



ATOMIC ENERGY ACT
TITLE II SITE
DECOMMISSIONING
FROM A LICENSEE
PERSPECTIVE

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INTRODUCTION

- Under the Atomic Energy Act of 1954 (AEA), as Amended by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), Congress Established the Framework for a Program for “Active” Uranium Milling Facilities and Their 11e.(2) Byproduct Material to Fulfill UMTRCA’s Statutory Mandate:
 - Safely Provide for Long-Term Control of Any and All 11e.(2) Byproduct Material at the Site;
 - Ensure Adequate Site Boundaries to Satisfy Statutory Closure Period of at Least 200 Years and, to the Maximum Extent Practicable (Reasonably Achievable), 1,000 Years;
 - Create a Regulatory Process By Which Such Closure Can Be Completed and the Site May Be Transferred to a Mandatory Long-Term Custodian (Resident State or the Department of Energy (DOE));
 - Create Procedures for Agreement State Site Closure With NRC Concurrence

INTRODUCTION

What is the Law for Title II Sites Under UMTRCA:

- “Active” Sites (Title II) Under UMTRCA As Opposed to “Inactive” Sites (Title I);
- All Fully Closed Sites Must Be Transferred to a Mandatory Long-Term Custodian (DOE Usually) as a General Licensee to NRC in Perpetuity at No Cost to the Government (Criterion 10 Contribution);
- Only NRC Can Approve Title Transfer to a Site and Termination of a License; Agreement States Can Recommend But NRC Must Agree;
- Mandatory Closure Period of 200 Years and, to the Maximum Extent Practicable (Reasonably Achievable), 1,000 Years (Presumes Governmental Entity);
- Sites Licensed Before the Enactment of UMTRCA Have Property Ownership Flexibility (Section 83 of the AEA);
- At the End, the Commission Determines What Property is Necessary to Fulfill Its UMTRCA Statutory Mandate and No One Else

ISSUES FOR DISCUSSION

This Presentation Will Focus on Nuances in UMTRCA's Title II Program and Potential Solutions to Outstanding Issues:

- UMTRCA-Based Legal Issues;
- Property Control Issues;
- NRC-Agreement State Interaction on Title II Sites;
- Institutional Controls;
- SA-900 Guidance Revisions & Recommendations;
- Understanding DOE's Role in Title II Site Transfer

UMTRCA-BASED LEGAL ISSUES

The Most Important Premise of UMTRCA, as Well as the AEA, is That The Commission Controls 11e.(2) Byproduct Material Under Exclusive, Preemptive Federal Jurisdiction and That The Commission Regulates Through Licensing and Enforcement (In Other Words, No License, No Commission Authority):

- Commission Dictates What Its Licensees Must Do With Licensed AEA Materials and Sites;
- Commission Accords Latitude to Licensed Sites Licensed Prior to 1978;
- Commission, and Not Agreement States, Make Final Decision on Site Closure and License Termination;
- Commission Determines the Extent of Property Necessary to Safely Contain 11e.(2) Byproduct Material in All Its Forms (e.g., Groundwater, Surface Water, Tailings, Etc.);
- Commission Accords Resident States “Right of First Refusal” on Taking Title to Title II Sites

PROPERTY CONTROL ISSUES

UMTRCA Requires Transfer of All Properties Included Within the Long-Term Care Boundary (LTCB) to the Mandatory Long-Term Custodian Prior to License Termination:

- Most Title II Sites Are Located in Jurisdictions Where There is a Smattering of Different Property Ownerships of Split (Surface & Subsurface) Estates:
 - Mineral Rights;
 - Use of Groundwater;
 - Personal Property;
 - Federal Control (BLM, USFS, Etc.)
 - State Control
- Since Old Tailings Cell Were Designed to Leak for Water Management Purposes, Groundwater Always Poses Unique Issues

PROPERTY CONTROL ISSUES

Test Case and New Commission “Good Faith Effort” Standard (Western Nuclear, Inc. (WNI) Split Rock Site):

- WNI Extends Its Site Footprint to Include Sufficient Property to Safely Contain a Plume of 11e.(2) Byproduct Material in Groundwater;
- One of the Properties in the Projected Pathway of the Plume Was a Privately-Owned Property Which WNI Was Seeking to Acquire;
- After Several Fair and Equitable Offers, the Parties Could Not Come to an Agreement, Including Counteroffers from the Property Owner That Were Cost Exorbitant;
- WNI Informs NRC Staff and a SECY Paper (SECY-02-0183) is Sent to Commission Requesting Instructions;
- Commission by a 3-1 Vote (SRM-SECY-05-0200) Approves One Further “Good Faith” Effort to Acquire The Property Prior to the Commission Taking Affirmative Action

PROPERTY CONTROL ISSUES

Hence, the New Commission “Good Faith” Standard is Born:

- Licensees Having Difficulty Acquiring Fee Title or Appropriate Institutional Controls on Property Within an LTCB Must Act in “Good Faith,” Including Appropriate Offers for Acquisition, That Constitute a Reasonable Negotiation;
- Property Owners May In Some Cases Seek to Extort a Licensee Seeking to Act in Good Faith;
- All Offers and Counteroffers Received Must Be Properly Summarized and Documented in a Paper to the Agreement State or NRC Staff for Its Legal Evaluation;
- Commission Remedy in WNI Was to Increase Criterion 10 Contribution in a Way Sufficient to Condemn the Property (Surface and/or Subsurface) When or If the Plume Reached the Property;
- Part of the Flexibility Accorded to Sites Licensed Prior to 1978 But Equally Applicable to Other Properties in the Commission’s Discretion

NRC / AGREEMENT STATE INTERACTIONS

Since NRC Has the Final Sign-Off on Site Closure and License Termination and Wyoming Becoming an Agreement State in 2018 Added Four (4) New Title II Sites to the List, Communication and Coordination Amongst Now Five (5) Entities (NRC, Agreement State, Licensee, DOE, USACE) is Critical:

- When NRC Switched from the Old SDMP Program to Timeliness in Decommissioning, the Goal Was to Close Two (2) Sites Per Year, Ambitious But Not Accomplished;
- Increases in Process Efficiency Requires NRC and Agreement States to Develop *Rigid* Processes and Requirements to Ensure Timeliness in Site Closure of Title II Sites, Which Are Especially Burdensome to State Regulatory Authorities;
- Early Inclusion of Other Agencies is Crucial and Free and Open Communication Amongst the Parties Should Be Sought at All Times While Maintaining Agency Transparency;
- ISR Sites, the Now Most Prevalent Form of Production, Will Eventually Become the Functional Equivalent of Title II Sites Except Without a Long-Term Custodian

NRC / AGREEMENT STATE INTERACTIONS

Rigid Processes and Timelines Should Be Followed To Ensure Transparency for Stakeholders and Fairness for Licensees; Too Many Sites Have Waited Far Too Long to Receive License Termination:

- Hecla Durita Site Completion Review Report from Colorado Has Been at NRC for Well Over a Decade With Intervening Questions on Hydrology Later Yielded No Problems; Still Not Terminated;
- WNI Split Rock Jumps Several Hurdles to Get to the Point It is at Now:
 - First, NRC Staff Said That Proposed LTCB Was Too Large and Then Questioned the Adequacy of the Proposed LTCB in Light of Groundwater-Related Issues Thereby Adding More Time and Cost to Closure Process;
 - Final Alternate Concentration Limits (ACL) Were Approved in 2005 and It Is Now 2020; 2005-2013 Was A Period of Inaction;
 - Wyoming Transitions to Agreement State in 2018 and the Ball Starts Rolling;
 - NRC/WDEQ MOU and 8 Old Rec. Plans Decision Essentially Close the Door on Re-Opening Past Decisions

NRC / AGREEMENT STATE INTERACTIONS

Critical Element is to Increase Interagency Interaction and Involve Licensee in Every Step:

- Many Moving Parts in This Process for Both NRC States (i.e., NRC, DOE, USACE, Licensee) and Agreement States (NRC, DOE, USACE, Agreement State, Licensee);
- Hearing Rights Attach Under the AEA to Aggrieved Parties So Mutual Agreement is Key;
- Title Package “Freshness” Important to USACE and DOE But Undefined in Guidance;
- Legally Enforceable and Durable institutional Controls Must Be Agreed Upon;
- Post-Closure Items for DOE Must Be Properly Documented in LTSP and Understood;
- No Need for Agencies to Maintain Independence As The Final Decision Should Be Mutually Agreeable;
- Procedures and Timelines Should Be Clearly Defined and Understood; This is a Future Budget Line Item for DOE

INSTITUTIONAL CONTROLS

An Important Component of Title II Site Closure is Institutional Controls for Land Use Control During Closure Period:

- It Was Envisioned That Some Title II Property Parcels Could Be Used Despite LTCB (e.g., Grazing, Residences, Mineral Development) But Cannot Ignore 11e.(2) Byproduct Material Impacts;
- Some Subsurface Areas May Be Impacted But Not the Surface, Groundwater Use is an Issue;
- As a General Licensee, DOE Has an Extended License Term (200-1,000 Years) and Needs Assurances That Land Control is Not an Issue;
- AEA Allows Commission Flexibility on Land Ownership Status So Certainty is Critical;
- LTCB Boundaries Get Large With Groundwater Plumes and More Property Acquisition is Necessary But Fee Title is Not a Dealbreaker

INSTITUTIONAL CONTROLS

Federal Agencies Recognize That Institutional Controls Are an Acceptable Form of Property Control:

- EPA, DOE, and NRC All Have Accepted Institutional Controls as Part of a Larger Site Closure Package;
- Representative Examples Come from Various Industries Including Oil and Gas, Coal, and Uranium;
- Can Take the Form of Easements, Covenants Running With the Land, and Split Estate Ownership;
- Governmental Laws and Policies Are Not Sufficient Because They Are Not Durable; Government Laws and Policies Are Subject to Change Depending on Politics;
- Title Package Submitted to USACE by DOE Must Have Properly Documented Institutional Controls;
- Can Be Factored Into Commission “Good Faith” Standard;
- Can Be Negotiated *Post Hoc* By DOE With Increased Criterion 10 Contribution for Properties Potentially Impacted in the Future

INSTITUTIONAL CONTROLS

Often, Property Ownership Poses a Unique Dilemma When Neither the Licensee Nor DOE Wish to Be Custodian of the Property; Trusts Can Solve the Problem:

- Trusts are Tried and True Financial Instruments Designed to Maintain Financial Mechanisms Over a Long Timeframe With a Designated Beneficiary for Whom the Money is Spent;
- NRC Typically Uses Standby Trusts for Active Licensees to Maintain Financial Assurance and Achieve Site Closure;
- Circumvents Miscellaneous Receipts Act and Guarantees Availability of Agency-Approved Funds for Decommissioning;
- Can Avoid Otherwise Contentious and Costly Litigation Over Title Transfer

SA-900 GUIDANCE REVISIONS

SA-900 Guidance is the Agreement State's Users Manual for Title II Site Closure:

- Sets Forth Contents of a Compliant Completion Review Report (CRR) for an Agreement State;
- Defines the Process for Involving All Agencies in a Coordinated Approach;
- Revisions to Guidance May Be Necessary to Update Based on Past Experiences;
- Agreement States Must Have Clear Path for CRR Development Despite Revisions;
- Licensees Cannot Wait Decades for the Site Closure Process to Be Completed; Must Pay Annual and Hourly Fees and Maintain Financial Assurance

SA-900 GUIDANCE REVISIONS

Recommendation: Involve the Agreement States and Other Stakeholders While Revisions Are Being Developed and Not After a Draft is Issued:

- Agreement States Have Good Experience With Sites and Have Useful Input;
- Alternatives to Fee Title Such as Institutional Controls Should Be Thoroughly Discussed;
- Good Faith Effort Standard Should Be Defined in Guidance;
- Other Resource Areas for CRR Should Be Noticed Prior to Revisions Being Issued So That CRR's Being Developed in the Interim Are Not Halted;
- LTSPs Should Be Discussed and Timing Should Be Made to Facilitate Joint Development With CRR With All Three Agencies (NRC, DOE, & Agreement State) Involved;
- Include Rigid Process for ISR Properties as They Are Not Transferred to DOE But Must Get NRC Sign-Off for License Termination

SA-900 GUIDANCE REVISIONS

Add Specific, Rigid Processes for Agreement State Treatment of ISR Properties:

- Phased Process Using Multiple Wellfields, All of Which Need to Meet Criterion 5B(5) Standards Prior to Closure;
- Prescribe Whether Agreement States Must Wait for Final Wellfield to Be Restored to Recommend Termination or Can It Be a Dynamic Process Where Each Wellfield is Listed in a Master CRR;
- Can Partial Site Closure Concept Used at Fuel Cycle Facilities Be Employed for Wellfields;
- Work Directly With Agreement States to Develop Uniform Program; While Agreement States Are Entitled to Some Autonomy Under Section 274 Agreement, Licensees Are Penalized For Processes Inconsistent with Typical NRC Processes (i.e., Annual and Hourly Fees & Financial Assurance Upkeep)

DOE'S ROLE IN TITLE II SITE **TRANSFER**

By Law, UMTRCA Requires the Following of DOE:

- Act as Mandatory Long-Term Custodian If Resident State Refuses to Take Possession;
- Maintain Control and Monitoring for 200-1,000 Year Period (License Term);
- Receive Title to All Necessary Properties At No Cost to the Government;
- Hold a “General License” from NRC in Perpetuity;
- Comply With All Elements of its Approved LTSP Upon Title Transfer;
- Due to Miscellaneous Receipts Act, Request Congressional Appropriations Each Budget Cycle for Site Maintenance;
- Engage in Active Maintenance to the Extent Necessary

DOE'S ROLE IN TITLE II SITE **TRANSFER**

DOE's Initial Step is to Prepare an LTSP For NRC Approval:

- DOE Appears to be the Only Entity That Files a Specific License Application (LTSP) While Being a General Licensee;
- DOE is the License Applicant to NRC; But The Licensee Has Rights to Challenge DOE Proposals or NRC Approvals;
- Commission is the Decisionmaker; If the Commission Says DOE Must Take Property, Then It Must Do So;
- Better to Have Mutual Licensee and Agency Agreement But Occasionally That is Not Possible;
- LTSP and CRR Should Be in Sync With Each Other to Ease NRC Staff Review

DOE'S ROLE IN TITLE II SITE TRANSFER

DOE Uses the USACE As Its *De Facto* Real Estate Agent:

- USACE Brought in After LTSP is in Final Stages of Approval; Earlier Involvement At Least Gives Licensee Clarity on Timeline;
- Typically USACE Review is Six (6) Months But Can Vary on a Site-by-Site Basis:
 - Level of Institutional Controls;
 - Complexity of Surface/Subsurface Control;
 - Good Faith Condemnation Proceedings;
 - Freshness

QUESTIONS TO BE ANSWERED

With the Release of the Recent Memorandum of Understanding (MOU) Between NRC and EPA on Cooperation for Mill Tailings Sites, How Does That Affect Listing of Agreement State Sites on the National Priorities List (NPL) and Sites That Are Already on the List?;

How Will ISR Sites Be Addressed for Site Closure As There Are Sequentially Developed Wellfield and Multiple Business Models for a Central Processing Plant?;

Can Partial Site Closure Be an Effective Tool for ISR Site Closure?

CONCLUSIONS

Title II Site Closure Should Be an Efficient Process; While Sites Are Complex, These Nuances Can Be Readily Understood;

Wide Use and Acceptance of Interagency Coordination and Institutional Controls Helps to Facilitate Site Closure;

Agencies Should Not Be Concerned on Transparency Grounds From Involving Licensees and Their Experts Throughout the Process;

Agreement State CRR Recommendations and DOE LTSPs Should Be Discussed Prior to CRR Submission; Similar to Pre-Submission Audit Program for New Applications