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NUCLEAR REGULATORY COMMISSION

10 CFR Part 40

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[Docket No. PRM-40-23]

Sierra Club; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-40-23) submitted by the Sierra Club. The petitioner submitted an amendment to their petition which is also being denied. The original petition requested that the NRC amend its regulations pertaining to uranium mill tailings sites to require an NRC license for the possession of material being cleaned up under Title I of the Uranium Mill Tailings Radiation Control Act (UMTRCA). The NRC believes that petitioner's proposal is inconsistent with both the intent and specific requirements of Title I of UMTRCA. In an amendment to its original petition, the petitioner requested that if their original petition is denied, that NRC ensure that the management of the material at, or derived from, inactive sites be conducted in a manner that protects the public health and safety and the environment. Prior to DOE cleanup at these sites, NRC is not authorized by either UMTRCA or the Atomic Energy Act (AEA) to perform such management oversight. UMTRCA has two very distinct parts: Title I for inactive sites to be cleaned up by the

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Department of Energy (DOE) with NRC concurrence, and Title II which covers sites licensed by the NRC, AEC or Agreement States as of January 1, 1978 and all new sites. The petitioner's proposal would, in essence, require that the NRC regulate Title I sites in a similar manner as Title II sites. UMTRCA, however, clearly distinguishes the authorities and responsibilities of Federal agencies in regulating Title I and Title II sites.

ADDRESSES: Copies of the petition for rulemaking, the public comments received, and the NRC's letter to the petitioner are available for public inspection or copying in the NRC Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mark Haisfield, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-3877.

SUPPLEMENTARY INFORMATION:

The Petition

On February 25, 1981 (46 FR 14021) and May 2, 1983 (48 FR 19722), the Nuclear Regulatory Commission published notice of receipt of a petition and subsequent amendment to the original petition for rulemaking filed by the Sierra Club. The petition and amendment requested that the NRC amend its regulations or practices regarding licensing or management of the possession of uranium mill tailings at inactive sites (Title I of the Uranium Mill Tailings Radiation Control Act).

The petitioner proposed that the NRC take the following regulatory actions to ensure that public health and safety and the environment are adequately protected from the hazards associated with byproduct material:

1. Repeal the licensing exemption for inactive mill tailings sites subject to the Department of Energy's remedial program.
2. Require a license for the possession of byproduct material on any other property in the vicinity of an inactive mill tailings site if the byproduct materials are derived from the inactive mill tailings site.
3. Or alternatively, conduct a rulemaking to determine whether a licensing exemption of these sites or the byproduct material derived from the sites constitutes an unreasonable risk to public health and safety.

In the 1983 amendment, the petitioner requested that, in the event that NRC denied the petitioner's earlier request that NRC repeal the licensing exemption for inactive sites or conduct the requested rulemaking, the NRC take further action. Specifically, the petitioner requested that the NRC ensure that the management of byproduct material located on or derived from inactive uranium processing sites is conducted in a manner that protects the public health and safety and the environment from the radiological and nonradiological hazards associated with uranium mill tailings.

Whether the original petition is granted or not, the petitioner also requested that the NRC establish requirements to govern the management of byproduct material, not subject to licensing under Section 81 of the Atomic Energy Act (42 U.S.C. 2111), comparable to the requirements applicable to similar materials under the Solid Waste Disposal Act, as amended (42 U.S.C. 6901 et seq). In the alternative, the petitioner suggested that NRC extend the coverage of the requirements in 10 CFR Part 40, Appendix A, which are now applicable only to licensed byproduct material, to byproduct material not subject to licensing. In addition, the petitioner requested that NRC issue regulations that would require a person exempt from licensing to conduct monitoring activities, perform remedial work, or take any other action necessary to protect health and safety and the environment.

Basis for Request

As a basis for the requested action, the petitioner stated it is a national conservation organization with hundreds of thousands of members. Substantial numbers of Sierra Club members live, work, and travel in proximity to the inactive uranium mill tailings sites, as well as properties in the vicinity of the sites which have been contaminated with radioactive materials derived from them. The petitioner states that the presence of such hazardous materials at these locations constitutes an unreasonable risk to the health and safety of these members. These health hazards may also impair the value of the homes and properties of these local members. In addition, these members make substantial use of nearby lands and waters for hiking, climbing, fishing, boating, camping,

photography, nature study, and other forms of physical and spiritual recreation. Their use of these lands and waters is adversely affected by the environmental degradation which results from the continued, unregulated presence of radioactive materials.

The Sierra Club's interest is the protection of present and future Sierra Club members, their progeny, and the public from increased risks of cancer and genetic mutations that may occur as the result of their exposure to unregulated radioactive materials at inactive uranium mill tailings sites and at other properties contaminated by this radioactive material. By the petition, the Sierra Club sought to insure that public exposure to the radioactive material at such sites and locations is minimized and that off-site migration of radioactivity is prevented.

The petitioner also states that for more than 80 years it has sought to create public-governmental cooperation in the preservation and enhancement of the natural environment and its resources of air, water, land, and wildlife. The Sierra Club has also endeavored to provide the public and government with information relevant to environmental issues and to stimulate informed public discussion of them.

The organizational objectives of the Sierra Club are fostered by its activities and its members, including their representation by counsel before legislative bodies, courts, and public agencies. In pursuit of its objectives, the Sierra Club has been involved in many proceedings before the Atomic Energy Commission, and now the Nuclear Regulatory Commission, to safeguard its members and the public at large from uses of radioactive materials which pose undue risks to public health and safety and the environment.

Public Comments on the Petition

The notices of filing of petition and amendment for rulemaking in the Federal Register invited interested persons to submit written comments concerning the petition. The NRC received three comments in response to the original petition and none in response to the amendment. All three were from industry or their representatives, and opposed the petition.

Staff Action on the Petition

The response to the petition for rulemaking was delayed because of other rulemaking actions related to uranium mill tailings sites. Because of a number of issues related to uranium mill tailings regulations at the time the petition and its amendment were received, including potential court actions, changing legislative requirements, and another petition, the NRC needed to reassess its entire uranium mill tailings regulatory program. Congressional actions imposed mandated changes to uranium mill tailings regulations. These required changes were not completed until the end of 1987. Another modification to Part 40 regulations was required to allow for the licensing and long-term care of mill tailings sites in response to a rapidly approaching program end date (Congressional action has since provided additional time). This action was started in 1987. An Advance Notice of Proposed Rulemaking and a Proposed Rule have since been issued in the Federal Register (53 FR 32396; August 25, 1988, and 55 FR 3970; February 6, 1990, respectively).

Although the NRC was considering the petitioner's proposals during this reassessment period, none of the specific regulatory changes eventually made were directly related to the petition. Once the required regulatory changes were made or proposed, the NRC directed its attention to fully respond to petitioner's request.

Reasons for Denial

The petitioner's first proposal requests that the exemption for inactive mill tailings sites subject to the DOE Remedial Action Program should be repealed. The petitioner states that the Atomic Energy Act, as amended, requires the Commission to license the possession of byproduct materials at these sites, unless it makes an express finding that public health and safety will not be imperiled by a licensing exemption. The petition also states that no licensing exemption for DOE-designated inactive sites can be implied from the legislative history of the Uranium Mill Tailings Radiation Control Act. Finally, petitioner states that NRC should determine that licenses are required for the DOE inactive sites.

The NRC believes that the petitioner has misinterpreted both the intent and specific requirements of UMTRCA. UMTRCA has two very distinct parts: Title I for inactive sites to be cleaned up by DOE and Title II which covers sites licensed as of January 1, 1978 and all new sites. The exclusion of Title I sites in 10 CFR Part 40 was specifically added to comply with UMTRCA during the active remedial action phase.

NRC's regulations, that petitioner is requesting be amended, deal exclusively with the regulation of Title II sites. Title I sites are not covered by these regulations for the following reasons:

1. Unless specifically authorized by the Congress, DOE is not subject to NRC regulation.
2. Title I specifically requires an NRC license only after completion of remedial actions to cover the long-term care of these sites.
3. Congress specifically gave NRC only a review and concurrence role for DOE sites specified in Title I (inactive sites) during the remedial action phase of the program.

Petitioner appears to assume that since the residual radioactive material is uranium mill tailings it should legally be considered equally subject to NRC jurisdiction as Title II material. However, even though the material under the Title I program may be chemically and physically similar to material under the Title II program, UMTRCA makes a very clear distinction in how this material is to be controlled and regulated.

The NRC concludes that the UMTRCA statutory basis for the DOE program under Title I does not provide a sufficient basis for NRC to bring DOE within NRC licensing jurisdiction during the active remedial action phase.

The petitioner's second proposal requests that the NRC should also require licensing of the tailings used for construction or other purposes off-site where public health and safety is imperiled thereby. Under Title I of UMTRCA these are called vicinity properties and are to be remediated by DOE under the Title I program. As with the disposal sites, NRC's role has been clearly defined in UMTRCA as one of concurrence and consultation. Use of residual radioactive material for construction and

other purposes occurred prior to establishment of Federal authority, as stipulated in UMTRCA, Title I. Prior to that time, residual radioactive material and its use were not controlled. With the establishment of UMTRCA Title I authority, EPA promulgated standards by which DOE has been reclaiming the abandoned sites and remedying vicinity properties where residual radioactive material had been used for construction and for backfill and grading purposes.

Cleanup of these properties is conducted as part of the two general DOE remedial action programs -- The Uranium Mill Tailings Remedial Action Program (established in 1978) and the Grand Junction Remedial Action Program (established in 1970). After the processing activities terminated at the Title I sites, windblown tailings and tailings hauled off for construction resulted in contamination of off-site locations. This material was not considered, legally, to be a controlled radioactive material until passage of UMTRCA in 1978. When the Environmental Protection Agency established regulations for conducting cleanup at processing sites, it also established criteria for cleanup of vicinity properties.

The number of off-site areas around each inactive site varies from a few, up to thousands (mostly around Grand Junction, Colorado). DOE has been cleaning up these areas, and transporting the residual radioactive material to the corresponding site for disposal. In some cases, the DOE with NRC concurrence, has stabilized the materials in place. These locations were judged to pose little risk to the public, and cleanup would have involved detrimental impacts far outweighing the benefits. The vicinity property cleanups have had to be done in coordination with the processing site cleanup, since this is where the contaminated material is disposed of.

Alternately, the petitioner requests that the NRC should conduct a rulemaking to determine whether a licensing exemption of such sites or classes of byproduct material will constitute an unreasonable risk to the health and safety of the public.

The NRC does not believe a rulemaking is necessary, because these sites are not exempted from inclusion in the remedial action program. They are being controlled and regulated under the provisions of Title I of UMTRCA. As discussed previously, Title I provides NRC a concurrence and consultation role during remedial actions and provides for long-term care licensing after remedial actions are completed. The NRC has and will continue to consult and concur with DOE actions to cleanup the inactive sites.

The NRC is completing a rulemaking providing criteria and procedures for the long-term (perpetual) care of these sites. Proposed amendments to 10 CFR Part 40 were issued in the Federal Register on February 6, 1990, 55 FR 3970. The final rule is scheduled to be completed by the end of 1990. The inactive sites will be licensed under this new rule after completion of remedial actions as specified and required by Title I of UMTRCA.

In the petitioner's amendment to their original petition they requested that, in the event that the NRC denies the petitioner's earlier request that NRC repeal the licensing exemption for inactive sites or conduct the requested rulemaking, the NRC take further action. Specifically, the petitioner requested that the NRC ensure that the management of byproduct material located on or derived from inactive uranium processing sites is conducted in a manner that protects the public health

and safety and the environment from the radiological and nonradiological hazards associated with uranium mill tailings.

The petitioner also requested, whether the original petition is granted or not, that the NRC establish requirements to govern the management of byproduct material, not subject to licensing under Section 81 of the Atomic Energy Act, comparable to the requirements applicable to similar materials under the Solid Waste Disposal Act, as amended. In the alternative, the petitioner suggested that NRC extend the coverage of the requirements in 10 CFR Part 40, Appendix A, which are now applicable only to licensed byproduct material, to byproduct material not subject to licensing. In addition, the petitioner requested that the NRC issue regulations that would require a person exempt from licensing to conduct monitoring activities, perform remedial work, or take any other action necessary to protect health and safety and the environment.

The NRC is denying this amendment for essentially the same reasons as the original petition. Title I of UMTRCA provides the NRC only a review and concurrence role in remedial actions. Management of the residual radioactive material prior to and during remedial actions is the responsibility of the Department of Energy. Licensing and concomitant regulation by the NRC occurs only after completion of the remedial action.

While it is true that the sites are not licensed by the NRC prior to completion of remedial action, the sites are managed by DOE under a comprehensive environmental, health, and safety program similar to the types of programs required by the NRC under 10 CFR Part 20. This program includes the types of activities requested by petitioner, including monitoring and other actions necessary to provide adequate protection of

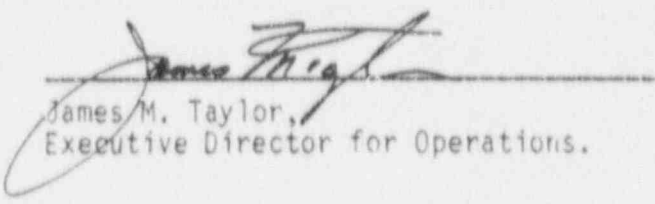
public health and safety and the environment. In addition, the remedial action program operates under a series of State laws and regulatory programs intended to protect human health and the environment. Although the Commission does not have the authority to approve DOE's environmental, health, and safety program for these sites, the NRC has reviewed and commented on the adequacy of the program and DOE has considered these comments in the design and implementation of its program. Furthermore, NRC exercises oversight through its concurrence role in DOE's remedial program. NRC must concur with DOE's completion determination that the remedial action at any site complies with EPA standards for inactive milling sites. These standards require longevity of isolation from the unrestricted environment, reduction of radon exhalation from the disposal impoundment, geotechnical stability of the disposal structure and ground-water protection. Vicinity property cleanup must also be performed to reduce risks to specific unrestricted use levels. By means of these clearly stipulated responsibilities, UMTRCA Title I established mechanisms in the performance of the remedial work, construction and performance monitoring and perpetual custody and surveillance under NRC license, which all contribute to the main goal of protection of the public health, safety and the environment. The added regulatory mechanism of direct licensing prior to final cleanup would not enhance this main goal; rather it would delay the completion of remedial action, because of the added administrative burden associated with the formal licensing process.

The DOE has essentially completed cleanup at eight sites. At seven sites DOE is actively proceeding toward final cleanup. Initial planning has been completed for the remaining nine sites although significant

construction has not yet started. Construction activities at all the inactive sites is scheduled to be completed by the end of 1994.

Dated at Rockville, Maryland this 8th day of June, 1990.

For the Nuclear Regulatory Commission.


James M. Taylor,
Executive Director for Operations.