

RESPONSE TO FREEDOM OF
INFORMATION ACT (FOIA) REQUEST

2017-0029 REV.

2

RESPONSE
TYPE☐

INTERIM

☒

FINAL

REQUESTER:

Patricia Larimore

DATE:

12/29/2016

DESCRIPTION OF REQUESTED RECORDS:

The response with any attachments to the NRC memorandum, "Procedure Regarding Radioactive Waste in the West Lake Landfill", January 29, 1988 (NRC Accession Number 9710070296)

PART I. -- INFORMATION RELEASED

- ☐ Agency records subject to the request are already available in public ADAMS or on microfiche in the NRC Public Document Room.
- ☒ Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☒ See Comments.

PART I.A -- FEES

AMOUNT*

\$

*See Comments for details

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You will be billed by NRC for the amount listed.

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None. Minimum fee threshold not met.

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You will receive a refund for the amount listed.

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Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- ☐ We did not locate any agency records responsive to your request. *Note:* Agencies may treat three discrete categories of law enforcement and national security records as not subject to the FOIA ("exclusions"). 5 U.S.C. 552(c). This is a standard notification given to all requesters; it should not be taken to mean that any excluded records do, or do not, exist.
- ☒ We have withheld certain information pursuant to the FOIA exemptions described, and for the reasons stated, in Part II.
- ☐ Because this is an interim response to your request, you may not appeal at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination.
- ☒ You may appeal this final determination within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or FOIA.Resource@nrc.gov. Please be sure to include on your letter or email that it is a "FOIA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

In conformance with the FOIA Improvement Act of 2016, the NRC is informing you that: (1) you have the right to seek assistance from the NRC's FOIA Public Liaison; (2) you have the right to seek dispute resolution services from the NRC's FOIA Public Liaison or the Office of Government Information Services; and (3) notwithstanding the language in Parts I.B and II.B of this form, you may appeal this final determination within 90 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or FOIA.Resource@nrc.gov. Please be sure to include on your letter or email that it is a "FOIA Appeal."

[continued on next page]

SIGNATURE - FREEDOM OF INFORMATION ACT OFFICER

Nina Argent

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**RESPONSE TO FREEDOM OF INFORMATION
ACT (FOIA) REQUEST Continued**

RESPONSE
TYPE

☐

INTERIM

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FINAL

REQUESTER:

Patricia Larimore

DATE:

12/29/2016

PART I.C COMMENTS (Continued)

The Office of General Counsel has reevaluated the memo, "Procedure Regarding Radioactive Waste in the West Lake Landfill" and decided to release portions of information previously redacted.

Subsequent to our revised response to your request, dated 12/01/2016, you contacted the FOIA Public Liaison to call to our attention a missing attachment to the above-mentioned memo. We have located the 2-page document, "Disposal of Source Material Pursuant to 10 CFR Part 40". According to ADAMS, NRC's official document repository, the document you requested is profiled as non-publicly available. And, we have not uncovered any information confirming, or suggesting, that the requested document was officially released by the NRC.

However, as a matter of discretion, the Office of General Counsel has determined that the requested attachment may be released to you in full.

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PART II.A -- APPLICABLE EXEMPTIONS

Records subject to the request are being withheld in their entirety or in part under the FOIA exemption(s) as indicated below (5 U.S.C. 552(b)).

- ☐ Exemption 1: The withheld information is properly classified pursuant to an Executive Order protecting national security information.
- ☐ Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.
- ☐ Exemption 3: The withheld information is specifically exempted from public disclosure by the statute indicated.
- ☐ Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
- ☐ Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
- ☐ 41 U.S.C. 4702(b), which prohibits the disclosure of contractor proposals, except when incorporated into the contract between the agency and the submitter of the proposal.
- ☐ Exemption 4: The withheld information is a trade secret or confidential commercial or financial information that is being withheld for the reason(s) indicated.
- ☐ The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
- ☐ The information is considered to be another type or confidential business (proprietary) information.
- ☐ The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- ☒ Exemption 5: The withheld information consists of interagency or intraagency records that are normally privileged in civil litigation.
- ☐ Deliberative process privilege.
- ☒ Attorney work product privilege.
- ☐ Attorney-client privilege.
- ☐ Exemption 6: The withheld information from a personnel, medical, or similar file, is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- ☐ Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
- ☐ (A) Disclosure could reasonably be expected to interfere with an open enforcement proceeding.
- ☐ (C) Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.
- ☐ (D) The information consists of names and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
- ☐ (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
- ☐ (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- ☐ Other

PART II.B -- DENYING OFFICIALS

In accordance with 10 CFR 9.25(g) and 9.25(h) of the U.S. Nuclear Regulatory Commission regulations, the official(s) listed below have made the determination to withhold certain information responsive to your request.

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL	
			EDO	SECY
Nina Argent	Acting FOIA Officer		<input checked="" type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>

Appeals must be made in writing within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or FOIA.Resource@nrc.gov. Please be sure to include on your letter or email that it is a "FOIA Appeal."

<date> 19880217 </date>

<to> Cunningham, Richard </to>

<from> Treby, Stuart </from>

<subject> WEST LAKE LANDFILL </subject>

DOC-NO: ELD--132A

DATE: 02/17/88

TYPE: Internal ELD

TO: Richard E. Cunningham

FROM: Stuart A. Treby

SUBJECT: WEST LAKE LANDFILL

PAGES: 003

In your memorandum of January 29, 1988 you requested advice as to the legal resources available to the NRC to require a former licensee, the Cotter Corporation, to properly dispose of radioactive wastes dumped in the **West Lake landfill** on the outskirts of St. Louis, Missouri.

The background information accompanying your memorandum shows that the radioactive material, seven tons of uranium, was contained in some 8700 tons of barium sulfate mixed with about 39,000 tons of soil. It was moved to the **landfill** between July and October 1973 from the Latty Avenue site which had been used by the licensee to dewater uranium processing residuals purchased from the AEC prior to shipment to the licensee's uranium processing mill at Canon City, Colorado, for further processing. The operations at Latty Avenue were carried out under a source material license, SUB-1022, which was subsequently terminated. It is also abundantly clear that the AEC was fully aware in 1974 of the admixture of the barium sulfate with soil and its transfer to the **landfill**. See letter of November 1, 1974 from John G. Davis, Deputy Director for Field Operations, Directorate of Regulatory Operations, to Cotter Corporation.

Mr. Davis' letter noted that, 'The disposal does not appear to be within the intent of the Commission's regulations, KC 10 CFR Part 40, to allow alteration of the physical nature of Source Material (i.e., dilution of solids with nonradioactive source material) in order to obtain a physical mixture which would no longer be subjected to licensing by the Commission.' An inspection report, No. 040-8035/74-01, transmitted on May 17, 1974 identified the same transfer of material to the **landfill** as a disposal contrary to the requirements of KC 10 CFR 20.301. There does not appear to have been any follow up enforcement action by either the AEC or the NRC to these two apparent violations of regulations.

It is a foregone conclusion that the usual enforcement procedures of the NRC, that is, a notice of violation or order to show cause leading eventually to a civil penalty, would be of no avail in this case. In Secy-85-285 the General Counsel and the Executive Director of Operations (for the Executive Legal Director) provided a legal analysis of the application of 28 U. S. C. 2462, a federal statute of limitations, to enforcement action of the NRC. The conclusions of that legal analysis, when applied to the facts of this case, clearly indicate that any administrative enforcement action that could or would result in a civil fine, penalty or forfeiture, is barred by the five year limitation on actions in that statute. The five year period commences to run from the time of the violation. In this case that is October 1973, at the latest. Accordingly, normal enforcement action by the NRC leading to civil penalty would have been barred after the end of October 1978.

The only effective resource available to NRC at this point in time would be judicial action under Section 232 of the Atomic Energy Act of 1954, as amended. Section 232 authorizes the NRC, through the Attorney General, to seek injunctive relief with respect to violations of regulations or orders. This would, of course, draw into question whether an order to clean up the **landfill** (if that action were to be selected to establish a basis for injunctive relief) was lawful, as well as if the other necessary bases for injunctive relief were met, for example, that no other remedy was available, and that the health and safety hazard warranted judicial intervention. The question of the lawfulness of the order would likely turn upon the question of whether there was indeed a violation of regulations in sending the material to the landfill. Whether there was a violation of KC 10 CFR 20.301,

as stated in the inspection report, depends upon how 10 CFR 40.13(a) is construed. We note that there is nothing in that section or elsewhere in 10 CFR Part 40 that expressly prohibits dilution of source material in a mixture to below .05 weight percent in order for it to be exempted from the regulations in Part 40. (FN1) If exempt, the requirement for transfer to an authorized recipient would not apply. (See attached memorandum from W. Olmstead to J. Lieberman) Thus, the licensee could argue that the dilution with soil was legal and that the transfer and subsequent disposal were legal.

Although the doctrine of laches (a doctrine of repose applied in equity cases, such as injunction proceedings, analogous to a statute of limitations) does not apply to the United States Government, the fact that 14 years has elapsed since the AEC/NRC had evidence of the disposal, and had considered it a possible violation, argues against the need for immediate vigorous enforcement through a judicial injunction. Added to this is the fact that the AEC/NRC terminated the license with full knowledge of the disposal. One could argue that the responsible regulatory agency, in terminating the license without further enforcement action, had determined that the alleged violations were without merit. Finally, the United States has an alternative statutory remedy. Uranium is a hazardous substance under CERCLA (Superfund) and the response authority under Section 104 of that Act could be invoked.

If the staff determines upon proceeding judicially, Section 161c of the Atomic Energy Act would authorize the NRC to conduct the necessary studies and evaluations to support any order to be issued and any subsequent request for enforcement of the order by judicial injunction. If EPA was to be requested to proceed under Section 104 of CERCLA then EPA would initiate the necessary studies and evaluations and supervise the remedial action. We note that under CERCLA, EPA is not required to litigate responsibility before proceeding. Under CERCLA, litigation comes after the fact and is focused upon collection of agency remedial action costs and penalties from responsible parties.

(b)(5)

LEVEL 1 - 1 OF 1 DOCUMENT

DOC-NO: ELD-242

DATE: 01/03/83

TYPE: Internal ELD

TO: James Lieberman

FROM: William J. Olmstead

SUBJECT: DISPOSAL OF SOURCE MATERIAL PURSUANT TO 10 CFR PART 40

PAGES: 002

TEXT:

In your memorandum of December 20, 1982 you asked our opinion on disposal of source material under 10 CFR Part 40. The specific question is whether source material can be disposed of other than by transfer pursuant to 10 CFR 40.51. The answer is yes, by clear implication matter containing less than .05% source material by weight is not regulated (10 CFR 40.13(a)) and although the regulation does not refer to disposal explicitly, it is implicit that exempt or unregulated material may be disposed of without regard to other NRC

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regulations.

Further thorium and uranium may also be disposed of under 10 CFR 20.106, 20.301, and 20.303. These rules cover disposal of "licensed material" with reference to 10 CFR Part 20 Appendices B and C for quantity limitations. Thorium and uranium are listed in the Appendices. We do not read the exemption from Part 19, 20, and 21 referred to in 10 CFR 40.22(b) as denying to licensees the disposal "benefits" under Part 20. The exemption, in our opinion, refers to the regulatory burdens pertaining to occupational health and safety, and defect reporting required where licensed activities can present a substantial safety hazard, but deemed unnecessary for persons possessing and using only small quantities of source material. See e.g., 42 FR 28891.

We note also that 10 CFR 20.302 has been used as a basis to review and approve disposal methods for source material contaminated soil (e.g., Parkersburg, West Virginia - AMAX Corporation).

However, none of those provisions would appear to justify a licensee (whether general or specific) from taking matter exceeding .05% by weight source material and disposing of it by spreading it on the ground, without authorization under 10 CFR 20.302. Such a disposal would not be of an unimportant quantity (10 CFR 40.13(a)), nor a release in effluents (10 CFR 20.106), nor a release to a

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sanitary sewage system (10 CFR 20.303). Accordingly, if the matter dispersed on the licensee's grounds exceeded .05% by weight source material it was not a disposal authorized by regulation.

[2] The memorandum from John G. Davis to Robert B. Minogue, referred to in your memorandum raises the question of whether the exemption in 10 CFR 40.13(a) is justifiable from a health and safety viewpoint. The issue raised by Mr. Davis' memorandum reflects the fact that the .05% by weight figure was arrived at for common defense and security purposes in the initial regulatory definition of source material. 12 FR 1855 (1947). The .05% figure was carried over in the 1960 general revision and again related primarily to the common defense and security. 25 F.R. 8619 (1960). The Davis memorandum also, it seems to us, reads too much into the exemption in 10 CFR 40.22(b) from 10 CFR Parts 19, 20, and 21. As you have noted in your memorandum, 10 CFR 40.22 does not, in itself, permit disposal.

Dear FOIA Requester:

The FOIA Improvement Act of 2016, which was enacted on June 30, 2016, made several changes to the Freedom of Information Act (FOIA). Federal agencies must revise their FOIA regulations to reflect those changes by December 27, 2016. In addition to revising our regulations, we intend to update the Form 464, which we use to respond to FOIA requests.

In the interim, please see the comment box in Part I.C of the attached Form 464. The comment box includes information related to the recent changes to FOIA that is applicable to your FOIA request, including an updated time period for filing an administrative appeal with the NRC.

Sincerely yours,

Nina Argent /S/

Nina Argent
FOIA Officer (Acting)