

STAFF ANALYSIS OF PUBLIC COMMENTS ON  
UTAH'S PROPOSED AMENDMENT TO THE AGREEMENT BETWEEN  
THE STATE OF UTAH AND THE U.S. NUCLEAR REGULATORY COMMISSION

INTRODUCTION:

NRC staff received comments from one person in response to the four notices that Utah was proposing to amend the Agreement between the State of Utah and the U.S. Nuclear Regulatory Commission to authorize Utah to regulate 11e.(2) byproduct material and the facilities that generate such material. In accordance with Section 274e, the proposed amendment to the Agreement and a summary of the staff assessment of Utah's application were published for four consecutive weeks in the Federal Register (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).

COMMENTS ON THE PROPOSED AMENDMENT TO THE AGREEMENT AND THE DRAFT STAFF ASSESSMENT OF THE UTAH 11e.(2) BYPRODUCT MATERIAL PROGRAM

Comments regarding the proposed amendment and draft staff assessment have been summarized and responses provided below.

Commenter:

Sarah M. Fields  
(ML040780577 and ML040780567)

Affiliation:

Nuclear Waste Committee (NWC), Glen Canyon  
Group/Sierra Club, Moab, Utah

**Summary of Comment:** The State has not used an open, public process for the development of the Elements paper by the DEQ task force. Environmental and public interest groups were excluded from the DEQ task force and they did not hold public meetings in the vicinity of the 11e.(2) facilities.

**NRC Staff Response:**

The NRC does not have any specific policy on the process a State uses to develop its basis for a decision whether to pursue an agreement with the NRC.

**Summary of Comment:** The State should make all records available to the public including indices of records in both electronic form and in locations near the licensed facilities. The State should not just rely on the Utah Government Records Access and Management Act (GRAMA) to provide the public with access to licensing documents. The NRC should make sure that the State has the staff and monetary resources to provide the public with licensing records in a timely manner, convenient for use.

**NRC Staff Response:**

The NRC requirement is to make the licensing and inspection records available to the public. The NRC policy does not specify how this is to be accomplished. The State's policy should be followed. The current State process under GRAMA meets NRC's policy requirements for access to licensing and inspection records.

**Summary of Comment:** The NRC and the State should address the pre-1978 sites that are not included in the Uranium Mill Tailings Radiation Control Act (UMTRCA), Title I program prior to the final approval of the amended agreement.

**NRC Staff Response:**

The amendment to the Agreement is for 11e.(2) byproduct material (Title II program) and is not applicable to pre-1978 tailings or residual materials covered by the Title I program. The Department of Energy is the Federal agency that is responsible for designating sites to be remediated under Title I of UMTRCA and for adding sites to the Formerly Utilized Sites Remedial Action Program (FUSRAP). If the materials at the sites listed by the commenter have material that is greater than 0.05% weight uranium, they would already fall under the current Utah program as source material. The sites could be considered naturally occurring radioactive material (NORM) sites which are not covered by the amendment to the Agreement.

**Summary of Comment:** There needs to be a master list of sites and materials at those sites that the State proposes to assume responsibility for as an Agreement State.

**NRC Staff Response:**

The final application identified the sites affected by the proposed amendment to the Agreement. The four licensed sites are: Rio Algom, Lisbon site; Plateau Resources, Shootaring Canyon site; International Uranium (USA) Corporation, White Mesa site; and Envirocare, 11e.(2) disposal cell at the Clive site.

**Summary of Comment:** The State of Utah did not use a public participation process in the formulation of the State Policy guidance as presented in the "Elements Paper" in particular the policy on alternate feed material.

**NRC Staff Response:**

The formulation process for the State of Utah policies on what program elements it wishes to incorporate into its radiation control program is a State decision that is not subject to criteria in NRC policy for entering into an Agreement. The NRC criteria apply to the State process for incorporating requirements into its regulations or license conditions. NRC reviewed and found acceptable the State administrative process in its regulations for the development of regulations and license conditions. The State public participation process for the development of regulations and license conditions is similar to that of NRC and is acceptable.

**Summary of Comment:** 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 11e.(2) byproduct material impoundments or whether such applications would even be considered by the State. The Final Application should have addressed this matter.

**NRC Staff Response:**

The State did not discuss the direct disposal policy in Regulatory Issue Summary (RIS) 2000-23 in the Final Application because the State had decided that it would not allow such disposals in

11e.(2) byproduct material impoundments. The State could at a later date decide to change its policy on direct disposal of non-11e.(2) material into 11e.(2) byproduct material impoundments.

**Summary of Comment:** The interim guidance has become final guidance since NRC no longer intends to pursue rulemaking to issue a new Part 41 for uranium milling which was to address the issues in RIS 2000-23.

**NRC Staff Response:**

Since the Commission decided not to pursue the Part 41 rulemaking, the guidance in RIS 2000-23 is final guidance. The NRC staff has been using and will continue to use this guidance in the conduct of the uranium milling licensing program. The State chose to adopt the alternate feed policy and to not adopt the disposal of non-11e.(2) material in 11e.(2) byproduct material impoundments.

**Summary of Comment:** The State and NRC have not discussed who has the authority to determine whether material in Utah or material that will be disposed of in Utah meets the definition of 11e.(2) byproduct material, once the State assumes regulatory responsibility.

**NRC Staff Response:**

When material is generated in Utah, Utah will have the relevant documentation regarding how the material was produced and will make the determination. If the material is from another jurisdiction (either NRC or an 11e.(2) Agreement State), that jurisdiction will make the determination. Once a jurisdiction has determined that a material is 11e.(2) byproduct material, the other jurisdictions should defer to that determination.

**Summary of Comment:** The NRC has not resolved the issue of the State's request to substitute State groundwater protection standards for NRC standards. The public should have had access to NRC staff responses to the comments on the Utah's proposal and the staff assessment, staff recommendations to the Commission, and the Commission's decision, prior to the noticing of comment on the Final Application. The commenter requested that the above information be made available to the public and extend the comment period so that the public can submit additional comments on the Final Application.

**NRC Staff Response:**

Since the preliminary NRC staff finding was that Utah's alternative standard was equivalent to the NRC standard, the staff proposed and the Commission approved the parallel process. The staff has prepared an analysis of public comments for the alternative standard notice (see Attachment 2). The need for a final Commission determination on the alternative standard request was clearly stated in the NRC staff assessment as a condition of approval for the amended Agreement. If the Commission determines that the Utah alternative standard is equivalent or more stringent than the NRC standard, the amended Agreement would meet compatibility criteria and processing of the amendment to the Agreement would proceed.

**Summary of Comment:** The commenter presented an extensive (beginning on page 8 through page 25 of the comment letter) discussion on the definition of "ore" and how that

definition was being changed by the State of Utah through the commitment to follow NRC's guidance in RIS 2000-23.

**NRC Staff Response:**

The NRC staff respectfully disagrees with the underlying premise of this comment which is "that the definition of alternate feed material is a change in the statutory definition of "ore." The term "ore" is not defined in the Atomic Energy Act or UMTRCA. Therefore, the NRC staff in development of the alternate feed guidance considered the Webster's New Collegiate Dictionary, 1975 Edition, definition, which is:

"ore" - 1. a mineral containing a valuable constituent (as metal) for which it is mined and worked, 2. a source from which valuable matter is extracted.

When a "term of art," such as "ore," is not specifically defined in a statute or regulation, the implementing agency may use the common use or understanding of the term. The NRC staff in providing guidance on what is acceptable as an "ore" under UMTRCA essentially used the common definition as stated above with the additional clarification that alternate feed, a type of "ore," is processed for its source material content at a license uranium mill, the tailings or waste from the process are 11e.(2) byproduct material.

UMTRCA specifically uses the phrase "any ore" which means that the material being processed primarily for its source material content does not have to meet the definition of source material to be considered an "ore."

The NRC staff believes that the proposed Utah regulatory program for 11e.(2) byproduct material is consistent with the NRC program for the same activities.

**Summary of Comment:** The commenter requested that the State make it clear that environmental impacts include cumulative impacts of licensed activities, evaluation of all the alternatives to the proposed licensed activities, and evaluate environmental justice impacts, including impacts on the White Mesa Utes, Navajos, and low-income people.

**NRC Staff Response:**

The State regulations (R313-24-3(1)) have adopted the statutory requirement for States that regulate 11e.(2) byproduct material. The State may conduct additional evaluations if it desires. The National Environmental Policy Act (NEPA) is not a matter of compatibility for Agreement States and the State of Utah has met the requirements in UMTRCA.

**Summary of Comment:** The commenter in Section 5.2 of the commenter's letter requested that the State notice all amendment requests and requested clarification of terms in the licensing program description. The commenter requested that the State define in writing the criteria by which it will determine whether a proposed amendment will be considered a minor or major amendment.

**NRC Staff Response:**

The State of Utah practice of not noticing minor amendments is consistent with the NRC licensing practice. The clarifications requested in sections 5.23 and 5.24 of the NWC letter involve terms used in the description of major amendments and are appropriately used. The commenter requested clarification for how they would be used for minor amendments and the NRC staff believes that they are not being used by Utah for minor amendments. The State may chose to further document its licensing process, but the existing process is adequate for entering into the amended Agreement. The State's decision on minor and major amendments are subject to appeal under the State's administrative rules and adjudicatory process.

**Summary of Comment:** The commenter identified the Velvet Mine Water Treatment Facility as being dropped by the State and NRC from the uranium recovery program. The status of the Velvet Mine and possible 11e.(2) byproduct material at the site should be addressed by the State.

**NRC Staff Response:**

Mine water treatment facilities are not uranium mills under 10 CFR Part 40. They are considered side stream recovery (the concentration of uranium is a secondary purpose of the facility). Therefore, the waste from the side stream recovery is not 11e.(2) byproduct material. The Mine Water Treatment Facility has been licensed to possess the source material generated in the water treatment process and has been authorized to transfer the source material to the mills mentioned by the commenter for processing in the respective uranium mills. This type of process was one of the first alternate feed processes that were specifically approved by the NRC staff prior to the development of the guidance on alternate feed discussed earlier. Any contamination at the mine site, other than the source material handling equipment which is subject to source material release criteria, would be subject to the State's requirements for mine reclamation, not the requirements for uranium milling.

**Summary of Comment:** The commenter requests that the State and NRC make a serious and comprehensive effort to identify past regulatory program mistakes and failures in Utah, identify reasons for these mistakes, and failures, and propose solutions so that future regulatory programs do not lead to another incomplete and ineffective regulatory regime.

**NRC Staff Response:**

The NRC and the State are implementing the environmental standards established by EPA and public health and safety standards established by NRC. Because the condition at the sites predated the UMTRCA and the standards established thereunder, the concerns discussed by the commenter are issues that NRC has been working on for many years. The decision the Commission is required by statute to make is whether the State of Utah has a regulatory program for 11e.(2) byproduct material that is (1) compatible with the NRC program and (2) adequate to protect public health, safety, and the environment. Although no comprehensive review of past regulatory programs for 11e.(2) byproduct material has been explicitly conducted, NRC has and continues to review operational experience and historical practices and to reflect that experience in our rules, licensing and inspection guidance, and licensing and inspection actions.

**Summary of Comment:** Congress has never delegated to EPA or NRC the authority to regulate the processing of material other than "ore" at licensed uranium and thorium facilities under the Atomic Energy Act of 1946, as subsequently amended. The commenter asserts that because Congress has never delegated such responsibility to the NRC or the EPA, the NRC has no authority to transfer to the State of Utah the regulation of this type of uranium mill operation activity. The informal adoption of a policy by the State is not a means whereby the State can assume responsibility outside of the directives of Congress and outside of EPA and NRC regulation.

**NRC Staff Response:**

As discussed above, the NRC staff holds a different view on what constitutes an "ore" under UMTRCA. The NRC and the State of Utah are addressing the material and facilities covered under UMTRCA in the evaluation and execution of the proposed amended Agreement. The NRC has defined "alternate feed material" in RIS 2000-23 as "ore"; therefore, processing such material for its source material content produces 11e.(2) byproduct material. Both the processing and the management of the resulting wastes are covered under the proposed amended Agreement.

**Summary of Comment:** The commenter requested that the State submit an amended application that recognizes that the State has no authority over the processing of materials other than natural ore at licensed uranium or thorium processing facilities. The commenter also requested that the public promptly be provided with an opportunity to comment on an amended Final Application after the NRC responds to comments.

**NRC Staff Response:**

The Final Application, as currently amended in response to NRC comments (July 22, 2003), does not require modification to be acceptable to NRC. The commenter has raised several broad issues regarding the State's authority and the staff has addressed them in responses to other comments.

**Summary of Comment:** The commenter requested that the public also be provided an opportunity to comment on the Final Application after the NRC responds to the comments on the Alternative Standards proposal by Utah, the staff recommendations to the Commission, and the Commission's decision.

**NRC Staff Response:**

The NRC staff proposed and the Commission approved the parallel processing of the alternative groundwater standard and the evaluation of the Final Application and proposed amendment to the Utah Agreement. Both actions were published separately in the Federal Register requesting public comments on the staff's preliminary findings. In the draft staff assessment, the staff provided its preliminary finding to the Commission that the alternative groundwater standard was acceptable. The analysis of public comments received on the alternative groundwater standard and final staff recommendation are presented in the public comments analysis document for the alternative groundwater standard. If the alternative standard is not acceptable, then the Commission will not approve the amended Agreement.