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June 2, 1997

The United States Nuclear Regulatory
Commission (The Commission)
Washington, D. C. 20555-0001

In the Matter of
Moab, Utah Facility, License SUA-917
(Site Reclamation Plan Milestone)
Docket No. 40-3453-MLA
ASLBP No. 97-723-02-MLA

Dear Commission:

Presented below is an appeal on the question as to whether or not a request for a hearing (request) - submitted to the Secretary of the Commission on January 30, 1997, and supplemented on February 24, March 3, March 13, March 29, and April 21, 1997, by John Francis Darke (petitioner) - should have been granted in whole or in part. See 10 CFR 2.1205(o). See also Presiding Officer Memorandum and Order (Denying Hearing Request) (May 16, 1997) [hereinafter May 16 Denial, or Denial].

Petitioner filed a hearing request commenting upon the Applicant/Licensee's December 20, 1996, application to "amend" its 10 CFR Part 40 license for its uranium milling facility. The "amendment" in question would modify License Condition 55 of the license. See 62 Fed. Reg. 3313, 3313-3314 (January 22, 1997) (which was responded to by petitioner's request)

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See request. However, particularly see 10 CFR 2.1 (Scope of Part), 10 CFR 2.2 (Subparts), 10 CFR 2.700 (Scope of Subpart), and 10 CFR 2.1205 (Request). See also 10 CFR 2.1209 and 2.1239(a) (with respect Consideration of Commission rules and regulations in informal ajudications).

The request was subsequently, improperly, referred on February 10 to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) by the Secretary of the Commission "in accordance with 2.1261". See Memorandum to B. Paul Cotter, Jr. from John C. Hoyle (February 10, 1997). See also 10 CFR 2.1261, 2.772.

The request was further improperly considered by way of a designation of a presiding officer on February 11, 1997, "pursuant to [ ] and 2.1207". See May 16 Denial, page 6. See also 10 CFR 2.1207.

The modification, commented on by the request (supra), would substitute the date December 31, 2000, for the date December 31, 1996, found at A.(3) of the license condition. See Denial, page 1.

The reclamation schedule date - enforceable milestone - is a completion date for placing a final earthen radon barrier "on the existing mill tailings pile at the Moab facility". See Denial, page 1. It is important to emphasize that the reclamation schedule date is an enforceable milestone derived from and interagency agreement (MOU). See May 16 Denial, page 4.

The Applicant/Licensee disagreed with comments contained in petitioner's request. The Applicant/Licensee asserted that the petitioner lacked standing, was not entitled to the reestablishment of the Commission's Local Public Document Room in the vicinity of the Moab facility, and procedures other than informal hearing procedures were not "appropriate". See Applicant/Licensee's Response (April 7, 1997), which is actually entitled "Licensee's Response" [hereinafter App/Lic Response], pages 3, 5-8, and 10-12.

The May 16 Denial found that the petitioner had "not established his standing to intervene in [the proceeding]", was not entitled to the reestablishment of the Commission's Local Public Document Room in the vicinity of the Moab facility, and that there is not the slightest doubt, however, that as a request for a revision to its 10 CFR Part 40 source materials license, the Applicant/Licensee "amendment application falls squarely within" that designation - licensee-initiated amendment, as opposed to being a 10 CFR Part 2, Subpart B staff-imposed amendment that would be subject to the formal hearing procedures in Subpart G - and thus properly is the subject of informal procedures. See Denial, page 12.

Denial Background

Beyond the summary, which the petitioner has addressed (supra), lies a "Background". The May 16 Denial, at page 2, under "I.A. [Applicant/Licensee] Reclamation Plans for the Moab Facility", attempts to flesh out the bare bones context of the December 20, 1996, "amendment" application discussed supra.

Such reclamation plan background assiduously avoids referring to those periods of the Moab facility regulatory history that have any bearing on site reclamation plan milestones.

The Denial states, at pages 2 and 3, that the Applicant/ Licensee initially submitted an onsite reclamation plan, dated May 29, 1981, on July 10, 1981, which the NRC staff approved on June 30, 1982. "Then, [on August 2, 1988 the Applicant/Licensee] submitted a license amendment application [August 31, 1988] that included a revised onsite reclamation plan. [NRC] Staff review of [the August 31] plan resulted in requests for additional information and redesign [dated October 17, 1988, and November 14, 1991]. Thereafter, [on June 4, 1992, the Applicant/Licensee] submitted another [2 part] revised onsite reclamation plan.

By way of omission, the reclamation plan background totally fails to provide province, or foundation (context) required for a proper review of the December 20 application at issue herein. Understandably, the "Background", given its purpose, could not be exhaustive. See Denial, pages 2 and 3.

The Denial, at pages 2 and 3, fails to reveal a long acrimonious licensing/enforcement action which commenced on June 25, 1987. See LICENSING/ENFORCEMENT ACTION [underscored]: Not to be publicly released., POLICY ISSUE [under and overscored], (Notation Vote), SECY-87-158 (June 25, 1987).

In addition, the May 16 Denial fails to reveal a July 31, 1987, Order, later implemented for the most part by a controversial, February 25, 1988, license renewal, heavily laden with NRC staff-initiated license conditions. See Order, NRC to Applicant/Licensee (July 31, 1987). See also Letter from NRC to Applicant/Licensee (February 25, 1988).

The Denial also fails to reveal, in its proper context, a Memorandum of Understanding Between EPA, NRC and [certain Agreement States] concerning Clean Air Act Standards From Uranium Mill Tailings, Subparts T and W, 40 CFR Part 61, dated variously October 18, 19, 23, and 25, 1991. See 56 Fed. Reg. 55432, 55432-55435 (October 25, 1991).

The May 16 Denial, at page 4, under "I.B. [Applicant/Licensee] Request to Extend Radon Completion Date" states that "related to the approval of the reclamation plan" for the Moab facility is an "item of central interest" in the present proceeding.

The Denial allows no explication of how "the item of central interest", i.e., "the December 31, 1996, target date" is related to an "approval of a reclamation plan" which has not yet occurred. See May 16 Denial, page 4. Further, see App/ Lic Response, page 2, and n. 2.

The May 16 Denial would further indicate that the date "came into play by reason of "the October 25, 1991, Memorandum of Understanding (MOU), cited above.

The Denial avoids explaining what exactly is ment by "came into play". It would appear that how the mandatory, enforceable dates "came into play" is explic.tly revealed in the MOU itself.

The MOU, cited supra, under NRC [ ] Lead Actions, states that the "NRC [agreed on October 25, 1991] to provide for public notice and comment by publishing in the Federal Register receipt of requests, intent to issue amendments, or intent to issue orders which (1) incorporate reclamation plans or other schedules for effecting final closure into licenses", such as the license discussed herein. See 56 Fed Reg. 55432, 55434, column 3, at 2. (October 25, 1991).

It is apparent, recalling the quote above, that the MOU considers reclamation plans to be schedules (large scale maps, implementing Criterion 6, reflecting small scale maps, implementing 10 CFR Part 40 Appendix A, Criterion 6A in the Applicable license.

And thus, the MOU explicates the relationship between "the item of central interest" and "approval of the reclamation plan".

The May 16 Denial, however, avoids explaining how "the item of central interest" can be finally authorized before the relevant reflecting reclamation plan receives final Commission imprature (OK).

As indicated above, the "Background" failed to integrate the October 25, 1991, MOU into the contemporanious reclamation plan licensing actions.

In doing so, the May 16 Denial avoided considering the statuatory purpose of the item of interest at issue herein.

License Condition 55, by its nature, cannot be modified in part, as required by the Applicant/Licensee December 20, 1996, application. This being so, because any partial modification would alter that conditions statuatory purpose, and thus, its force and effect. See petitioner's March 3, 1997, response to the February 12, 1997, Presiding Officer Memorandum and Order (Initial Order), pages 2-4. See petitioner's April 21, 1997, response to the Presiding Officer April 11, 1997, Order (Permitting Reply Filing) (the in lieu response). See also petitioner's February 24, 1997, response to Presiding Officer February 12, 1997, Memorandum and Order, page 2.

The Applicant/Licensee was not a signatory to the October 1991 Memorandum of Understanding. The NRC did sign that Memorandum on October 18. Thus, the Applicant/Licensee has no authority to initiate an action which would detract from the force and effect of Condition 55. Only the NRC staff is authorized to initiate any changes to the radon barrier suspence date, by way of changes to its October commitments.

Given the above, contrary to the May 16 Denial, the "amendment" request at issue does not fall squarely within the catagory "licensee-initiated amendment". However, see the May 16 Denial, page 12.

As it happens, the Presiding Officer avoided establishing any basis that could be used for recommending to the Commission that informal hearing procedures not be used. See discussion of "Background" above. See Denial at page 13.

Standing or Lack Thereof

The May 16, at page 9, under "2. Analysis", explains that the petitioner must be "a person whose interest may be affected by the proceeding", and would, further, explicate the meaning of 189a(1)(A) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a) (A) [hereinafter 189a].

At page 13, under "2.B. Standing to Intervene", the Denial states that the petitioner's request to convene a hearing comes down to the "question whether he has made a [sufficient] showing [ ]."

Again, the May 16 Denial explicates the meaning of 189a, citing agency case law.

On page 16, the petitioner's March 24, at 4, is quoted: "proximate (a short walk)."

On page 19, the Denial explicates the petitioner's problem: "[the petitioner] has failed to carry [ ]". The Denial would further indicate that a reasonable nexus has not been shown with enough specificity and particularity ("concreteness") to establish impact sufficient to provide him with standing. There is a footnote. There is an error.

The error indicates inattention. Contrary to the claim made on page 20 of the Denial, the petitioner is not forced to drink water from the Colorado River that flows next to the facility. Contrary to the claim made on page 20, the petitioner's "activities near the facility" are not all qualified with vague terms. See page 16 of the Denial. Proximate means a short walk. Close proximity means a close short walk. Perhaps, a short walk has become a vague term.

The petitioner has problems with the use of the word cryptic, as found on page 20 of the Denial. A short walk, as a measure of length or time, is not cryptic.

The petitioner would offer that the May 16 Denial, by way of long lists of interest criteria, is actually requesting the ajudicatory equivalent of an industrial time motion study

of the petitioner's daily life, and that the term of measure "a short walk" is necessary and sufficient. 189a does not contemplate an invasion of privacy at the behest of industrial time motion study parameters.

It has occurred to the petitioner that perhaps the Denial neglected to consider that the petitioner might appeal the denial and dismissal. See Denial, page 22, Footnote 6. On the other hand, it is understandable that upon the dismissal the job was done.

Be that as it may be, petitioner would be pleased to supplement this appeal promptly upon the reestablishment of the NRC Local Public Document Room a short walk from the Moab facility restricted area.

AFFIRMANT

/S/

John Francis Darke
Member of Public

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At Moab, Grand County, Utah
Monday, June 2, 1997

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In the Matter of

Moab, Utah Facility
License SUA-917

(Request for License Amendment)

Docket No. 40-3453-MLA
ASLBP No. 97-723-02-MLA

CERTIFICATE OF SERVICE

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I hereby certify that copies of the foregoing Appeal to the Commission have been served on the above persons by U.S. mail, first class, in accordance with the requirements of 10 CFR 2.1203(c), 2.701(b), 2.1203(e), and 2.1205(o).

Dated at Moab, Utah this
2nd day of June 1997

/S/

John Francis Darke