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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C 20555-0001

September 20, 2001

Jonathan P. Carter, Esq.  
Envirocare of Utah, Inc.  
46 West Broadway, Suite 116  
Salt Lake City, Utah 84101

**SUBJECT: DISPOSAL OF FUSRAP WASTE AT ENVIROCARE**

Dear Mr. Carter;

I am responding to your letter to Michael Weber, Director of the U.S. Nuclear Regulatory Commission's (NRC's) Division of Fuel Cycle Safety and Safeguards, dated February 22, 2001, and your letter to James Lieberman of the NRC Office of General Counsel, dated May 16, 2001, in which you sought clarification concerning several issues associated with the status of mill tailings located at the Wayne and Maywood, New Jersey FUSRAP sites. These issues arise out of the 2.206 Director's Decision issued on December 13, 2000, to respond to the petition submitted by Envirocare and the Snake River Alliance and our January 26, 2001, letter to Kenneth Alkema from Mr. Weber. In your letter of February 22, 2001, you took the view that the pre-UMTRCA (Uranium Mill Tailings Radiation Control Act) mill tailings at Maywood were subject to NRC's requirements as source material. Upon further reflection, you indicated in your May 16, 2001, letter that your view was now that all the tailings at Maywood are 11e.(2) byproduct material.

The third item in your February 22, 2001, letter seeks confirmation that the pre-UMTRCA material at Wayne and Maywood is radiologically, physically, and chemically similar to and compatible with the material in Envirocare's 11e.(2) cell and that disposal of such material in an 11e.(2) cell will provide adequate protection to the public health, safety, and environment. This is our understanding as reflected in our January 26, 2001, letter to Kenneth Alkema. Our understanding of the nature of the material is based on representations made by Envirocare and by the U.S. Army Corps of Engineers. Subject to Envirocare verifying, as it would do with any other material, that the material meets disposal requirements, disposal of such material in a 11e.(2) cell should provide adequate protection of the public health, safety, and environment.

In regard to the fourth item in your February 22, 2001, letter concerning enforcement discretion, the NRC has been relying on its enforcement discretion to allow Envirocare to continue disposing of pre-UMTRCA mill tailings in its 11e.(2) disposal cell. Although the 120-day period identified in our January 26, 2001, letter expired on May 28, 2001, we are currently reviewing Envirocare's license amendment request dated May 22, 2001, to dispose of the material as non-11e.(2) byproduct material in accordance with the NRC's November 30, 2000, interim guidance, set forth in Regulatory Issue Summary 2000-23, "Recent Changes to Uranium Recovery Policy." The NRC will continue to exercise enforcement discretion during its review of the license amendment application.

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Your fifth item in your February 22, 2001, letter seeks confirmation that the NRC would not require Envirocare to take any action or seek a license amendment to address the non-11e.(2) byproduct material already in its 11e.(2) cell. We agree that, at this time, we would not require any action or license amendment. However, you should recognize that there is not yet a commitment from the long-term custodian of the site to accept that material. Until such a commitment is made, we can not assure you that no further action is needed with respect to the non-11e.(2) byproduct material currently in the 11e.(2) cell.

Your February 22, 2001, letter also sought clarification of the licensing requirements applicable to pre-UMTRCA mill tailings containing 0.05 percent by weight or greater uranium or thorium. We agree with your conclusion that such material is subject to NRC requirements applicable to source material and are taking this opportunity to clarify the December 2000, 2.206 Director Decision. That decision noted throughout the document that pre-UMTRCA mill tailings were not regulated by the NRC. That statement was made in the context of mill tailings which normally contain only a very small concentration of uranium or thorium (usually assumed to be somewhat less than 0.05%). However, to the extent that mill tailings contain greater than 0.05% uranium or thorium, the tailings are clearly licensable under 10 CFR Part 40. In regard to determining concentration, it is important to note that the sampling process for the determination of the concentration, absent other applicable requirements, should generally be based on the license conditions of the licensed site for which the material is to be sent. In the absence of license requirements, standard sampling practices should be followed. It is recognized that the process of preparing contaminated material for shipment may result in some mixing with cleaner material as it is "dug up" and loaded for shipment before sampling. This natural dilution of the concentration of uranium and thorium in contaminated material is in contrast to the intentional dilution of contaminated material for the purpose of reducing its concentration below 0.05% which is not acceptable in the absence of prior authorization. Finally, we note that pre-UMTRCA mill tailings from FUSRAP sites which are source material may be placed in a 11e.(2) cell if the conditions of the November 2000 guidance are met.

With respect to the first two items in your February 22, 2001, letter and your May 16, 2001, letter to James Lieberman of the NRC's Office of the General Counsel, we remain of the view as stated in our January 26, 2001, letter to Envirocare that its license for disposal of 11e.(2) byproduct material (NRC Materials License SMC-1559) does not authorize Envirocare to dispose of radioactive material from the Wayne, New Jersey FUSRAP site. However, we have reconsidered the statements in the January 26 letter concerning the classification of the material at the Maywood, New Jersey site.

As stated in the January 26, 2001, letter, the tailings material in the three pits identified in NRC Materials License STC-1333, issued to Stepan Chemical Company at the Maywood site, is 11e.(2) byproduct material. This byproduct material is regulated pursuant to 10 CFR 40.2a.(b) as that material was possessed by a licensee at an inactive site which was licensed both before and after 1978. The NRC's regulatory authority, as explained in the December 30, 2000, Director's Decision, at 19, "under UMTRCA only extends to tailings produced or possessed by a person licensed by the NRC as of the effective date of UMTRCA or thereafter." It is our understanding that the tailings in the three licensed pits were produced in the same processes that produced the tailings possessed by the licensee throughout the rest of the Maywood site and that the tailings on the site have essentially the same radiological characteristics. In 1954, the entire site was in essence licensed as the licensee was licensed to possess unlimited quantities of thorium at the Maywood site. By 1978, the licensee was limited to underground storage of a specified amount of material. A broader license could have been issued, given the material on the site. In fact, notwithstanding that the license only addressed

material in the pits, the NRC took the position in a November 1, 1982, letter from R. Haynes, Region I Administrator, to J. Stuart, Mayor of Maywood, New Jersey that NRC continued to have regulatory responsibility for the thorium on the property. In light of the above, it is our view that the tailings from the entire site are 11e.(2) byproduct material.

Finally, as a result of the above positions, a question remains concerning the treatment of material at the Maywood site which is considered source material because of its greater than 0.05 weight percent thorium and uranium content and also considered 11e.(2) byproduct material because of the process by which it was created. Given that the material fits into two different legal classifications with different regulatory requirements, both of which are protective of the public health and safety, we conclude that the NRC has the discretion to appropriately classify the material. Rather than impose two different regulatory approaches to essentially the same material, we conclude that classifying all the tailings at the Maywood site as 11e.(2) byproduct material, even if some of the tailings contain licensable source material, is sensible regulatory policy.

I hope these responses are helpful to you. If you have any further questions, please contact Mr. Weber at (301) 415-7212, or by e-mail at [mfw@nrc.gov](mailto:mfw@nrc.gov).

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at the Public Electronic Reading Room (<http://www.nrc.gov/NRC/ADAMSfindox.html>).

Sincerely,

Martin Virgilio, Director  
Office of Nuclear Material Safety  
and Safeguards

Docket No. 40-8989  
License No. SMC-1559

cc: W. Sinclair, Utah Division of Radiation Control  
T. Brown, EPA, Region 8, Denver CO  
A Wright, Army Corps of Engineers