



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

January 29, 2018

Mr. Carmelo Melendez, Director
U.S. Department of Energy
Office of Legacy Management
1000 Independence Avenue, SW
Washington, DC 20585

SUBJECT: CLARIFICATION OF ALLOWABLE LAND USE AT URANIUM MILL TAILINGS
RADIATION CONTROL ACT (UMTRCA) TITLE I AND TITLE II DISPOSAL
SITES

Dear Mr. Melendez:

I am writing in response to the U.S. Department of Energy's (DOE's) request for clarification of the allowable land uses at Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) Title I and Title II Disposal Sites, as discussed in the UMTRCA and Title 10 of the *Code of Federal Regulations* (10 CFR) Section 40.27, *General license for custody and long-term care of residual radioactive material disposal sites*, and Section 40.28, *General license for custody and long-term care of uranium or thorium byproduct materials disposal sites*. This request was made during discussions between U.S. Nuclear Regulatory Commission (NRC, the Commission) and DOE staff regarding potential future alternative uses at DOE's UMTRCA Title I and Title II sites and during a recent visit by NRC staff to DOE's Title I sites in Colorado.

UMTRCA Title I, Section 104(h) states, in part, that:

No provision of any agreement under section 103 shall prohibit the Secretary of the Interior, with the concurrence of the Secretary of Energy and the Commission, from disposing of any subsurface mineral rights by sale or lease (in accordance with laws of the United States applicable to the sale, lease, or other disposal of such rights) which are associated with land on which residual radioactive materials are disposed and which are transferred to the United States as required under this section if the Secretary of the Interior takes such action as the Commission deems necessary pursuant to a license issued by the Commission to assure that the residual radioactive materials will not be disturbed by reason of any activity carried on following such disposition.

UMTRCA Title II, Section 201(b)2(B) states, in part, that:

If the Commission determines by order that use of the surface or subsurface estates, or both, of the land transferred to the United States or to a State under subparagraph (A) would not endanger the public health, safety, welfare, or environment, the Commission, pursuant to such regulations as it may prescribe, shall permit the use of the surface or subsurface estates, or both, of such land in a manner consistent with the provisions of this section.

The NRC staff's understanding of the difference between what may be permitted for Title I and Title II sites derives from UMTRCA itself, and what other uses are permitted for each class of site.

These requirements are reflected in 10 CFR 40.27(d), which states, in part, that:

As specified in the Uranium Mill Tailings Radiation Control Act of 1978, as amended, the Secretary of the Interior, with the concurrence of the Secretary of Energy and the Commission, may sell or lease any subsurface mineral rights associated with land on which residual radioactive materials are disposed. In such cases, the Commission shall grant a license permitting use of the land if it finds that the use will not disturb the residual radioactive materials or that the residual radioactive materials will be restored to a safe and environmentally sound condition if they are disturbed by the use.

And 40.28(d), which states, in part, that:

Upon application, the Commission may issue a specific license, as specified in the Uranium Mill Tailings Radiation Control Act of 1978, as amended, permitting the use of surface and/or subsurface estates transferred to the United States or a State. Although an application may be received from any person, if permission is granted, the person who transferred the land to DOE or the State shall receive the right of first refusal with respect to this use of the land.

As outlined above for Title I sites, only the subsurface mineral rights may be sold or leased, whereas, for Title II sites, use of the surface or subsurface estates, or both, is allowed, consistent with NRC requirements, including the need to license the user, and the applicable provisions of UMTRCA. In either case, DOE would remain the owner of the site and the 11(e)2 byproduct material. As such, any transfer of the surface estate at an UMTRCA Title I site is not permitted, and therefore, could not be approved by the NRC. DOE may otherwise manage the site as it thinks appropriate, so long as it complies with UMTRCA and its obligations under the NRC general license. Specifically barred for Title I sites, however, is the use of the surface estates by another party (e.g., under the lease agreement described for the Durango site, discussed below).

Further, while transfer of the surface and/or subsurface estates is permitted under certain circumstances at UMTRCA Title II sites, use of the surface or subsurface estates by an entity other than the DOE will generally require that a specific license be issued by the NRC, as required in 10 CFR 40.28(d). In addition, DOE would remain the owner of the land, and would need to meet its requirements under UMTRCA and NRC regulations for its general license.

During evaluation of this request for clarification of allowable land use, the NRC staff identified that by letter dated May 20, 2011,¹ the staff accepted a revision to the Long Term Surveillance Plan (LTSP) for the Durango, Colorado, disposal site. The accepted Durango LTSP revisions would accommodate the following two potential alternative uses:

¹ Agencywide Documents Access and Management System Accession No. ML111290657.

- lease the disposal area to private industry or electric utilities to place solar photovoltaic panels on top of the disposal cell cover or on previously disturbed areas west of the cell to generate electricity; and,
- coordinate with other government agencies in management of site activities, such as coordination with state agencies to enhance site resources to the benefit of the local wildlife population.

The letter further references 10 CFR 40.28, which applies only to Title II sites, even though the Durango site is an UMTRCA Title I site, governed by 10 CFR 40.27. Upon review, we have determined that the NRC staff should not have accepted this change to the LTSP for the reasons discussed above. Based on a discussion with the staff on November 15, 2017, the DOE committed to submit a revised LTSP for the Durango, Colorado, Disposal Site, specifically updating Section 4.0, *Beneficial Reuse Project*, accordingly.

Based on a review of DOE Annual UMTRCA Site Inspection Reports, the NRC staff is also aware that DOE has previously allowed ranchers to graze their cattle on Title I and Title II sites. The staff has no concerns regarding this activity at this time, but notes that DOE is responsible for ensuring that any damage done to the disposal cell associated with the grazing is addressed in a timely manner and reported to the NRC consistent with the LTSP.

The NRC staff understands the importance of returning land to productive use where practicable, and looks forward to working with DOE in permitting such use where appropriate while ensuring the safe long-term management of these sites.

In accordance with Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2.390 of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's ADAMS. ADAMS is accessible from the NRC Website at <http://www.nrc.gov/reading-rm/adams.html>.

C. Melendez

- 4 -

If you have any questions concerning the content of this letter, please contact me at 301-415-7319 or by email at john.tappert@nrc.gov.

Sincerely,

/RA/

John R. Tappert, Director
Division of Decommissioning, Uranium Recovery
and Waste Programs
Office of Nuclear Material Safety
and Safeguards

Docket No.: WM-00048

cc: distribution via listserv

SUBJECT: CLARIFICATION OF ALLOWABLE LAND USE AT URANIUM MILL TAILINGS
RADIATION CONTROL ACT (UMTRCA) TITLE I AND TITLE II DISPOSAL
SITES DATED JANUARY 29, 2018

DISTRIBUTION:

RidsRgn1MailCenter
J. Whited, NMSS

RidsRgn3MailCenter
N. Orlando, NMSS

RidsRgn4MailCenter

ADAMS Accession No.: ML17216A800

***via e-mail**

| OFFICE | DUWP/MDB/PM | DUWP/LA | DUWP/MDB/BC | OGC (NLO) | DUWP |
|---------------|-------------|------------|-------------|-------------|------------|
| NAME | JWhited | CHolston | SKoenick | AGendelman* | JTappert |
| DATE | 08/08/2017 | 08/08/2017 | 12/05/2017 | 12/01/2017 | 01/29/2018 |

OFFICIAL RECORD COPY