

September 24, 2015

EA-15-094

Mr. Lawrence J. Corte
President and General Manager
Western Nuclear Incorporated
28011 Youngfield Street, Suite 340
Golden, CO 80401

SUBJECT: WESTERN NUCLEAR INCORPORATED - EXERCISE OF ENFORCEMENT DISCRETION RELATED TO THE 2007 INDIRECT TRANSFER OF CONTROL OF RADIOACTIVE MATERIALS LICENSE SUA-56 AND EXCEEDENCES OF GROUNDWATER PROTECTION STANDARDS AT WESTERN NUCLEAR INCORPORATED'S SPLIT ROCK SITE IN JEFFERY CITY, WYOMING

Dear Mr. Corte:

I am writing to inform you of the actions being taken by the U.S. Nuclear Regulatory Commission (NRC) staff regarding two apparent violations at the Western Nuclear Incorporated (WNI) Split Rock site in Jeffery City, Wyoming. The first apparent violation relates to the indirect transfer of control of the WNI license from Phelps Dodge Corporation to Freeport-McMoRan Copper and Gold Inc. in 2007. The second apparent violation relates to exceedances of the ground water protection standards at the Split Rock site.

Regarding the first apparent violation, by letter dated March 12, 2007, WNI advised the NRC that Phelps Dodge Corporation would be acquired by Freeport-McMoRan Copper & Gold Inc., (Freeport) under a definitive merger agreement (Agencywide Document Access and Management System (ADAMS) Accession Number ML071080087). By letter dated September 5, 2007 (ML072710031), WNI informed the NRC that the acquisition was completed on March 19, 2007. While Phelps Dodge Corporation continued to be the parent company of WNI, Phelps Dodge Corporation was now a wholly owned subsidiary of Freeport. This merger is an indirect transfer of control of the NRC license held by WNI. By letter dated July 22, 2009 (ML092100247), WNI submitted a request for consent to an indirect transfer of control of WNI's license for the Split Rock site. The NRC approved the indirect transfer of control on May 11, 2015 (ML15070A168).

The NRC staff finds that from, March 19, 2007 to May 11, 2015, WNI was in apparent violation of 10 CFR 40.46, which requires written approval by the Commission of an indirect transfer of control of an NRC license.

This apparent violation of 10 CFR 40.46 was evaluated in accordance with the NRC Enforcement Policy, the current version of which is included on the NRC's Web site at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>. Based on its review of the applicable information, the NRC determined that a violation has occurred. The failure to obtain written NRC approval prior to an indirect transfer of control in accordance with 10 CFR 40.46 is normally considered a Severity Level III violation pursuant to the Enforcement Policy.

However, in consideration of the circumstances of this case, the NRC has determined that it is appropriate to exercise enforcement discretion in accordance with Section 3.5 of the Enforcement Policy, and to refrain from issuing an enforcement action. The circumstances supporting enforcement discretion are summarized below.

In 2007, WNI may not have understood that the merger constituted an indirect transfer of control under 10 CFR 40.46, which requires NRC's written approval *before* the indirect transfer of control. In addition, there may have been some confusion in the communications between WNI and NRC regarding the approval of the transfer. After the transfer, Freeport provided financial assurance for the site through a parent company guarantee (PCG) and the staff determined that financial assurance for decommissioning was provided. Finally, operations at the Split Rock site are, minimal; only semi-annual well monitoring and general control of the site (fencing, no manned guard posts) are taking place. WNI and NRC staffs are completing the final actions necessary to terminate the WNI site license and transfer the site the Department of Energy.

The second apparent violation concerns groundwater protection standards. WNI requested NRC approval of Alternate Concentration Limits (ACLs) for the Split Rock site in a series of letters between 1988 and 1999. NRC deferred or denied the initial requests, however, the NRC approved the ACLs for the site (ML062910216) in license amendment 99 (ML062910222) on September 28, 2006. Pursuant to a WNI request in 2007, the NRC revised the ACLs for the Split Rock site in license amendment 105 (ML092940027) issued on February 24, 2010.

NRC regulations at 10 CFR 40, Appendix A, Criterion 5B(1) state that "Hazardous constituents entering the ground water from a licensed site must not exceed the specified concentration limits in the uppermost aquifer beyond the point of compliance during the compliance period." WNI license SUA-56, license condition (LC) 74 specifies the ground-water protection standards, trigger levels, and alternate concentration limits that WNI must comply with at the Split Rock site.

By letter dated February 6, 2013, WNI acknowledged that they were not in compliance with the limits in the Split Rock license (ML13077A379). WNI provided an explanation as to why they believed that ACLs described in NRC regulations at 10 CFR 40, Appendix A, Criterion 5B(1) did not apply. WNI argues that they are not required to comply with ACLs because the NRC staff approved an "alternate approach" to meeting the 10 CFR 40 Appendix A, Criterion 5B(1) requirements. WNI reiterated this position and referenced 10 CFR 40 Appendix A Criterion 5B(3) (WNI letter dated July 8, 2014, ML14223A452). Criterion 5B(3) permits a detected constituent to be excluded as an ACL, if the NRC finds that the constituent is not a substantial present or potential threat to human health or the environment. WNI contends that the ACL exceedances at Split Rock fall within Criterion 5B(3) are not a threat to public health and the environment. WNI stated the constituents do not pose an actual or potential threat. WNI states it has established control over the groundwater by ownership of the land in fee simple and through the use of restrictive covenants, negative easements, and easements to ensure that groundwater will not be available for human consumption. The NRC discussed the ACL exceedances at Split Rock in the past with WNI, most recently during a public meeting the NRC staff held WNI on June 10, 2015 (ML15180A408).

NRC staff identified that WNI was in apparent violation of 10 CFR 40, Appendix A, Criterion 5B(1) and License Condition 74. Monitoring wells down gradient from the Point of Compliance well WN-21 exceed the limits established in License Condition 74 for the Ground Water

Protection Standards for selenium and cadmium and the Alternate Concentration Limit (i.e., the secondary ground water standard) for nitrate between 2006 and 2014.

The apparent violation of 10 CFR 40, Appendix A, Criterion 5B(1) and License Condition 74 was evaluated in accordance with the NRC Enforcement Policy, the current version of which is included on the NRC's Web site at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html>. Based on its review of the applicable information, the NRC determined a violation of 10 CFR 40, Appendix A, Criterion 5B(1) and License Condition 74 occurred. A failure to comply with the NRC's regulations and license conditions for environmental protection standards would normally be considered a Severity Level III violation pursuant to the Enforcement Policy. However, in consideration of the circumstances of this case, the NRC has determined that it is appropriate to exercise enforcement discretion in accordance with Section 3.5 of the Enforcement Policy, and to refrain from issuing an enforcement action. The circumstances supporting enforcement discretion are summarized below.

On January 7, 2015, the NRC staff formally informed WNI that the NRC has not approved the institutional controls and the "alternative approach" for ACLs proposed for the site (ML14338A463). Because of considerable confusion on the part of WNI and the NRC staff on the status of the approval of the both institutional controls, the "alternate approach" for ACLs, and the applicability of Criterion 5B(1), the staff believes enforcement discretion is appropriate.

The measured values in the identified wells are expected to continue to be out of compliance with the limits in the license condition, however WNI initiated actions to address the non-compliance. The NRC will continue to monitor WNI's actions and confirm they are progressing in a timely manner. WNI's continued efforts to address the ACL issues in a timely manner will be considered in any future enforcement action.

The NRC concludes the background information on both apparent violations is adequately addressed on the docket. In addition, WNI came into full compliance with 10 CFR 40.46 when the request for indirect transfer of control was approved by the NRC on May 11, 2015, and the NRC amended the WNI license to update the financial assurance on September 3, 2015 (ML15225A245). WNI's continuing efforts to address modeling issues at the site to support license termination is identified on the NRC docket and NRC recognizes that this process toward license termination will result in resolution of the ACL exceedance and compliance. You are not required to respond to this letter unless the description herein does not accurately reflect your actions or your position. If you contest this action or its significance, you must provide a response within 30 days of the date of this letter, with the basis for your denial and/or corrected information, to the NRC, ATTN.: Document Control Desk, Washington, D.C. 20555-0001, with a copy to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

In accordance with 10 CFR 2.390 of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>.

L. Corte

- 4 -

If you have any questions, please contact Dominick Orlando at 301-415-6749 or by email at Dominick.Orlando@nrc.gov.

Sincerely,

/RA/

Larry W. Camper, Director
Division of Decommissioning, Uranium Recovery
and Waste Programs
Office of Nuclear Material Safety
and Safeguards

Docket No.: 040-01162
License No.: SUA-56

L. Corte

- 4 -

If you have any questions, please contact Dominick Orlando at 301-415-6749 or by email at Dominick.Orlando@nrc.gov.

Sincerely,

/RA/

Larry W. Camper, Director
Division of Decommissioning, Uranium Recovery
and Waste Programs
Office of Nuclear Material Safety
and Safeguards

Docket No.: 040-01162

License No.: SUA-56

DISTRIBUTION:

R. Evans, RIV L.Gersey, RIV R. Kellar, RIV OGC OE DUWP r/f

ML15190A195

OFFICE:	DUWP	DUWP	MSTR	DUWP	DUWP
NAME:	DOrlando	CHolston	MBurgess	MNorato	APersinko
DATE:	07/09/15	07/09/15	07/13/15	07/13/15	07/15/15
OFFICE:	DWMEP	OE	OGC	DWMEP	
NAME:	LCamper	NHilton	PJehle NLO	LCamper	
DATE:	07/16/15	08/10/15	9/17/2015	9/24/2015	

OFFICIAL RECORD COPY