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OFFICE OF THE SECRETARY
RULEMAKING AND ADJUDICATIONS STAFF

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemaking and Adjudications Staff

THIRD SUPPLEMENT TO A JANUARY 24, 2000, REQUEST FOR A HEARING IN
RESPONSE TO 65 FED. REG. 138, JANUARY 3, 2000, DOCKET NO. 40-3453,
LICENSE NO. SUA-917

Dear Secretary:

My January 24, 2000, request for hearing ("petition to intervene") states by postscript: "I have one additional thought. The EDO's Order was issued, inter alia, pursuant 10 CFR Part 40. Part 40 often mentions "application" or "applicant", which provokes the question whether or not such parts of the 10 CFR part would apply. See, e.g., 10 CFR 40.20(a), 40.41(e), and 10 CFR 40.44." See also letter dated January 22 from the United States Nuclear Regulatory Commission's (NRC's) Office of the Secretary acknowledging the receipt of the January 24 at Docket No. 40-3453-LT.

I would respectfully request to herein address such January 24 "additional thought" about NRC implementation of 10 CFR Part 40 at the present proceeding.

I will show below that, given the nature of the EDO's December 27 Order and the procedural and substantive criteria found in 10 CFR Part 40 of the Commission's regulations, Part 40 would not apply to the instant proceeding.

A Federal Register Notice (FRN) was published on Monday, January 3, 2000 (65 Fed. Reg. 138) indicating that the NRC intended to implement an order dated December 27, 1999 and signed by the Director, Office of Nuclear Material Safety and Safeguards (EDO's Order or EDO's December 27 Order). The FRN contained the text of that order and allowed a concise, descriptive title of that order, which read: "Order Transferring

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License No. SUA-917 for the Moab, Utah, Facility and Site from Atlas Corporation to the Moab Mill Reclamation Trust".

I have previously responded to such January 3 FRN by way of:

- January 24 hearing request,
- February 9 first supplement (an errata), and
- February 11 second supplement

The EDO's December 27 Order, on page 6, under Roman five (V), states in pertinent part:

Pursuant to Sections 62, 63, 81, 84, 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (42 USC 2011 et seq.), and the Commission's regulations in 10 C.F.R. Part 40, IT IS HEREBY ORDERED that, effective December 30, 1999, License SUA-917 is transferred to the Trust, and the Trustee is authorized to possess byproduct material in the form of uranium waste tailings and other uranium waste generated by Atlas' milling operations at the Moab [, Utah, Facility and] Site pursuant to the terms and conditions of License SUA-917 [and its predecessor licenses]. [Emphasis added.]

"The Commission's regulations in 10 C.F.R. Part 40", as referred to herein, are published in an annotated, controlled document entitled United States Nuclear Regulatory Commission Rules and Regulations, Title 10, Chapter 1, Code of Federal Regulations--Energy, Part 40, Domestic Licensing of Source Material (March 31, 1999). Where possible, I will indicate the relevant Federal Register citation.

The "purpose" of 10 CFR Part 40 is found at 10 CFR 40.1, which is found within the NRC's regulations. See 56 Fed. Reg. 55991.

10 CFR 40.1 states, in pertinent part:

The regulations in this part establish procedures and criteria for the issuance of licenses to receive title to, receive, possess, use, transfer, or deliver source and byproduct materials, as defined in this part, and establish and provide for the terms and conditions upon which the Commission will issue such licenses. [Emphasis added.]

10 CFR 40.2a is entitled, in pertinent part, "Coverage of tailings sites" and reads, in pertinent part (see 10 CFR 40.2a(b)):

The Commission will regulate byproduct material as defined in this part that is located at a site where milling operations are no longer active, if such site is not covered by the remedial action program of Title I of the Uranium Mill Tailings Radiation Control Act of 1978. The criteria in Appendix A of this part will be applied to such sites.

10 CFR 40.3 is entitled "License requirements" (See 55 Fed. Reg. 45591) and reads, in pertinent part:

A person subject to the regulations in [10 CFR Part 40] may not receive title to, own, receive, possess, use, transfer, provide for long-term care, deliver or dispose of byproduct material as defined in [10 CFR Part 40] or any source material after removal from its place of deposit in nature, unless authorized in a specific license issued by the [NRC] under the regulations in [10 CFR Part 40].

It should be noted that a "person", with few exceptions, is contemplated to be individuals or entities (even governmental) outside the NRC. For example, the "trust" (see January 24 request, page 1) may not be a person to which 10 CFR Part 40 would apply, if the trustee were an NRC contractor. See 10 CFR 40.4 "Definitions", at the definition of "Persons" found therein.

10 CFR 40.9 talks about the "completeness and accuracy of (the) information" expected to be found in such an application. Material misstatements of fact by omission or commission are not allowed.

10 CFR 40.20 is entitled "Types of licenses" and states at 10 CFR 40.20 (a) (see 55 Fed. Reg. 45591), in part:

Licenses for source material and byproduct material are of two types: general and specific... The general licenses provides (for in 10 CFR Part 40) are effective without the filing of applications with the Commission on the issuance of licensing documents to particular persons. Specific licenses are issued to named persons upon applications filed pursuant to the regulations in (10 CFR Part 40).
Emphasis added.

The EDO's December 27 Order does not so much as mention a "specific license" issued upon application," as would be contemplated by 10 CFR 40.20 (a). Emphasis added.

Given that "licenses for source material and byproduct material are of (only) two types: general and specific," the question arises as to whether or not the EDO's December 27 Order issued a general license provided for in 10 CFR Part 40, which is effective without the filing of an application. Any amendment to a specific source material license (e.g., SUA-917) would be allowed of certain "procedures and criteria" (regulations) found in 10 CFR Part 40 were properly addressed by the applicant in an application. 10 CFR 40 indicated how to properly address such procedures and criteria by way of the implicit interrogatories contained in 10 CFR 40.41 et seq ("licenses").

10 CFR 40.31 (see 26 Fed. Reg. 284) is entitled "Applications for specific licenses." 10

CFR 40.31 (b) states, in part:

The commission may at any time after the filing of the original application, and before the expiration of the license, require further statements to determine whether the application should be granted or denied or whether a license should be modified or revoked.

10 CFR 40.31 (c) (see 36 Fed. Reg. 145) would indicate that:

Applications and documents submitted to the Commission in connection with applications will be made available to the public inspection in accordance with the provisions of the regulations contained in Parts 2 and 9 of the chapter.

10 CFR 40.31 (c) would lead me to believe that if there is an application responded to by the EDO's December 27 Order, such applications should be found as an NRC official record on Docket No. 40-3453. See January 24 request for hearing, page 2, and, particularly, paragraphs 3 and 4.

10 CFR 40.44 (see 56 fed. Reg. 40757) is entitled "Amendment of licenses at request of licensee" and states:

Applications for amendment of a license shall be filed of NRC 313 in accordance with 40.31 and shall specify the respects in which the licensee desires the license to be amended and the grounds for such amendment.

The EDO's December 27 sua sponte, confirmatory order would offer an administrative amendment to a Part 40 specific license. See January 24 hearing request, page 1. The specific license (see 10 CFR 40.3 above) issued by the NRC under the regulations in 10 CFR Part 40 would normally be applied for by an "applicant." An applicant may seek a "specific source material license."

10 CFR 40.46 (see 25 Fed. Reg. 8689) is entitled "Inalienability of license". Such regulation implements Section 184 of the Atomic Energy Act of 1954 ("42 USC 2254), even as amended. See also 63 Fed. Reg. 48644, col. 3. 10 CFR 40.46 states:

No license issued or granted pursuant to the regulations in this part shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall after securing full information, find that the transfer is in accordance with the provisions of this act, and shall give its consent in writing. Emphasis added.

I have discussed the applicability of Section 184 in my request for hearing dated January 24, 2000. That discussion considered an application as often mentioned by 10 CFR Part 2, Subpart M (10 CFR 2.1300 et seq). See, particularly, page 2 and 3 of the January 24. With respect the findings NRC must make to grant an application, I would indicate that such findings as are required in a license transfer proceeding must be based on "full information". (63 Fed. Reg. 48644, col. 3, where laid out, in relevant part, Section 184 of the Atomic Energy Act of 1954 ("42 USC 2254"), even as amended.) (See 10CFR 40.41 et seq.)

Indeed the "application" mentioned by 40.31 et seq should have provided the NRC with most, if not all, of the required or relevant information ("full information") the NRC must have to make a license transfer decision in conformance with the above referenced statute. See section 184.

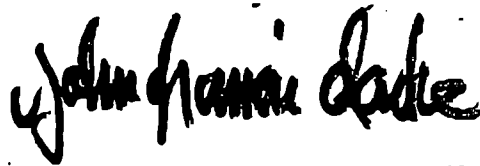
Given the nature of the EDO's December 27 Order and the procedural and substantive criteria found in 10 CFR Part 40 of the Commission's regulations, Part 40 would not apply to the instant proceeding.

An interested person, such as myself, who has come to the conclusion that the EDO's Order should not, absent more information, be sustained, need only show that the EDO's Order was not based on the "full information" required by Section 184 of the Atomic Energy Act of 1954, as amended.

A 10 CFR 2.1306(b)(2)(iii) hearing request and intervention petition must provide a concise statement which lays out what that interested person intends to do at, or with a hearing if that hearing were to be granted.

If granted a hearing I would show that the EDO's Order is defective in that it is not based on the necessary "full information".

I would show that the EDO's Order does not reflect, via its findings, "full information". It is the "petitioner's position", in this instance, that the EDO's Order does not reflect the proper "procedures and criteria" and, thus, should not be sustained.



John Francis Darke

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