



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

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July 10, 1984
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MEMORANDUM FOR: William J. Dircks, Executive Director
for Operations
FROM: *W. J. Dircks*
Samuel J. Chilk, Secretary
SUBJECT: SECY-83-523/523A - PROPOSED AMENDMENTS
TO URANIUM MILL TAILINGS REGULATIONS
AND ADVANCE NOTICE OF PROPOSED RULEMAKING

This is to advise you that the Commission (with Chairman Palladino and Commissioners Asselstine and Bernthal agreeing) has approved the following course of action in regard to these papers:

1. The Commission agreed to address the question of whether the EPA mill tailings standard exceeds EPA's jurisdiction in a Implementation and Enforcement Policy Statement as described by Commissioner Asselstine in his comments (Attachment 1). The Policy Statement should be finalized and forwarded to the Commission for approval and publication.
(EDO/NMSS) (SECY SUSPENSE: 8/13/84)
2. The Commission also agreed to issue the proposed rule and advanced notice of proposed rulemaking (ANPR) based upon the attached April 24, 1984 drafts with modifications as indicated (Attachments 2 and 3). In addition the above implementation and enforcement policy should be incorporated into the Statement of Consideration for both rulemaking actions.

The revised proposed rule and ANPR should be forwarded for signature and publication in the Federal Register.
(EDO/NMSS) (SECY SUSPENSE: 8/13/84)
3. The appropriate Congressional Committees should be advised. (OCA) (SECY SUSPENSE: 8/13/84)
4. You should provide a copy of the proposed rule and ANPR to all affected licensees and interested parties and issue a press release.
(EDO/OPA) (SECY SUSPENSE: 8/13/84)

Adm

WM Record File
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WM Project _____
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Rec'd Off. EDO
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Commissioner Roberts approved, but preferred the proposed rule and ANPR presented in SECY-83-523.

Action on this item was completed prior to Commissioner Zech's Oath of Office.

Attachments:
As Stated

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
OGC
OPE

Commissioner Asselstine's Comments on SECY-83-523:

I would address the question of whether the EPA mill tailings standard exceeds EPA's jurisdiction in the proposed Implementation and Enforcement Policy. I would also include the Implementation and Enforcement Policy in both rulemaking packages.

We should squarely face the jurisdictional question. I would suggest the following as an outline of the approach for addressing the jurisdictional issue. A reasonable argument can be made that the Congress did not intend that EPA develop the type of standard contained in 40 CFR 192. The legislative history of the provision when it was first adopted by the Senate Environment and Public Works Committee indicates an intent that EPA establish a general environmental standard for both radiological and nonradiological hazards. This legislative history indicates that EPA was not to establish such elements as cover requirements or liner requirements as part of its standard. However, the legislative history is contradictory in that some other statements indicate a Congressional intent that the EPA standard include such requirements.

Given these conflicting statements in the legislative history, the Commission is left with the question of whether the EPA standard constitutes a reasonable approach for mill tailings disposal. I conclude that the EPA standard is a reasonable approach in the circumstances. Unlike a power reactor or other operating facility, a mill tailings disposal

site is not intended to have a fixed and permanent site boundary. Rather, the emphasis is on stabilization of the pile in a manner that will assure long-term protection after institutional controls such as fences and guards are gone. In such circumstances, on-site and off-site distinctions appear to make little sense, and it is difficult to argue that the types of requirements adopted by EPA, including radon emanation limits, groundwater limits and groundwater control measures, are legally impermissible. I would therefore not question EPA's jurisdiction to adopt the types of requirements contained in 40 CFR 192, even though there is some basis for concluding that this may not have been what Congress had in mind.

However, there is one aspect of EPA's standard that I believe clearly exceeds its jurisdiction, and we should say so. That is the requirement for EPA concurrence in NRC case-by-case deviations from elements in the EPA standard. In essence, the EPA position establishes a system of dual regulation that clearly was not intended by the Congress. Section 84 of the Atomic Energy Act, in my view, gives the NRC exclusive authority to allow case-by-case deviations from the EPA standard based upon a practicability determination. I would suggest that we assert our exclusive jurisdiction in this area, point out that we believe EPA has exceeded its jurisdiction in this regard, and state that we do not intend to seek EPA concurrence on these case-by-case determinations.

IMPLEMENTATION AND ENFORCEMENT POLICY

(NOTE: LANGUAGE WHICH MIGHT BE USED IN ONE OR ALL OF THE FOLLOWING: LETTERS TO LICENSEES AND AGREEMENT STATES, IN THE ANPRM ON FURTHER REVISIONS TO APPENDIX A OF PART 40, OR IN A FORMAL POLICY STATEMENT.)

To the extent that it is determined that EPA has acted within its jurisdiction,

THE COMMISSION BELIEVES THAT BOTH THE NRC AND THE AGREEMENT STATES ARE LEGALLY OBLIGATED UNDER SECTION 275D OF THE ATOMIC ENERGY ACT TO IMPLEMENT AND ENFORCE THE EPA STANDARDS FOR URANIUM AND THORIUM MILL TAILINGS IN 40 CFR 192, SUBPARTS D AND E. SINCE THE EFFECTIVE DATE SPECIFIED IN THE EPA STANDARD WAS DECEMBER 6, 1983, THE COMMISSION BELIEVES THAT THE LEGAL OBLIGATION FOR NRC AND AGREEMENT STATES INCLUDES ENFORCEMENT IN THE INTERIM WHILE CONFORMING AND IMPLEMENTING RULE CHANGES ARE MADE.

✓ Thus, Commission licensees are expected to: 1) be in compliance with the EPA standards in 40 CFR 192 or, 2) be working toward compliance, or 3) submit proposed alternatives for Commission review in compliance with dates established in ⁴⁰CFR~~X~~192. The Commission believes that licensee proposals for alternatives can be an important and effective way to help deal with the problems associated with implementing the new EPA standards. NRC's current regulations lack necessary implementation features called for in the preamble to the EPA standards and contain provisions in conflict or inconsistent with the EPA standards. NRC is under congressional mandate to modify its rules to conform to EPA's standards and develop general requirements comparable, to the maximum extent practicable, to requirements applicable to similar hazardous materials regulated by EPA under the Solid Waste Disposal Act, as amended. The Commission expects that it may require several years to fully meet this dual mandate and expects to use the flexibility provided by Section 84 in the interim to consider and approve alternative proposals from licensees. Section 84 c provides NRC sufficient authority to independently approve alternatives so long as the Commission can make the required determination.

Requestor's ID:
JPK

ATTACHMENT

2

Author's Name:
DRAGONETTE K

Document Comments:
Draft FRN on Revised Appendix A to 10 CFR Part 40

ENCLOSURE A-2 OF STAFF
MEMO DATED 3/2/84 MODIFIED
PER DISCUSSIONS 4/19/84 AND
TO DELETE COMPARATIVE TEXT

TENSE AND DATE CHANGES NOT MARKED.
OTHER CHANGES SHOWN. THAT REFLECT
4/19/84 DISCUSSIONS. IN PARTICULAR
SEE PAGES 5, 10, 11, 25, 26

DRAFT 4/24/84

NUCLEAR REGULATORY COMMISSION

10 CFR PART 40

Uranium Mill Tailing Regulations: Conforming NRC
Requirements to EPA Standards

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations governing the disposal of uranium mill tailings. The proposed rule changes are intended to conform existing NRC regulations to the regulations published by the Environmental Protection Agency for the protection of the environment from these wastes. This action is *being taken* ~~necessary~~ to comply with the legislative mandate set out in the Uranium Mill Tailings Radiation Control Act and the NRC Authorization Act for FY 1983. ~~However, by taking this action the Commission takes no position on whether the EPA has acted within its jurisdiction.~~

DATE: The comment period expires on (30 days after publication). Comments received by the Commission after that date will not be considered.

ADDRESSES: Mail comments to Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Deliver comments to Room 1121, 1717 H Street NW., Washington, DC between 8:15 a.m. and 5:00 p.m. weekdays.

Radiation Control Act of 1978 (UMTRCA). Under Section 18(a) of Pub. L. 97-415, the Nuclear Regulatory Commission Authorization Act for fiscal years 1982 and 1983, the Commission was directed to conform its regulations to EPA's by no later than March 31, 1984, with notice and opportunity for public comment. Today's proposal addresses that responsibility.

Previous Actions

In keeping with Section 18(a) of the NRC Authorization Act, the Commission suspended portions of its October 3, 1980 mill tailings regulations after notice and opportunity for public comment (48 FR 35350; August 4, 1983). As required by the Act, this suspension terminated automatically April 1, 1984. Those portions of the Commission's regulations which were suspended were those that were determined to be in conflict or inconsistent with EPA's proposed requirements. More specifically, the suspended portions were those that would require a major commitment or major action by licensees which would be unnecessary if (1) the EPA proposed standards were promulgated in final form without modification, and (2) the Commission's regulations were modified to conform to the EPA standards. The objective of the suspension was to avoid a situation where a licensee or applicant might make a major commitment or take a major action which would be unnecessary or ill-advised after subsequent rulemaking to permanently modify the existing regulations on the basis of EPA's final standards.

The final EPA standards are very similar to those that were proposed. Nevertheless, the Commission has reconsidered the appropriateness of changes to Appendix A to 10 CFR Part 40 in light of the new EPA standards, and the

need for additional supporting documentation. The changes proposed today are more modest than the previous suspension.

Scope of This Proposal

In addition to conforming its existing regulations to new EPA standards, under the provisions of the UMTRCA, the Commission has a further legislated responsibility; it must establish general requirements, for the management of byproduct material, with EPA concurrence, which are, to the maximum extent practicable, at least comparable to requirements applicable to the management of similar hazardous material regulated by the EPA under the Solid Waste Disposal Act (SWDA), as amended. The Commission deliberated as to how best to deal with these related rule-making needs and decided on the course of action resulting in this proposal and the accompanying ANPRM. This proposal addresses all the changes to the existing Commission regulations in Appendix A to 10 CFR Part 40 that can be legally promulgated without additional supporting documentation. Other changes to the Commission's regulations for mill tailings management resulting from the EPA standard are the subject of the accompanying ANPRM.

The content of these two rulemakings also may be characterized in terms of the need for EPA concurrence, although that was not the deciding factor. This proposal consists of modifications not requiring EPA concurrence, including conforming changes to existing NRC rules and incorporation of EPA requirements not deriving from the SWDA. Those modifications that are the subject of the ANPRM accompanying this proposal deriving from the SWDA require EPA concurrence pursuant to section 84 of the Atomic Energy Act. Modifications addressed in the ANPRM include

Appendix A criteria. The due date originally set for submittals is past. A new due date for revised submittals is not considered necessary.

(c) Add the following paragraph at the end: Licensees or applicants may propose alternatives to the specific requirements in this Appendix. Such alternative proposals may take into account local or regional conditions, including geology, topography, hydrology, and meteorology. The Commission may find that the proposed alternatives meet the Commission's requirements if the alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, ^{to} the extent practicable, or more stringent than the level which would be achieved by the requirements of this Appendix and the standards promulgated by the Environmental Protection Agency in 40 CFR 192, Subparts D and E.

Reason: The flexibility to propose alternatives to the Commission's and EPA standards was included in Pub. L. 97-415 changes to the AEA. The added paragraph paraphrases the language in Section 84c. The added paragraph explicitly acknowledges the legislative intent and provides licensees and applicants the opportunity to propose alternatives as a routine licensing matter. Licensees would have to provide ^a site-specific rationale ^{Commission to make the} to enable the [^] required ~~Commission~~ finding. This generic approach was taken instead of modifying individual criteria to provide flexibility. A generic approach avoids the chance of not identifying all areas where flexibility may be needed and preserves the existing support for Appendix A. Administratively, alternatives are easier to process under an explicit provision than exceptions to rules.

Regulations, Part 440, "Ore Mining and Dressing Point Source Category: Effluent Limitations Guidelines and New Source Performance Standards, Subpart C, Uranium, Radium, and Vanadium Ores Subcategory," as codified on January 1, 1983."

Reason: These new paragraphs incorporate EPA requirements imposed under 40 CFR 192.41(d) and 40 CFR 192.32(a)(3), respectively.

8. Criteria 2, 7, 9, 10, 11, and 12 are not affected by the new EPA standards or editorial changes and no modification is proposed for any portion of those criteria.

Impact of the Proposed Amendments

~~Compliance with Subparts D and E to 40 CFR Part 192 of EPA's regulations is an established requirement. Under Section 275d. of the Atomic Energy Act of 1954, as amended, the Commission believes that it is obligated to implement and enforce the new EPA standards as of December 6, 1983, the date they became effective. This Commission responsibility is being carried out on an ad hoc, case-by-case basis in individual licensing actions.~~

The Commission's action in proposing these modifications to its regulations in Appendix A to 10 CFR Part 40 is to conform them to the new EPA standards. These changes are for the purpose of avoiding conflicts and inconsistencies, and for clarifying previously existing language so as to be compatible with the new requirements. The action proposed here by the Commission is a consequence of previous actions taken by the Congress and the EPA, and is legally mandated in Section 275b(3) of the Atomic Energy Act of 1954, as amended.

Commission action in this case is essentially nondiscretionary in nature, and for purposes of environmental analysis, rests upon existing environmental and other impact evaluations in the following documents: (1) "Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing (40 CFR Part 192)," Volumes 1 and 2, EPA 520/1-83-008-1 and 2, September 1983, and (2) "Regulatory Impact Analysis of Final Environmental Standards for Uranium Mill Tailings at Active Sites," EPA 520/1-83-010, September 1983, both prepared in support of Subparts D and E of 40 CFR Part 192, and (3) "Final Generic Environmental Impact Statement on Uranium Milling," NUREG-0706, September 1980, prepared in support of Appendix A of 10 CFR Part 40. The Commission believes that these supporting analyses for the new EPA standards and the existing Commission regulations provide a more than adequate environmental review for the standards addressed herein, and that no additional impact analysis is warranted by the conforming actions proposed herein. The EPA engaged in and completed a ^{NEPA} ~~reasoned decisionmaking~~ process with full consideration of environmental concerns, and for the purposes of this rule-making action, can be viewed as the lead agency.

PAPERWORK REDUCTION ACT STATEMENT

This proposed rule does not contain a new or amended information collection requirement subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0020.

Requestor's ID:
JPK

ATTACHMENT

3

Author's Name:
DRAGONETTE K

Document Comments:
You MUST return this sheet when submitting corrections

Enclosure B of SECY-83-523
Modified as discussed in
Deliberations on April 19, 1984
(III. 1. (t) of draft 2)

Changes underlined and marked in margins

following closure. The EPA rule sets a performance standard for a limited time period. In addition, the preamble to the EPA standard and the supporting environmental evaluation indicate that the EPA consciously considered the acceptability of relying on active maintenance to provide stability following closure, and did not prohibit it. Rather, the EPA standard requires that, for nonradiological hazards the need for active maintenance only be minimized. *NRC's Appendix A flatly prohibits any planned reliance on active maintenance.*

The Commission requests comments on whether it should delete or modify additional provisions of Appendix A including prescriptive requirements for specific design features which may not be necessary to meet the EPA standard. ~~(In particular, the Commission questions whether it should expand the necessary resources to support additional changes related to provisions that were suspended before April 1, 1984.)~~ The prescriptive requirements in question include those for minimizing upstream drainage area, siting where there is good wind protection, relatively flat slopes, mandatory vegetative or rock cover, cobble size rock, high quality rock cover, and rock armoring. The Commission also considered deleting the prohibition on reliance on active maintenance, ~~considered~~ modifying Criterion 3 mandating below grade disposal as the prime option, and deleting the requirement for background radium concentrations in cover materials. Relief from these retained provisions is available through case-by-case proposals by licensees as noted in proposed additions to the introduction. *The Commission seeks comment on whether this is* ~~The question is, is this sufficient~~ flexibility in view of the Commission's intent to consider alternative proposals as routine licensing actions?

i. Subpart F:

40 CFR 264.91 Required programs

40 CFR 264.95 Point of compliance

40 CFR 264.96 Compliance period

40 CFR 264.97 General ground water monitoring requirements

40 CFR 264.98 Detection monitoring program

40 CFR 264.99 Compliance monitoring program

ii. Subpart G:

40 CFR 264.117 Post-closure care and use of property

iii. Subpart K:

40 CFR 264.226 Monitoring and inspection (of impoundment liners),
as applicable

40 CFR 264.228 Closure and postclosure care, as applicable."

The above quotations from the EPA's October 7, 1983 Notice serve to clarify the substance of EPA's standards, the respective agency responsibilities under the UMTRCA, and the nature and scope of the rulemaking the NRC is herein considering undertaking. The NRC has reviewed the language quoted and believes it to be factually correct and a fair representation of the issues addressed.

II. Issues for Public Comment

The NRC requests public comment on the general question of how best to proceed to fulfill its responsibilities under the Atomic Energy Act, with respect to establishing SWDA-comparable requirements for the management of mill tailings, to the maximum extent practicable. In this context, comments are requested on choices and decisions the NRC must

With the exception of the jurisdictional concerns discussed above,

make concerning issues and actions that are within its discretion.

Comments on the basic value, validity, lawfulness, or appropriateness of the EPA's SWDA regulations, the SWDA, or the UMTRCA are not requested.

A. Tentative NRC Approach for Ground Water Protection

The NRC has developed a tentative approach to place SWDA-comparable requirements in its regulations, based on planning and development efforts conducted to date. This approach is tentative, and is made a part of this public announcement so efforts spent in providing public comment might be better guided. It involves the development of a block insert to NRC regulations (either at the end of 10 CFR Part 40 or perhaps by creation of a new Part 41) which would contain the entire set of SWDA-comparable requirements.

The insert would be organized in terms of design, operating, closure, and post-closure requirements, and would to the fullest extent feasible, be a complete statement of the requirements without reference to EPA requirements in Title 40 of the Code of Federal Regulations. In this way, the requirements could be stated in a self-contained, unified manner in one place. Coverage would include at least the SWDA requirements already imposed by EPA (40 CFR 264.92-94, 264.100, 264.111, and 264.221), and appropriate portions of the SWDA requirements mentioned by the EPA explicitly as "examples of areas which NRC must address" (these include 40 CFR 264.95-99, 264.117, 264.226, and 264.228).

The insert being considered for proposal by the NRC would likely include all of Subpart F (40 CFR 264.90-100), due to the close relationship and interdependency of the separate provisions, and because all but

40 CFR 264.90, "Applicability," is either imposed or mentioned as an example by the EPA.

The remainder of the EPA's SWDA regulations, including Subparts A (except Section 264.3), B, C, D, E, F, G, H, and K would be reviewed in developing a proposal to determine which of those requirements would need to be incorporated in NRC regulations to establish NRC requirements which are to the maximum extent practicable, at least comparable to the EPA's SWDA requirements for similar hazardous material.

In developing this proposal the NRC would distinguish between substantive requirements and EPA's procedural permitting requirements because it does not believe the UMTRCA mandate requires the NRC to adopt any portion of the procedural permitting aspects of EPA's regulations. The NRC's established procedures for licensing, inspection, and enforcement would be used with respect to implementation.

B. Issues and Questions

The NRC seeks public input with respect to all aspects of the question of how best to fulfill its responsibilities under Section 275 and 84 of the Atomic Energy Act of 1954, as amended, for protection of ground water. The NRC also seeks public comment with respect to the following issues and questions (In providing public comment, commenters are requested to provide the basis in fact for any opinions offered or assertions made):

- 1) Should the SWDA-comparable requirements to be placed in NRC regulations be explicitly restated to precisely duplicate EPA's language, or should substantive requirements be paraphrased?

2) Should all of Subpart F be included? What should not be included?

3) What should be included in a ^{listing} ~~list~~ of hazardous constituents for mill tailings to replace the 375-item long list in Appendix VIII to 40 CFR Part 261 referenced in 40 CFR 264.93? Should constituents not usually present or not present above trace levels be included? What criteria should be applied to decide ~~by~~ what constituents should be included?

4) The NRC must establish SWDA-comparable requirements to the maximum extent practicable. In this context, what is practicable given current practice and the current state of technology?

5) Should NRC retain the basic sequence embodied in Subpart F where licensees who detect ground water contamination progress through a graduated scale of action, from detection monitoring, through compliance monitoring, and on to corrective action, with significant time delays allowed between steps while plans and programs are being developed, reviewed, and implemented? Would it be advisable, practicable or appropriate to require, for example, that all NRC licensees have approved compliance monitoring programs that are automatically activated and implemented when needed?

6) Should the basic SWDA scheme for the timing and duration of a "compliance" period, a "closure" period, and a "post-closure care" period be maintained? What modifications, deletions, additions should be made?

7) To what extent, how, and under what conditions should leak detection systems under single-liner impoundments be allowed to fulfill the requirements for a detection monitoring program that otherwise requires a monitoring well in the uppermost aquifer?

8) How detailed should NRC's regulations be, and what should and should not be required in areas such as well construction, sampling and sample analysis, determinations of annual average and seasonal background concentrations, minimum detection levels, statistical treatment of data and determinations of statistically significant differences, recordkeeping and reporting, quality assurance, etc.?

9) To what extent must the NRC provide supporting environmental impact analyses considering the nature of the requirements under consideration, some of which have already been imposed by EPA and are effective? If supporting environmental evaluations are needed for SWDA-comparable rule changes except for the requirements already imposed by the EPA, should the NRC continue to proceed with only a single rulemaking to establish a complete set of SWDA-comparable requirements?

10) Is the flexibility cited in the proposed addition to the Introduction of Appendix A 10 CFR Part 40 sufficient or should the NRC ^e~~expand the necessary resources to~~ develop and support additional modifications to conform to the physical stability aspects of the EPA standard?

III NEW