

POLICY ISSUE INFORMATION

October 17, 2001

SECY-01-0190

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: STATUS OF THE TRANSFER OF THE ATLAS-MOAB FACILITY TO
THE DEPARTMENT OF ENERGY

PURPOSE:

To inform the Commission of the status of the transfer of the Atlas uranium mill tailings site near Moab, Utah, to the U.S. Department of Energy (DOE) and the termination of its U.S. Nuclear Regulatory Commission (NRC) license.

BACKGROUND:

Atlas Corporation held NRC Source Material License SUA-917 for its uranium mill near Moab, Utah, when it ceased operation in 1984. Atlas proposed to remediate the site and the contaminated material on the site in accordance with NRC regulations. The contaminated material is byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954, as amended. NRC was given authority to regulate 11e.(2) byproduct material and disposal sites containing this material at active mill operations, and after termination of such operations, in Title II of the Uranium Mill Tailings Radiation Control Act of 1978, as amended (UMTRCA). NRC implemented this authority primarily through the enactment of 10 CFR Part 40, Appendix A (Appendix A). Atlas' proposed remediation was to stabilize the tailings pile in place to meet the standards in Appendix A. Because the site is located along the Colorado River and some contamination is seeping into the river, various individuals and organizations have mounted significant opposition to reclamation of the site, with the tailings pile in place. Opponents argued that the only safe and environmentally appropriate

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remediation would be to move the tailings to another location. In September 1998, partly as a result of the costs attributable to defending its remediation proposal, Atlas filed for chapter 11 bankruptcy protection. As part of the settlement of the bankruptcy, NRC, along with the State of Utah (which filed a claim as a creditor for the cost to restore contaminated ground water at the site) agreed to the establishment of a trust, with NRC and Utah as the beneficiaries, which would be responsible for the mill site and its remediation. In November 1999, NRC and Utah selected Pricewaterhouse Coopers, LLP (PWC), as the trustee. In December 1999, Atlas transferred the title to the site, along with other assets, to the Moab Mill Reclamation Trust and NRC issued an order transferring the license to the Trust. The license was amended in May 1999, approving Atlas' plan for on site remediation.

In January 2000, Secretary of Energy Bill Richardson visited the site and announced his intention to have the site transferred to DOE and drafted legislation to accomplish this. Several bills were submitted to Congress, wherein the site would be transferred to DOE, which would move the tailings to a location away from the Colorado River. Ultimately, the proposal to transfer the site to DOE was incorporated into the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which was signed by President Clinton on October 30, 2000.

DISCUSSION:

Section 3405.(j) of the above referenced Defense Authorization Act contains several requirements related to the transfer of the site to DOE. Subsections (1)(A) and (1)(B) require DOE to prepare a plan to remediate the site in accordance with Title I of UMTRCA, no later than one year after the date of enactment (i.e., October 30, 2001), and to begin remedial action as soon as practicable thereafter. Subsection (1)(D) requires DOE, as part of the remediation plan, to develop, in consultation with PWC, NRC, and Utah, ...“an efficient and legal means for transferring all responsibilities and title to the Moab site and all materials therein...” to DOE. Subsection (1)(C) states “The license for the materials at the Moab site issued by the Nuclear Regulatory Commission shall terminate one year after the date of enactment...unless the Secretary of Energy determines that the license may be terminated earlier.” NRC staff has been working with Utah, DOE, and PWC to transfer the site to DOE, and anticipated that termination might occur before October 30th. Because of several factors early site transfer will not occur. Therefore, NRC staff intends to transmit a letter (Attachment 1) to PWC terminating the NRC license as of October 30, 2001.

After the termination of the NRC license and the transfer of the site to DOE, the site will be controlled and remediated by DOE under Title I of UMTRCA. NRC's responsibilities with regard to an UMTRCA Title I site and remediation are much more limited than for a site licensed under Title II. Before DOE's completion of the remediation, NRC's primary role in the Title I program requires NRC to concur with DOE's selection and performance of remedial actions. A Memorandum of Understanding (last revised in 1990) was established to provide an orderly process for interactions between the two agencies. After DOE completes the remediation, NRC must concur in its completion. NRC will not regulate DOE's management of the site during remediation, (e.g., under the Title I program, NRC does not regulate DOE's health physics and environmental monitoring programs, or perform inspections; however, site visits to gather information necessary for concurring in the selection or performance of the remedial action will likely occur). After completion of the remedial action, the site with the contaminated material

(i.e., either the current Atlas-Moab site or another site, if DOE's remedial action is to remove the tailings to another location) remains under DOE's perpetual custodial care, under the general license in 10 CFR 40.27.

Several issues have come up that may delay the transfer of the title to the site to DOE beyond October 30, 2001. First, until recently DOE was unable to do all the necessary preparatory work required for the transfer of the site and is thus in the position of addressing technical issues late in the process. This is because DOE did not have appropriated funds that would allow it to accept the site or even make preparations to accept the site until passage of a supplemental Fiscal Year 2001 appropriations bill on July 24 that provided \$1.95 million to DOE for Atlas activities. DOE has contracted with the U.S. Army Corps of Engineers (USACE) to handle the transfer of real property associated with the site. USACE has performed this service for DOE for other NRC licensed sites transferred to DOE at license termination.

Second, the Atlas-Moab site is currently held by the Moab Mill Reclamation Trust. The Atlas Corporation transferred the site to the Trust under a Quit Claim Deed. The Trust would transfer the site to USACE also under a Quit Claim Deed; however, PWC's attorneys have raised concerns that Department of Justice regulations appear to place limitations on the U.S. government's ability to accept real property under a Quit Claim Deed (i.e., can not use this approach to accept contaminated properties). PWC has, therefore, asked USACE for evidence of the government's authority to accept the Atlas site under a Quit Claim Deed. USACE wrote to PWC on September 4, 2001, affirming its authority to receive real estate for the Federal government under a Quit Claim Deed. The staff is awaiting PWC's response to USACE.

Finally, PWC, as trustee, has been pressing DOE to reach a decision regarding a disputed Atlas Corp. claim with DOE, under the Energy Policy Act of 1992 Title X reimbursement program. The claim is for about \$1.3 million, which would generate a Title X payment (at 56 percent), if the claim were upheld, of over \$700,000. In the bankruptcy agreement, the Moab Mill Reclamation Trust is entitled to 50 percent of any moneys received from that claim--the remainder of the claim would go to the reorganized Atlas. DOE had previously denied the claim and PWC appealed that decision. On September 5, 2001, DOE's Office of Hearings and Appeals denied the appeal. Before the denial, PWC told DOE that if the claim was not resolved by October 30, 2001, the date on which the NRC license terminates, the trustee would not transfer title to the site, but would resign as trustee. The staff understands that PWC is now considering whether to appeal the denial through the courts. The staff is inquiring about PWC's intentions in light of the denial of the appeal. At this time, it appears that PWC will not pursue appeal through the courts.

Whether or not the actual transfer of the site occurs, NRC will terminate the license, in conformance with subsection (1)(C) of the Defense Authorization Act, on October 30, 2001. PWC has informally told the staff that the trustee will resign if the site transfer has not occurred when the license is terminated, as PWC is concerned about its liability as trustee for a site containing radioactive material without an NRC license. (PWC has informally suggested to NRC staff that if the site transfer has not occurred when NRC terminates the license, PWC would continue to control the site, if NRC were to issue it an order. However, staff has concluded that NRC would not have the authority to issue such an order to be effective beyond October 30, 2001.) NRC and Utah, in accordance with section 8.02 of the trust agreement, could appoint a successor trustee, or, if that can not be done in a timely manner, section 8.05 of the trust agreement allows NRC to appoint an entity to carry out the duties of the trustee. Utah has indicated that, although it would not agree to become the trustee, it would consider carrying

out the duties of the trustee under section 8.05. The successor trustee, or the entity appointed under section 8.05, would complete the transfer of the site and materials to DOE. Staff concludes that PWC's concerns are not warranted because DOE would be responsible for control of the site and material to protect public health and safety, regardless of whether the site transfer has occurred, once NRC terminates the license in accordance with the Act.

PWC has stated, that (assuming it remains as the trustee) it expects to be able to terminate the trust by the end of the year. After site transfer, the major responsibilities of the trustee will be to verify and pay outstanding bills and to file tax returns. PWC estimates that the trust will have approximately \$700,000 in assets at that time. Section 9.02 of the trust agreement addresses termination of the trust. It states that any balance ... "shall be distributed to a trust approved by the NRC and the State for use as the NRC and the State shall direct." Utah has proposed (Attachment 2) that the funds go to a trust to be administered by Utah and used at the Atlas site for activities approved by NRC and Utah. NRC staff has responded negatively to Utah (Attachment 3) because this would violate the Miscellaneous Receipts Act and, without specific statutory authority to retain the funds, would constitute an improper augmentation of NRC's appropriations. In the absence of specific statutory authority, NRC's portion must be returned to the U.S. Treasury.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.

/RA/

William D. Travers
Executive Director
for Operations

Attachments:

1. NRC License termination letter to Moab Mill Reclamation Trust
2. Letter from Utah, DEQ, August 10, 2001
3. NRC Response to Utah DEQ, to Moab Mill Reclamation Trust, September 27, 2001

Mr. William Abington, Trustee
Moab Mill Reclamation Trust
Pricewaterhouse Coopers LLP
1201 Louisiana Street
Houston, Texas 77002

SUBJECT: TERMINATION OF LICENSE SUA-917 FOR THE MOAB MILL SITE

Dear Mr. Abington:

This is to notify you that U.S. Nuclear Regulatory Commission (NRC) Materials License SUA-917, issued to the Moab Mill Reclamation Trust on December 30, 1999, is terminated as of October 30, 2001. The license for the former uranium milling facility and mill tailings pile near Moab, Utah, is being terminated in accordance with subsection 3405(i)(1)(C) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Act), which requires the NRC license to be terminated one year after the date of the enactment of the Act, i.e., October 30, 2001. An NRC environmental assessment is not required for this action, as it is categorically excluded under 10 CFR 51.22(c)(11).

Although the Moab site will no longer be subject to an NRC license, the Moab Mill Reclamation Trust (Trust) established pursuant to the Moab Uranium Mill Transfer Agreement which was confirmed on December 1, 1999, by the U.S. Bankruptcy Court for the District of Colorado, for which you, in your capacity as a partner of Pricewaterhouse Coopers, LLP, (PWC) have been Trustee, will continue to exist until the Trust can be closed. Section 3405(i) of the Act, generally, requires the Secretary of Energy to develop a plan for remediation of the Moab site in accordance with Title I of the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7911 et seq.) no later than one year after the enactment of the Act, and the Secretary of Energy to commence remedial action at the site as soon as practicable, after completion of the plan. Subsection (D) requires the Secretary of Energy, in consultation with the Trustee, the NRC, and the State of Utah, to develop an efficient and legal means for transferring all responsibilities and title to the Moab site and all the materials therein from the Trustee to the Department of Energy (DOE). The NRC has been working with DOE, PWC, and Utah to complete this task as expeditiously as possible.

If you have any questions, please contact Dr. Myron Fliegel, the NRC project manager for this site who can be reached at (301) 415-6629.

Sincerely,

Melvyn Leach, Chief
Fuel Cycle Licensing Branch
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Material Safety
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DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE EXECUTIVE DIRECTOR

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August 10, 2001

Mr. Michael F. Weber
Director, Division of Fuel Cycle Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: State Proposal to Manage Residual Trust Funds: Moab Mill Reclamation Trust.

Dear Mr. Weber:

This letter is to follow up on our discussions concerning termination of the Atlas trust with the transfer of the lands and water rights to DOE. The question has been discussed regarding any remaining funds. DOE and NRC have informally indicated that if monies are transferred to either agency, the funds may have to go to the federal treasury, making it difficult to insure the monies would eventually be applied to the Atlas site. The State of Utah by this letter confirms in writing our representation that under Utah law, the State could receive the monies and those monies could be used either by contract with DOE or otherwise be applied through agreements with DOE to the remediation effort at the Atlas site.

Under Utah Code Annotated Section 19-1 -202(2)(c) the Executive Director of the Department of Environmental Quality can receive funds from private or public sources for purposes of protecting the public health and the environment and the funds may be expended as included in the appropriations authorizations to the Department by the Legislature. The funds would be received by Utah to an account that would be restricted for use for the purposes of carrying out the activities identified in the Moab Mill Reclamation Trust Fund Agreement and would be held in trust and used only as approved by NRC and the State.

We believe this process is consistent with the provisions in Section 9.02(a) of the Moab Mill Reclamation Trust Fund Agreement, which provides that on termination of the trust, any balance of the Trust Estate shall be distributed to a trust approved by the NRC and the State for use as the NRC and the State shall direct.

Mr. Michael F. Weber
August10, 2001
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If you have any questions, please let us know. We are hopeful this process will be acceptable to NRC. Thank you for your efforts in moving the Atlas work forward.

Best Regards,

Dianne R Nielson, Ph.D.
Executive Director

DRN/FN:lbm

cc: Billl Sinclair, DRC
Loren Morton, DRC
Fred Nelson, Utah Attorney Generals Office
Paul Lohaus, NRC-Washington, D.C.
Mike Fliegel, NRC-Washington, D.C.
Ray Plieness, DOE-GJPO
Kim Schappert, Grand County Council
Bill Abington, PricewaterhouseCoopers

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File: Atlas Tailings, Moab Mill Reclamation Trust

Accession #: ML012740497

Diane R. Nielson, Ph.D.
Executive Director
Department of Environmental Quality
State of Utah
168 North 1950 West
Post Office Box 144810
Salt Lake City, Utah 84114-4810

SUBJECT: STATE OF UTAH'S PROPOSAL TO MANAGE RESIDUAL FUNDS FROM THE
MOAB MILL RECLAMATION TRUST

Dear Dr. Nielson:

In your August 10, 2001, letter to me, you requested the U.S. Nuclear Regulatory Commission's (NRC's) acceptance of a process to ensure that upon termination of the Moab Mill Reclamation Trust (Trust), residual funds from the Trust would continue to be available for remediation efforts at the Atlas site. Your letter indicates that the State of Utah has enabling language in its statutes which would allow it to establish a trust to receive the residual funds. Use of these funds would be restricted to the purpose of carrying out the activities identified in the original Trust and only as approved by NRC and Utah.

We appreciate your continuing efforts regarding remediation of the Atlas site, including this proposal. Although Utah state law may authorize its Department of Environmental Quality to receive private or public funds for specific stated purposes, there is no comparable Federal law that would allow NRC to receive these residual funds without transferring them to the general fund of the U.S. Treasury. To the contrary, we conclude that NRC's use of the residual funds in this manner would violate the Miscellaneous Receipts Act and constitute an improper augmentation of NRC's appropriations. Under this Act, unless otherwise authorized, a Federal agency may not retain for its own use any funds received for the use of the United States; instead, it must deposit all such funds in the general fund of the U.S. Treasury as miscellaneous receipts. According to the General Accounting Office, failure to do so constitutes an improper augmentation of an agency's appropriations. There are a few exceptions to the general statutory requirement to deposit the money into the general fund of the U.S. Treasury, e.g., when there is specific statutory authority for a Federal agency to retain the funds. However, our review indicates that at this time, none of the recognized exceptions to the Miscellaneous Receipts Act are applicable to the residual funds from the Trust.

Therefore, NRC is not able to agree to the process discussed in your August 10, 2001, letter to establish a trust into which the residual Trust funds would be deposited in order to use these funds for remedial activities at the Atlas site. If you have any questions concerning this subject, please contact me or the NRC Project Manager, Myron Fliegel. I can be reached by telephone at (301) 415-7212 or by e-mail at mfw@nrc.gov and Dr. Fliegel at (301) 415-6629, or by e-mail at mhf1@nrc.gov

D. Nielson

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Sincerely,

/RA/

Michael F. Weber, Director
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Material Safety
and Safeguards

Docket No. 40-3453
License No. SUA-917