COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P. O. BOX 7566
WASHINGTON, D. C. 20044

(202) 662-6000
WRITER'S DIRECT DIAL NUMBER
(202) 662-5304

September 16, 1985

The Honorable Nunzio J. Pallandino
Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: Proposed Amendments to 10 C.F.R. Part 40, Appendix A

Dear Mr. Chairman:

This letter supplements my comments on behalf of Kerr-McGee Corporation, United Nuclear Corporation, and Homestake Mining Company at the meeting of the Commission on September 10, 1985, concerning the proposed amendment of the Commission's criteria for uranium mill tailings. 10 C.F.R. Part 40, Appendix A. This letter, like my comments at the meeting, will focus on a fundamental flaw of the NRC criteria -- namely, the failure of the criteria, even with the proposed amendments, to reflect an adequate consideration of the relative costs and benefits of compliance.

In Part I of this letter I will discuss the origins of the requirement that the NRC balance costs and benefits. In Part II, I shall turn to some arguments offered by NRC staff to justify promulgation even in the absence of compliance with this obligation.

I.

The criteria that are now subject to amendment were originally promulgated in 1980. 45 Fed. Reg. 65521 (Oct. 3, 1980). In the litigation challenging the validity of the

DS10
add: Robert L. Jones, 9604 MNBB
Kitty S. Dragonette, 62355

1/0

criteria before the United States Court of Appeals for the Tenth Circuit, the petitioners asserted that the NRC had failed to undertake a cost/benefit analysis. The panel that heard the case found that "[t]he NRC's position is . . . that is required only to consider the economic feasibility of the regulations -- a far less severe restraint on agency actions than a cost-benefit analysis requirement." Kerr-McGee Nuclear Corp. v. NRC, 17 E.R.C. 1537, 1552 (10th Cir. 1982) (pending for rehearing en banc). Guided by the Uranium Mill Tailings Radiation Control Act ("UMTRCA") as it then existed, the panel concluded that the minimal consideration of costs undertaken by the NRC was sufficient.

Congress, however, was very troubled by the tremendous costs that the NRC criteria would impose. In late 1982 (i.e., after the NRC criteria were initially promulgated) Congress amended section 84(a)(1) of UMTRCA to require the NRC to:

> tak[e] into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate.

Pub. L. No. 97-415, 22(a), 96 Stat. 2067, 2080 (1982). Nearly identical language was inserted in Section 275 to require a similar evaluation by the EPA in its promulgation of standards. The House Conference Report explained the amendments by stating that "the conferees are of the view that the economic and environmental costs associated with standards and requirements established by the agencies [EPA and NRC] should bear a reasonable relationship to the benefits expected to be derived." H. Rep. No. 884, 9th Cong., 2d Sess. 47 (1982).

In its recent decisions concerning the validity of EPA's UMTRCA standards, the Tenth Circuit concluded that the 1982 amendment "does require a consideration of costs relative to benefits, a cost-benefit analysis." American Mining Congress v. Thomas, No. 83-1014, slip op. at 27 (Sept. 3, 1985); see American Mining Congress v. Thomas, No. 83-2226 (Sept. 3, 1985). In the face of arguments by certain environmental petitioners that feasibility analysis would still suffice, the court observed that "feasibility analysis and cost benefit analysis are mutually exclusive approaches." Id. at 26. The Court held that EPA's standards under UMTRCA must reflect a reasonable relationship of costs and benefits. Because nearly identical statutory language and legislative history apply to the NRC, the Tenth Circuit's opinion serves to define the obligations of the NRC as well.

In sum, the 1982 amendment introduced a significant change in the law: the NRC's criteria are to reflect a reasonable balance of costs and benefits. But, as shown by the original panel opinion in the Tenth Circuit, the NRC criteria were not promulgated with such balancing in mind. The amended criteria now before the Commission do not even purport to correct this fatal flaw.

II.

The NRC staff, while not disputing the need to balance costs and benefits, offer several arguments to justify noncompliance in the promulgation of amendments to the criteria. None of the arguments can withstand scrutiny.

1. It is suggested that the NRC is not required to perform a balancing of costs and benefits because the EPA has already done so. The argument is undermined by the plain language of UMTRCA; Congress imposes the balancing requirement separately on each agency. Moreover, as a cursory review of the proposed amendments of the criteria reveals, only about ten percent of the original NRC criteria will be affected by the proposed changes. The remainder will continue to reflect NRC's original judgments, which have never been cost-justified. Thus, the criteria continue to include many rigid and expensive requirements, including those barring active maintenance (criterion 1), establishing below-grade disposal as a "prime option" (criterion 3), and demanding very gradual slopes and "perfect" rock for cover (criterion 4). These aspects of the criteria (and many others) not only have remained unchanged since 1980, but also in some instances are contrary to EPA's conclusions as to controls that can be cost justified. For example, EPA explicitly rejected below-grade disposal for existing sites. EPA, Final Environmental Impact Statement for Standards for the Control of Byproduct Material for Uranium Ore Processing (40 CFR 192) S-2 (1983) (EPA 520/1-83-008-1).

2. It is also suggested that the requirement for cost-benefit balancing can be met on a case-by-case, site-specific basis. This suggestion ignores the fact that Congress has required that the criteria themselves be cost-justified. NRC cannot avoid the requirements of Section 84(a)(1) by promulgating criteria that do not comply with the statute, and then assert that compliance will be achieved by allowing exceptions.

The legislative history of the 1982 amendments demonstrates the Congressional intent that the NRC should revise its criteria in order to bring costs and benefits into balance. For example, when asked if the NRC could implement its existing mill tailings criteria, Senator Simpson replied: "Only if the NRC determined . . . that those regulations are reasonably related to the costs of implementation." 128 Cong. Rec. S13055 (Oct. 1, 1982). In fact, the debate reflects a consistent understanding that NRC would assure that its criteria are cost-justified. See, e.g., id. at S13052 (Oct. 1, 1982) (amendments direct "EPA and NRC, in promulgating . . . standards and regulations, to consider the risk . . ., the economic costs . . ., and . . . other factors"); id. at S13055 (Oct. 1, 1982) ("consideration of costs . . . by NRC in issuing site-specific regulations is now expressly established").

Practical considerations reinforce the need to reject the staff's approach. The criteria must be used as the yardstick against which a licensee's proposals are judged. To the extent these criteria cannot be justified in cost terms, their use in determining the adequacy of the licensee's proposal is fundamentally unsound. The criteria should have generic validity, not generic invalidity. Moreover, the regulation-by-exception approach will invite confusion and inconsistency and will stand as an open invitation to litigation.

3. Finally, it was suggested at the meeting that the balancing of costs and benefits may be achieved in conjunction with an Advanced Notice of Proposed Rulemaking relating to the criteria. The suggestion was very misleading. The ANPR notice does not even include revision of the criteria for cost reasons as a subject for comment. 49 Fed. Reg. 46425 (Nov. 26, 1984).

* * * *

In closing, it must be emphasized that the balance of costs and benefits in the amended criteria is of great concern to the industry. The costs for stabilizing tailings piles that are already in existence are massive; at a recent congressional hearing, a DOE representative estimated that costs of stabilization "could exceed $4 billion" if conducted by the Government. Statement of James E. Vaughan, Jr., Acting Assistant Secretary for Nuclear Energy, before the Joint Hearing of the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources and the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs (July 16, 1985). In

light of the current depressed state of the industry and these immense costs, I urge that the Commission reject the currently proposed amendments. Rather, the Commission should promulgate new criteria that reflect a reasonable relationship of costs and benefits.

Sincerely,

Richard A. Meserve

cc: Commissioner James K. Asselstine
Commissioner Frederick M. Bernthal
Commissioner Thomas M. Roberts
Commissioner Lando W. Zech, Jr.
Mr. Samuel J. Chilk