

Natural Resources
Defense Council



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February 21, 1997

OFFICE OF SECRETARY
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BRANCH

The Honorable Dr. Shirley A. Jackson, Chairman
The Honorable Dr. Kenneth C. Rogers
The Honorable Greta J. Dicus
The Honorable Dr. Nils J. Dias
The Honorable Edward McGaffigan, Jr.

Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

**RE: Request for Review of Director and Staff Decisions Denying
NRDC 10 CFR § 2.206 Petition Regarding Envirocare of Utah, Inc.**

Dear Commissioners:

We are writing to request that you review in part, and take action with respect to, the February 7, 1997, decisions of the Nuclear Regulatory Commission ("NRC") Staff and the Director of the Office of Nuclear Material Safety and Safeguards¹ to deny the petition submitted under 10 CFR § 2.206 by Dr. Thomas B. Cochran on behalf of the Natural Resources Defense Council, Inc. ("NRDC").² The NRDC petition requested, in pertinent part, that the NRC take the following actions:

1. Suspend the agreement with the state of Utah under which regulatory authority has been transferred from the NRC to the Utah's Bureau of Radiation, until the state of Utah can demonstrate that it can operate the Bureau of Radiation in a lawful manner, and without

¹ Letter from Hugh L. Thompson, Jr., NRC Acting Executive Director for Operations, to Dr. Thomas B. Cochran, Ph.D., Director, NRDC Nuclear Program (February 7, 1997).

Enclosure 1: NRC Staff Evaluation of Natural Resources Defense Council Request to Suspend Section 274 Agreement With the State of Utah (undated) ("NRC Staff Evaluation")

Enclosure 2: In the Matter of Envirocare of Utah, Inc., (Docket No. 40-8989) Director's Decision Under 10 C.F.R. § 2.206 (February 5, 1997) ("Director's Decision").

Enclosure 3: U.S. Nuclear Regulatory Commission, Natural Resources Defense Council, Receipt of Petition and Issuance of a Director's Decision Under 10 C.F.R. § 2.206 (copy of notice filed for publication with the Office of the Federal Register) (February 7, 1997).

² Letter to Hugh L. Thompson, Jr., NRC Acting Executive Director for Operations, from Thomas B. Cochran, Ph.D., Director, NRDC Nuclear Program (January 8, 1997).

the participation of licensees, or employees of licensees, in Bureau of Radiation oversight roles;

2. Immediately revoke or cause the state of Utah to revoke Envirocare's license or licenses to receive low-level radioactive waste and mixed waste; and
3. Immediate revoke the NRC 11e.(2) byproduct material license under which Envirocare is currently permitted to accept uranium mill tailings for disposal.³

The NRC Staff evaluated NRDC's first and second requests above and determined not to take the actions requested by NRDC.⁴ The Director's Decision denied NRDC's third request above.⁵

As detailed below, we believe that the denial of NRDC's petition by the Director and the NRC Staff constitutes an abuse of discretion because the petition, and the court papers upon which it is based, provide undisputed evidence that both the State of Utah and Envirocare have violated a host of NRC regulations designed to ensure the integrity of the licensing process and prevent conflicts of interest. Given the State's egregious failure to comply with the requirements of the Atomic Energy Act, and the incompatibility of its program with that of the NRC, we submit that it is an abuse of discretion for the NRC to refuse to begin proceedings for the suspension of the state's Agreement State Program. If after conclusion of these proceedings, NRC decides to suspend the state's Agreement State program, NRC would have ample authority to revoke Envirocare's license to receive low-level radioactive waste and mixed waste. Moreover, Envirocare's willful violation of NRC regulations is grounds for immediate license revocation of its 11e.(2) byproduct materials license.

As provided in 10 CFR § 2.206(c), the Commission has 25 days from the issuance of the Director's Decision to review this decision, in whole or in part, to determine if the Director has abused his discretion. We assume that the Commission has similar authority to review the decision of the NRC Staff. While we recognize that under NRC regulations, the Commission does not have to consider our urgent request for such review, we ask that under the circumstances you do so nonetheless. The reason we feel so strongly about this matter is aptly stated in Part I of Executive Order 11222:

³ NRDC also requested the NRC to immediately revoke any other NRC or Utah license held by Envirocare, its owner, or related entities; and prohibit the future issuance of any license by NRC or the state of Utah to Envirocare's owner or related entities. NRDC is not seeking Commission review of the denial of these requests.

⁴ NRC's denial of NRDC's request for a suspension of Utah's Agreement State program is in the form of a Staff determination rather than a Director's Decision, apparently on the grounds that the request does not fall squarely within the scope of matters ordinarily considered under the 10 C.F.R. § 2.206 process. NRC Staff Evaluation at note 1. Yet in 1995, NRC issued a Director's Decision with respect to another petition for revocation of Utah's Agreement State status. In the Matter of State of Utah, DD-95-01, Director's Decision Under 10 CFR 2.206 (January 26, 1995). NRDC will consider any denial of its petition for suspension of Utah's Agreement State Status to be final agency action for purposes of review.

⁵ Director's Decision, supra note 1.

Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

(emphasis added). The NRC has included this policy statement in its own regulations at 10 CFR § 0.735-20(a). These regulations further state: (10 CFR § 0.735-20):

(b) The elimination of conflicts of interest in the Federal service is one of the most important objectives in establishing general standards of conduct. A conflict of interest situation may exist where a Federal employee' private interests, usually of an economic form, conflict, or raise a reasonable question of conflict, with his public duties and responsibilities. The potential conflict is of concern whether it is real or only apparent.

(c) An employee, including special Government employee, shall not: (1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities: or (2) engage in, directly or in indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(emphasis added). As noted in 10 CFR § 0.735-1(a):

The Atomic Energy Act requires the Commission to assure itself that the character, associations, and loyalty of workers in atomic energy are of a high order. Conduct and self discipline, both on and off the job, must measure up to unusual standards.

Thus, when the Commission hands over its regulatory responsibility to a state--in this case the state of Utah--the Commission has a legal obligation to ensure that the state maintains the same high standards of conduct in all official actions that the Commission maintains on behalf of the U.S. Government. Agreement States must have, and enforce, regulations fully compatible with those in 10 CFR Part 0. We believe there has been a breakdown in this NRC oversight responsibility. Nowhere in the decisions of the Director or the NRC Staff is there **any** reference to the extensive employee code of conduct set forth in 10 CFR Part 0. Aside from these legal requirements, as a matter of good government it is equally, if not more, important for the Commission to ensure that Agreement States have and enforce compatible standards of employee conduct, than it is to ensure that the states have and enforce compatible health and safety regulations.

I. Suspension of Utah's Agreement State Program

As the NRC Staff Evaluation notes, the NRC has authority under 274j of the Atomic Energy Act, 42 U.S.C. § 2021(j) ("AEA"), to terminate or suspend Utah's Agreement State Program, if the Commission finds that:

"(1) termination or suspension of a State's program is required to protect the public health and safety, **OR**

(2) the State has not complied with one or more requirements of Section 274 of the AEA, (e.g., the requirement for the State program to be compatible with the NRC program)."

(emphasis added). In other words, apart from any question of public health and safety, the Commission must consider whether any actions of the state of Utah in establishing or enforcing its Agreement State program are incompatible with the requirements of the NRC's own program. In this case, it is abundantly clear that actions by the then-Director of Utah's Division of Radiation Control are incompatible with the following NRC regulations:

10 CFR § 0.735-20(a)-(c) General.

10 CFR § 0.735-21(a) Acts affecting a personal financial interest (based on 18 U.S.C. 208)

10 CFR § 0.735-22(a) Future employment (based on 18 U.S.C. 208).

10 CFR § 0.735-24(a) Receiving salary from sources other than the U.S. Government (based on 18 U.S.C. 209).

10 CFR § 0.735-25(a) Compensation to employees in matters affecting the Government (based on 18 U.S.C. 203)

10 CFR § 0.735-28(a) Confidential statements of employment and financial interests.

10 CFR § 0.735-28a Financial disclosure reports under the Ethics in government Act.

10 CFR § 0.735-42(a) Gifts, entertainment, and favors.

Two of these regulations, 10 CFR §§ 0.735-21(a) and 0.735-42(a), are of particular significance:

Except as permitted by paragraphs (b), (c) and (d) of this section, no employee, or special Government employee, shall participate personally and substantially as a Government officer or employee, though decision, approval, disapproval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination...or other particular matter in which, to the employee's knowledge, the employee, ... or any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment, has a financial interest upon which the outcome of the particular matter will have a direct and predictable effect. 10 CFR § 0.735-21(a)

Except as provided in paragraph (b) or (e) of this section, an employee should not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

- (1) Has, or is seeking to obtain, contractual or other business or financial relations with the NRC;
- (2) Conducts operations or activities that are regulated by the NRC or by an applicant for a license from the NRC; or
- (3) Has interests that may be substantially affected by the performance or nonperformance of his official duty. 10 CFR § 0.735-42(a)

In a complaint filed in Utah's Third District Court of Salt Lake County, former Director of the Utah State Board of Radiation Control Larry F. Anderson claims that while in office he set up a corporation to advise Mr. Khosrow Semnani, owner of Envirocare, about how to license a low level radioactive waste site in the state of Utah.⁶ Mr. Anderson further alleges that Mr. Semnani, President of Envirocare, agreed to pay a consulting fee of 100,000 dollars and an ongoing remuneration of 5 percent of all direct and indirect revenues that Mr. Semnani would realize from such a facility, if the site were successful.⁷ In his counterclaim, Mr. Semnani stated that Mr. Anderson requested the above fees while Mr. Semnani's application was before the Utah State Board of Radiation Control, and that Mr. Semnani paid the requested amounts and more.⁸ Under either party's statement of the facts, it is clear that the payments took place and that Mr. Anderson's participation in any matters concerning Envirocare were therefore incompatible with these NRC requirements.

Moreover, in 1991, as one of eight members of the Northwest Compact, Mr. Anderson is reported to have represented Mr. Semnani's interest in seeking Northwest Compact approval to permit Envirocare to accept low-level radioactive waste.⁹ We believe this conduct is incompatible with at least two NRC regulations, namely 10 CFR § 0.735-21(a), discussed above, and 10 CFR § 0.735-49a, which requires employees to avoid any action, whether or not specifically prohibited by Part 0, which might result in, or create the appearance of, using a

⁶ In the Matter of Larry F. Anderson and Lavicka v. Khosrow B. Semnani and Envirocare, Civil No. 96090727, Third Judicial District Court of Salt Lake County at § 10 and 11 (October 12, 1996).

⁷ Id. at § 14.

⁸ Id., Defendants' Answer and Counterclaim at § 18.

⁹ See US Ecology, Inc. v. Northwest Interstate Compact on Low-Level Radioactive Waste Management, No. C92-5091B (W.D. Wash.), Plaintiff's Memorandum in Opposition to the Utah Defendant's Motion to Dismiss, at 3 (Noted for: Aug. 20, 1992).

public office for private gain, giving preferential treatment to any person, or losing complete independence or impartiality.

In evaluating NRDC's petition for the suspension of Utah's Agreement State status, the NRC Staff abused its discretion by failing to evaluate whether the undisputed payments by Mr. Semnani to Mr. Anderson, and the failure of the State program to prevent or detect such flagrant abuses, are incompatible with NRC program requirements designed to ensure the integrity of the licensing process and prevent conflicts of interest. The Staff merely points to routine NRC reviews of the Utah Agreement State program in 1994. Yet these reviews took place over two years before any evidence of improper conduct came to light. They cannot serve to shield NRC from its obligation to conduct a new, independent review of the State program in light of this new evidence.

Nor may the NRC waive its independent obligation to enforce its own regulations on the grounds that the Utah State Attorney General is investigating the matter. As stated above, the Atomic Energy Act requires the Commission to assure itself that the character, associations, and loyalty of workers in atomic energy are of a high order. Relying on the Utah State Attorney General's investigation is particularly inappropriate here since the Utah State Attorney General also appears to have a conflict of interest in two respects. First, Ms. Jan Graham, the current Utah State Attorney General, is alleged to have accepted \$2,750 in political contributions from Mr. Semnani, President and owner of Envirocare. Second, Larry F. Anderson claims that he received informal approval from the Utah State Attorney General's office to set up a corporation by which he could advise Mr. Semnani about how to license a low level radioactive waste site in the state of Utah.¹⁰

Finally, the NRC Staff abused its discretion by denying NRDC's request that it suspend Utah's program until the state demonstrates that it can operate its radiation control program without the participation of licensees, or employees of licensees, in an oversight capacity. The Staff bases its denial on a belief that Utah has adopted satisfactory conflict-of-interest procedures, and on the fact that Mr. Semnani has taken a two-month leave of absence from the Utah Radiation Control Board pending the completion of the criminal investigation. It appears from these statements that absent a criminal indictment, Mr. Semnani will be permitted to continue serving on the Board, despite the fact that he is the President and owner of a major licensee of the Board. If so, either Utah's conflict-of-interest regulations are inadequate or they have not been applied properly to Mr. Semnani. In either case, the State program is clearly incompatible with that of the NRC.

¹⁰ In the Matter of Larry F. Anderson and Lavicka v. Khosrow B. Semnani and Envirocare, Civil No. 960907271, at § 10 (Third Judicial District Court of Salt Lake County)(October 12, 1996).

II. Revocation of Envirocare's Low-Level Radioactive Waste and Mixed Waste License

The NRC Staff denied NRDC's petition that it revoke, or cause the state of Utah to revoke, the license or licenses under which Envirocare is currently permitted to accept low-level radioactive waste and mixed waste for permanent disposal. The Staff based its denial on the fact that NRC currently has no direct authority over licensing of these activities in Utah. However, if the Commission were to suspend Utah's Agreement State status, as discussed above, it would then have ample authority to revoke Envirocare's licenses for low-level radioactive waste and mixed waste. By denying NRDC's petition regarding Utah's Agreement State program, the NRC staff has inappropriately foreclosed any consideration of this licensing issue.

III. Revocation of Envirocare's Byproduct Materials License

The Director of the Office of Materials Safety and Security denied NRDC's petition to revoke Envirocare's 11e.(2) byproduct materials license on the grounds that NRDC has not provided any information that would provide a basis for immediate suspension of the license. This decision also constitutes an abuse of discretion. The NRC Enforcement Policy provides that Revocation Orders may be used for **any** reason for which revocation is authorized under Section 186 of the Atomic Energy Act, including any condition that would warrant refusal of a license on an original application. The Director noted that "this matter involves potential issues of integrity, which, if proven, may raise questions as to whether the NRC should have the requisite reasonable assurance that Envirocare will comply with Commission requirements."¹¹ Yet, no further proof is necessary, since both Mr. Anderson and Mr. Semnani admit that payments were made under circumstances that are illegal under either parties' interpretation. Surely this information would, if known, have provided sufficient cause for NRC to refuse to grant an original license to Mr. Semnani, and therefore sufficient cause to revoke the present license.

The Director's Decision is also faulty in its conclusion that immediate revocation is inappropriate because NRDC's petition does not raise any "substantial health and safety issues." NRC regulations specifically provide an alternative ground for revocation in cases where the conduct causing the violation was willful. 10 C.F.R. § 2.202(a)(5). Surely that is the case here, when the licensee and its owner have admitted in court to making payments that it knew were illegal.

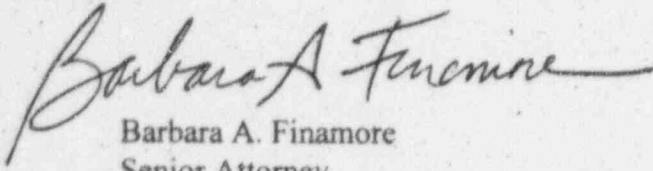
III. Conclusion

We strongly urge the Commission to preserve its own integrity, and that of the entire national radiation licensing program, by reviewing the decisions made by the NRC Staff and the Director in the matter of Envirocare. We further urge the Commission to ensure that the NRC Office of Investigations is promptly notified of the allegations of suspected wrongdoing made in our petition, as required by Management Directive 8.11, "Review Process for 10 C.F.R. § 2.206 Petitions." Finally, we request the Commission to conduct an informal public hearing on this matter.

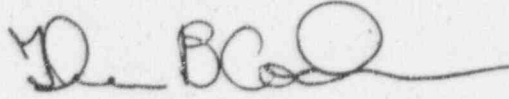
¹¹ Director's Decision on NRDC Petition, *supra* note 1, at 8.

We thank you for your immediate consideration of this request.

Sincerely,



Barbara A. Finamore
Senior Attorney



Thomas B. Cochran, Ph.D.
Director, Nuclear Program

cc. Hugh L. Thompson, Jr., NRC Acting Executive Director for Operations
Carl J. Paperiello, NRC Director, Office of Nuclear Material Safety and Safeguards