunity to provide comments as a rulemaking that was promulgated without the notice and comment required by section 553 of the Administrative Procedures Act. As the staff noted in its December 19, 2003, response, notice of Utah's proposal being placed in the "Proposed Rule" section of the *Federal Register* may have caused some confusion about the status of that proposal. Because the Commission had decided to adopt a process similar to the process in 10 CFR Part 2, Subpart H to request comments on Utah's proposed used of alternative standards for groundwater regulation, the *Federal Register* published Utah's proposal in its proposed rulemaking section. However, Utah's proposed use of alternative standards is not a proposed rule, nor does it involve rulemaking. Therefore, in the instant case, a 10 CFR 2.802 petition for rulemaking is not an appropriate mechanism for requesting that the Commission reconsider its decision to use the *Federal Register* to provide notice and an opportunity for the public to provide comments on Agreement State alternative standards in general, and on Utah's proposal specifically, to meet the notice and public hearing requirements in Section 274o of the AEA.

I appreciate your interest in this process and believe that this letter has been fully responsive to your requests that the NRC treat your letter and supplements as either a 10 CFR 2.808 motion or a 10 CFR 2.802 petition.

Sincerely,

/ra/

Stuart A. Treby
Assistant General Counsel
for Rulemaking and Fuel Cycle

Attachments: As stated