



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

August 6, 1984

The Honorable Samuel S. Stratton, Chairman  
Subcommittee on Procurement and Military  
Nuclear Systems  
Committee on Armed Services  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to advise you that the proposed amendments to the Commission's rules in 10 CFR Part 40 for licensing uranium mills and disposal of mill tailings and waste as well as an advance notice of proposed rulemaking on further amendments to 10 CFR Part 40 were withdrawn prior to publication in the Federal Register.

Advance copies of the Federal Register notifications were provided to you by John Davis, Director, Office of Nuclear Material Safety and Safeguards, on July 31, 1984. Our office will notify you when further action is taken on these rulemakings.

Sincerely,

A handwritten signature in cursive script, reading "Carlton Kammerer", is written over the typed name.

Carlton Kammerer, Director  
Office of Congressional Affairs

cc: Rep. Marjorie S. Holt

E-10

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*Rule*  
*LC-3*

The Honorable Alan Simpson, Chairman  
Subcommittee on Nuclear Regulation  
Committee on Environment and Public Works  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

The U.S. Nuclear Regulatory Commission (NRC) is proposing amendments to the Commission's rules in 10 CFR Part 40 for licensing uranium mills and disposal of mill tailings and waste. The NRC is also issuing an advance notice of proposed rulemaking on further amendments to 10 CFR Part 40.

The NRC Authorization Act for FY 1983 (Public Law 97-415, signed January 4, 1983) contained a requirement that the Commission modify its mill tailings regulations to conform to final Environmental Protection Agency (EPA) standards for these materials. Final standards were signed by the Administrator September 30, 1983 and published on October 7, 1983 (48 FR 95928).

The enclosed proposed amendments and advance notice reflect the two rulemakings the NRC is undertaking to modify its rules to make them consistent with the new EPA standards and satisfy provisions of Section 205 of the Uranium Mill Tailings Radiation Control Act of 1978, as amended. The proposed amendments to Appendix A consist of changes to the existing Commission regulations necessary to conform to the new EPA standards and to incorporate within Commission regulations those provisions of the EPA standards not related to ground water. Minor conforming amendments to Appendix A, as necessary to remove inconsistencies with the ground water protection provisions of EPA's new standards, are included as proposed amendments. The advance notice outlines the NRC's plans for a further rulemaking to consider the incorporation within NRC regulations of these and other EPA ground water protection requirements issued by the EPA pursuant to provisions of the Solid Waste Disposal Act, as amended.

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The enclosed notices are being sent to the Office of the Federal Register for publication. A copy of a public announcement to be released by the NRC on this matter is also enclosed.

Sincerely,

(Signed) John G. Davis  
John G. Davis, Director  
Office of Nuclear Material Safety  
Safeguards

Enclosures:

1. FR Notice on proposed amendments
2. FR Notice on advance notice of proposed rulemaking
3. Public Announcement

cc: Senator Gary Hart

Identical letters sent to those on the attached list.

Ref. Encl. E, SECY 83-523 (changes shown on attached).

IDENTICAL LETTER SENT TO:

Rep. Ottinger/cc: Rep. Moorhead

Rep. Ucall/cc: Rep. Lujan

Rep. Stratton, Chairman

Subcommittee on Procurement and Military Nuclear Systems

Committee on Armed Services

WMLU:WM

K Dragoinette

84/07/18

WMLV:NM

L Hogganbotham

84/07/12

WM

WJ Bell

84/07/

WM

RE Browning

84/07/17

NMSS

D Mausshardt

84/07/20

NMSS

JG [signature]

84/07/23

OCA  
84/7/31

June 16, 1980



Note to: Ross A. Scarano, Chief  
Uranium Recovery Licensing Branch

In your memorandum of April 11, 1980 you asked our opinion on the application of the land ownership requirements of § 83(b)(1)(A) of the Atomic Energy Act (AEA), as amended by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). The matter was raised, apparently, by your review of the Energy Fuels Nuclear submittal of land acquisition documents indicating that acquisitions from private individuals, in the majority of cases, were of surface rights only. The question is whether the statutory requirement for transfer of land and interests therein to State or Federal Government ownership is absolute, or subject to some discretion in its application.

At the outset it should be noted that Energy Fuels Nuclear has already received a source material license under Section 62 of the AEA. Accordingly,

1/ Sec. 83. OWNERSHIP AND CUSTODY OF CERTAIN BYPRODUCT MATERIAL AND DISPOSAL SITES.--

(b)(1)(A) The Commission shall require by rule, regulation, or order that prior to the termination of any license which is issued after the effective date of this section, title to the land, including any interests therein (other than land owned by the United States or by a State) which is used for the disposal of any byproduct material, as defined by section 11 e. (2), pursuant to such license shall be transferred to--

- (i) the United States, or
- (ii) the State in which such land is located, at the option of such State.

unless the Commission determines prior to such termination that transfer of title to such land and such byproduct material is not necessary or desirable to protect the public health, safety, or welfare or to minimize or eliminate danger to life or property. Such determination shall be made in accordance with section 181 of this Act. Notwithstanding any other provision of law or any such determination, such property and materials shall be maintained pursuant to a license issued by the Commission pursuant to section 81 in such manner as will protect the public health, safety, and the environment.

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that company is subject to Section 83(b)(4) of the AEA,<sup>2/</sup> not § 83(b)(1)(A), which applies only to licenses issued after the effective date of Section 83 (November 8, 1981).

In the case of licenses issued before November 8 1981, the Commission is clearly given discretion to require transfer of "such land and interests therein . . . as may be necessary to protect the public health, safety and environment from the effects associated with such byproduct material." The Commission is further required to take into consideration the ownership status of such land and interests therein and the ability of the licensee to transfer title and custody thereof to the United States or a State.

It is clear from the legislative record that § 83(b)(4) was specifically intended to give discretion to NRC to waive the ownership and transfer requirements of § 83 because of title and ownership obstacles. See H. Rept. 95-1480, Part 2, p. 44, and Cong. Record p.H 12969, October 14, 1978. For licenses issued after November 8, 1981, to which § 83(b)(1)(A) applies, the question is more difficult to answer. On its face the statutory language does not give the same discretion to the Commission as is found in § 83(b)(4). The language in § 83(b)(1)(A) as enacted first appeared in the version of H.R. 13650 that was offered as a House amendment to Title II of UMTRCA as it appeared in the Senate version, S-2584. See Cong. Rec. p. H-12965, October 14, 1978.

The successive drafts of legislation reported out of the House Committees stated the requirement as follows:

1. From the Committee on Interior and Insular Affairs (Mr. Udall):

Sec. 83. OWNERSHIP AND CUSTODY OF CERTAIN BYPRODUCT MATERIAL AND DISPOSAL SITES.--

"a. Any license under section 62 or section 81 for any activity which results in the production of any byproduct material as defined in section 11 e. (2)

<sup>2/</sup> (4) In the case of any such license under section 62, which was in effect on the effective date of this section, the Commission may require, before the termination of such license, such transfer of land and interests therein (as described in paragraph (1) of this subsection) to the United States or a State in which such land is located, at the option of such State, as may be necessary to protect the public health, welfare, and the environment from any effects associated with such byproduct material. In exercising the authority of this paragraph, the Commission shall take into consideration the status of the ownership of such land and interests therein and the ability of the licensee to transfer title and custody thereof to the United States or a State.

shall contain such terms and conditions as may be necessary to assure that, prior to termination of such license--

"(1) the license will comply with such requirements as the Commission may establish respecting such termination, and

"(2) ownership of--

"(A) any byproduct material defined in section 11 e. (2) which resulted from such licensed activity, and

"(B) any land (other than land owned by the United States), including both the surface and subsurface estates, which is used for the disposal of such byproduct material.

shall be transferred to the United States.

Such material and land shall be transferred to the United States without cost to the United States (other than administrative and legal costs incurred in carrying out such transfer). The United States shall not transfer title to property acquired under this subsection to any other person. (H. Rept. 95-1480, Part 1, p. 7, emphasis supplied).

H. Rept. 95-1480, Part 1 contains no material relevant to answering the question of whether the transfer requirement can be applied on a discretionary basis. On its face the draft bill provision appeared absolute in requiring both surface and subsurface estates to be transferred.

2. From the Committee on Interstate and Foreign Commerce (Mr. Staggers):

"b. (1) Any such license which is issued after the effective date of this section shall also contain such terms and conditions as the Commission determines to be necessary to assure that, prior to termination of such license and after the licensee has complied with the requirements of subsection a., any land (other than land owned by the United States) which is used for the disposal of such byproduct material shall be transferred to the United States, including both the surface estate and any interest in the subsurface estate which may be necessary to protect the public health, welfare, and the environment. (H. Rept. 95-1480 Part 2, pp. 15-16)



The pertinent part of the section-by-section analysis for this draft reads as follows:

Subsection (b) requires that licenses issued after the effective date of the new section 83 must include terms and conditions for the transfer of land used to dispose of tailings from active operations to the United States. This will occur before termination of the license, but after the land has met the requirements of subsection (a).

This transfer will include surface and subsurface interests. Similar provision is made for the transfer of such interest to the United States in the case of a license in effect before the effective date of this section. However, in such case, the NRC has some discretion because such licenses (sic) may not own the subsurface or even the surface interests and thus could not transfer the land to the United States. (H. Rept. 95-1480, Part 2, pp. 43-44)

The legislative record on the enacted version is equally sparse, consisting of a single reference in the remarks of Congressman Dingell as follows:

The amendment provides for transfer of title of land to a State, at its option, or the United States, just as the Senate proposed. It includes the clause allowing the NRC not to require such transfer if NRC determines that it is not necessary to protect health, et cetera. Such determination would be made in accordance with section 181 of the 1954 act.

This provision applies to future licenses. In the case of existing licensees, the NRC is given discretion to determine whether or not such transfer is required, taking into consideration the practical problem of who owns the land. (Cong. Rec. p. H12969, October 14, 1978)

The only conclusion that can reasonably be drawn from these materials is that after November 8, 1981 an inability to secure complete and full title to private lands intended for a disposal area may bar the use of those lands for tailings disposal. That is, an inability to convey an interest is not, in and of itself, a sufficient ground for the Commission to waive the title transfer requirement as to mills and tailings licensed after November 8, 1981. If the legislative record illuminates anything it is that a demonstrated inability to convey a real property interest to a State or to the United States serves as a basis for waiving the requirement only as to sites "grandfathered" under § 84(b)(4).

The question must be answered, however, whether the waiver authority in § 83(b)(1)(A) may be applied separately to severable interests in the real property. Land ownership can become a complicated matter.<sup>3/</sup> Unencumbered fee estates may be difficult to assemble in the western states where it is not uncommon for surface rights, mineral rights (including oil and gas), and water rights appurtenant to the land (in particular appropriative rights) to be conveyed as separate interests. Added to such fractionated interests may be an overlay of easements and rights-of-way for roads, pipelines, transmission lines, etc. Wills and trusts may have created life estates or future interests in the real property. The statute does not distinguish among these various interests in terms of transfer.

An argument can be made based upon § 83(b)(1)(B) that both surface and subsurface estates ("subsurface" probably includes at least mineral, oil, gas, and ground water rights; "surface" would include as a minimum grazing rights, right to springs or to water in surface water courses, easements, rights of way, etc.) must be conveyed because the section also gives the authority to the Commission to permit use rights to both surface and subsurface estates with a right of first refusal in the grantor, based essentially, upon the same considerations of public health, safety, and environmental protection that authorize waiver of transfer in § 83(b)(1)(A). The statutory scheme can be described as total conveyance followed, if appropriate, by a Government controlled use program. Thus, it may be argued that the Commission has only two routes to follow, (1) complete and total transfer, followed by a use permitting program, or (2) waiver of transfer, with subsequent regulation of the privately owned surface and subsurface estates by licensing. Under the second option above, an unanswered issue (and probably unanswerable in terms of UMTRCA) would concern the authority of the Commission to regulate activities, e.g., oil and gas exploration, that could be conducted with no threat to the integrity of the disposal site through the use of techniques that avoided disturbing the tailings and containment area. It can be argued that future licensees have been placed on notice that future tailings disposal sites must be suitable not only from the safety and environmental viewpoints but also as to feasibility of total conveyance.

On the other hand an argument can also be made that the waiver provision of § 83(b)(1)(A) may be applied selectively to the severable interests in real property on an individual basis. That is, the Commission could waive conveyance of those interests in real property that were not necessary or desirable to protect the public health, safety, or welfare or to minimize

<sup>3/</sup> The term "land" is at best an ambiguous word when used in the context of real property conveyancing. "Surface" and "subsurface" are only a little less vague. The phrase "any interest therein" can, however, be viewed as all inclusive of any legal or equitable real property interests.



or eliminate danger to life or property. For example, a rancher might be allowed to retain rights to water from a well located in the disposal area that tapped an aquifer not subject to seepage contamination from the tailings disposal area, or oil and gas rights might be waived if drilling and extraction could be conducted without damage to the long term integrity of the tailings containment.

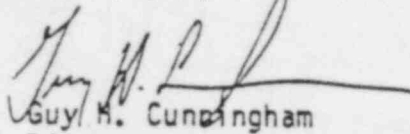
That this approach was contemplated, if not explicitly enacted, is evident in the language of § 83(b)(1) as reported by the Staggers Committee (quoted above) which would have required transfer only of any interest in the subsurface estate necessary to protect the public health, welfare, and the environment.

It can also be noted in favor of this view that the Commission is required to implement the land transfer requirements by rule, regulation, or order, arguably implying discretion in the scope of application as well as the procedures by which such conveyancing will be accomplished. If no discretion were intended the provision for implementation by regulation could be viewed as redundant because the provision would be self-executing in its substantive requirements. The current proposed regulations, however, especially Criterion 11, do not answer the question. Criterion 11 follows the statute practically word for word and therefore does not present a view of what NRC staff might believe to be the proper answer.

- It is difficult to say which view is the better view legally. Neither the language of the statute nor the skimpy legislative record is overwhelmingly in support of one or the other. Accordingly, considerations of policy and administration may be given some weight in determining which position should be adopted in implementing the land ownership requirements. It is conceivable that the rigid requirements of the first view could preclude an applicant from selecting a superior disposal site because some aspect of ownership unrelated to health, safety, or environmental concerns, posed an insurmountable obstacle to conveyancing. The first view could also force a licensee into gambling on an all or nothing waiver, or attempting to justify a waiver on health, safety and environmental grounds when acquisition and transfer were the real problem.

The second view has the virtue of placing the land transfer requirement in the context of necessity for protecting public health, safety, and the environment. It may, however, also have the effect of encouraging applicants to be less than diligent in acquiring all interests in the land. Its application

would also require a more refined set of regulations to establish the standards for waiver than those currently proposed.



Guy H. Cunningham

Director and Chief Regulations Counsel

- 4/ Your memorandum also asked that we address the question whether the requirements differ as to subsurface rights where the land is owned by the United States or a State. Generally, if the United States owns land it owns the entire estate. On a sale or patenting of U.S. land subsurface rights may or may not also have been conveyed. In other instances subsurface rights may be subject to an outstanding lease or mining claim. A consistent application of § 83 after November 8, 1981, would indicate that any rights in Federal or State land outstanding in private individuals should be acquired in order to transfer an unencumbered title to the Governmental body. However, note must be taken of the fact that a literal reading of § 83 appears to except land already owned by the United States or a State from any transfer requirements, including interests that may be in other third parties (e.g., grazing rights, oil and gas leases, etc.) on the theory that the Government itself will continue to manage those interests.