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March 14, 1984

MEMORANDUM FOR: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal

FROM: Martin G. Malsch
Deputy General Counsel

SUBJECT: PROPOSED AMENDMENTS TO URANIUM MILL TAILINGS REGULATIONS (SECY-83-523 AND -523A)

In response to OGC's comments on proposed amendments to the uranium mill tailings regulations, staff has provided two alternative modified proposed rules. These new proposals and the accompanying discussion indicate to us that the fundamental principle underlying our comments has not been addressed. That principle is simply that where proposed amendments to the NRC's mill tailings regulations involve matters of implementation within NRC's jurisdiction, then such changes cannot be justified solely on a legal theory of necessity for conformance with EPA's standards. Such changes must be accompanied by technical justifications adequate to provide notice and permit informed comment on the bases for those changes. This does not mean that OGC has any views on the technical merits of any of the proposed changes, only that OGC believes that some technical justification is required now to provide legally adequate notice.[1]

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[1]Staff suggests that because a proposed rule is not binding, comments supporting OGC's analysis could be accommodated by adopting a substantially different final rule. This is likely to be true. However, there is no good reason why the Commission should issue a proposed rule with an inadequate justification in the hope that somehow no one will call this to the Commission's attention during the

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Staff replied to this basic point as follows: (1) the "technical evaluation of what is necessary to comply with the EPA standard is not a legal issue"; (2) "on a technical basis most of the originally proposed changes are not discretionary"; and (3) the "changes are justified." This may all be so. However, the only justification offered for these changes in the rulemaking notice is the necessity to conform to EPA's standard. This is a legal justification which does not at all address technical merits and, thus, does not provide adequate notice.

The issue is illustrated by the staff's own example. It would be arbitrary and capricious, says the staff, for the NRC to adopt EPA's new higher radon emanation rate and shorter longevity requirement for tailings stabilization without modifying the prescriptive technical requirements initially promulgated to implement the Commission's now superseded stricter standards. This may be correct. But it does not follow as a matter of law that the prescriptive requirements such as an earthen cover and some minimum cover thickness should simply be deleted. Such changes in the regulations may be technically justified, but the public will have no meaningful opportunity to comment on such deletions if there is no technical analyses supporting them.[2]

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comment period. The job should be done right the first time.

[2]The staff also suggests that OGC has ignored the relationship between the original standards and the prescriptive requirements to achieve those standards. However, the example given shows that the relationship is by no means self-evident. That example is that the 3-meter cover requirement is essentially equivalent to the 2 $pCi/m^2/s$ radon emanation rate limit in soil containing 9% moisture. What is not stated, is that EPA estimated that for the drier soil in New Mexico, the new 20 $pCi/m^2/s$ radon emanation rate would be achieved by an earthen cover of 2.6 meters. Thus, there is no self-evident relationship between the prescriptive criteria and the fundamental standards. There are many possible regulatory regimes for meeting EPA's standards, and the NRC, as the staff states, must make a

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Staff also suggests that OGC's suggestions for rulemaking will take several years and require extensive resources. However, this seems inconsistent with staff's firmly stated conviction that its more extensive conforming rule is technically justified. If this is the case, then the essential element of OGC's proposal simply requires the staff to write out the thought process that underlies its conviction.[3] Moreover, of the twelve criteria in the original regulations only a few are proposed to be changed, and the changes requiring some technical justification are limited to:

1. The proposal to delete the prohibition on active maintenance in Criteria 1 and 12;

2. The proposal to delete from Criterion 3 below-grade disposal as the prime option;

3. The proposal to modify the siting and design changes in Criterion 4; and

4. The proposal to delete from Criterion 6 the prescriptive requirements.

The staff appears to believe that EPA has authority to establish implementation requirements as part of its tailings standards. OGC does not agree with staff's arguments supporting this position.[4] And in a recent letter to

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rational connection between the facts found and the choices made. That rational connection includes technical justifications where necessary.

[3]Staff also suggests that OGC's position would relegate to secondary status the extensive environmental work by EPA. In view of the NRC's comments to EPA on its proposed standards, the Commission could not rely heavily on EPA's record.

[4]Staff would interpret the phrase "general application" in section 275b of the Atomic Energy Act to mean applicable to all licensees in the same situation and to include the possibility of implementation measures. We admit that this

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Mr. Cannon of the EPA, the Executive Director for Operations stated that the staff believes EPA's prescriptive engineering requirements to be contrary to the intent of Section 84c of the Atomic Energy Act as amended by Public Law 97-415, the NRC Authorization Act for FY82-83. Moreover, such a view of the statute is directly contrary to NRC's often stated policy objective to be flexible in its case specific reviews. If EPA can issue implementation requirements, then NRC will be bound by them (or the levels of protection they represent). In any event, these arguments are irrelevant for present purposes. As we understand it, the nub of staff's argument is that EPA's failure to impose implementation requirements renders any NRC implementation requirements automatically inconsistent with EPA's standard simply by virtue of their existence. However, simple failure by EPA to impose something does not on its face constitute disapproval. EPA silence on an implementation measure could also signal neutrality, and EPA neutrality would not by itself require conforming changes.

Because the staff has not provided the level of technical justification necessary to permit informed comment on the proposed substantive changes to discretionary parts of the rule, OGC recommends that the Commission approve for publication the proposed rule[5] contained in enclosure A-2 with the following modification:

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is a possible reading. However, a contrary reading is equally possible on the face of the language in the statute. Moreover, the legislative history supports the view that EPA is not to promulgate implementation measures. H.R. Rep. No. 95-1480, Part 2, 95th Cong. 2nd Sess. 46 (1978); H.R. Rep. No. 95-1480, Part 1, 95th Cong. 12d Sess. 21 (1978). As for the EPA's implementation provisions regarding groundwater, the UMTRCA explicitly authorizes EPA to promulgate groundwater standards consistent with its standards under the Solid Waste Disposal Act.

[5]We believe that staff proposed addition of the "flexibility" language from Pub. Law 97-415 is a useful addition to the rulemaking, although the same result can be achieved under 10 CFR 40.14(a) without any rule change. In addition, it strikes us that Pub. Law 97-415 already gives

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On page 12, in the underlined language proposed to modify criterion 6, delete "at least 3 meters of earth" and replace it with "an earthen."

Finally, we should address the subject of litigative risk. Good rulemaking requires time and resources, just like good licensing, good enforcement, and just about anything NRC might do. And, in the usual scheme of things, nothing can be done with perfection and zero litigative risk given limited resources and conflicting priorities. But, while it may be cheaper to cut corners in the short term, this "penny wise - pound foolish" strategy has often come back to haunt us. In high visibility rulemakings such a strategy has the real potential to lead to crash efforts to fix things up following a court remand that are far more disruptive and resource intensive than doing things right the first time. Moreover, such remands further enhance a reputation for sloppy rulemaking that many associate with the Commission.

Here we are dealing in an area which has attracted considerable Congressional and public interest, has a long history of litigation, involves a severely distressed industry, and has led to a staff conviction that some current requirements are not necessary and may be imposing unnecessary burdens. Shouldn't we give this one our "best shot" and try to do it right the first time? If a technical analysis indicates that we are imposing unnecessary burdens, then let's get on with a technically-based rulemaking to eliminate them.

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the Commission considerable flexibility in enforcing its current requirements, even if the more limited rulemaking is adopted.