

40-3453

REVISED LETTER

February 06, 1997

Please be advised that the Atlas Corporation correspondence previously issued on February 03, 1997 to Robert D. Williams, Assistant Field Supervisor of the FISH and WILDLIFE SERVICES, Salt Lake City, Utah, regarding *Atlas Uranium Mill Tailings Reclamation Formal Section 7 Consultation Pursuant to the Endangered Species Act of 1973* was revised and accompanies this notice. Further, please be advised that the revised correspondence dated February 06, 1997 contains no substantive changes or alterations; revisions were cosmetic. Enclosures provided with the February 03, 1997 correspondence have not changed, and should now accompany the February 06, 1997 correspondence.

We apologize for any inconvenience this may have caused, and ask that you replace the February 03, 1997 version with the correspondence dated February 06, 1997.

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RICHARD E. BLUBAUGH
Vice President Environmental
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February 06, 1997

Mr. Robert D. Williams
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FISH AND WILDLIFE SERVICE
U.S. Department of the Interior
145 East 1300 South, Suite 404
Salt Lake City, Utah 84115

**RE: Revised Letter -- Atlas Uranium Mill Tailings Reclamation Formal Section 7
Consultation Pursuant to the Endangered Species Act of 1973, as amended**

Dear Mr. Williams:

Atlas Corporation appreciates receiving a copy of your January 14, 1997 letter to Myron Fliegel, Nuclear Regulatory Commission (NRC), for review. Atlas is aware of the importance of maintaining open and candid communications on issues involving its uranium tailings site near Moab, Utah. After reviewing your January 14, 1997 letter, we have a number of concerns and comments which we wish to share with you.

As we read your letter, it appears to raise two general types of issues -- "procedural" or "process" issues and "technical" issues. This letter is intended to give you Atlas' perspective on the "procedural/process" issues and, in combination with the attached memorandum prepared by Grant Ohland of Harding Lawson Associates (HLA), to provide you with Atlas' perspective on the technical issues as well.

Procedural or Process Issues

NRC (as the successor to the Atomic Energy Commission) is an independent regulatory agency whose regulatory process and procedures have been in place literally for decades. It is my understanding that within NRC's regulatory framework, the potential actions which NRC may take are limited. According to NRC, the scope of their regulatory action is determined in the first instance by the nature of the application or petition presented to the Commission. So far as NRC is concerned, the available alternatives are to grant the application, grant the application subject to certain conditions, or deny the application either with or without prejudice. While NRC, in accordance with its NEPA responsibilities, has an obligation to

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determine the accuracy and relevance of safety and environmental related information and to perform the requisite analysis, the Commission can not compel an applicant to come forward or to require an applicant, once having come forward, to prepare and submit a totally different proposal.

The Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), as it amends the Atomic Energy Act, was specifically designed by Congress to address management of uranium mill tailings. This legislation, the rulemaking proceedings to implement it, and the litigation related thereto began in the late 1970's and concluded in the mid-1980's. NRC's uranium mill tailings regulatory management program, therefore, has been in place for practically a decade. Atlas participated in the development of that regulatory program, including the legislation, rulemaking proceedings and litigation. We are unaware whether or not the Fish and Wildlife Service ("Service") participated but, in any event, the resulting regulatory program cannot be changed by the desires of Atlas or the Service. Thus, despite the Service's apparent interest in having NRC refocus its regulatory process in a different fashion, (i.e., to consider the groundwater corrective action program, State of Utah, and Corps of Engineers issues, etc.) we believe it is time to put these issues aside since the regulatory action under consideration by NRC is the licensee's proposed on-site reclamation plan.

Nevertheless, we believe the issues raised in your letter as not satisfactorily addressed will be addressed by NRC in its revised biological assessment (BA). We can only assume that your letter identifies all unresolved issues the Service needs to see addressed in the revised BA in preparation by NRC. The only issue in your letter which was not raised during previous meetings and discussions is the question of water depletion from the Colorado River for dust control or other purposes.

Incorporation of Conservation Measures into ROD

The EIS and TER which are support documents for an NRC decision on the licensee's proposal do not address the groundwater corrective program in detail. The primary focus of the EIS and TER are whether or not the Atlas proposal complies with NRC's technical regulatory requirements as set forth in 10 C.F.R. Part 40, Appendix A. and associated guidance documents. NRC has resolved this "site suitability" issue (See attached letter of October 2, 1996) and is now putting the final touches on its EIS and TER which includes preparation of a revised BA. In the NRC process, there is no ROD. Instead, NRC will determine whether to amend Atlas' license on the basis to its proposed on-site reclamation

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plan. Under NEPA and CEQ's implementing regulations, NRC needs only to consider reasonable alternatives to the proposed action. The detail and amount of information furnished concerning the potential environmental consequences of any alternatives, including the proposed action, need only be sufficient to permit NRC to make a reasoned choice among those alternatives so far as the potential environmental consequences are concerned. Therefore, your suggestion that in order to comply with NEPA regulations, there can be no ROD until the Service issues a biological opinion (BO) which is "received and accepted" does not seem quite accurate on two counts - - there is no ROD and, in our opinion, NEPA regulations do not mandate acceptance of a consulting agency's opinion.

Further, it is my understanding that not only is NRC *not* required to accept the Service's recommendations under NEPA regulations but the commission also is not required to accept such recommendations contained in any jeopardy opinion issued by the Service pursuant to the Endangered Species Act (ESA). It appears the ESA vests the ultimate responsibility for compliance with section 7(a)(2) in the *action* agency, not the *consulting* agency. Thus, under 50 C.F.R. section 402.15(a), the action agency "shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." It is my understanding that numerous courts have also upheld this view, although, the action agency must base its decision upon the "best scientific or commercial data available as required under section 7(a)(2).

Atlas is not aware of NRC's intent to issue the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) prior to the conclusion of the section 7 consultation and issuance of the Service's biological opinion, as suggested in your letter. However, in order to avoid this possibility, we request the Service expedite the consultation process to the maximum extent. Atlas has very serious concerns about the potential impact of a prolonged delay on its ability to conduct business and its long-term financial stability.

Your letter seems to assume that a BO will be necessary in spite of the fact that NRC's revised BA has not been finalized and transmitted to the Service as yet. The discussions between and among the Service, NRC, Atlas and others regarding the BA were designed to focus NRC on issues of concern to the Service which, in turn, are to be addressed in the revised BA. The Service must first address the revised BA when it is presented. In the event that formal consultation between NRC and the Service becomes necessary to determine whether any listed species or critical habitat will be "jeopardized" by the proposed reclamation, Atlas intends to

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actively participate in the development of the BO. Atlas will likely exercise its right to review and comment on the draft BO to insure that its concerns and comments are fully communicated to both NRC and the Service.

The bottom line is that the EIS and TER do not have to address every regulatory issue associated with the Atlas site and its closure. The groundwater corrective action program is not on the table at this time and, as we understand it, the Service cannot put it there. However, the fact that certain issues, technical or otherwise, that may concern the Service are not addressed in detail at this time in the EIS and TER does not mean that they will not be addressed in more detail and to the Service's satisfaction when they are properly before NRC. Therefore, it would serve the process and all participants therein if the Department of Interior and its constituent agencies, including the Service, would simply recognize that it has no authority under NEPA regulations or the ESA to dictate modifications to NRC's long-standing regulatory program. Under UMTRCA, NRC (not DOI or even EPA) has the delegated authority by Congress to make site-specific regulatory and licensing decisions for uranium mill tailings facilities.

Mitigation, Monitoring and Enforcement

Atlas is currently operating and maintaining a "Groundwater Corrective Action Program" and this program does include a requirement for monitoring. Whether or not NRC's enforcement and monitoring program is acceptable to all concerned, Atlas is, and will continue to be, by license condition, conducting its activities at this site in accordance with NRC's requirements.

Technical Issues

The Service implies that NRC has failed to include an evaluation of all impacts associated with reclamation of the site in the consultation process, and has questioned "...whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." As noted above, in our view, this is presumptive and premature since NRC's revised BA has not yet been provided to the Service. But, again, the questions raised by these implications are subject to varying interpretations. The "...best scientific and commercial data available or which can be obtained...for an adequate review of the effects that an action may have upon listed species or critical habitat." is a matter that can be addressed best in relation to the actual NRC document.

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In this regard, it appears that BA's have been produced with less data on similar sites, and BO's have been issued on those assessments. Indeed, the DEIS on the former Climax Uranium Company's uranium mill and tailings site, Grand Junction, Colorado, published in 1986, states that the no action alternative, i.e., stabilizing the uranium tailings at the existing Grand Junction site "...would cause no new impacts on the aquatic and riparian ecosystems." This is especially relevant to Atlas since the conclusion regarding impacts for the alternative of relocating the uranium tailings states, "[t]he impacts of this alternative on the aquatic and Mr. riparian ecosystem would be the same as stabilization at the Grand Junction site." (DOE/EIS-0126-D, Vol. I, p.166, March, 1986) The document also concluded (p. 167) that the no action alternative would cause no impacts on threatened and endangered species. However, later in section 5.6.3 it was noted that "...remedial action is expected to have a minimal effect on these fish species." This in spite of the fact that earlier in the document (p. 95) it was acknowledged that the Colorado squawfish, the humpback chub and the razorback sucker may occur in the Colorado River near the Grand Junction site (USFWS, 1983, 1984).

We do not believe there is any significant difference between the Atlas site and the Climax site with respect to potential impacts on the aquatic environment and T&E species. Consequently, we believe that holding Atlas to some as yet undefined higher or stricter standard will be difficult to sustain on the record. In that vein, we will seek to have BA's, like the one prepared by DOE for the Grand Junction site, and others of a similar nature for sites located on the Colorado River and its tributaries, incorporated into NRC's regulatory record associated with Atlas' proposal to reclaim on-site. Also, while we do not have specific details of construction to provide the Service at this time, Atlas has agreed to improve the aquatic habitat at the mouth of the reconfigured Moab Wash in conjunction with final site reclamation.

Further to the issue of providing to the Service a complete picture of project impacts and measures to reduce impacts, we are aware that the DOE has not included detailed descriptions of actions and measures it intends to implement at the Title I uranium sites (such as the Grand Junction site mentioned above). DOE is just now providing its strategy for addressing groundwater contamination at many of the Title I sites (Don Metzler, Jan. 14, 1997). At the Title I sites, decisions on the disposition of the tailings were made prior to the determination of any final groundwater corrective actions or measures.

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Water Depletion from Colorado River

The issue of water depletions from the Colorado River for dust control or other purposes resulting in jeopardy to the endangered fish is a concern to Atlas, particularly since this is the first time it has been raised in context of the proposed action and NEPA process. It is worth noting here that were the pile ever to be moved, a far greater volume of water would be needed for dust control. In any event, I believe that we have indicated that Atlas has a very senior water right on the Colorado River during at least one of the meetings and discussions we have had with the Service, and this fact was reiterated to your staff in a recent telephone call. The Colorado River has been the source of water for Atlas' uranium operation since the facility was constructed in 1956. The Utah State Engineer can verify this information. Atlas anticipates using a small portion of its water right to control dust and, if necessary, irrigate the reseeded mill site upon final reclamation. Atlas can only assume that the water depletion being referred to by the Service is depletion in excess of a lawful right. If the Service is suggesting that "any" depletion results in jeopardy, then there are many valid and legal water rights holders along the Colorado River who would find themselves jeopardizing endangered fish, including the U.S. government (i.e., the National Park Service, Bureau of Reclamation, Bureau of Land Management, etc.), state governments and municipalities, and tens of thousands of individuals.

Other Permit Requirements

Your January 14, 1997 letter requests "...as much information as is known about probable permit requirements..." be included in the BA, and referred specifically to any actions or measures required by the Corps of Engineers or the State of Utah. We wish to assure you that any actions or measures required by the State of Utah or any other agency with legal jurisdiction will be considered as necessary in the NRC process. With respect specifically to the State of Utah, the enclosed letter dated January 8, 1997 from Mr. Don Ostler, Director of the Division of Water Quality, Department of Environmental Quality, to Mr. James Holtkamp, should clarify that there are no identified actions or measures at this time (other than the existing groundwater corrective action program and proposed cap). It should also clarify that the State of Utah does not expect to review any specific information that might be considered probable requirements until after issuance of the Final Environment Impact Statement, and, that resolution of State of Utah concerns is not necessarily required until initiation of construction of "...mechanisms that may require retrofit..."

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Tailings Pile Characterization

Your letter suggests that the analytical methods used to characterize the leachate are associated with detection limits too high for some parameters, and that, for a number of analytes, the detection limit used by Atlas is above that recommended and used by DOI. The enclosed memorandum from Grant L. Ohland of HLA responds to this comment, however, this comment raises a question about just what DOI recommended standards are being referenced. Are they "official" DOI standards, and if so, where are they published and on the basis of what statutory authority? Even assuming there are such standards, they must be compatible with NRC requirements, since NRC has exclusive authority to implement the UMTRCA regulatory requirements applicable to final site disposition.

Your letter repeats a National Park Service (NPS) concern about the constituents of the tailings pile. As Atlas has repeatedly stated, the pile solids have been sufficiently characterized, particularly in light of the minimal risk they present. Please refer to Attachment A of Atlas' response to NRC's DEIS and DTER dated April 29, 1996 and the enclosed comments from HLA. The referenced December 16, 1996 letter containing the results of a one-time constituent mass sample analysis of water pumped from the tailings pile was a courtesy copy of the 1996 annual report to NRC required by Condition 17 C. of our Source Material License SUA-917. Atlas has been operating the subject groundwater corrective action program since July 1990. The annual reports to NRC are a component of the program. Although the Service had not been copied on previous reports (because they were not yet involved), copies of the 1995 annual report for the groundwater corrective program were sent to parties at other DOI offices, including the NPS. The report is not intended to report on every possible constituent in the pile, rather it is to provide NRC an indication of the effectiveness of the ongoing groundwater corrective action program. Analysis lowest possible detection limit is not required by NRC.

Ammonia and Sediments

The issues raised by your letter regarding ammonia levels and sediments are addressed in the enclosed HLA memorandum. Also, Atlas is confident that NRC will address these questions in its amended BA and FEIS.

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Southwestern Willow Flycatcher

Your concerns about the southwestern willow flycatcher are addressed in the enclosed HLA memorandum. Also, NRC's contractor, Oak Ridge National Laboratory (ORNL) has been investigating this matter and are we are confident that it will be addressed in the BA and FEIS.

We have tried to address all the issues raised in your January 14, 1997 letter. We hope these comments are helpful as you review the BA. Atlas is convinced that stabilizing the tailings pile in its existing location presents the least impact and risk to human health and the environment, including the aquatic environment of that segment of the Colorado River nearest the site. Atlas is aware that other uranium tailings piles have been relocated for final disposition and that many others (including virtually all Title II sites) have not been and will not be moved. In any case, water quality issues associated with the original site remain to be addressed. And, as with the Title I sites managed by DOE, the details of how these water quality issues are finally addressed are still being determined. Also, at least in some cases, the Service apparently has not objected to the extremely small and temporary risks associated with the stabilization of these uranium tailings sites, whether on-site or off-site, along the Colorado River. Atlas does not seek special treatment, but only wishes to be treated fairly. Atlas understands its rights and responsibilities with respect to the NRC regulatory process, related NEPA requirements, and ESA requirements as well. Atlas will fulfill its responsibilities and exercise its rights.

We trust you will consider these comments in your evaluation process. We appreciate the professionalism and courtesy expressed by your staff in the meetings and discussions we have had to date. Please let me know if you have any further questions.

Sincerely,



Richard E. Blubaugh

Enclosures

cc:	J. Holonich, NRC	W. Sinclair, UDEQ
	L. Stone, DOI	D. Kimball, NPS
	A. Thompson, SPPT	G. Ohland, HLA