

FOIA - 91-394

RESPONSE TYPE

☒ FINAL☐ PARTIAL

DATE

MAY 29 1992

DOCKET NUMBER(S) (if applicable)



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

REQUESTER

John D. Gaught

PART I.—AGENCY RECORDS RELEASED OR NOT LOCATED (See checked boxes)

☐ No agency records subject to the request have been located.

☐ No additional agency records subject to the request have been located.

☐ Requested records are available through another public distribution program. See Comments section.

☐ Agency records subject to the request that are identified in Appendix(es) _____ are already available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC.

☒ Agency records subject to the request that are identified in Appendix(es) W are being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC in a folder under this FOIA number.

☐ The nonproprietary version of the proposal(s) that you agreed to accept in a telephone conversation with a member of my staff is now being made available for public inspection and copying at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC in a folder under this FOIA number.

☐ Agency records subject to the request that are identified in Appendix(es) _____ may be inspected and copied at the NRC Local Public Document Room identified in the Comments section.

☐ Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, N.W., Washington, DC.

☒ Agency records subject to the request are enclosed.

☐ Records subject to the request have been referred to another Federal agency(ies) for review and direct response to you.

☒ Fees

☐ You will be billed by the NRC for fees totaling \$_____.

☒ You will receive a refund from the NRC in the amount of \$ 617.42.

☐ In view of NRC's response to this request, no further action is being taken on appeal letter dated _____, No _____.

PART II. A—INFORMATION WITHHELD FROM PUBLIC DISCLOSURE

☐ Certain information in the requested records is being withheld from public disclosure pursuant to the exemptions described in and for the reasons stated in Part II, B, C, and D. Any released portions of the documents for which only part of the record is being withheld are being made available for public inspection and copying in the NRC Public Document Room, 2120 L Street, N.W., Washington, DC in a folder under this FOIA number.

COMMENTS

The record is identified on the enclosed Appendix W.
The actual fees associated with the processing of your request are as follows:
\$174.48 (6 hours & 15 minutes of professional search @ \$27.93 per hour)
\$490.91 (17 hours & 35 minutes of professional review @ \$27.93 per hour)
\$389.17 (29 hours & 25 minutes of clerical search @ \$13.23 per hour)
\$132.30 (10 hours of clerical review @ \$13.23 per hour)
\$407.20 (2,036 pages of duplication @ 20 cents per page)
\$1,594.06 - TOTAL

Estimated fees paid on 10/24/91: \$2,211.48
REFUND: \$ 617.42

SIGNATURE, DIRECTOR, DIVISION OF FREEDOM OF INFORMATION AND PUBLICATIONS SERVICES

Donnie H. Shively

9211230411 920529
PDR FOIA
GAUGHT91-394 PDR

Re: FOIA-91-394

APPENDIX W
RECORDS RELEASED TO REQUESTER

NUMBER	DATE	DESCRIPTION
1.	4/11/90	Memo from Denton to [redacted] re: SECY-90-073 - Proposed Amendment to Utah Section 274b Agreement - Correct Staff Response, with attachment dated 4/10/90 (6 pages)

April 11, 1990

MEMORANDUM FOR: Samuel J. Chilk
Secretary

FROM: Harold R. Denton, Director
Office of Governmental and Public Affairs *IS/*

SUBJECT: SECY-90-073 - PROPOSED AMENDMENT TO
THE UTAH SECTION 274b AGREEMENT -
CORRECTED STAFF RESPONSE

On March 28, 1990 I provided staff responses to Commissioner Curtiss' questions concerning Utah's plans for licensing a low-level radioactive waste disposal site. We have since learned that the response to Question 2 contained a sentence that was added during final preparation of the staff responses and should not be included. A corrected copy is attached.

Attachment:
As stated

cc: Chairman Carr
Commissioner Roberts
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick

Distribution

SP RF
~~CHA RF~~
JOLubenau
VMiller
FCombs
Utah File

*See previous concurrences

FC	:SP:SA*	:SP:SA:AD*	:SP:D*	:GPA:DD	:GPA:DD	:
AME	:JLubenau:dd	:VMiller	:CKammerer	:SSchwartz	:HEDenton	:
ATE	:4/10/90	:4/10/90	:4/10/90	:4/11/90	:4/11/90	:

OFFICIAL RECORD COPY

FOIA 91-094
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W-1

April 10, 1990

CORRECTED COPY

Question 1: Does Utah intend to comply with section 61.59(a), either by owning the disposal site itself or by taking steps to obtain federal ownership? If not, why not?

Response:

Utah has issued License No. UT 2300249 to Envirocare of Utah authorizing land disposal of naturally occurring radioactive material (NORM) in Clive, Utah. The site had been previously used by the U.S. Department of Energy (DOE) to dispose of certain mill tailings under Title I of the Uranium Mill Tailings Radiation Control Act of 1978. Title to the portion of the Clive site used for this purpose was transferred to DOE. In its program narrative supporting the request for the amendment to its section 274b agreement with NRC, Utah reported that prior to receiving the application for the NORM disposal license, the licensee requested an exemption from the State requirements¹ for State or Federal ownership of the waste disposal site. The request was made pursuant to Utah regulation R447-12-125 which states:

"The Bureau may upon application therefor or upon its own initiative grant such exemptions or exceptions from the requirements of these rules as it determines are authorized by law and will not result in undue hazard to public health and safety or property."

Utah granted the request for the following reasons:

- "a. The Utah code does not provide for State ownership of this type of facility and it would require legislative action to amend the code.
- b. The Utah Bureau of Solid and Hazardous Waste Management siting requirements stipulate private ownership. Therefore, a precedence factor was taken into account.
- c. It is believed that the ownership issue does not necessarily relate to issues of protection of the public health and safety.
- d. The recognition that, ultimately (upon failure of all other controls), the State would be responsible for any public health related problems that might occur.
- e. The belief that an undisputable surety arrangement for long term monitoring and maintenance would provide for public safety and health."²

¹ See, Utah Radiation Control Rule R 447-25-28.

² "Utah Radiation Regulatory Program," p. 12.

The Utah Radiation Technical Advisory Committee reviewed this position and the consensus was to grant the exemption.

The staff believes that, for these same reasons, Utah will continue the exemption when it amends the existing license to add the radioactive materials covered by the amended section 274b agreement.

Question 2: If Utah intends to exempt the licensee from the requirements of section 61.59(a) by invoking the authority contained in section 61.6, is that acceptable to the staff? If so, why? If not, what recourse do we have if we approve the Agreement as proposed in SECY-90-073?

Response:

Although there is presently a statutory requirement with respect to ownership of land that has been used for the disposal of Section 11.e(2) byproduct material i.e., uranium or thorium mill tailings³ there is no parallel Federal statutory requirement for State or Federal ownership applicable to land used for the disposal of low-level radioactive waste.

³ Section 274 o.(1) of the Atomic Energy Act, as amended, states:

"In the licensing and regulation of byproduct material, as defined in section 11e.(2) of this Act, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection b., a State shall require--

(1) compliance with the requirements of subsection b. of section 83 (respecting ownership of byproduct material and land),..."

In such cases, unless the Commission determines otherwise prior to termination of a license, ownership of the land must be transferred to the United States or under certain circumstances to a State.

Section 83(b)(1)(A) provides in part that:

"(b)(1)(A) The Commission shall require by rule, regulation, or order that prior to the termination of any license which is issued after the effective date of this section, title to the land, including any interests therein (other than land owned by the United States or by a State) which is used for the disposal of any byproduct material, as defined by section 11e.(2), pursuant to such

...(footnote 3 cont'd on next page)

Consequently, issuance by the State of an exemption would not be contrary to Federal law and therefore would be "authorized by law." As noted in response to the first question, Utah determined the exemption was authorized by law, provided reasons supporting the exemption and determined that the public health and safety was protected.

10 CFR 61.6 states that the Commission may, "upon application by any interested person, or upon its own initiative, grant any exemption from the requirements of the regulations in this part as it determines is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest."⁴ Neither this section nor the underlying Statement of Considerations impose or imply other restrictions on the use of this provision, such as, for example, by placing land ownership requirements of 10 CFR 61.59(a) beyond its reach.

Therefore, the staff concludes that the expected action to be taken by Utah is acceptable.

With respect to recourse by NRC, if the Commission is of the opinion that in every case land ownership by the State or Federal government is essential to assure adequate maintenance of the site during the period of

³ (cont'd)
license shall be transferred to--

- (i) the United States or--
- (ii) the State in which such land is located, at the option of such State.

unless the Commission determines prior to such termination that transfer of title of such land and such byproduct material is not necessary or desirable to protect the public health, safety, or welfare or to minimize or eliminate danger to life or property. Such determination shall be made in accordance with section 181 of this Act. Notwithstanding any other provision of law or any such determination, such property and materials shall be maintained pursuant to a license issued by the Commission pursuant to section 81 of this Act in such manner as will protect the public health, safety, and the environment."

In 1981 the Commission exercised this exemption authority with respect to the Rhode Ranch land in Texas, a former mill site, based upon health and safety considerations. (See, 46 FR 2982, June 3, 1981 (attached)).

⁴ Similar provisions can be found in other parts of the Commission's regulations. For example, see 10 CFR 30.11(a), 40.14(a) and 70.14(a).

institutional control, then Commissioner Remick's recommendation that staff should "develop recommendations for Commission action to limit the availability of the exemption provision" should be followed.

Question 3: Is this a concern that is unique to the Utah site or could it arise for other low-level waste facilities? What are the staff's views on whether this issue should be addressed in a generic manner, before the Utah agreement is amended?

Response:

Although this concern could occur for other LLW facilities, as far as staff is aware, the concern is unique to the Utah site. There is neither a legal nor a health and safety basis for deferring Commission action on Utah's request for an amended section 274b agreement unless Federal or State ownership is determined to be a compatibility matter. As noted in the response to the second question, should staff conclude that in every case land ownership by the State or Federal government is essential to assure adequate maintenance of LLW sites during the period of institutional control, then recommendations should be developed for Commission action. Should such changes be made by the Commission and be identified as a matter of compatibility for the Agreement States, the Agreement States, including Utah, will be so advised. At the present time there is no compatibility basis for requesting the State of Utah to take legislative action to require State ownership of the disposal site. Informal discussions with Utah staff indicate, however, that legislative action may be feasible. It should be noted that the transfer of ownership to the Federal government is not presently precluded.

Question 4: Does this issue arise only in the low-level waste area or are there other areas in our regulations where similar exemption authority exists?

Response:

As noted in connection with our response to Question 2 (see footnote 4, supra) there are several areas in NRC regulations where similar exemption authority exists. Although NRC staff does not maintain statistics on State use of this authority, our overall impression is that exemptions are infrequently granted by the Agreement States. Staff, in their oversight of the Agreement States, would normally find State issued exemptions through their reviews of license files, through discussions with cognizant State staff, and when a State requests NRC technical assistance in reviewing a request for an exemption.

Question 5: What are the implications, if any, of permitting Agreement States to grant exemptions from our regulations where those regulations constitute matters of compatibility? If

a State is permitted to grant exemptions from regulations that the NRC has determined constitute matters of compatibility, what limitations, if any, are there on a State's ability to exercise this authority?

Response:

The Commission Policy Statement, "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption thereof by States Through Agreement" sets out criteria for a State program to meet to enable a Commission finding that the proposed State program is compatible with that of the NRC.⁵ Included in the criteria for State Radiation Protection Standards (nos. 2-12) is the following:

"Consistent with the overall criteria here enumerated and to accommodate special cases or circumstances, the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety or to grant necessary exemptions which will not jeopardize health and safety."
(emphasis added).

Agreement States satisfy this criterion usually through language in the State enabling legislation and implementing language in the State regulations.

We see no signs whatsoever that the Agreement States have or would use their exemption authority with any less care and due regard for the law and the public health and safety than the Commission.

⁵ 48 FR 33376, July 21, 1983

⁶ Ibid., Criterion 12.

⁷ Footnote 2 to the Policy Statement notes that Suggested State regulations and State legislation "will give content to all criteria enunciated." Section 7.(c) of the Council of State Governments Suggested State Radiation Control Act and Section A.3 of the Conference of Radiation Control Program Directors, Inc. Suggested State Regulations for Control of Radiation provide statutory and regulatory language corresponding to the exemption authority portion of Criterion 12.