

POLICY ISSUE
(Notation Vote)

July 19, 2004

SECY-04-0128

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations /RA/

SUBJECT: AMENDMENT TO SECTION 274b AGREEMENT WITH THE STATE
OF UTAH AND APPROVAL OF ALTERNATIVE GROUNDWATER
STANDARDS

PURPOSE:

To request (1) a Commission determination that Utah's proposed alternative groundwater standards are adequate, and (2) Commission approval of the proposed amendment to the Agreement with the State of Utah for 11e.(2) byproduct material.

SUMMARY:

The staff has processed the request from former Governor Leavitt of Utah for an amendment to the Utah Agreement which would add authority for 11e.(2) byproduct material. The staff used the Office of State and Tribal Programs procedure for processing new Agreements. Utah proposed the use of alternative groundwater standards in lieu of the groundwater standards in Appendix A to 10 CFR Part 40. The Commission approved a parallel review process for the alternative standards review and the amendment to the Utah Agreement review. Both proposals were noticed in the Federal Register and the staff prepared an analysis of public comments for each proposal. The staff completed both review processes and is proposing the approval of Utah's alternative groundwater standards and the proposed amendment to Utah's Agreement.

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BACKGROUND:

Former Governor Michael O. Leavitt of Utah requested that the Nuclear Regulatory Commission (NRC) enter into an amended Agreement under Section 274b of the Atomic Energy Act of 1954, as amended (Act), to transfer regulatory authority for 11e.(2) byproduct material to Utah. In its proposed regulations, Utah identified that it intends to use groundwater protection standards, which are based on the Environmental Protection Agency's (EPA) hazardous waste program, to protect the waters of the State from the hazardous constituents produced by uranium milling operations. To address this request, in SECY-03-0025, dated February 18, 2003, the staff presented the Commission with the staff's proposed definition of an alternative standard, a process to conduct the hearing required by Section 274o of the Act, and the staff's preliminary finding on Utah's proposed alternative standards. By Staff Requirements Memorandum (SRM) for SECY-03-0025, the Commission approved the staff's recommendation for addressing the three points in the paper. Subsequently, the staff published a Federal Register notice that presented the Commission's preliminary finding on the proposed Utah alternative standard (68 FR 51516, August 27, 2003) and offered an opportunity for the public to provide comments. The staff addressed several issues that were raised by a member of the public, and published a second Federal Register notice that provided additional information and extended the comment period (68 FR 60885, October 24, 2003).

In parallel, the staff evaluated the Final Application submitted by Governor Leavitt. The staff requested Commission approval in SECY-04-0008 dated January 26, 2004, to publish in the Federal Register the proposed amendment to the Utah Agreement and a summary of the draft staff assessment. By SRM SECY-04-0008 dated February 6, 2004, the Commission provided its approval. As required by Section 274e of the Act, the proposed amendment to the Agreement and the summary of the draft staff assessment were published in the Federal Register for four consecutive weeks (69 FR 7026, February 12, 2004), (69 FR 7803, February 19, 2004), (69 FR 8703, February 25, 2004), and (69 FR 10269, March 4, 2004). The full text of the draft staff assessment as well as all references in the assessment, were provided through the Agencywide Document Access and Management System (ADAMS).

The amendment to the Agreement (Attachment 1) allows Utah to assume regulatory authority over 11e.(2) byproduct material as well as the facilities that generate such material (e.g., uranium mills) and dispose of such material. In addition to the proposal for 11e.(2) byproduct material authority, the amendment to the Agreement document also includes the wording changes needed to reflect the return of the Sealed Source and Device Evaluation regulatory authority to NRC which was approved by the Commission in 1996. Thus, the amended Agreement would provide authority for Utah to regulate all categories of materials available to States under Section 274b of the Act, except as noted above, i.e., the authority to regulate Sealed Source and Device Evaluation.

DISCUSSION:

The processing of the public comments on the alternative standards and the amendment to the Utah Agreement as well as the other steps required to implement the amendment to the Agreement are discussed below.

(1) Public Comments

Public Comments on the Utah's Proposed Alternative Groundwater Standards

NRC staff received comment letters from three persons in response to the two Federal Register notices. Comments were made on: (1) Utah's alternative groundwater standards; (2) the alternative standards hearing process the NRC has chosen to comply with the requirement in Section 2740; and, (3) other issues.

Comments on Utah's Alternative Groundwater Standards:

A letter received from Vice President and General Counsel, International Uranium (USA) Corporation (IUSA), did not identify any concerns with the proposed Utah alternative standards as set out in Utah statutes and regulations. IUSA could not comment on the application of these standards to their facility until the negotiations on their groundwater discharge permit are completed. Utah and IUSA have been working on the groundwater discharge permit and have not identified any obstacles to completion.

A second letter was received from the Director, Office of Environmental Policy and Compliance, Fish and Wildlife Service (FWS), U.S. Department of Interior. The letter stated that the protection of groundwater should be equal to, or better than under NRC standards, and equal in protection under standards required by the EPA. The FWS also identified other issues: i.e., (1) the adequacy of the existing NRC and EPA standards to provide protection for trust resources (such as, migratory birds); (2) the fact that loads from discharges are not addressed, only concentrations; and, (3) the coordination on issues of concern to FWS under the amended Agreement, since Utah is not a FWS Federal partner. FWS stated that these issues can be addressed within the Utah program if Utah will consult with FWS regarding the possible impacts on natural resources, when applications for groundwater discharge permits are reviewed.

A third letter was received from an individual for the Nuclear Waste Committee, Glen Canyon Group/Sierra Club (NWC) which commented on the following areas pertaining to groundwater standards: (1) the definition of "point of compliance;" (2) the application of groundwater corrective action programs; (3) the application of groundwater detection monitoring; (4) the adequacy of Criterion 13's list of hazardous constituents in Appendix A to 10 CFR Part 40; and, (5) the belief that dependency of agency practice in implementation of such standards is as important as the standards themselves. The NWC's primary comment in each of these areas was that Utah should implement its standards in a manner that provides greater protection to members of the public and the environment than NRC's program has.

Comments on the Alternative Standards Hearing Process:

The NWC also challenged the NRC process for conducting the public hearing required by Section 274o of the Act as a Subpart H like process. The NWC asserts that the NRC should establish this public hearing process through rulemaking. The staff responded to these issues in the second Federal Register notice and by letter dated December 19, 2003 (ML040560195). The staff sent a letter to the individual providing the comments for the NWC on June 21, 2004 (ML041770014) to close the request for motion and/or petition initially requested by letter dated September 8, 2003.

Comments on Other Issues:

The NWC also raised several other issues including: (1) the process to be followed to determine when uranium mills may process alternate feed material; (2) whether NRC's environmental impacts statements adequately addressed the groundwater impact from alternate feed materials; (3) whether site-specific approvals for alternate feed materials constitute alternate standards; (4) issues raised in an EPA letter commenting on NRC's policies for alternate feed and direct disposal of non-11e.(2) material; and, (5) the Utah process for development of its policies in the Final Application for the amendment to its Agreement.

The staff's summary of comments and responses to each comment are included in Attachment 2. The staff believes, based on an overall evaluation of these comments, that those responding consider the Utah alternative groundwater standards to be equivalent or more stringent than the NRC requirements in Appendix A to 10 CFR Part 40.

Public Comments on Utah's Proposed Amendment to the Agreement and the Draft Staff Assessment

NRC staff received one comment letter in response to the Federal Register notices published on February 12, 19, 25, and March 4, 2004. Comments were requested in two categories: (1) the proposed amendment to the Agreement; and, (2) the NRC staff's assessment of the Utah 11e.(2) byproduct material regulatory program.

The letter received from the individual representing the NWC provided comments in numerous areas which are discussed in the staff analysis of public comments (Attachment 3). The comments address the following issues: (1) the State did not use an open, public process in developing its background information paper on what discretionary elements of the NRC program should be included in the Utah program; (2) the State should make all records available to the public including indices of records in both electronic form and in a location near the licensed facilities; (3) the NRC and the State should address the pre-1978 sites that are not included by the Department of Energy (DOE) in the Title I program prior to the final approval of the amendment to the Agreement; (4) there needs to be a master list of sites and materials; (5) the State did not use a public participation process in the formulation of the State Policy in the "Elements Paper;" (6) the final application does not discuss what guidance, if any, would be used in evaluating applications to dispose of non-11e.(2) byproduct material in mill tailings impoundments; (7) it appears that NRC's interim guidance (Regulatory Issue Summary (RIS) 2000-23) has become final guidance; (8) who determines what material meets the definition of 11e.(2) byproduct material; (9) the NRC should resolve the issue of alternative groundwater

standards prior to closing the comment period on the amendment to the Agreement; (10) that Utah is modifying the statutory definition of “ore” by adopting the NRC policy for alternate feed in RIS 2000-23; (11) the State should make it clear that environmental impacts include cumulative impacts, evaluation of alternatives, and evaluation of environmental justice impacts to include impacts on the White Mesa Utes, Navajos, and low-income citizens; (12) the State should commit to notice all amendments and clarify what is a major or minor amendment; (13) the Velvet Mine Water Treatment Facility has been dropped by NRC and the State from the uranium recovery program and should be addressed; (14) the NRC and the State should conduct a comprehensive review of past regulatory program “mistakes and failures” in Utah to identify solutions so that future regulatory programs do not lead to “another incomplete and ineffective regulatory regime;” (15) the Congress has never delegated to EPA or NRC the authority to regulate the processing of material other than “ore” therefore, Utah can not assume regulatory authority for processing alternate feed material under this amendment to the Agreement, (16) Utah should amend its application to recognize that the State does not have authority over processing of material other than natural ore at uranium milling facilities and NRC should provide an opportunity for public comment on the revised application; and, (17) the public should be provided an opportunity to comment on the Final Application after the NRC responds to comments on the alternative standards proposal by Utah, the staff recommendations to the Commission, and the final Commission decision.

The staff responses to each of these comments are in Attachment 3. Each of these comments stressed its opposition to Utah allowing the processing of alternate feed materials as outlined in Commission policy, RIS 2000-23 (including the NRC definition of “ore”). The State of Utah has proposed to follow the alternate feed material policy in RIS 2000-23, but the State has chosen not to adopt the policy for disposal of non-11e.(2) byproduct material in tailings impoundments. The staff finds Utah’s proposed policy on use of a portion of RIS 2000-23 consistent with NRC policy and acceptable. The other primary comment expressed concern with the way NRC has conducted its licensing and inspection program in Utah and suggested that Utah should implement a more effective program than the NRC. As discussed in the staff’s final assessment of Utah’s proposed regulatory program for 11e.(2) byproduct material (Attachment 4, MLO41940185), the staff has concluded that Utah’s program is adequate to protect public health, safety and the environment and compatible with NRC’s regulatory program.

(2) Transfer of Licenses

Currently, there are four NRC 11e.(2) byproduct material licensees in Utah. The four licensees are three conventional uranium mills and one commercial 11e.(2) byproduct material disposal facility. The staff has been coordinating with Utah staff on the current or pending licensing, inspection, and enforcement activities involving the four 11e.(2) byproduct material licensees to be transferred, to ensure a smooth transition and continuation of regulatory actions after the transfer.

(3) Actions Pending Against Licensees to be Transferred

There are no pending enforcement actions or ongoing investigations involving the four 11e.(2) byproduct material licensees in Utah.

(4) Effective Date of the Agreement

The NRC and Utah staffs have targeted August 15, 2004, as the effective date for the amendment to the Agreement. To meet this date and provide adequate time for an orderly transfer of files, and assumption of authority by Utah, staff requests Commission approval, if practical, by August 1, 2004.

(5) Procedure for Reviewing Proposed Agreements

Staff processed Utah's request for an amendment to Agreement using the procedure for reviewing proposed Agreements as described in the Office of State and Tribal Programs Procedure SA-700 dated April 2, 2001. The procedure directs the staff to use a self-directed team approach and to perform one comprehensive review of the application. The single comprehensive review was preceded by a team review of the draft application for completeness to ensure that the State had assembled the information required for the comprehensive review. The team members were represented by the Offices of State and Tribal Programs, Nuclear Material Safety and Safeguards, General Counsel, and Region IV.

IMPLEMENTATION:

Following the execution of the amendment to the Agreement, staff will continue a program of actively interacting with the State regarding Utah's regulation of 11e.(2) byproduct material. The NRC will exchange regulatory information, provide notices of NRC training courses, and conduct periodic on-site reviews of the State's program for regulation of 11e.(2) byproduct material. Communications are generally more frequent during the first years after an Agreement or amendment to an Agreement is signed. The regulatory information exchange includes reports of incidents, significant enforcement actions, and amendments to policies, regulations, or guidance.

An orientation meeting between NRC and Utah's Division of Radiation Control staff will be conducted as part of the next periodic meeting currently scheduled to occur in late FY 2005 to discuss the initial program implementation. Unless significant issues are identified, the first Integrated Materials Performance Evaluation Program (IMPEP) review of the 11e.(2) byproduct materials program is planned to be conducted as part of the next routine IMPEP review scheduled for FY 2007. Subsequent routine Agreement State program reviews usually occur at 12- to 48-month intervals, with good performance resulting in longer intervals between reviews.

If approved by the Commission, Utah will become the sixth Agreement State to have 11e.(2) byproduct material regulatory authority.

RESOURCES:

The shift in authority from NRC to the State of Utah was considered in the budget assumptions used to prepare the FY 2004 and FY 2005 budgets. No resource changes are required.

COORDINATION:

This paper has been coordinated with the Office of General Counsel, which has no legal objection. The office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections. Staff has obtained concurrence from the Office of Management and Budget (OMB) that this action does not constitute a “major rule” under the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA).

RECOMMENDATIONS:

That the Commission:

1. Determine:

That the Utah proposed alternative standard for groundwater protection is equivalent to or more stringent than the NRC standards for 11e.(2) byproduct material.

2. Find:

- a. That the proposed Utah program for regulation of 11e.(2) byproduct material is compatible with the Commission’s program for the regulation of like material; and
- b. That the proposed Utah program for 11e.(2) byproduct material is adequate to protect public health, safety, and environment with respect to the materials and uses covered by the proposed amendment to the Agreement.

3. Approve:

- a. The proposed amendment to the Utah Agreement between Utah and the NRC pursuant to Section 274 of the Act, as set forth in Attachment 1.
- b. The proposed amendment to the Agreement by August 1, 2004, if practicable, to afford adequate time for the signing of the amendment to the Agreement, the orderly transfer of license files, and the assumption of regulatory authority by Utah on August 15, 2004.

4. Note:

- a. The Secretary will publish in the Federal Register the Commission’s final determination on the alternative groundwater standards (Attachment 5).
- b. The Governor of Utah does not desire to sign the amendment to the Agreement in a formal ceremony. Three formal copies of the Agreement will be provided, upon approval by the Commission, for signature by the Chairman and the Governor of Utah (Attachment 6).

- c. Pursuant to the Act, Small Business Regulatory Enforcement Fairness Act, and Commission guidance, the NRC oversight committees of the U.S. House of Representatives and of the U.S. Senate, and the Utah Congressional delegation, and certain Federal agencies be informed of the Commission's decision.
- d. The Office of Public Affairs will issue a press release.
- e. The text of the amendment to the Agreement will be published in the Federal Register as required by Section 274e, within 30 days after the amendment to the Agreement is signed (Attachment 7).

/RA Ellis W. Merschoff Acting for/

Luis A. Reyes
Executive Director
for Operations

Attachments:

- 1. Proposed Amendment to the Agreement
- 2. Staff Analysis of Public Comments on Utah's Alternative Groundwater Standards
- 3. Staff Analysis of Public Comments on Utah's Proposed Amendment to the Agreement
- 4. Final NRC Staff Assessment of the Utah 11e.(2) Program
- 5. Draft Federal Register Notice of the Commission's Determination on Utah's Proposed Alternative Standards
- 6. Draft Letter to Utah Governor Walker
- 7. Draft Federal Register Notice of the Signing of the Amendment to the Agreement

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***See previous concurrence.**

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