DD-99-07

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
Carl J. Paperiello, Director

In the Matter of	)	
	)	
The United States Army Corps of Engineers	)	
	)	Docket No. N/A
	)	
	)	
	)	(10 C.F.R. 2.206)

DIRECTOR'S DECISION UNDER 10 CFR § 2.206

I. INTRODUCTION

On October 15, 1998, Thomas B. Cochran, Ph.D., Director, Nuclear Program, Natural Resources Defense Council (NRDC) and James Sottile, IV, Caplin & Drysdale, Chartered, filed a petition on behalf of NRDC (the "petitioner") addressed to L. Joseph Callan, Executive Director for Operations, U.S. Nuclear Regulatory Commission (NRC). The petition requests that NRC exert authority to ensure that the Corps of Engineers' handling of radioactive materials in connection with the Formerly Utilized Sites Remedial Action Program (FUSRAP) is effected in accord with a properly issued license and all other applicable requirements.

II. BACKGROUND

During the 1940s, 1950s, and 1960s, the Manhattan Engineer District and the Atomic Energy Commission performed work at a number of sites throughout the United States as part of the nation's early atomic energy program. Although many of the sites were cleaned up under guidelines in effect at the time, residual contamination remains at many of the sites today. The contaminants at these sites involved primarily low levels of uranium, thorium, and radium, with their associated decay products. The U.S. Department of Energy (DOE) began FUSRAP in

1974 to study these sites and take appropriate cleanup action. By 1997, DOE had identified 46 sites in the program and had completed remediation at 25 sites with some ongoing operation, maintenance, and monitoring being undertaken by DOE. 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,[1] which transferred administration of FUSRAP to the U.S. Army Corps of Engineers (the Corps or USACE) and appropriated $140,000,000 to the Corps for the completion of FUSRAP activities. The language in the law reads as follows:

> For the expenses necessary to administer and execute the Formerly Utilized Sites Remedial Action Program to clean up contaminated sites throughout the United States where work was performed as part of the nation's early atomic energy program, $140,000,000, to remain available until expended: *Provided*, that the unexpended balances of prior appropriations provided for these activities in this Act or any previous Energy and Water Development Appropriations Act may be transferred to and merged with this appropriation account, and thereafter, may be accounted for as one fund for the same time period as originally enacted.[2]

The legislative history behind this provision offers little guidance regarding the details of the Corps' new involvement. The Conference Committee report states that "(t)he conferees have agreed to transfer the Formerly Utilized Sites Remedial Action Program (FUSRAP) to the Corps of Engineers, and funding for this program is contained in Title I of the bill."[3] The House Appropriations Committee report indicates that this change stems from concerns over the cost

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[1]Energy and Water Development Appropriations Act, 1998, Pub. L. No. 105-62, 111 Stat. 1326 (1997)

[2] Id.

[3] H.R. Conf. Rep. No. 271, 105th Cong., 1st Sess., 85 (1997).

of the FUSRAP program under DOE. The Committee report concludes that "(c)learly, the problem must be in the contract management and contract administration function performed by the Department of Energy and the management and operating contractors who actually subcontract for most of the cleanup work."[4] Finally, citing the Corps' efforts under the Formerly Used Defense Sites (FUDS) program, the report indicates that there are significant cost and schedule efficiencies to be gained by "... having the Corps of Engineers manage the Department of Energy's FUSRAP program as well."[5]

Given the lack of guidance in the legislative history, two members of Congress sought to clarify the law's intent through subsequent correspondence. In a November 6, 1997, letter to Energy Secretary Federico Pena and Defense Secretary William Cohen, Senator Pete Domenici and Representative Joseph McDade indicated, among other things, that:

> Transfer of the FUSRAP program to the U.S. Army Corps of Engineers makes management, oversight, programming and budgeting, technical investigations, designs, administration, and other such activities directly associated with the execution of remediation work at the currently eligible sites a responsibility of the Corps of Engineers. It should be emphasized that *basic underlying authorities for the program remain unaltered and the responsibility of DOE* [emphasis added].

The Energy and Water Development Appropriations Act for fiscal year 1999 (FY99), P.L. 105-245, continued the Corps' involvement as the implementing agency for the FUSRAP. In particular, the 1999 Act provided that response actions by the United States Army Corps of Engineers under FUSRAP shall be subject to the administrative, procedural, and regulatory provisions of the Comprehensive Environmental Response, Compensation and Liability Act

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[4] H.R. Rep. No. 190, 105th Sess., 99 (1997).

[5] Id.

(CERCLA) (42 U.S.C. 9601 et seq.), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR, Chapter 1, Part 300. In addition, the 1999 Act provided that, "...except as stated herein, these provisions do not alter, curtail or limit the authorities, functions or responsibilities of other agencies under the Atomic Energy Act (42 U.S.C. 2011 et seq.)..."[6]

To date, NRC has not regulated activities conducted under FUSRAP, including those activities conducted by the Corps since the transfer of the program. The petitioner, however, believes that NRC should regulate the Corps' FUSRAP activities, arguing that the Appropriations Act did not purport to transfer authority over FUSRAP to the Corps. As such, according to the petitioner, the Corps may not legally administer the program absent proper oversight because, unlike DOE and (in most cases) DOE contractors, the Corps is not exempt from the licensing requirements of the Atomic Energy Act (see 42 U.S.C. § 2014(s)). The petitioner further indicates that DOE has publicly stated that it cannot extend its licensing exemption for private contractors to the Corps and that DOE has no regulatory authority over the Corps for the latter's FUSRAP activities. The petitioner concludes that "... the Corps does not have the legal authority to run FUSRAP without first obtaining a license from the NRC."

In support of its position, the petitioner notes that the institutional mission of the Corps is not focused on the safety and security of the nation's nuclear activities. In addition, NRC's failure to regulate the Corps' FUSRAP activities is claimed to be inconsistent with the intent of the laws governing the utilization and cleanup of nuclear materials. Finally, the petitioner adds that, with very few exceptions, Congress intended that no person should be permitted to handle nuclear materials except in accordance with a license issued by NRC.

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[6]Pub. L. No. 105-245, Title I.

In a November 30, 1998, letter NRC informed the petitioner that the petition had been received and was currently under review. On the same date, NRC forwarded the petition to the DOE and the Corps for their comment. In a January 12, 1999, letter, the Chief Counsel for the Corps, Robert M. Andersen, responded to NRC's request. DOE responded to NRC's request in a January 14, 1999, letter from William J. Dennison, Assistant General Counsel for Environment.

The Corps' Response

In its response, the Corps states that it is not required to obtain a license from NRC for its FUSRAP activities. The Corps' response emphasizes that Congress directed the Corps to conduct its FUSRAP activities pursuant to the CERCLA.[7] The Corps' principal argument is that no NRC license is required because of the federal permit waiver for on-site removal or remedial actions in § 121(e)(1) of CERCLA. The Corps also believes that the AEA exempts FUSRAP activity from NRC licensing. In its opinion, "Congress intended for USACE to fill the shoes of the AEC successor agency responsible for FUSRAP cleanup, that is DOE, an agency not considered a 'person' subject to licensing under the AEA." The Corps further posits that, in transferring the FUSRAP program, Congress expressed no intent that the agency obtain an NRC license for that activity and, instead, sought a seamless transition "unimpeded by procedural requirements outside of CERCLA."

Nevertheless, the Corps commits to meeting the substantive requirements of both the Atomic Energy Act (AEA) and CERCLA. It acknowledges that NRC license requirements may

[7] 42 USC §9601 et seq.

apply to portions of FUSRAP response actions conducted off-site, beyond the scope of the permit waiver. The letter concludes by acknowledging that the substantive provisions of NRC regulations are applicable or relevant and appropriate requirements (ARARs) for many FUSRAP response actions under CERCLA and, as such, the Corps will look "... to NRC for guidance in interpreting and implementing these requirements on the sites."

DOE's Response

DOE's response differs in several respects from that of the Corps. On the matter of DOE's continued involvement with FUSRAP and oversight of the Corps, the Department "respectfully disagrees" with the Corps. According to its submittal, DOE is not authorized to regulate the Corps' FUSRAP activities and cannot transfer its AEA authorities to the Corps. In the Department's view, "(t)he transfer legislation did not make the Corps a DOE contractor, or otherwise subject the Corps' activities to the control or direction of DOE." The letter also indicates that DOE and the Corps are currently developing a memorandum of understanding (MOU) to clarify their respective roles and responsibilities as a result of the legislative transfer. Nevertheless, DOE believes that, with the exception of a few "administrative issues," there are no remaining issues between the two agencies that should affect NRC's disposition of the NRDC petition. The letter concludes that NRC should "evaluate the licensability of the Corps' activities in the same manner as it would evaluate the activities of any other 'person' within the meaning of the Atomic Energy Act." DOE defers to NRC on this question. The letter does not contain a DOE position concerning the viability of the Corps' CERCLA argument.

III. DISCUSSION

The NRC staff has completed its evaluation of the petitioner's requests and the responses from the Corps of Engineers and the Department of Energy. For the reasons discussed below, the NRC denies the petitioner's request insofar as it calls on NRC to require the Corps to obtain a license for activities conducted at FUSRAP sites.

CERCLA Permit Waiver

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."[8] This provision waives any NRC license requirements that would apply to the Corps' activities at FUSRAP sites conducted pursuant to CERCLA.

The Corps argues that, because Congress specifically subjected FUSRAP sites to the provisions of CERCLA in the 1999 Act, section 121(e)(1) applies to Corps' response actions at FUSRAP sites. In developing regulations for the implementation of CERCLA, the Environmental Protection Agency (EPA) addressed the § 121(e)(1) waiver provision for federal agency CERCLA response actions in § 300.400(e) of the National Contingency Plan (NCP). That provision states, in pertinent part:

> "*Permit requirements*. (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term on-site means the areal extent of contamination and all suitable

[8] See also, 10 CFR § 300.400(e).

> areas in very close proximity to the contamination necessary for implementation of response actions."[9]

In the preamble of the final rule which proposed this section, EPA provided:

> Proposed § 300.400(e)(1) states that the permit waiver applies to all on-site actions conducted pursuant to CERCLA sections 104, 106, or 122; in effect, this covers all CERCLA removal and remedial actions (all "response" actions). However, a number of other federal agencies have inquired as to whether this language would reach response actions conducted pursuant to CERCLA sections 121 and 120. In response, EPA has made a non substantive clarification of the applicability of the permit waiver in CERCLA section 121(e)(1) to include on-site response actions conducted pursuant to CERCLA sections 120 and 121. . . . The addition of CERCLA section 120 simply recognizes that the permit waiver applies to federal facility cleanups conducted pursuant to CERCLA section 120(e), which are also selected and carried out in compliance with CERCLA section 121.[10]

Section 121(e)(1) applies to federal agencies such as the Corps in this case. The Corps may take the role of "lead agency" in a CERCLA cleanup action. The NCP defines "lead agency" as "the agency that provides the OSC/RPM to plan and implement response actions under the NCP. EPA, the USCG, another federal agency, or a state . . . may be the lead agency for a response action."[11] The NCP also states that "Federal agencies listed in § 300.175 have duties established by statute, executive order, or Presidential directive which may apply to federal response actions following, or in prevention of, the discharge of oil or release of a hazardous

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[9]40 CFR 300.400(e)(1).

[10]55 Fed. Reg. 8666, 8689 (1990) ("National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule) (emphasis added). This change echoed EPA's intentions stated in the proposed rule: "EPA proposes to state that on-site permits are not required for response actions taken by EPA, other federal agencies, States, or private parties pursuant to CERCLA sections 104, 106, or 122." 53 Fed. Reg. 51394, 51406 (1988) ("National Oil and Hazardous Substances Pollution Contingency Plan; Proposed Rule) (emphasis added).

[11]40 CFR 300.5 (emphasis added). The definition goes on to state, "The federal agency maintains its lead agency responsibilities whether the remedy is selected by the federal agency for non-NPL sites or by EPA and the federal agency or by EPA alone under CERCLA section 120."

substance, pollutant, or contaminant."[12] The Corps, a branch of the U.S. Department of Defense, is among the agencies listed.[13] In the case of the FUSRAP program, Congress specifically designated the Corps as the "lead agency" in passing the 1999 Appropriations Act.[14]

As the Corps acknowledges in its letter, the permit waiver in § 121(e)(1) has been rarely addressed in the courts. In support of its position, the Corps does cite McClellan Ecological Seepage Situation (MESS) v. Cheney, a case which held that a Resource Conservation and Recovery Act (RCRA) permit was not required when activities which might otherwise require a RCRA permit took place at a site only as part of a CERCLA removal or remedial action.[15] In McClellan, MESS, a citizens' group, filed suit against the Secretary of Defense, with regard to cleanup actions being taken at McClellan Air Force Base, under RCRA and certain state laws. MESS claimed, inter alia, that McClellan was required to obtain a RCRA permit for the management of certain hazardous wastes on the base. The court held that an RCRA permit was not required, because the remedial activities were taken pursuant to CERCLA. The court relied on § 121(e)(1), stating, "Section 121(e) expressly provides that the activity does not have to be separately permitted."[16]

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[12]40 CFR 300.170.

[13]See 40 CFR 300.175(b)(4)(i).

[14]Pub. L. No. 105-245, Title I.

[15]763 F. Supp. 431 (E.D. Cal. 1989). This holding was later vacated on the basis of subject matter jurisdiction. See McClellan Ecological Seepage Situation (MESS) v. Perry, 47 F.3d 325 (9th Cir. 1995).

[16]763 F. Supp. 431, at 435. The court went on to note in dicta that where there has been treatment that requires a RCRA permit which is not associated with a remedial or removal action under CERCLA, such a permit would be required. Id.

The Corps also cites United States v. City of Denver to uphold this interpretation of §121(e)(1).[17] In that case, the court held that CERCLA preempted a zoning ordinance which was in actual conflict with EPA's remedial order. The court stated, "[T]o hold that Congress intended that non-uniform and potentially conflicting zoning laws could override CERCLA remedies would fly in the face of Congress's [sic] goal of effecting prompt cleanups of the literally thousands of hazardous waste sites across the country."[18]

In passing the 1998 and 1999 Appropriations Acts, Congress gave no indication that it intended to suspend the waiver provision in §121(e)(1) of CERCLA in the context of the Corps' FUSRAP activities. The 1999 Act does say: "Provided further, That, except as stated herein, these provisions do not alter, curtail or limit the authorities, functions or responsibilities of other agencies under the Atomic Energy Act (42 U.S.C. 2011 et seq.)..." In its letter, DOE points to this language to support its argument that the Appropriations Act does not create any authority for it to regulate the Corps. In doing so, DOE interprets the term "provisions" as referring to the provisions of the Appropriations Act and not the provisions of CERCLA. The NRC staff agrees with DOE on this point. While the language appears to indicate that the transfer of the program to the Corps does not alter the extent of DOE and perhaps NRC authority under the AEA, there is no specific indication that the language is intended to direct NRC to regulate the Corps' administration of the FUSRAP program. In particular, there is no evidence that in including this phrase, Congress intended to limit the application of the §121(e)(1) permit waiver to the Corps'

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[17] 100 F.3d 1509 (10th Cir. 1996).

[18] Id. at 1513. The Corps cited Ohio v. USEPA, 997 F.2d 1520 (D.C. Cir. 1993) in support of its § 121(e)(1) position. NRC would note that the case upholds a number of provisions in EPA's 1990 revision of the NCP, including § 121(e)(1). However, the court's discussion centers on EPA's definition of the term "onsite," and does not discuss the exemption provision, as a whole, in detail.

FUSRAP activities. In fact, nowhere in the reports for either the 1998 or 1999 Acts or in the text of the laws themselves did Congress give any hint that it intended NRC to regulate the Corps in its administration of the FUSRAP program. Instead, the inclusion of the specific reference to CERCLA suggests that Congress intended NRC to continue to refrain from regulating activities under the FUSRAP program even after DOE's role was reduced or discontinued.

As DOE states in its letter, the Corps has "consistently expressed the view that its authorities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) ..." are sufficient for the Corps' administration of the FUSRAP program. By the time the 1999 Appropriations Act was passed, the Corps' administration of the FUSRAP program under CERCLA was a matter of public record[19] and NRC had not taken any steps to require the Corps to obtain a license from NRC. If Congress had intended NRC to regulate the Corps' activities at FUSRAP sites, it is likely that it would have specifically directed NRC to do so in passing the 1999 Appropriations Act.

We note, however, that the waiver in §121(e)(1) does not apply to off-site activities. To the extent that NRC and U.S. Department of Transportation (DOT) requirements apply to the transportation, transfer and disposal of Atomic Energy Act material taken off of FUSRAP sites, the Corps has committed to following applicable requirements, including those for transfer under the AEA, shipment under the Hazardous Materials Transportation Act, 49 U.S.C. § 5101, and NRC manifest requirements (e.g., 10 CFR §20.2006).[20]

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[19] See, e.g., Letter from Albert J. Genetti, Jr., U.S. Army Deputy Commander, U.S. Army Corps of Engineers, to Mr. Thomas B. Cochran and Ms. Barbara A. Finamore, Natural Resources Defense Council, May 20, 1998.

[20] While the Corps will be following NRC's requirements in this area, it is unlikely that any specific NRC license requirements would apply to shipments from FUSRAP sites. However,

NRC Authority Under UMTRCA

Many FUSRAP sites contain material over which NRC would have no regulatory jurisdiction regardless of whether the Corps is the lead agency in implementing the program and regardless of whether response actions by the Corps under the program are subject to CERCLA. In particular, of the 21 sites at which remediation has not yet been completed, 12 sites contain residual material resulting from activities that were not licensed by NRC at the time the Uranium Mill Tailings Act of 1978 (UMTRCA) became effective or at any time thereafter. As defined by the UMTRCA, NRC does not have authority to regulate cleanup of covered residual material resulting from an activity that was not so licensed.

The language of section 83 of the Atomic Energy Act (42 U.S.C. 2113(a)), was added to that Act by UMTRCA. Section 83 a. requires 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 date of enactment" of the section. No such responsibility was imposed upon 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.

Prior to the enactment of UMTRCA, neither the AEC nor the NRC had statutory jurisdiction over residual material resulting from the processing of ore for source material. This position was taken by the AEC after careful legal analysis, and was subsequently adopted by the NRC when it succeeded to the AEC's regulatory functions. Though NRC exercised some

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the staff will request that the Corps contact NRC if it plans to ship material that does not meet one of the exemptions for a specific license in NRC regulations. See, e.g., 10 C.F.R. § 71.10.

control over such material in connection with licensed processing of ore for source material, it did not exercise jurisdiction at inactive sites where no license was in effect. UMTRCA was enacted because the Congress recognized that NRC did not have jurisdiction over radioactive residuals resulting from the extraction of uranium or thorium from ore processed for its source material content at inactive sites. This is evidenced by the floor remarks regarding the amended version of H.R. 13650, the bill that was enacted as UMTRCA. Senator Hart explained:

> Although the NRC licenses active uranium mining and milling activities, existing law does not permit the Commission to regulate the disposal of mill tailings once milling and mining operations cease and the operating license expires. It is that authority to regulate tailings after milling operations cease, that we propose be given to the NRC.[21]

Because the residual material at many FUSRAP sites was generated in activities that were not licensed when UMTRCA was enacted, or thereafter, NRC today has no basis to assert any regulatory authority over handling of the residuals at those sites.

The NRC staff notes that many of the remaining sites (i.e., sites containing materials other than mill tailings) also raise some significant jurisdictional questions in their own right. For instance, a few of the sites may still be in legal possession of DOE even though the Corps is conducting clean up at the site under FUSRAP. While the issue of possession appears to be a matter of continuing discussion between the Corps and DOE, it is highly unlikely that 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. In addition, the concentration of radioactive material at some of the remaining sites may not be sufficient to trigger NRC license requirements. While NRC does not have information sufficient to reach a final conclusion for

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[21] 124 Cong. Rec. S18,748 (October 13, 1978).

specific sites, it is the NRC staff's understanding that some of these sites may contain only "unimportant quantities" of source material as defined 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. Given the limitations of NRC jurisdiction under UMTRCA, the potential DOE ownership issues, and the possibility that several sites may contain "unimportant quantities" of source material, it is likely that the number of FUSRAP sites over which NRC may have jurisdiction would be very small even absent the CERCLA permit waiver.

The Corps' Authority Under the Appropriations Act

In its response, the Corps states that the AEA also exempts FUSRAP activity from NRC licensing because Congress intended the Corps to fill the shoes of DOE, an agency exempt from NRC regulatory requirements under most circumstances. DOE disagrees with this characterization, claiming that, for the most part, it has no role in the FUSRAP program at this time (regulatory, contractual, or otherwise). As such, in DOE's view, the Corps cannot rely on any exemption in the AEA to avoid regulation by NRC. Nevertheless, DOE acknowledges that the transfer to the Corps did not completely eliminate the Department's involvement with FUSRAP. While the issues have yet to be resolved, DOE may have responsibility for inventory reporting of government-owned FUSRAP sites to the General Services Administration and may be required to conduct post-cleanup monitoring at some sites after the Corps' clean up activities cease.

DOE and the Corps are working on an MOU to address their disagreements regarding the nature of the transfer of the FUSRAP program and their respective responsibilities under

the program. Until the disagreement has been resolved, either by the agencies or by further direction from Congress, the NRC staff need not reach a conclusion on the matter. Nevertheless, in view of the clear applicability of CERCLA §121(e)(1) to the Corps' activity at FUSRAP sites, the staff does not believe that it would be appropriate to require the Corps to obtain an NRC license for its activity at FUSRAP sites.

IV. CONCLUSION

In sum, Congress has given NRC no clear directive to oversee USACE's ongoing effort under CERCLA to complete the FUSRAP cleanup project. Indeed, Congress has provided NRC no money and no personnel to undertake an oversight role. In addition, Congress has made it clear that the Corps is to undertake FUSRAP cleanup pursuant to CERCLA which waives permit requirements for onsite activities. In these circumstances, we are disinclined to read our statutory authority expansively, and to commit scarce NRC resources, to establish and maintain a regulatory program in an area where, under Congressional direction, a sister federal agency already is at work and has committed itself to following appropriate safety and environmental standards.

Accordingly, I deny the petition insofar as it requests NRC to impose licensing and other regulatory requirements on the Corps for that agency's handling of radioactive material at FUSRAP sites. Both the permit waiver provision of CERCLA and the ambiguity regarding DOE's role in the program lead me to the conclusion that NRC should not inject itself into the

FUSRAP program at this time. Absent specific direction from Congress to the contrary, NRC will continue to refrain from regulating the Corps in its clean up activities at FUSRAP sites.

As provided by 10 C.F.R. § 2.206, a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland this 26th day of March, 1999.

FOR THE NUCLEAR REGULATORY COMMISSION

Original Signed By

Carl J. Paperiello, Director
Office of Nuclear Material Safety
and Safeguards