



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

'84 SEP 18 AIO:51 September 14, 1984

MEMORANDUM FOR: Chairman Palladino
FROM: James R. Tourtellotte, Chairman
Regulatory Reform Task Force
SUBJECT: DIFFERING PROFESSIONAL OPINION

Thank you for your memorandum of September 10, 1984 which affords me the opportunity to file a differing professional opinion on the uranium mill tailings issue. Although your memo suggested that my statement pay particular attention to the legal issues involved, I would like to make it clear that I intend to address policy issues as well.

This paper should not be considered as my differing professional opinion. I am currently gathering materials from the staff to provide a basis for a prompt, complete analysis. Nevertheless, preliminarily I suggest that the Commission not take further action at this time for the following legal and policy reasons:

1. The only OGC analysis in this matter is in draft form. As a matter of both law and policy, without having a final and complete legal analysis it would be imprudent for the Commission to take further action in a matter involving substantial legal questions.
2. Even if a legal analysis were complete, there has been no comprehensive policy analysis.

In the Congressional Record of September 18, 1978, page S. 15323 under the discussion of Section 23 of the section-by-section analysis for the Committee amendment S. 2584, Congressional intent about the EPA standards is clearly expressed. There it states: "These standards and criteria are intended to prescribe general standards of performance rather than to impose specific management requirements, including particular techniques or technologies for meeting the general standards."

The EPA standards should be analyzed from a policy standpoint to determine which of those standards impose specific management requirements or particular techniques or technologies. The analysis should also examine the near and long-term effects of imposing such requirements on NRC.

The section-by-section analysis also states: "These general standards are not intended to be site specific." A policy analysis similar to the one described above should address the issue of the extent to which EPA standards are site specific and the effect on NRC policy in the near and long-term.

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The section-by-section analysis also states: "Responsibility for implementation and enforcement of the standards and criteria is vested in the Commission in the conduct of its licensing activities." There should be a policy analysis of the near and long-term effects of EPA standards on the NRC's ability to carry out its implementation and enforcement responsibilities.

- 3 It is not in the best interest of the NRC to issue the implementation and enforcement policy statement in the present circumstances.
 - a. The American Mining Congress and others are engaged in litigation on the EPA/NRC jurisdiction issue. If they win, traditional jurisdictional lines between EPA and NRC will be preserved. This would clearly be in the best interest of the NRC. Issuance of the implementation and enforcement policy statement could create a prejudice against finding that traditional jurisdictional lines would be preserved. Specifically, the court is likely to take a position that the NRC concedes the jurisdictional position in its implementation and enforcement policy statement, that any rights to complain about the jurisdictional issue would therefore be waived and the parties to the lawsuit would have no real standing to complain about jurisdiction.
 - b. Issuing the implementation and enforcement policy statement at this time also could present administrative problems and be a potential source of embarrassment to the agency. If enforcement proceedings are carried out pursuant to the issuance of the implementation and enforcement policy and if it later develops that EPA has overstepped its jurisdictional bounds, the NRC would have a difficult time explaining enforcement of unlawful standards. The NRC would also be presented with an administrative problem of how to provide remedies for those against whom enforcement actions had already been taken or were in the process of being taken.
4. A policy analysis should be made to determine the likely effect of the NRC surrendering jurisdiction in this case upon other interfaces with EPA, e.g., clean air and low-level waste.

I recommend that appropriate legal and policy direction be given to resolve all of these issues prior to publication of the implementation and enforcement policy statement or the advanced and proposed notices of rulemaking.

cc: Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
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