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March 1, 2002

Lilia Lopez
Assistant Attorney General
Office of the Attorney General
P.O. Box 40109
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STP

Re: Dawn Mining Company - Financial Surety

Dear Ms. Lopez:

The amount of the financial surety for the closure of Dawn Mining Company's Uranium Millsite in Ford, Washington has been the subject of ongoing discussions between the Department of Health (DOH) and Dawn Mining. As you are aware, Dawn Mining has limited funds to devote to the closure of the mill. The cost of maintaining a financial surety for the closure of the mill is a substantial yearly expense. While recognizing the regulatory requirement for the financial surety, Dawn Mining continues to seek ways to minimize the cost of maintaining the surety bond so more funds may be dedicated to actual mill-closure activities.

Reducing the amount that needs to be bonded will reduce the cost of maintaining the financial surety. In an effort to delve further into ways that the surety bond may be reduced, I spoke several times with Dennis Sollenberger, who heads up the Agreement States program of the Nuclear Regulatory Commission (NRC). As a result of these discussions with Mr. Sollenberger, Dawn Mining believes it is possible to reduce the amount of the surety bond while continuing to satisfy the regulatory requirements. Several approaches to reducing the amount of the surety bond are discussed below.

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- **Contingency.** As a contingency, the DOH requires Dawn Mining to bond 125% of the estimated amount of the remaining closure costs. The DOH has indicated that the amount of the contingency is derived from NRC policy, which recommends that the addition of a 25% contingency is appropriate for financially securing the closure of an operating uranium mill.¹ In explaining to me the bases of the recommended 25% contingency, Mr. Sollenberger stated the contingency was the sum of a 15% engineering contingency and a 10% administrative contingency.
- **Engineering contingency.** According to Mr. Sollenberger, the 15% engineering contingency is to ensure that when a state assumes the responsibility to close a mill it will have enough funds to cover unexpected engineering issues. For instance, if the defaulting licensee leaves the site in a condition that requires an additional amount of work to be done before the closure plan can be implemented, the engineering contingency will cover the cost of that extra work. The engineering contingency is also intended to cover unexpected conditions not anticipated by the closure plan.

The unexpected situations and conditions that the NRC-recommended contingency is designed to address do not exist at the Dawn Mining millsite. Dawn Mining's mill is not operating. The Dawn Mining closure plan is not a plan to be implemented in the future; the closure plan is an ongoing project that has been underway for several years. DOH regulators maintain a detailed oversight of the millsite closure by visiting the millsite often and requiring detailed progress reports. Dawn Mining's adherence to the millsite closure timeline is closely monitored by the DOH. If, for the purposes of this discussion only, Dawn Mining were to default on its mill closure responsibilities, the DOH would know exactly what has been done and what needs to be done to complete the implementation of the closure plan. The DOH's regulation

¹ A recent NRC guidance document recommends a minimum contingency of 15%. See NUREG 1620 at C-4 (May 2000).

of Dawn Mining's millsite closure ensures that the state would inherit no surprises.

Similarly, Dawn Mining and the DOH have closely studied the environmental conditions at the site for years.² The environmental conditions at the millsite are well known and accounted for in the closure plan. Where uncertainty exists, the closure plan addresses those uncertainties.³

If there are aspects of the closure plan for which uncertainty exists, applying an engineering contingency to the costs reflecting those uncertain aspects may be reasonable. However, applying an engineering contingency to the entire cost of implementing Dawn Mining's millsite closure plan, including those aspects to which no uncertainty attaches, addresses an uncertainty that does not exist and as a result, imposes an unnecessary surety bonding expense on Dawn Mining.

- Administrative contingency. According to Mr. Sollenberger, the 10% administrative contingency is intended to cover post-default regulatory and oversight costs incurred by the regulating agency. By law, Dawn Mining, as a licensee, is currently required to pay the costs the DOH incurs in regulating and overseeing Dawn Mining's millsite activities. Because no licensee would exist to pay these costs in the event of default, the administrative contingency is added to the closure cost estimate to address the costs that the agency would incur in overseeing the closure of the millsite after default.

² Indeed, the study of the environmental conditions at the millsite has been upheld as adequate and reasonable after intense scrutiny during the several legal challenges to the closure plan.

³ For instance, with regard to the contaminated site soils at the millsite, Dawn Mining's closure plan includes both the excavation of the soils and the capping of the soils if the amount needing to be excavated is determined to be unreasonable. The closure cost estimate accounts for the more expensive of these possibilities.

Dawn Mining's closure cost estimate already includes a specific line item addressing the oversight costs that the DOH would incur in the event of default. Because Dawn Mining's closure cost estimate already includes the oversight costs that the DOH would incur in the event of Dawn Mining's default, the addition of an administrative contingency is duplicative and unnecessarily increases the amount to be bonded. As a result, Dawn Mining incurs an additional bonding expense that has no reasonable basis.

- **Adjustment for inflation.** According to Mr. Sollenberger, where no adjustments are made to a closure plan cost estimate and where the only adjustment to be made to the cost estimate is for the value of money, it is appropriate to use the Consumer Price Index (CPI) to adjust for the value of money. However, when reviewing and updating the cost of each line item of a closure cost estimate, application of the CPI is inappropriate. Based on my conversations with Mr. Sollenberger, it is Dawn Mining's understanding that it is reasonable to update each line item by either obtaining a new cost estimate for that line item or by adjusting the cost through the application of the specific price index for that item.⁴

Accordingly, when Dawn Mining updates the cost estimate for the millsite closure plan by updating the cost of each line item, it is inappropriate to also apply the CPI to adjust the cost estimate. Doing so artificially inflates the closure cost estimate resulting in an additional, but unnecessary, bonding expense.

- **Title X reimbursement.** By law, Dawn Mining is entitled to a 37% reimbursement for the costs it incurs in closing the millsite. In the event of default, the State would be entitled to the same reimbursement for the closure costs it incurs. The DOH has previously denied Dawn Mining's request to reduce the amount of the closure surety bond to account for the

⁴ For instance if the line item to be updated is a construction activity, Mr. Sollenberger indicated that it is reasonable to apply the specific construction producer price to the line item to adjust the cost.

reimbursement entitlement. The DOH based its denial on the uncertainty of the future funding of the Title X program. For the same reason, Mr. Sollenberger has indicated that the NRC too is reluctant to use the Title X reimbursement monies to satisfy the financial surety requirement.

While understanding (if not agreeing with) the DOH's position on this issue, Dawn Mining wishes the DOH to consider the following:

- The Title X program has been funded, fully or partially, every year;
- Two years ago, Congress allocated sufficient funds to the Title X program to make up for any shortfalls in reimbursement for previous years;
- The federal government's recent commitment to compensate for illnesses resulting from employees working on AEC contracts further indicates the federal government's dedication to its responsibility for the after-effects of those AEC contracts; and
- By requiring Dawn Mining to provide financial surety for costs that the State would ultimately not incur as a result of its legal entitlement to Title X reimbursements, Dawn Mining is expending substantial funds for bonding that could otherwise be dedicated to actual mill closure activities.

As with all government programs, no absolute guarantee exists for future appropriations to the Title X program. However, Title X reimbursement represents funds to which Dawn Mining is legally entitled, and in the event of default, to which the State would be legally entitled. Sufficient evidence exists to demonstrate the federal government's dedication to this program as well as other programs committed to the compensation for private costs and injuries incurred as a result of AEC contracts.

Dawn Mining's position continues to be that financial surety credit should be given for the entire amount of the 37% Title X reimbursement entitlement. However, to the extent that the DOH believes that the future funding of the Title X program is uncertain, Dawn Mining proposes that the

DOH's level of uncertainty be quantified based on objective and demonstrable evidence of the federal government's commitment to the Title X program. This level of uncertainty could then be used to adjust the Title X reimbursement credit given to Dawn Mining.⁵

It is Dawn Mining's understanding that the DOH is strictly adhering to NUREG 1620 and other NRC guidance documents in evaluating the financial surety for the millsite closure. Such strict adherence to NRC guidance as the only approach to regulating the closure of Dawn Mining's millsite is inconsistent with the nature of the guidance documents as well as the information provided by Mr. Sollenberger. NRC guidance is just that – guidance. While NRC guidance documents offer a reasonable approach to the regulation of millsite closures, it is not the only reasonable approach. If NRC guidance were the only allowable approach, Mr. Sollenberger stated that the guidance documents would have been promulgated in the form of rules and regulations. They were not. As a result of my discussions with Mr. Sollenberger, it is my understanding that the regulation of a millsite closure should be done on a case-by-case basis. The regulatory agency should make a determination of what is reasonable in light of the applicable regulatory requirements and the circumstances of the particular licensee and at the particular site.

The applicable regulations require that Dawn Mining provide financial surety to the State for the closure of its millsite. The DOH can ensure that the legal requirements for financial surety are satisfied while at the same time considering the unique circumstances of Dawn Mining and its millsite closure. Dawn Mining wishes to meet with the DOH to further discuss ways that Dawn Mining may reduce the cost of maintaining the financial surety so that Dawn Mining may devote more funds to actual millsite closure activities.

⁵ Each time the DOH reviews Dawn Mining's closure cost estimate, the level of uncertainty with regard to the Title X reimbursement could also be reviewed.

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Please contact me so that we may further discuss these issues. I look forward to hearing from you.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Karla J. Axell".

Karla J. Axell

cc David Delcour
Robert Nelson
Gary Robertson
Dennis Sollenberger ✓