



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

May 3, 1999

PDR  
par:  
E. Spellman Williams

Stephen C. Collins, Chairman  
Conference of Radiation Control Program Directors, Inc.  
Office of Executive Director  
205 Capital Avenue  
Frankfort, Kentucky 40601

Dear Mr. Collins:

I am responding to your April 9, 1999, letter to Commissioner Dicus in which you discussed your concern that the U.S. Army Corps of Engineers (USACE) is performing cleanup work at the Formerly Utilized Sites Remedial Action Project (FUSRAP) sites without independent regulatory oversight. You state that the Board of Directors of the Conference of Radiation Control Program Directors (CRCPD) believes that the U.S. Nuclear Regulatory Commission has authority to regulate USACE's cleanup of FUSRAP material and should exercise such authority in order to assure that adequate measures are being taken to protect human health and the environment. Alternatively, you suggest that if NRC believes it does not have such authority, it should approach Congress to obtain appropriate authority to regulate FUSRAP material.

For the most part, the material in question is the residual contamination which remains at sites throughout the United States from work performed during the 1940s, 1950s, and 1960s by the Manhattan Engineer District and the Atomic Energy Commission (AEC) as part of the nation's early atomic energy program. The contaminants that remained at these sites involved primarily low levels of uranium, thorium and radium, with their associated decay products. The AEC, which eventually became the U.S. Department of Energy (DOE), began the FUSRAP in 1974 to study these sites and take appropriate cleanup action. Congress assigned responsibility to the DOE for the FUSRAP. NRC did not have regulatory oversight of this program.

By 1997, the DOE had identified 46 sites in the program and had completed remediation at 25 sites. Remedial action was planned, underway, or pending final closeout at the remaining 21 sites.

On October 13, 1997, Congress passed the 1998 Energy and Water Development Appropriations Act, Pub. L. No. 105-62, 111 Stat. 1326 (1997), which transferred administration of the FUSRAP from the DOE to the USACE and appropriated funds to the USACE for the completion of FUSRAP activities. The Energy and Water Development Appropriations Act for fiscal year 1999, P.L. 105-245, continued the USACE involvement as the implementing agency for the FUSRAP. In particular, the 1999 Act provided that response actions by the USACE under FUSRAP shall be subject to the administrative, procedural, and regulatory provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9601 et seq). Pursuant to § 121(e)(1) of CERCLA, "(n)o Federal, State, or Local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."

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Because Congress specifically subjected FUSRAP sites being cleaned up by USACE to the provisions of CERCLA in the 1999 Act, section 121(e)(1) applies to USACE response actions at the FUSRAP sites. This provision waives any NRC license requirements that would apply to USACE's activities at FUSRAP sites.

In any event, FUSRAP sites contain material over which NRC would have no regulatory jurisdiction regardless of whether USACE is the lead agency in implementing the program and whether response actions by the USACE under the program are subject to CERCLA. Prior to the enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), neither the AEC nor the NRC had authority under the Atomic Energy Act of 1954, as amended, (AEA) to regulate residual radioactive material resulting from the processing of ore for source material. In particular, 12 of the 21 FUSRAP sites at which remediation has not yet been completed contain residual material resulting from activities that were not licensed by NRC at the time the UMTRCA became effective or at any time thereafter. The language of section 83 of the AEA (42 U.S.C. 2113), was added to that Act by UMTRCA. Section 83a required NRC to impose certain terms and conditions relating to cleanup with respect to any "license issued or renewed after the effective date" of section 83 for covered activities, and also imposes such terms or conditions on any such "license in effect on the effective date of section 83." With the exception of authority to oversee remediation of sites under UMTRCA Title I, no authority was provided to the NRC with respect to activities that were not under NRC license before the date of the enactment of section 83, if they were not licensed thereafter.

Because the residual material at many FUSRAP sites was generated in activities that were not licensed when UMTRCA was enacted, or thereafter, the NRC today has no basis to assert any regulatory authority over handling the cleanup of the residuals at those sites. Many of the remaining sites (i.e., sites containing materials other than mill tailings) also raise significant jurisdictional questions in their own right. For instance, a few of the sites may still be in legal possession of the DOE even though the USACE is conducting clean up at the site under the FUSRAP. It is highly unlikely that the NRC would have authority to require a license for cleanup activities conducted at a site which continues to be a DOE-owned or controlled site because the AEA excludes the DOE from NRC regulatory authority unless Congress expressly provides to the contrary. In addition, the concentration of radioactive material at some of the remaining sites may not be sufficient to trigger NRC license requirements even if the site would otherwise be subject to NRC jurisdiction. While the NRC does not have information sufficient to reach a final conclusion for specific sites, it is the NRC staff understanding that some of these sites may contain only "unimportant quantities" of source material that are exempt from NRC regulation under 10 CFR § 40.13(a). If this is the case, the amount of material at these sites would not be sufficient to implicate NRC license requirements.

In sum, the NRC does not have regulatory authority with regard to USACE onsite cleanup of FUSRAP material because USACE activities, at the explicit direction of Congress, are to be conducted pursuant to CERCLA, which waives permit requirements for onsite activities. Further, limitations of NRC's authority or responsibility with regard to FUSRAP material exist under UMTRCA, DOE ownership considerations, and the possibility that several sites may contain "unimportant quantities" of source material.

Your suggestion that there may be a basis for taking jurisdiction retroactively over this material from an EPA practice under regulations implementing the Resource Conservation and



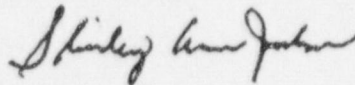
Recovery Act is not consistent with the way regulations under the AEA have been implemented. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (on the issue of retroactive application of rules).

The NRC's lack of authority with regard to the FUSRAP sites does not mean the cleanup activities by the USACE are not subject to health and safety standards. The EPA has issued regulations and environmental standards for activities under CERCLA and Congress has made USACE FUSRAP response actions subject to the administrative, procedural and regulatory provisions of CERCLA. In addition, the waiver in section 121(e)(1) of CERCLA does not apply to offsite activities. NRC and U.S. Department of Transportation requirements apply to the transportation, transfer and disposal of AEA material taken off of FUSRAP sites. The USACE has committed to following applicable requirements, including those for transfer under the AEA, shipment under the Hazardous Materials Transportation Act, 49 U.S.C. section 1501, and NRC manifest requirements (e.g., 10 CFR 20.2006).

Finally, in response to your suggestion that NRC seek regulatory authority over the USACE, Congress has given the NRC no clear directive to oversee USACE's ongoing effort under CERCLA to complete the FUSRAP cleanup project. If Congress intended the NRC to regulate USACE's activities at FUSRAP sites, it is likely that it would have specifically directed the NRC to do so in passing the Fiscal Year 1999 Appropriation Act. Rather, Congress has made it clear that USACE is to undertake FUSRAP cleanup pursuant to CERCLA, which waives permit requirements for onsite activities. Congress has provided the NRC no money and no personnel to undertake an oversight role. In these circumstances, we believe it is clear that Congress does not intend that the NRC oversee or regulate the USACE activities at the FUSRAP sites at this time. Because we believe that USACE FUSRAP activities are governed by CERCLA requirements in a manner which protects health and safety, we do not see a need to ask Congress to provide regulatory authority to the NRC.

We appreciate your interest in this matter. I trust that this response clarifies the Commission's position on these issues.

Sincerely,



Shirley Ann Jackson