

R.M.D. Operations LLC

February 10, 2009

United States Nuclear Regulatory Commission
Attn: Keith McConnell, Deputy Director
Decommissioning and Uranium Recovery
Licensing Directorate
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and
Environmental Management Programs
Washington, D.C. 20555-0001

Re: **License SUC-1591, R.M.D. Operations LLC – Trustee Issues**

Dear Mr. McConnell:

We are in receipt of your letter dated December 24, 2008 in response to R.M.D. Operations, LLC's (RMD's) letter dated October 14, 2008 requesting that the Nuclear Regulatory Commission (NRC) approve RMD's selection of Mr. Anthony J. Thompson, Esq. as standby trustee and Mr. Christopher S. Pugsley, Esq. as successor standby trustee for RMD's standby trust arrangements under License No. SUC-1591. In your letter, NRC Staff concludes that Mr. Thompson and Mr. Pugsley do not satisfy NRC regulations for standby trustees in 10 CFR § 40.36(e)(2)(ii) and NRC guidance at NUREG-1757, Volume 3 entitled *Consolidated NMSS Decommissioning Guidance - Financial Assurance, Recordkeeping, and Timeliness - Final Report*. Specifically, NRC Staff concludes that, despite the broad discretion accorded to NRC under Part 40.36(e)(2)(ii) to determine whether a standby trustee is acceptable, the identified persons do not constitute acceptable standby trustees due to their current status as RMD's counsel of record and to the assertion that Bar Associations do not serve as oversight authorities in a manner similar to that of Federal or State agencies that regulate financial institutions. RMD strongly disagrees with the conclusions of NRC Staff and, by this letter, requests that the Staff reconsider its findings.

Comment #1: “The staff notes that the law firm of Thompson & Simmons acts as RMD's legal counsel. There may be times when a trustee would need legal advice regarding trust administration matters, and having RMD's own attorneys acting as the trustee would create potential conflicts of interest and lead to a lack of trustee independence.”

Response: RMD disagrees with NRC Staff's conclusion that Mr. Thompson or Mr. Pugsley, acting as trustee, would create a conflict of interest that would result in a lack of trustee independence. Initially, financial assurance, including a standby trust, is a component of NRC's licensing framework which presupposes that a licensed entity could enter bankruptcy and, thereby, be unable to perform required decommissioning and decontamination of licensed

facilities and final disposition of licensed material in accordance with NRC regulations and license conditions. In the event that RMD enters bankruptcy and ceases operations under its NRC license, such attorneys (Mr. Thompson and Mr. Pugsley) would have to be approved by the bankruptcy court and be subject to its control and oversight to continue to perform as regulatory counsel for RMD. Even if the bankruptcy court were to approve such continued representation, then Mr. Thompson and Mr. Pugsley could obtain a waiver from RMD to perform trustee duties under the trust agreement which, by this letter, RMD agrees to provide. If the bankruptcy court were not to approve such continued representation, then any potential conflicts of interest would be eliminated. As a result, in either case, RMD's attorneys should be able to effectively discharge their fiduciary duty as trustees without the potential for conflicts of interest.

Next, the existence of a trust document (which the standby trust will become if the financial assurance mechanism is called) presupposes that the trustee is bound to act in accordance with the express provisions of the trust agreement and in accord with the fiduciary duty that is the fundamental assumption underlying trust law throughout the United States. The definition of "fiduciary duty" in Black's Law Dictionary is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. *It is the highest standard of duty implied by law.*" Thus, by definition, the trustee's fiduciary duty is not only the "highest standard of duty implied by law," but also it mandates the subrogation of a trustee's personal interests (e.g., an attorney serving another client) to those of a specific beneficiary named in the trust agreement. Therefore, the trust agreement provides inherent protection against adverse impacts associated with a potential conflict of interest by essentially overriding any such potential conflicts of interest.

Finally, by obtaining a client waiver and by agreeing to serve as a trustee subject to legally-binding fiduciary responsibilities, any attorney necessarily will be performing a legally-defined role that mandates trustee independence. The client waiver effectively demonstrates that the previously-represented client consents to conduct by its counsel or former counsel that may be contrary to its business interests, although the trust funds involved in the NRC-mandated financial assurance package no longer belong to RMD. Accordingly, the mandated fiduciary duty assumes that the trustee, whether or not having represented another client previously, will subrogate any RMD interests to those of the beneficiary identified in the trust agreement (i.e., to act in accordance with NRC's best interests which is to perform D&D of licensed facilities and final disposition of licensed material in order to provide adequate protection of public health and safety). Indeed, a trustee that does not possess the extensive knowledge of NRC regulatory processes and RMD's licensed operations will have to hire a knowledgeable attorney to assist with administration of decommissioning and decontamination (D&D) activities. Therefore, a trust agreement constructed in accordance with existing trust law will provide adequate assurance that either Mr. Thompson or Mr. Pugsley, as trustee, will be required to act in accordance with a trustee's fiduciary responsibilities to NRC as beneficiary under RMD's standby trust agreement. As a result, RMD strongly disagrees with NRC's conclusion in Comment #1 and respectfully requests that NRC reconsider such conclusion.

Comment #2: "Further, the NRC Staff does not agree with your statement that a Bar Association serves a function identical to that served by a Federal or State agency that regulates financial institutions which serve as trustees."

Response: RMD believes that NRC Staff misconstrues the functions of Bar Associations with respect to attorney conduct and underestimates the level of oversight that Bar Associations exert over such conduct. As a general proposition and similar to agencies regulating a financial institution's conduct, Bar Associations serve as the primary oversight authority regarding attorney conduct with respect to clients or other entities with which they do business. Traditionally, Bar Associations, as well as the highest courts in a State's jurisdiction (e.g., Court of Appeals of Maryland), are responsible for the conduct of attorneys in a given jurisdiction and for guaranteeing that clients receive legal services from attorneys who are properly trained in the law and ethics. For example, as stated in the definition of "bar association" in The Free Dictionary:

"The modern U.S. bar association traces its beginnings to the mid nineteenth century. At that time, the practice of law was largely unregulated. People in need of legal services had no assurance that the lawyers they hired had had even minimum legal training. *To address this situation, leaders of the legal profession began to organize self-governing bar associations to establish standards of education and of professional conduct.*"¹

As part of its effort to develop a sense of ethics and professional conduct in attorneys, Bar Associations have created a system of rules to ensure proper professional conduct:

"Bar associations develop guidelines and rules relating to ethics and Professional Responsibility and *enforce sanctions for violation of rules governing lawyer conduct.*"²

This system of Professional Responsibility governs conduct of the legal profession:

"To address this situation, leaders of the legal profession began to organize self-governing bar associations *to establish standards of education and of professional conduct.* The first Code of Professional Ethics was formulated by the Alabama State Bar Association in 1887. The ABA Canons of Professional Ethics followed, in 1908, and were subsequently adopted in whole or in part throughout the United States. These canons were revised and expanded in 1969, as the Model Code of Professional Ethics, and again in 1983, as the Model Rules of Professional Conduct."

With this system of Professional Responsibility in place, State Bar Associations and high courts in State jurisdictions have developed approaches to attorney conduct that monitor and enforce Professional Responsibility standards. These approaches include ethics review boards or their equivalents, due process for attorney being charged with unethical conduct, and adverse consequences for improper attorney conduct such as censure, suspension, and disbarment. In other words, Bar Associations and State high courts have the responsibility and the authority, by

¹ See <http>

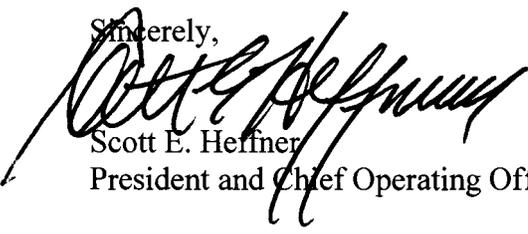
² See *id.*

rule, to regulate the conduct of attorneys in their professional environment to the point of denying an attorney the right to continue practicing law.

With that said, the remaining question is whether the aforementioned system of Professional Responsibility can sufficiently regulate attorney conduct with respect to trust administration. An attorney serving as a trustee is required to conduct him or herself under the rules of Professional Responsibility of their respective State Bar Association(s) and is subject to penalties associated with conduct resulting in a violation of the trustee's fiduciary duty. In the event that such attorney engages in conduct that is deemed improper under these rules (e.g., breach of fiduciary duty), the attorney would then be subject to penalties associated with such conduct and which potentially could result in revocation of his/her license to practice law (disbarment). These consequences also could include potential civil and/or criminal penalties in the jurisdiction where such conduct occurred. Thus, in keeping with the mandatory fiduciary duty imposed on *any trustee* which, as stated above, is the highest standard of responsibility in the United States civil legal system, Bar Associations' regulatory authorities (and the aforementioned potential for civil/criminal penalties), there is more than adequate oversight of attorney conduct for attorneys serving as trustees for NRC standby trusts.

While attorneys and law firms are not financial institutions regulated by federal or State agencies, the rules inherent in trust law in this country and those of Bar Associations governing attorney conduct are essentially parallel to the oversight of financial institutions and would serve to provide viable and effective protection of any trust beneficiary's best interests. Indeed, attorneys regularly function as trustees in every jurisdiction in the United States. As a result, RMD respectfully requests that NRC reconsider its decision to reject the appointments of Mr. Thompson and Mr. Pugsley as standby trustees for RMD's NRC standby trusts and approve such appointments under its broad authority in 10 CFR § 40.36. If you have any questions on this letter, please do not hesitate to contact me at your convenience. In addition, RMD would be happy to meet with NRC Staff to discuss this matter in more detail. Thank you for your time and consideration on this matter. Please call me or Duane Bollig, at 303.424.5355, if you have any questions related to this issue.

Sincerely,



Scott E. Heffner
President and Chief Operating Officer

cc: Chris Pugsley, Esq.
Ted Carter, NRC