

REGULATORY INCONSISTENCY AND REGULATORY DEVELOPMENTS RELATIVE TO URANIUM MILL TAILINGS

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ABSTRACT

The Nuclear Regulatory Commission ("NRC" or the "Commission") Decision of the Director of the Office of Nuclear Materials Safety and Safeguards dated December 13, 2000, concerning petitions filed under 10 CFR § 2.206 by the Snake River Alliance and Envirocare of Utah, Inc. ("Envirocare") relating to the NRC's jurisdiction over uranium mill tailings ("the Decision") decided that the NRC does not have regulatory jurisdiction over non-NRC-licensed radioactive mill tailings. The Decision is seriously defective from a legal standpoint and it will produce significant adverse public policy consequences. From a legal perspective, while there are numerous considerations that argue against the Decision's interpretation of the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA" or "the Act"), the most significant of those considerations can be reduced to two.

The first is that it is impossible to imagine that a Congress that in fact wished to exclude material remediated under the Formerly Utilized Sites Remedial Action Program ("FUSRAP") from coverage under Title II of UMTRCA, the regulatory provisions of the Act, could have drafted Title II's provisions the way they are drafted. Second, it is impossible to imagine that a Congress that in fact wished to adopt the Decision's test of what is covered by Title II – i.e., the test of whether the tailings were produced through an activity licensed on UMTRCA's date of enactment or thereafter (or were covered by Title I of the Act) – could have failed to include in Title II's provisions any reference to that test or any statutory language that could possibly be interpreted to establish that test.

The provisions of Title II most critical to this analysis are sections 11e.(2), 81 and 84 of the Atomic Energy Act ("AEA") as adopted or amended by UMTRCA. Section 11e.(2) defines "byproduct material" to include "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." Section 81 then provides that "no person may . . . own [or] possess . . . any byproduct material, except to the extent authorized by this section, section 82 or section 84." Section 81 provides for the issuance of domestic licenses, section 82 for the issuance of export licenses. Section 84 provides that "[t]he Commission shall insure that the management of any byproduct material, as defined in section 11e.(2), is carried out in such manner as . . . the Commission deems appropriate to protect the public health and safety and the environment" There is no hint of any temporal or other limitation in these words that would allow for the exclusion of FUSRAP material.

Further, it is clear that the Congress did not wish to adopt the test of NRC jurisdiction espoused by the Decision. It is not believable that the congressional and NRC draftsmen of UMTRCA could have intended to incorporate that test into the statute when the operative provisions of the statute do not include any words that provide, or can be interpreted to provide, that test. Again, no explanation has been offered as to why the dividing line that the Decision finds in Title II's regulatory coverage does not appear anywhere in that title's provisions.

The public should be concerned that dangerous radioactive material that Congress intended to be fully regulated by the NRC can be shipped and disposed without any regulatory oversight. This situation should not continue.

INTRODUCTION

The NRC has failed to acknowledge and exercise the full scope of its jurisdiction over mill tailings meeting the definition of section 11e.(2) of UMTRCA. The NRC considers that large quantities of such material currently are beyond its regulatory reach. Shipments of section 11e.(2) material have been made already to disposal facilities unlicensed by the NRC or agreement states, and additional shipments will occur. These unlicensed facilities do not meet the requirements imposed by the NRC on licensed section 11e.(2) disposal facilities.

The primary affect of the NRC's failure to regulate is on wastes generated under the Formerly Utilized Sites Remedial Action Program (FUSRAP). The U.S. Army Corps of Engineers (the "Corps" or the "Army Corps") assumed authority over FUSRAP sites in 1998, and, under the NRC's interpretation, it may dispose of FUSRAP wastes at disposal facilities that are unregulated by the NRC or NRC agreement states.

The Snake River Alliance and Envirocare filed separate petitions under 10 C.F.R. § 2.206 requesting the NRC to enforce UMTRCA and the Commission's regulations relative to the disposal of this material. The petitions challenged the Commission's refusal to exercise regulatory jurisdiction conferred by statute. The parties asserted that the NRC's non-enforcement position could not be reconciled with either the unambiguous statutory language of UMTRCA, the Act's legislative history, or the Commission's implementing regulations. Moreover, the parties argued that the NRC's position creates significant health and safety risks that could readily be avoided by adherence to statutory and regulatory mandates.

In a Director's Decision published on December 20, 2000, ____ Fed. Reg. ____ (2000), the NRC denied the petitions filed by the Snake River Alliance and Envirocare and upheld its reinterpretation that it lacks regulatory authority over uranium mill tailings if they were not possessed by an NRC licensee. In a statement issued on January 16, 2001, the Commissioners decided not to take review of the Decision in a 3-2 vote. Chairman Meserve and Commissioner Dicus asked that the Decision be reviewed.

THE NRC'S CURRENT INTERPRETATION OF UMTRCA RESULTS IN SIGNIFICANT AND UNJUSTIFIABLE HEALTH AND SAFETY RISKS BY LEAVING LARGE QUANTITIES OF SECTION 11E.(2) MATERIAL UNREGULATED.

The NRC has adopted an interpretation of UMTRCA that essentially exempts large quantities of section 11e.(2) material from the Commission's oversight. This material, accordingly, is being disposed of without the health and safety protections mandated by UMTRCA and the Commission's regulations. The NRC maintains that UMTRCA provided it with no authority to regulate tailings not produced under license, except for (i) certain regulatory authority granted the Commission in connection with the governmental remedial clean-up authorized by Title I of the Act, and (ii) authority over tailings produced at a site that was not licensed at the time of production of the tailings but was licensed for source material production when section 83 of the AEA, as added by UMTRCA, became effective or thereafter. The Commission also maintains that it lacks authority even over tailings produced under license if the license was terminated prior to the effective date of section 83.

The NRC interpretation results in a regime that consists of essentially three significant categories of tailings sites, only two of which are subject to regulation. Those categories are (i) sites licensed for source material production as of the effective date of section 83 or thereafter, (ii) Title I sites, sites where tailings were produced primarily as a result of unlicensed activity, and (iii) sites – typically Formerly Utilized Sites Remedial Action Program (FUSRAP) sites – where unlicensed activity produced tailings that for one reason or another were not included in the Title I program. Under the NRC's construction of UMTRCA, the first two categories fall within the NRC's regulatory jurisdiction, but the third – a category now consisting of approximately 12 sites, compared to the 24 ultimately included in Title I – is beyond the NRC's reach.

The NRC bases its interpretation principally on a subsection of the AEA added by UMTRCA, section 83a., that deals with the Commission's regulation of its source material licensees. Under the Commission's interpretation of that provision, the NRC's jurisdiction under UMTRCA is confined to mill tailings produced at a site where source material production was licensed by the NRC. Under that view of the statute, the Commission lacks authority to regulate tailings on FUSRAP sites – as well as the ultimate disposal of those tailings off-site – if the activities at such sites were never licensed by the Commission. That is so notwithstanding that the FUSRAP mill tailings are identical in all relevant respects to regulated section 11e.(2) material. The NRC, moreover, has determined that its regulations, with modest exceptions, preclude the disposal of tailings resulting from unlicensed activity in NRC- or agreement state-licensed low-level waste disposal facilities, but do not preclude disposal of such tailings in facilities governed by the less rigorous regulatory provisions of the Resource Conservation and Recovery Act of 1976 (RCRA).¹

If the pre-1978 tailings, as is often the case, occupy a portion of a disposal site separate from the site's post-1978 material, several significant NRC safety regulations will not be able to be applied to, or enforced against, the FUSRAP material. Such regulations include the radon flux standard of Criterion 6 of Part 40's Appendix A, the ground water protection requirements of Appendix A's Table 5, the ALARA requirements of 10 CFR § 20.1101(b), the storage and control requirements of 10 CFR §§ 20.1801 and 20.1802, the posting requirements of 10 CFR § 20.1902(a), and the long-term surveillance plan requirements of the general license issued under 10 CFR § 40.28. While these are all requirements that the NRC has determined are necessary for the protection of public health and safety where post-1978 material is concerned, the pre-1978 material would be free of such requirements. This would be the case notwithstanding that the pre-1978 material in question would be likely to have radiation levels that are on the higher end of the spectrum for such material. As the Commission is aware, the policy of the Corps has been to send material with higher than normal radiation levels to NRC-licensed sites.²

This does not necessarily mean, of course, that the material would not be subject to any alternative regulatory regime. From all indications, however, no federal regulation would currently be available. The Environmental Protection Agency ("EPA") has made clear that it does not regulate pre-1978 mill tailings, since, whatever the NRC's position may be, the EPA views this material as AEA byproduct material.³ The NRC's position, accordingly, will leave the regulation of this material to state authorities, without regard to the level of competence and experience such authorities may have demonstrated with respect to the regulation of nuclear materials. Some of these states may have no Agreement State relationship of any sort with the NRC. The Corps, of course, could evaluate a state's radiation protection program and its competence to administer that program before sending this material to any given NRC-licensed site. There is serious question, however, whether the Corps institutionally is the appropriate agency to make these judgments. There can be no doubt that the Congress that enacted UMTRCA would not have thought so.

The NRC's position also will result in a related undesirable consequence: that of dual or multiple regulation of disposal sites. In the scenario discussed – where pre-1978 and post-1978 material exist on the same site in separate identifiable locations – the site-owner typically will be subjected to two different sets of regulations and requirements.⁴ Scenarios are possible where the number of regulators could be larger than two.⁵ The Commission has recently considered dual regulation scenarios of this sort in other decision-making contexts and has generally regarded them as undesirable.⁶

The potential for dual regulation, moreover, has recently created another circumstance of great concern. Although Envirocare's section 11e.(2) disposal facility was originally licensed on the assumption that it would receive FUSRAP mill tailings, and it has been receiving such tailings ever since that time, the combination of the Decision's position and the Commission's current guidance on the disposal of non-11e.(2) material in tailings impoundments may create significant hurdles with respect to Envirocare's continued receipt of FUSRAP material. The guidance requires, among other things, that before non-11e.(2) material can be shipped to an NRC-licensed 11e.(2) site, approvals must be received from the proposed long-term custodian for the site – usually the Department of Energy ("DOE") – and from "other affected regulators" of the material.⁷

DOE is concerned that under the NRC's approach DOE may be subject to dual or multiple regulation of Envirocare's site once DOE becomes the custodian of that site. It is possible, therefore, that DOE will not provide the necessary "concurrence and commitment . . . to take title to the tailings impoundment after closure" that is required by the current guidance. It is also possible that the agency may provide the needed approval but only after a substantial time period, during which the FUSRAP material will not be able to be shipped. There may be difficulty as well in obtaining approvals from "other affected regulators," since there may be questions as to which federal or state agencies are willing and able to take jurisdiction over the FUSRAP material.

Indeed, the DOE has raised numerous concerns over potential adverse impacts of the Director's Decision and the NRC's non-regulation of FUSRAP waste. In a letter dated January 8, 2001, the Director of DOE's Long-Term Stewardship Office said, in part,

"Our fundamental concerns are that the decision could significantly increase the burdens on the Department's long-term stewardship management and operations (i.e., allocation of personnel

resource, time and cost for regulatory analysis and additional waste characterization). The decision could lead ultimately to dual regulation of the Department's long-term stewardship activities, which is a potentially inefficient regulatory structure that the Department has long opposed. Furthermore, this decision potentially creates significant environmental and financial liabilities for the Department of Energy and Federal Government as a whole."⁸

The ironies associated with this circumstance are clear. First, it may be that the only entities that are precluded from disposing of FUSRAP mill tailings are NRC licensees whom the agency has in fact determined are able to handle material of this nature acceptably. Even if those licensees in the end are not precluded from such disposal activity, they will be required to confront obstacles that non-licensees will not have to confront. Moreover, under the contemplated approach, a statute that was specifically designed to prevent dual regulation, EPA regulation, and unsupervised state regulation of mill tailings – where Congress took unprecedented steps to avoid those results – will be interpreted to produce exactly the kind of regulatory regime that was intended to be avoided. It would be hard to imagine, in fact, a regime more in conflict with the objectives of the Congress, which intended to establish a complete and integrated regulatory system for mill tailings under the NRC's control.

The NRC's interpretation creates unjustifiable regulatory distortions and poses significant safety risks. What is more, the interpretation discounts the safety concerns regarding all section 11e.(2) material that motivated Congress to enact UMTRCA, as well as Congress's expressed intent that all such material be subject to strict health and safety controls.

THE UNAMBIGUOUS LANGUAGE OF UMTRCA REQUIRES THAT THE NRC REGULATE ALL SECTION 11E.(2) MATERIAL.

Section 81 of the AEA, as modified by UMTRCA, provides that "[n]o person may . . . own [or] possess . . . any byproduct material, except to the extent authorized by this section, section 82 or section 84." (Emphasis supplied.) There is no indication that a significant category of tailings or tailings sites is to be exempted from this prohibition. Section 81 confers specified licensing authority on the NRC with respect to byproduct material; section 82 confers various authorities, including licensing authority, on the Commission with respect to the foreign distribution of byproduct material; and section 84 provides additional broad regulatory authority with respect to material meeting the definition of section 11e.(2).

More specifically, section 84 provides that "[t]he Commission shall insure that the management of any byproduct material, as defined in section 11e.(2), is carried out in such manner as . . . the Commission deems appropriate to protect the public health and safety." (Emphasis supplied.) The language of section 84 is phrased not merely as a grant of authority, but rather as the imposition of an obligation on the Commission. That authority and obligation extend to all section 11e.(2) tailings, including, as the applicable legislative history makes clear, tailings governed by the provisions of Title I of the Act. See H.R. Rep. No. 95-1480, Part 1, at 21 (1978), reprinted in 1978 U.S.S.C.A.N. 7433, 7444; id., Part 2, at 45, reprinted in 1978 U.S.S.C.A.N. 7433, 7472. In sum, what all of the relevant statutory language plainly states is that unless authorized by the NRC under one of the three sections listed in section 81, a person is prohibited from owning or possessing any byproduct material. That prohibition is not qualified in any way under the terms of section 81 or any other provision of the Act, including section 83a., on which the NRC relies.

The Commission has properly observed that section 83a. imposes requirements on the NRC that apply only to source material licenses in effect on the effective date of section 83 or thereafter. The language of section 83a. reflects a congressional decision that the NRC was to control tailings disposal primarily through the regulation of its source material licensees. Section 83a. provides specific direction to the Commission as to how it is to proceed in that regard. The language requires that licenses in effect on the effective date of section 83 or thereafter are to be subject to certain requirements that must be satisfied prior to the termination of those licenses. Section 84, however, imposes additional requirements on the Commission that supplement the requirements imposed by the preceding section. Notably, these latter requirements are phrased in comprehensive, or catch-all, terms, and apply to all tailings meeting the definition of section 11e.(2). While section 83a. applies to a more limited category of tailings, i.e., to tailings produced under NRC license, nothing in the language of that subsection suggests that it is intended to limit the application of the requirements and prohibitions of either section 81 or section 84. Those sections, accordingly,

establish both the authority and the obligation of the Commission to regulate all section 11e.(2) byproduct material, including section 11e.(2) material on FUSRAP sites.

THE LEGISLATIVE HISTORY OF UMTRCA SHOWS THAT CONGRESS INTENDED TO COVER ALL SECTION 11E.(2) MATERIAL.

Besides conflicting with the unambiguous statutory language of UMTRCA, the NRC's position also is fundamentally at odds with UMTRCA's legislative history. Three clear themes of that legislative history argue forcefully against the NRC's position.

First, Congress wished to provide for a comprehensive approach to mill tailings disposal. That is not to say that the Congress specifically intended to regulate FUSRAP materials or, for that matter, that it ever specifically focused on FUSRAP. Rather, the Congress intended to regulate everything that satisfied the definition of section 11e.(2), never considering the exclusion of a significant category or amount of tailings from the reach of the statute. The current NRC position does not dispute that virtually all tailings produced as a result of licensed activity were intended to be covered by the Act. In addition, the relevant committees wished to cover under Title I of the Act all tailings produced as a result of government contractual activity, subject to certain very narrowly-drawn exceptions. The House Interior Committee, for example, indicated its belief that the sites listed in Title I of the bill it reported were the only ones that could be said (i) to include tailings resulting from Federal contracts, and (ii) not to be under active NRC license. H.R. Rep. No. 95-1480, Part 1, at 13 (1978), reprinted in 1978 U.S.C.C.A.N. 7435-36. The Committee noted, moreover, that it wished to include under Title I (with the exception of two New Mexico-licensed sites that needed to be studied with respect to the adequacy of New Mexico's regulatory regime) "any other uranium tailings sites which the Secretary may determine within 5 years to have been created under Federal contract and not to be under active NRC license." Id. at 18 (emphasis supplied). These statements, and other similar sentiments that are reflected throughout the legislative history, are entirely at odds with a willingness to exempt a significant category of tailings from the reach of the legislation. See, e.g., H.R. Rep. No. 95-1480, Part 2, at 29 (1978), reprinted in 1978 U.S.S.C.A.N. 7433, 7456; Uranium Mill Tailings Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049, H.R. 13650 Before the Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce, 95th Cong. 197, 237-38 (1978) (answers to questions posed by John D. Dingell, Subcommittee Chairman).

The second theme in the legislative history, closely related to the first, is that uranium mill tailings indeed present a serious health and safety problem. There are repeated indications of Congress's concerns about the problem. For example, Senator Hart, the Chairman of the Nuclear Regulation Subcommittee of the Senate Environment and Public Works Committee, stated in floor remarks:

Mr. President, it is imperative that uranium mill tailings be carefully regulated. They are just as radioactive as the original uranium ore from which they came. In fact, if tailings are not properly controlled, they can be more dangerous than radioactive wastes generated by powerplants and nuclear weapons programs.

124 Cong. Rec. S18,748 (1978). In the same vein, the House Interior Committee stated that "[a]s a result of being for all practical purposes, a perpetual hazard, uranium mill tailings present the major threat of the nuclear fuel cycle." H.R. Rep. No. 95-1480, Part 1, at 11, reprinted in 1978 U.S.S.C.A.N. 7433, 7433. No participant in the legislative debate took issue with these health and safety concerns.

The third theme, also related, regards the relationship between NRC and EPA jurisdiction. While the Congress was intent on placing all uranium and thorium mill tailings under UMTRCA, it was equally intent on ensuring that similar residues from other mining operations would be covered by RCRA. Under no circumstances were any materials of this nature to be regulated by neither Act. That view was reflected in the following exchange between Chairman Hendrie and Congressman Dingell:

Mr. Hendrie. Mr. Chairman, the intent of the language [defining section 11e.(2) byproduct material] is to keep NRC's regulatory authority primarily in the field of the nuclear fuel cycle. Not to extend this out into such things as phosphate mining and perhaps even

limestone mining which are operations that do disturb the radium-bearing crust of the Earth and produce some exposures but those other activities are not connected with the nuclear fuel cycle, EPA is looking at those and those appear to me to be things that ought to be left to EPA regulation under the Resource Conservation Recovery Act and general authorities. Mr. Dingell. Your thesis is that we ought not however set up a set of circumstances where we would leave some of these to fall between the cracks and wind up being unregulated.

Mr. Hendrie. I agree fully, Mr. Chairman, and I believe the way the language would cut here, as we recommended, would not leave any crevasse between the two authorities.

Mr. Dingell. That is my main concern.

Uranium Mill Tailings Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049, H.R. 13650 Before the Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce, 95th Cong. 344 (1978) (statement of Joseph M. Hendrie, Chairman, NRC). The fact that UMTRCA was drafted to remove all uranium and thorium tailings from RCRA – by including such tailings in the section 11e.(2) definition and thus excluding them from RCRA's control – is yet another indication that all such tailings were to be covered by UMTRCA.⁹ While the Congress would have found intolerable the exemption of any category of such tailings from UMTRCA, it would have found even more objectionable the exemption of that category from both UMTRCA and RCRA.

Against this background of (i) significant concern, (ii) the desire to adopt a comprehensive approach to resolve that concern, and (iii) the desire that under no circumstances should wastes involving potential hazard to the public fall between NRC and EPA jurisdiction, it is inconceivable that Congress would have intended to place a significant category of tailings sites beyond the control of the regulatory authority established by UMTRCA.¹⁰

In accord with this analysis, the U.S. Court of Appeals for the District of Columbia Circuit has described the objectives of UMTRCA as follows:

The purpose of the UMTRCA was two-fold: first, to close the gap in NRC regulatory jurisdiction over the nuclear fuel cycle by subjecting uranium and thorium mill tailings to the NRC's licensing authority; and second, to provide a comprehensive regulatory regime for the safe disposal and stabilization of the tailings. Title I of the UMTRCA provided a specific remedial program for twenty designated inactive uranium milling sites. Title II established a comprehensive remedial program for mill tailings at all other sites.

Kerr-McGee Chem. Corp. v. United States Nuclear Regulatory Comm'n., 903 F.2d 1, 3 (D.C. Cir. 1990) (citations omitted) (emphasis supplied). Based on this view of the Act, the court resolved the matter before it – the appropriate interpretation of the language of section 11e.(2) – by rejecting an NRC interpretation it determined would create a “jurisdictional gap” in UMTRCA's regulatory regime. Id. at 8. It found objectionable that the NRC's construction would treat certain mill tailings as outside its reach, notwithstanding that they were “in all relevant ways identical to tailings found by the NRC to be byproduct material and thus subject to the UMTRCA's remedial program.” Id. The court did not address the issue of whether the tailings produced from unlicensed activity were covered by UMTRCA. It is fair to say, however, that any determination that such tailings are not in fact covered is inconsistent with the court's understanding of the Act's objectives.

THE NRC'S OWN REGULATIONS DO NOT EXEMPT ANY SECTION 11E.(2) MATERIAL.

The Commission's UMTRCA regulations, like UMTRCA itself, are all-inclusive with respect to section 11e.(2) material. The regulations, which have been in effect for nearly 20 years, have never included an exemption for FUSRAP materials or other tailings not produced at the site of a source material licensee. The most significant provision of those regulations, 10 C.F.R. § 40.2a (1999), reads as follows:

§ 40.2a Coverage of inactive tailings sites.

(a) Prior to the completion of the remedial action, the Commission will not require a license pursuant to 10 CFR chapter I for possession of residual radioactive materials as defined in this part that are located at a site where milling operations are no longer active, if the site is covered by the remedial action program of title I of the Uranium Mill Tailings Radiation Control Act of 1978, as amended. The Commission will exert its regulatory role in remedial actions primarily through concurrence and consultation in the execution of the remedial action pursuant to title I of the Uranium Mill Tailings Radiation Control Act of 1978, as amended. After remedial actions are completed, the Commission will license the long-term care of sites, where residual radioactive materials are disposed, under the requirements set out in § 40.27.

(b) The Commission will regulate byproduct material as defined in this part that is located at a site where milling operations are no longer active, if such site is not covered by the remedial action program of title I of the Uranium Mill Tailings Radiation Control Act of 1978. The criteria in appendix A of this part will be applied to such sites.^[11]

Notably, subsection (b) specifically rejects the interpretation that the NRC now espouses. The NRC had every opportunity at the time of adoption of these rules – and over 20 years thereafter – to include an exemption of the sort the Commission now reads into the statute. In the absence of such an exemption, the Commission's current position is in violation of its rules.

Other provisions of the regulations also depart from the Commission's position. Section 40.31(h) states:

An application for a license to receive, possess, and use source material for uranium or thorium milling or byproduct material, as defined in this part, at sites formerly associated with such milling shall contain proposed written specifications relating to milling operations and the disposition of the byproduct material to achieve the requirements and objectives set forth in appendix A of this part.

10 C.F.R. § 40.31(h) (1999) (emphasis supplied). Once again, there is no indication of any exemption for byproduct material produced through unlicensed activity. In a similar vein, Criterion 11 of Appendix A applies exactly the same requirements to all source material and tailings licenses, making no distinctions on the basis of whether the tailings were produced under license or whether the relevant site was licensed at the time section 83 became effective. Finally, section 40.3 requires that “[a] person subject to the regulations of this part may not . . . own, receive, possess . . . or dispose of byproduct material . . . as defined in this part” unless licensed by the Commission, and section 40.2 provides that, subject to certain inapplicable exceptions, “the regulations in this part apply to all persons in the United States.”

In sum, the applicable regulations, like the statute itself, are in direct conflict with the NRC's Director's Decision position of non-enforcement.

CONSIDERATIONS RELATING TO FUSRAP DO NOT PROVIDE A BASIS FOR NON-ENFORCEMENT.

The NRC has indicated that, apart from its reading of UMTRCA, it is inclined not to take any regulatory action with respect to FUSRAP because it believes that a sister agency, the Army Corps, is administering the program adequately. It further notes that the Congress has not specifically directed the NRC to involve itself in the program. See Issuance of Director's Decision under 10 C.F.R. 2.206, 64 Fed. Reg. 16,504, 16,508 (1999).

For many of the reasons noted above, the Commission is not authorized to absent itself from FUSRAP matters. As indicated, mill tailings on FUSRAP sites are subject to NRC regulatory jurisdiction by both UMTRCA and the NRC's implementing regulations, jurisdiction that the NRC is required to exercise. That does not necessarily mean that the Commission is required to regulate all aspects of FUSRAP. This petition does not take issue with the

Commission's determination that under section 121(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Corps may conduct on-site remedial clean-up activities on FUSRAP sites without obtaining an NRC license for those activities. That by no means suggests, however, that a blanket exemption for FUSRAP as a whole can be justified.

As noted above, Congress may not have specifically focused on FUSRAP sites and may not have specifically decided to cover them under UMTRCA. However, what is clearly indicated by both the statutory language and the legislative history of the Act is that the Congress wished to cover "any" and all section 11e.(2) tailings, wherever and whenever found. There is no basis to exclude tailings on FUSRAP sites from that coverage.

SERIOUS ANOMALIES RESULT FROM THE NRC'S INTERPRETATION OF UMTRCA.

Statutes should be read according to their plain meaning and in such a manner as to avoid absurd results. See Sheridan v. United States, 487 U.S. 392, 402 n.7 (1988). It is instructive, to say the least, that when the statute is read as written, the absurd results evaporate.

The Commission's current reading of UMTRCA not only excludes FUSRAP material, but also (1) makes all section 11e.(2) material imported into the United States off-limits to Commission regulation; (2) would have left indeterminate the extent of the Commission's jurisdiction in the early years after the enactment of UMTRCA; (3) would have left the Commission without authority over tailings produced by licensees that terminated their licenses during the three years following enactment of UMTRCA; and (4) creates a situation in which the disposal of FUSRAP wastes in licensed 11e.(2) disposal sites subjects such sites to dual regulation. It is submitted that Congress could not have intended to enact a legislative scheme creating such anomalies.

Any reading of UMTRCA that limits Title II's coverage to active sites and Title I sites necessarily attributes to Congress the decision to prohibit Commission regulation of numerous other categories of byproduct material. For example, under the NRC's interpretation, if an operator of an inactive, non-Title I mill tailings site were to apply for inclusion in FUSRAP but were to have its application denied, it would escape Commission regulation altogether. To illustrate this point: FUSRAP lacks authority to remediate a privately owned site if such remediation would give the owner a windfall profit on the property. See Formerly Utilized Sites Remedial Action Program Designation/Elimination Protocol at 8 (attached as Exhibit A). Thus, owners of such sites do not qualify for inclusion in the program. At the same time, they would not be covered by UMTRCA and would thus be left free of NRC jurisdiction with respect to byproduct material on their sites.

Another such anomalous exclusion would prevent NRC regulation of any sites that were excluded from Title I because they were owned by the federal government. See UMTRCA § 114(b). These sites would be forever off-limits to NRC regulation, even if they were later transferred to private parties prior to remediation.

More significantly, the NRC's position necessarily attributes to Congress the bizarre intention to deny the Commission jurisdiction over all non-Title I byproduct material from inactive sites even when that material is disposed of at NRC-licensed facilities. As the Commission knows, the Corps does dispose of pre-1978 FUSRAP tailings, typically those with relatively high levels of radioactivity, at NRC-licensed section 11e.(2) facilities. Under the NRC's interpretation, the Commission has no authority to regulate the disposal of this material, even though the material is in the hands of its licensees.

That is because the Commission's regulatory authority under the AEA relates only to activities involving licensable material. The fundamental purpose of the regulatory provisions of UMTRCA was to include mill tailings among those materials licensable by the NRC. If FUSRAP mill tailings are not materials subject to the NRC's regulatory jurisdiction, their presence on the site of an NRC licensee will not make them so.¹² Accordingly, under the NRC's interpretation, FUSRAP mill tailings sent to a site licensed to dispose of post-1978 mill tailings will not be subject to NRC jurisdiction. It is not conceivable that a Congress intent on developing a comprehensive solution to the mill tailings problems it confronted would have allowed this circumstance to exist.

Further, it is incomprehensible that Congress would have created a regulatory scheme that results in a situation where the same material is subject to regulation by two different regulatory agencies. Indeed, dual regulation is something the Commission has avoided in all situations.

It is notable that the NRC, even while holding to the interpretation that creates this circumstance, appears unwilling to live with the consequences of its interpretation. The NRC has taken a position that its rules governing 11e.(2) material do in fact apply to pre-1978 FUSRAP mill tailings at an NRC-licensed site.¹³ In so doing, it continues to regulate the FUSRAP tailings that the Corps now sends to sites licensed by the NRC. It has never rationalized, however, how it can do so consistent with its current interpretation of UMTRCA.

Any reading of UMTRCA that results in such a list of mandatory jurisdictional carve-outs flies in the face of Congress's repeated expressions of concern about the health and safety risks of mill tailings unregulated by the NRC. By contrast, all of these problems go away when the statute is simply read as it is written.

In sum, the NRC's interpretation of the statute creates problems where there would otherwise be none. Statutes should be read "to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading." Sheridan, 487 U.S. at 402 n.7. Contrary to these principles, the NRC is bypassing the plain meaning of legislation to produce anomalies, not to avoid them.

THE ATOMIC ENERGY ACT OF 1954 PREEMPTS TO THE FEDERAL GOVERNMENT THE FIELD OF REGULATION OF BYPRODUCT MATERIAL.

Under the doctrine of "field" preemption, "Congress' intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983). The nuclear safety regulation of source, special nuclear, and byproduct material is such a field. "Upon these subjects, no role was left for the States." Pacific Gas, 461 U.S. at 207.

THE EPA HAS NO AUTHORITY UNDER RCRA TO REGULATE BYPRODUCT MATERIAL.

As noted by the Commission during the UMTRCA hearings, EPA has no authority under RCRA to regulate nuclear materials governed by the AEA. See Commerce Hearings at 343. In enacting UMTRCA, Congress expanded the AEA's definition of byproduct material to include mill tailings and thereby excluded such material from RCRA's definitions of solid and hazardous wastes. See 42 U.S.C. § 6903 (5) & (28); Commerce Hearings at 343.

First, section 6925(c)(3) was added to RCRA in 1984, six years after the enactment of UMTRCA. It thus has absolutely no bearing on the meaning of UMTRCA. Moreover, neither section 6925(c)(3) nor its legislative history contains any suggestion that Congress intended by enacting that provision to execute a drastic change in the law. See H.R. Conf. Rep. No. 98-1133, at 94 (1984), reprinted in 1984 U.S.S.C.A.N. 5665. Allowing the regulation of numerous categories of hazardous materials where such regulation was otherwise expressly prohibited would indeed have constituted a drastic change. Nor is it likely that Congress would have used such generic language to override explicit and specific language elsewhere in the same statute.

Second, the EPA itself makes no claim to having such broad authority over section 11e.(2) FUSRAP material. It recently stated that "[t]o date, EPA has not distinguished between the kinds of material referred to in section 11e.(2) generated before 1978 and such material generated after 1978, and EPA does not regulate any of this material under RCRA." Enclosure to Letter from EPA to Idaho Senator Clint Stennett at 3 (attached as Exhibit D). It has not suggested that it can or will use section 6925(c)(3) to regulate such material.

Third, in Apache Powder Co. v. United States, 968 F.2d 66 (D.C. Cir. 1992), an explosives manufacturer (Apache) argued that the EPA could use section 6925(c)(3)'s additional "terms and conditions" language to include a RCRA license provision relating to the cleanup of nitrates, notwithstanding that nitrates do not qualify as hazardous waste under EPA regulations. The EPA responded that section 6925(c)(3) does not clearly give it such authority. The

D.C. Circuit agreed with the EPA, noting that “Apache does not claim that any court has accepted such a broad reading” of section 6925(c)(3). Id. at 70. In the court’s view, the EPA’s “concern that it may lack the necessary legal authority” to exercise RCRA permitting authority over nitrates was “thoroughly legitimate.” Id. at 70. If the EPA lacks authority to regulate nitrates under section 6925(c)(3), it certainly has no such authority over byproduct material.

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED IN TITLE II TO GRANT THE COMMISSION ALL-INCLUSIVE AUTHORITY OVER SECTION 11E.(2) BYPRODUCT MATERIAL.

Congress conceived of and drafted UMTRCA as a comprehensive statute for the remediation and regulation of mill tailings, with minor specific exceptions in Title I and no exceptions in Title II.

Congress wanted UMTRCA’s coverage to be comprehensive. Congress considered all mill tailings to be a serious health problem, and it sought to ensure that they would all be cleaned up and disposed of properly. See, e.g., H.R. Rep. No. 95-1480, Part 2 at 29 (1978) [hereinafter “Commerce Report”] (“The committee is convinced that all tailings pose a potential and significant radiation health hazard to the public.”). Generally this meant that inactive sites were to be included in Title I, and that active sites were to be regulated through conditions in source material licenses, under what became section 83.

Congress did make some minor, well-defined exceptions from Title I’s coverage of inactive sites, not because it intended that they not be regulated, but because Title I was to be funded by the federal and state governments, and Congress was concerned about who would pay for remediation. These exclusions appear in UMTRCA § 101(6), and FUSRAP is not among them. The main exclusions were for sites “owned or controlled” by federal agencies and sites where there had been little or no production for government contracts. See Interior Report at 13 (Title I was to cover all inactive sites with “tailings resulting from operations under Federal contracts,” but not “where the commercial uranium milling industry can be required through regulatory authorities to assume those costs”); Commerce Hearings at 328 (federally owned sites were excluded because state cost-sharing was “inappropriate”). When Congress asked how many sites were excluded by these provisions, it was told that three were. See Commerce Hearings at 197; id. at 259-60 (Ray Point, Texas, no federal production; Monticello, Utah, owned by DOE; and Edgemont, South Dakota, owned by TVA). There were no exclusions from Title II’s coverage.

Sometimes Congress referred to UMTRCA as covering “Title I” sites in Title I and “active” sites in Title II. As noted earlier, this terminology was imprecise. Any small significance that might be attributed to this terminology in the present context disappears entirely when one considers what is discussed in the following section: Congress expected DOE to use the one-year window provided in section 102(a) to designate any other sites with mill tailings (other than those meeting the above-mentioned exceptions) as Title I sites. Thus, Congress would have believed (if it thought about the matter at all) that when it occasionally referred to UMTRCA as covering “Title I” sites and “active” sites, that phrase would essentially encompass all pre-1978 sites to the extent those sites contained mill tailings.

CONGRESS INTENDED FOR ALL SITES MEETING TITLE I CRITERIA TO BE DESIGNATED AS TITLE I SITES, AND HAD NO INTENTION OF PROVIDING FOR TWO DISTINCT REMEDIAL PROGRAMS FOR MILL TAILINGS.

Although the complex legislative history of UMTRCA is subject to various plausible interpretations, the idea that Congress knew about, focused on, and deliberately decided to exclude the FUSRAP program is not among them. A number of critical points emerge from the legislative record. First, there is no question that during the UMTRCA hearings an ongoing survey of what DOE called “other sites” was discussed,¹⁴ sites that had been used by the government for research and development in the early days of the atomic weapons program and that had subsequently been turned back over to the public. Yet Congress was told only about a survey in progress, not a program currently performing remediation. DOE represented to Congress that it was “currently in the process of evaluating” these sites for radioactivity hazards, that some of these sites would “probably” require remediation but that “the need for remedial action [had not yet been] determined,” and that as a result there had been no remediation performed pursuant to the survey. Commerce Hearings at 185; see Commerce Hearings at 196 (DOE was “currently surveying other sites” to determine “the need for remedial action”). DOE had compiled a list of “Sites Formerly Utilized by MED/AEC Considered for Remedial Action,”¹⁵ but explained that even these sites would still need “a much

more intensive survey” before any remediation took place. Commerce Hearings at 297, 298-300. There was never any reference by anyone to a program that was already conducting remediation, only to this “survey” or “study” that was identifying sites with radioactivity hazards.

The Corps claims that “DOE commenced the FUSRAP program in 1974.” That statement, which might be accurate enough in other contexts, could well be misunderstood in the present context. The source cited by the Corps confirms that (1) “[a]ctivities leading to the establishment of FUSRAP began in 1974”; (2) at least as late as 1977 there was nothing but a “site survey program”; and (3) “FUSRAP was initiated” sometime thereafter. See FUSRAP Management Requirements and Policies Manual, Volume 1 at 1-1 to 1-4 (DOE, 1997) (emphasis added) (excerpt at Corps Ltr. Resp. Exh. 1). Most significantly, DOE publications show, consistent with what Congress was and was not told at the UMTRCA hearings, that no remediation was performed by the FUSRAP program until 1981, when the Kellex/Pierpont site was cleaned up. See The Formerly Utilized Sites Remedial Action Program (FUSRAP): Building Stakeholder Partnerships to Achieve Effective Cleanup at 7 (table), 8 (table) (Envirosource Supp. Resp. Exh. B); id. at A-7 (showing that at Kellex/Pierpont, the first site remediated by FUSRAP, “[r]emediation of radioactive contamination was in FY 1981”). In these circumstances, Congress could not in 1978 have “realized” that “DOE was already investigating and remediating” these sites and that these sites therefore “did not need to be included in . . . Title I,” as Envirosource claims. Envirosource Supp. Resp. at 7 (emphasis added).

Second, to the extent that this survey came to Congress’s attention, Congress probably had no clear understanding of how the “other sites” mentioned by DOE related to the mill tailings problem Congress was addressing. DOE repeatedly drew a distinction between “mill tailings” and the radioactivity hazards at formerly utilized sites. In response to a question from Congressman Dingell, Mr. Liverman stated that DOE’s study of formerly utilized sites was “a different study than mill tailings.” Commerce Hearings at 308. And in explaining the scope of a particular hearing to a late arrival, Mr. Liverman stated that the hearing “ha[d] been dealing with only two questions, one of mill tailings and the other excess sites that were declared excess and turned over to the public.” Uranium Mill Tailings Control: Hearings on H.R. 13382, H.R. 12938, H.R. 12535 and H.R. 13049, H.R. 13650 Before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs, 95th Cong. [hereinafter “Interior Hearings”] at 53 (1978). It is unclear what Mr. Liverman meant by making such unexplained distinctions, which must have caused misconceptions about whether or to what extent there were mill tailings at formerly utilized sites. There probably was no general understanding of the matter in Congress, given the confused state of the legislative record.

Most importantly, to the extent that Congress did understand that some formerly utilized sites might have mill tailings on them, it provided for their inclusion in Title I. Although DOE indicated that it was still doing its study and would finish within a year, the study had already identified one site that clearly involved a serious mill tailings problem, and that site was added to Title I before enactment. See UMTRCA § 102(a)(1); Interior Hearings at 49; Commerce Hearings at 298 (Canonsburg, PA). That is entirely inconsistent with the view espoused by Envirosource and the Corps that Congress believed there was a self-sufficient and adequate FUSRAP remedial program that it should not disturb. To the contrary, Congress did not have the results of a survey that DOE simply had not finished.

Mr. Liverman’s written testimony encouraged Congress’s expectations that additional mill tailings sites might be identified through this survey and added to Title I. In his testimony, he first described the Title I study, which he called “[a] full scale investigation of the inactive uranium mill tailings site situation,” and as “a study of all inactive uranium mill tailings sites in the Western States.” Commerce Hearings at 183. He added in a brief aside that DOE was evaluating “a number of additional sites at which a variety of materials from uranium and thorium ores to refined products were handled or processed”—conspicuously avoiding any assertion that there were “mill tailings” at these sites. Commerce Hearings at 185. He then explained that after the survey was complete, “DOE will be in a position to determine which, if any, of these properties could be included in this legislation.” Commerce Hearings at 185.

Addressing this situation, Congress explicitly provided a window during which other sites that had mill tailings and that met the Title I criteria were to be added to Title I after enactment. As enacted, section 102(a)(1) provides that DOE “shall within one year” of UMTRCA’s enactment “designate all other processing sites within the United States which [DOE] determines require remedial action to carry out the purposes of this title.” (The term “processing site” includes “any site, including the mill” that contains milling wastes produced under federal contracts, with the exceptions noted above. See UMTRCA § 101(6)(A).)

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In answers to written questions from Congress, EPA explained that the DOE's ongoing survey of these "other sites" was the very reason for the inclusion of a provision allowing the post-enactment designation of additional Title I sites by DOE:

[Question by Rep. Dingell:]

Please explain why it is necessary or desirable from a health standpoint for the Federal government to assume responsibility for sites in "any other State" later identified by the DOE. What other sites does this provision contemplate?

[EPA Response:]

The DOE has been conducting environmental surveys of old sites that were formerly used for research and development work in the early days of the Nation's atomic energy program. Some of these sites may be found to have similar conditions and would be covered under this bill. For instance we are currently reviewing [a site] in Canonsburg, Pennsylvania. . . . There may be similar sites in other states not specified in this bill.

Commerce Hearings at 237 (emphasis added). Thus the Interior Committee expressed the view (before a five-year window was narrowed to one) that Title I would include "any other tailings sites which the Secretary may determine within 5 years to have been created under Federal contract and not to be under active NRC license." Interior Report at 18.

Mr. Liverman did indicate that while the matter was in some doubt, he believed it likely that DOE already had authority to remediate some formerly utilized sites. However, he never expressed a definite view that DOE already had authority to remediate sites with mill tailings. His statements on the matter, moreover, were typically confusing. For example, he stated:

Some of these ["other sites"] at this point in time probably constitute a health hazard. Where we are clearly liable we will be moving within the limits of our budgets to deal with those questions. We do not need authorization to deal with a number of those; whereas, in the case of milltailings, we do not have the authority to move ahead in that area.

Commerce Hearings at 301 (emphasis added). It was in this context that Mr. Liverman stated, "We will probably be back in the next 9 months to a year, if we need additional authorization to cleanup, and that will depend upon the legal determination of who is responsible." Interior Hearings at 49. Again, it is unclear how well Congress understood the relationship between the formerly utilized sites and the mill tailings problem, and these sometimes cryptic explanations must have hindered as much as they helped.

Faced with a complex and indeterminate problem, Congress appears to have done the best it could to make sure that all mill tailings sites that met Title I criteria got into Title I. The "other sites" mentioned by DOE were no exception, and although no formerly utilized sites besides Canonsburg ever were included in Title I, it was not for lack of effort on Congress's part. At one point, Mr. Liverman's reference to a "different study" had the subcommittee on Energy and Power concerned that it might be missing some mill tailings sites, and it submitted this written question to Mr. Liverman:

[Y]ou state that the DOE is evaluating "additional sites" which "were released from Federal control in the period 1943 to 1970." Please provide a list of all known mill tailing sites located in the United States (other than the 22 studied by DOE), including any under the control of the DOE, and state whether active or inactive, the indentity [sic] of the entity now owning or controlling the site.

Commerce Hearings at 327 (Emphasis in original). Yet the DOE's response gave a list of "all known mill tailings sites located in the United States" that did not include any formerly utilized sites (except for Canonsburg). See Commerce Hearings at 328-332.

After the Interior Committee had heard and explored Mr. Liverman's testimony about "other sites," as well as testimony from many other witnesses, it had this to say:

All [22 specified Title I sites] consist of tailings resulting from operations under Federal contracts. None are now under active license by the Nuclear Regulatory Commission. While it is believed that these sites are the only ones which possess all such characteristics, the bill permits the inclusion of any other sites meeting those characteristics.

Interior Report at 13. In light of these and many other passages in the legislative history, the best explanation of the confused and complex history of Title I is that Congress made significant efforts to include everything that met the statutory criteria, and, having been told that DOE was still conducting a survey of "other sites," it provided a window in which all other mill tailings sites meeting those criteria were to be included.

TO THE EXTENT CONGRESS WAS AWARE OF MILL TAILINGS AT FORMERLY UTILIZED SITES, IT WOULD HAVE BEEN IRRATIONAL FOR CONGRESS TO EXCLUDE THEM FROM TITLE I.

Given the detailed and demanding provisions Congress enacted to govern remediation of Title I sites, it is impossible to imagine that Congress, to the extent it understood that the "other sites" might have mill tailings, would have excluded such sites from Title I on the assumption that DOE could remediate them on its own terms. Congress simply was not willing to leave that much up to DOE to decide.

In its development of Title I, Congress insisted on significant and unusual regulatory controls. The most important of these were (1) federal or state acquisition of tailings sites and disposal sites; (2) the ultimate transfer to the federal government of the tailings and sites once remedial action was complete; and (3) NRC licensing of DOE or such other federal agency as the President determined should be the ultimate custodian of the land and the tailings.

Congress felt particularly strongly about the latter point, and required that the NRC have licensing authority over Title I sites. Notwithstanding that the NRC objected to actual licensing of the DOE, the Congress insisted that such licensing be required. Chairman Hendrie, explaining the Commission's preferred approach, stated as follows:

[S]ince the Atomic Energy Act excludes DOE from the scope of NRC licensing authority over byproduct materials[,] . . . if the reclaimed inactive sites remain under long-term DOE control, then the tailings would not be licensed by NRC.

We would further propose that H.R. 13382 be modified to add a section to the Atomic Energy Act granting a statutory exemption from licensing to persons subsequently in possession of disposal sites that were previously subject to the DOE remedial action program.

Interior Hearings at 135. Congress rejected both of these suggestions, and instead provided that "[n]otwithstanding any other provision of law," remediated materials and sites under Title I "shall be maintained pursuant to a license issued by the Commission." UMTRCA § 104(f)(2).

Against this background, it is not conceivable that Congress, to the extent it understood that the "other sites" might have mill tailings on them, would have accepted a separate remedial system for those sites free of the protections Congress had laboriously developed for the Title I program, especially NRC regulation.

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO GIVE THE COMMISSION COMPREHENSIVE REGULATORY JURISDICTION OVER ALL BYPRODUCT MATERIAL, WHETHER OR NOT COVERED BY TITLE I.

Although Congress generally assumed during legislative hearings and in legislative reports that coverage of Title I sites and active sites would essentially cover the waterfront with respect to mill tailings, it did not count on that assumption in its drafting of Title II. Wishing to ensure that the NRC's jurisdiction over mill tailings would not be contingent in any manner, it drafted a grant of authority that would cover all active or inactive sites, even inactive sites excluded from Title I for whatever reason.

Contrary to the NRC's claims, any search for signs of a congressional decision to exclude a site or category of sites from the NRC's jurisdiction under Title II is in vain. The question of which sites to remediate under Title I was determined in part by questions of responsibility and cost, and, as noted, Congress specifically exempted sites from Title I based on those considerations. Such considerations, however, did not in the least affect Congress's desire to give the Commission regulatory control over all mill tailings. The House Interior and Insular Affairs Committee explained that the Commission "is the lead agency in regulation, oversight and management of uranium mill tailings-related activities," and that "one of the major purposes" of UMTRCA was "to clarify and reinforce these Commission responsibilities, with respect to uranium mill [tailings] at both active and inactive sites." Interior Report at 15 (emphasis added).

The NRC aided Congress in the drafting of what became Title II, and both the NRC and Congress indicated that the NRC should have direct, comprehensive regulatory authority over all mill tailings. The need for such regulatory authority was discussed at length while Congress was considering what became Title I. At one of the earliest House hearings, Congressman Ward pointed out that some material from the "other sites" mentioned by Mr. Liverman had been used in construction. Mr. Liverman acknowledged that, for example, at a Middlesex, New Jersey, formerly utilized site owned by the federal government, material had been taken off-site and used in the construction of a Catholic church. Congressman Dingell in turn inquired of Chairman Hendrie whether the NRC had authority to prevent such uses, and whether it might not be possible to make mill tailings licensable material rather than having the NRC regulate them only indirectly through source material licenses. As Chairman Hendrie responded to Congressman Dingell's concerns over use of tailings as fill, the following colloquy ensued:

Mr. Hendrie. Now I think if we were going to try to control those things, we probably would need some explicit statutory authority to deal with that kind of situation.

Rep. Dingell. Could you give us some suggestions as to perhaps some language for the legislation? If you feel you need it, it would be helpful.

Mr. Hendrie. All right, sir.

Commerce Hearings at 302. That was on June 20, 1978. It was not long before Chairman Hendrie and the NRC presented a draft of what eventually became Title II. On August 2, 1978, testifying again before the Interior Committee, Chairman Hendrie explained the draft this way: "[T]he Commission began to develop legislation that would fill the gaps and avoid some of the duplication in [the current] regulatory scheme. Such legislation should provide the clear statutory authority needed for the Commission to license directly and otherwise regulate uranium milltailings." Commerce Hearings at 342. These remarks — and the proposed legislation — were directly responsive to the concerns raised by Congressman Dingell and others at the previous hearing.

THE PLAIN LANGUAGE OF SECTION 11E.(2) INCLUDES PRE-1978 FUSRAP MILL TAILINGS.

The most obvious obstacle to reading FUSRAP material out of the definition of "byproduct material" is the statutory text itself. Nothing in that text permits differentiating between pre-1978 mill tailings and any other vintage or type of mill tailings. The statute provides: "The term 'byproduct material' means . . . (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source

material content.” AEA § 11e.(2). There is no temporal limitation even hinted at in this definition. There is therefore no textual basis for any attempt to limit the definition to post-1978 material.

CONCLUSION

With the Commission allowing the Director’s Decision to become final agency action, it is likely that litigation will be filed to overturn the Decision. Between now and the time of a decision in such litigation, if any, it can be expected that the Corps will ship significant additional quantities of FUSRAP waste to RCRA disposal sites. If the NRC does not prevail in the litigation, therefore, significant problems regarding those issues can be anticipated. Unfortunately, even if the NRC were to prevail, the NRC’s Decision creates numerous questions and problems relative to the lack of regulation of large quantities of FUSRAP waste for which there are no good answers.

FOOTNOTES

¹ Yet, as discussed below, even RCRA regulation will not govern the disposal of such tailings, since that Act is inapplicable to “byproduct material as defined by” the Atomic Energy Act (AEA), and the NRC has not contended that such tailings fail to meet the definition of byproduct material in section 11e.(2) of the AEA. See 42 U.S.C. § 6903(27) (excluding “source, special nuclear, [and] byproduct material as defined by the [AEA] as amended” from the RCRA definition of “solid waste”); 42 U.S.C. § 6903 (5) (defining “hazardous waste” as a particular kind of “solid waste, or combination of solid wastes”).

² Needless to say, none of these same safety standards would apply at sites that are wholly unlicensed by the NRC, such as the RCRA disposal sites to which the Corps is now sending FUSRAP tailings with lower levels of radiation.

³ Attachment to letter from EPA to Hon. Clint Stennett, Minority Leader, Idaho State Senate, at 3 (June 26, 2000).

⁴ See Envirocare Reply Brief filed in the 2.206 proceeding with the NRC at 45-49.

⁵ It would be possible, for instance, for the affected state to decide to regulate the radiological components of the pre-1978 mill tailings and for the EPA to regulate the non-radiological components.

⁶ See Commission vote sheets for SECY-99-0277 and SECY-99-0012.

⁷ See Interim Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments, RIS 2000-23 Attachment 1 (Nov.30, 2000).

⁸ Letter from James D. Werner to William F. Kane dated January 8, 2001. No response to this letter has been sent by the NRC to DOE as of the date of this paper.

⁹ See supra note 2.

¹⁰ It is possible that Congress may have believed that the only uranium and thorium mill tailings in existence at the time of UMTRCA were on Title I sites and licensed sites. It is also possible, however, that some in the Congress specifically considered the prospect of tailings that were not produced under license but might be learned about after the Title I sites were selected. It is impossible to know. The matter, however, is not central to the legal analysis, given the all-inclusive statutory language Congress chose and the absolute absence of any indication that Congress intended to exclude a significant category of section 11e.(2) material from the Act’s coverage. Again, both the statutory language and the legislative history establish an unmistakable intent on the part of the Congress to provide comprehensive coverage.

¹¹ The references to “this part” are to 10 C.F.R. Part 40. “[B]yproduct material as defined in this part” refers to the definition contained in section 40.4, which essentially parallels the definition of section 11e.(2) of the AEA.

¹² See, e.g., Letter from Robert Fonner (NRC) to Ann Wright (Corps) dated March 2, 1998 (attached as Exhibit B) (indicating that NRC waste disposal regulations “apply only to licensees disposing of licensed material”); 10 C.F.R. § 40.4 (defining “byproduct material” and indicating that NRC regulations relate only to byproduct material made licensable by statute).

¹³ See Letter from P.H. Lohaus (NRC) to William J. Sinclair (Utah DRC) dated Sept. 24, 1999, at 1 (attached as Exhibit C) (“If pre-1978 11e.(2) byproduct material is presented as such to the NRC-licensed Envirocare facility for disposal, Envirocare must comply with all the requirements applicable to disposal of 11e.(2) byproduct material.”). The letter also takes the position that Part 61 restrictions regarding section 11e.(2) material at an NRC-licensed low-level waste facility would apply to pre-1978 mill tailings proposed to be transferred to that facility.

¹⁴ At the UMTRCA hearings there was no consistent terminology to refer to what are now called “formerly utilized sites” or “FUSRAP sites.” While those terms were never used (they apparently had not yet been coined), the term “formerly utilized sites” is occasionally used here for the sake of convenience. The term most often used by DOE was “other sites.” See, e.g., Interior Hearings at 42, 49; Commerce Hearings at 297; cf. Interior Hearings at 191 (“additional sites”).