

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of
MINES DEVELOPMENT, INC.)

Source Material License No. R-174
Docket No. 40-1341

MEMORANDUM AND ORDER

Background

1. This matter comes before the Commission on exceptions and supporting Brief filed by Mines Development, Inc. (Mines or respondent) to the Hearing Examiner's Intermediate Decision dated November 25, 1960, and a Brief in reply to such exceptions filed by the AEC Staff. This proceeding arose out of an Order of the Director, Division of Licensing and Regulation, dated November 2, 1959 which charged Mines with violations of Section 20.201(b) of the Commission's regulations, 10 CFR §20.201(b)^{1/}, and ordered that Mines take certain corrective action, among other things, consisting of the making of surveys and furnishing reports thereon. The effect of the Order was stayed by a timely request for a hearing by Mines. This proceeding thus is

^{1/} "Section 20.201 Surveys. (a) As used in the regulations in this part, 'survey' means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. When appropriate, such evaluation includes a physical survey of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

"(b) Each licensee shall make or cause to be made such surveys as may be necessary for him to comply with the regulations in this part."

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not one for modification, revocation or suspension of Mines' license but rather is one to determine the validity of the Order of November 2, 1959.^{2/}

2. The Intermediate Decision found and concluded that:

(1) in violation of §20.201(b) of the Commission's regulations, Mines failed to conduct surveys in mill areas which are occupied by employees to determine the concentrations of airborne radioactivity; (2) in violation of §20.201(b), Mines failed to conduct adequate surveys during certain periods of its operation in mill areas which are occupied by employees, to determine external radiation levels, although a recent survey of such nature was adequate; and (3) the Order of the Director, Division of Licensing and Regulation dated November 2, 1959, directing Mines to take certain action with respect to the operation of the mill should be sustained, except insofar as it required licensee to report "deficiencies" and "steps taken to correct deficiencies."^{3/} The Intermediate Decision then ordered that: (1) within 30 days Mines file (a) a complete description of its radiation safety procedures, including a survey

^{2/} Mines appears to have misconstrued the nature of the proceeding herein as being criminal or penal in nature and thus would apply the requirements of strict construction to the statement of issues in the notice of hearing and to the regulation here involved. Such, of course, is not the case, see, e.g., L.P. Steuart and Brothers, Inc. v. Bowles, 322 U.S. 398, 403-405 (1944); FCC v. WOKO, 329 U.S. 223, 228 (1946); Wright v. SEC, 112 F. 2d 89, 94 (2nd Cir. 1940).

^{3/} We approve the Examiner's ruling that this portion of the Order should be rejected.

program to determine concentrations of airborne activity and external radiation levels and a program of instruction for employees, and (b) a detailed description of its organization including personnel at all levels responsible for the mill's radiation safety program; and (2) within 60 days, and monthly thereafter, Mines submit a report of data developed or disclosed by the program instituted under the above directives.

3. Accompanying respondent's exceptions is a request for oral argument. The granting of oral argument is discretionary with the Commission, 10 CFR §2.753, and the extensive pleadings herein, together with the transcript of hearing, constitute a sufficient record upon which to reach our decision. No useful purpose would be served by oral argument, and Mines' request accordingly is denied. X-Ray Engineering Company, Byproduct Material License No. 4-616-3, Memorandum and Order, November 18, 1960.

Exceptions

4. Mines has submitted five exceptions which pose three principal arguments: (a) the Intermediate Decision goes beyond the specification of issues (Exceptions I and II); (b) the Intermediate Decision is in error in upholding the Order of November 2, 1959 (Exceptions III and IV); and (c) the Intermediate Decision is in error for failure to rule upon Mines' defense that the survey

requirements of Part 20 are too vague to be enforceable (Exception V). These exceptions, together with substantial supporting arguments therefor, will now be considered.

(1) Exception I

5. The first exception states:

"The Findings and Orders contained in the Intermediate Decision with respect to surveys of airborne radioactivity ignore completely the specific question to be considered in Specification of Issue No. 1."

In support of such exception, Mines urges: that the first issue is to determine whether it has "failed to conduct surveys in mill areas which are occupied by employees to determine the concentrations of airborne radioactivity" (emphasis by respondent); that Mines had, in fact, conducted such surveys; and that, in determining that Mines had not conducted a "survey program or radiation control program" (emphasis by respondent), the Examiner went beyond the specified issue, and Mines thus was deprived of notice of the charge "against which it had to defend."

6. This exception is without merit. First, the argument that the first issue is limited to whether Mines failed "to determine concentrations of airborne radioactivity" ignores the entire text of such issue. The issue not only charges violation of §20.201(b) for "failure to conduct surveys" but relates such failure to "mill areas which are occupied by employees." The question is therefore clearly presented of whether or not respondent failed to evaluate

the exposure of personnel to airborne radioactivity in the mill. Second, the exception, insofar as it urges that respondent has conducted adequate surveys, is clearly erroneous. The expert testimony herein established that the method of conducting surveys of airborne particles in milling operations has been well known for 25 years. This method requires, among other things, regular sampling over an extended period of time at numerous locations within the mill, in order to take account of varying levels of airborne activity due to changing operational and weather conditions. Mines' occasional samplings do not meet these requirements. Third, even assuming lack of adequate notice in the notice of hearing, such inadequacy subsequently was cured by actual notice of the matters upon which Mines was to "defend" at both the pre-hearing conference and in correspondence thereafter between the parties. Exception I accordingly is denied.

(2) Exception II

7. The second exception states:

"The Intermediate Decision is in error because its findings with respect to external radiation surveys are inconsistent with the evidence and outside the scope of Specification of Issue No. 2."

Mines argues that the Hearing Examiner went beyond the scope of the second issue in determining that (1) inadequate surveys had been made prior to the making of the survey between July and October 1959, and (2) continued surveys would be necessary. Respondent further

challenges the Intermediate Decision's determination that film badge data indicated the necessity for some personnel to continue wearing such badges and asserts that a Staff witness had testified to the contrary.

8. The Examiner did not go beyond the specified issue. Issue No. 2 called for a determination of whether or not, in violation of § 20.201(b), respondent failed to conduct adequate surveys to determine external radiation levels. The Examiner's conclusion that Mines failed to do so at certain times is both within the specified issue and supported by the record. His conclusion that Mines has shown one adequate survey is likewise supported by the record. However, the Staff did not concede that only one survey was adequate to satisfy the requirements of the regulation and clearly stated that further surveys should be required thereunder (TR 337-339). The substantial evidence of record establishes that certain employees of Mines received exposure in excess of 75 mr per week and that radiation levels in uranium mills are variable, thus requiring continued surveys of external radiation levels and further wearing of film badges in accordance with our regulations. Exception II accordingly is denied.

(3) Exception III

9. The third exception states:

"The Intermediate Decision was in error with respect to its order in Specification of Issue No. 3 because (a) the order disregarded the evidence and the findings of the Intermediate Decision and (b) the order of November 2, 1959, should have been rejected or allowed in the whole."

Mines hereunder argues that (1) the first two issues were not proven, and an Order consequently cannot be based thereon; (2) the Intermediate Decision rejects the portions of the Order objected to by Mines, leaving only an Order to do essentially what Mines was willing to do voluntarily; and (3) the Order should be rejected or allowed in the whole.

10. As we have heretofore decided, the first two issues for hearing have been established on this record. The Order requiring certain corrective action is both correctly based thereon and required by the nature of the violations established. Mines' assertion that the Examiner's Order only requires it to do what it was willing to do voluntarily is immaterial. The fact is that since 1956 Mines has failed to conduct a single adequate survey for airborne concentrations of uranium in the mill and only conducted an adequate survey for external radiation levels after this hearing was instituted. No authority has been cited in support of respondent's contention that the Order must be rejected or allowed in whole, and the Examiner's rejection of a part of the Order does not invalidate the remainder. Exception III accordingly is denied.

(4) Exception IV

11. The fourth exception states:

"The Intermediate Decision was in error in allowing the proposed Order of the Staff because (a) such action is an improper, arbitrary, and capricious exercise of authority by the Division of Licensing and Regulation which is not warranted by the Atomic Energy Act nor the regulations in support thereof and (b) the new system of reporting enforced by the Order is not a proper exercise of the Division's authority."

Issuance of the Hearing Examiner's Order is clearly warranted by the record and authorized by the Atomic Energy Act and the Commission's regulations, see Chapter 7, "Source Material" and Section 161 (b), (1), (c) and (p) of the Act as implemented by 10 CFR §§ 40.30, "Reports"; 20.101, "Exposure of individuals in restricted areas"; 20.103, "Concentrations in effluents to unrestricted areas"; and 20.201 "Surveys". The purpose of this proceeding is to bring the operations of Mines' facility into compliance with the Commission's regulations in order that the health and safety of the public may be assured, and the Order is essential to assure the Commission that adequate procedures for the protection of the public health and safety are established and maintained. Exception IV accordingly is denied.

(5) Exception V

12. The fifth exception reads:

"The Intermediate Decision is in error for the reason that it does not rule on Mines' defense that the surveys required by Part 20 are not sufficiently definite for persons of ordinary intelligence to understand."

The argument that the Intermediate Decision has failed to rule on such defense is controverted by the clear language thereof (pp. 6-10). Exception V accordingly is denied.

WHEREFORE, IT IS ORDERED, this 8th day of February 1961, that:

Mines Development, Inc., hereinafter referred to as the licensee, with respect to its uranium mill at Edgemont, South Dakota, operated pursuant to Atomic Energy Commission source material license No. R-174 shall:

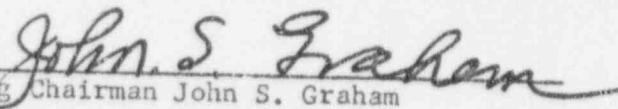
- A. Within 30 days from the date of this Order submit and file with the Director, Division of Licensing and Regulation, a complete description of its radiation safety procedures, which shall contain:
 1. A detailed description of the survey program, including sampling procedures, occupancy factors, any change in present method of sample analysis, commencement date of survey program and identification of personnel responsible for making surveys, to determine:
 - (a) Concentrations of airborne radioactive material to which employees have been and are exposed.
 - (b) Concentrations of radioactive material in airborne and liquid effluents to unrestricted areas; and

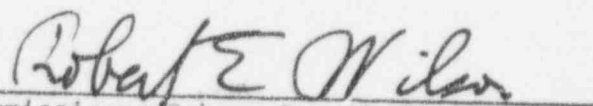
- (c) Exposure of employees to sources of external radiation.
- 2. A detailed description of the program instituted by the licensee for the instruction of employees in radiation safety measures to be observed in the mill.
- 3. A detailed description of the program for supervision instituted by the licensee to assure that:
 - (a) Radiation safety equipment installed in the plant or provided to employees is in proper working order and is being used in the proper manner, and
 - (b) Safety instructions and procedures are being observed.
- B. Within 30 days from the date of this Order, submit to the Director, Division of Licensing and Regulation:
 - 1. A detailed description of the licensee's organization including authority and responsibility of each level of management and/or supervision in regard to development and adoption of and adherence to mill operating procedures.
 - 2. The qualifications, experience and duties of the personnel in the licensee's organization assigned the responsibility for developing, conducting and administering the radiation safety program for the mill.

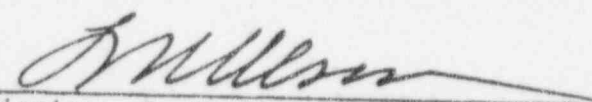
C. Within 60 days after the date of this Order and for each calendar month thereafter, submit to the Director, Division of Licensing and Regulation, a report of the data developed or disclosed by the program instituted by the licensee pursuant to Section A., which shall include an identification of areas of the mill or its environs for which surveys were conducted. Such monthly reports shall be filed not later than the 10th day of each subsequent month and such monthly reports shall be filed until the license is terminated or until, upon application of the AEC Staff or licensee pursuant to 10 CFR, Part 2, this Order is modified or rescinded.

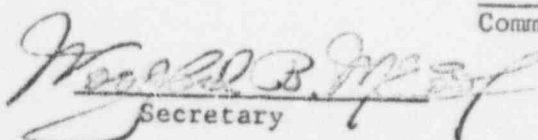
Issued this 8th day of February, 1961, at Germantown, Maryland.

UNITED STATES ATOMIC ENERGY COMMISSION


Acting Chairman John S. Graham


Commissioner Robert E. Wilson


Commissioner L. K. Olson


Secretary

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