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49 FR 46418
AG 50-2
PDR

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

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April 30, 1984

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MEMORANDUM FOR: Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal

FROM: Nunzio J. Palladino

SUBJECT: RECOMMENDATIONS CONCERNING MILL TAILINGS

The comments received by my office concerning my memorandum of April 20, 1984 on this subject indicate agreement with the course of action that was laid out by Commissioner Asselstine and me. Accordingly, I will plan to use the recommendations that I transmitted to you as the basis for preparing the mill tailings portion of my meeting on May 8 with Administrator Ruckelshaus.

As I had promised in my April 20 memorandum, I am circulating three additional documents for your review and concurrence:

1. Draft letter informing Congress of our intended course of action.
2. Draft conceptual agreement with EPA.
3. Draft memo of instruction to staff to prepare interagency programmatic agreement.

I request that any comments you have on these documents be received by my office no later than COB May 3 so that they may be factored into my briefing by the staff on May 4.

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LETTER TO CONGRESS
(OCA TO IDENTIFY APPROPRIATE ADDRESSEES)

DEAR MR. CHAIRMAN:

AS YOU AND OTHER CONGRESSIONAL OBSERVERS HAVE RECENTLY EMPHASIZED, THERE HAVE BEEN GROUNDS FOR GROWING CONCERN IN THE PAST SEVERAL MONTHS FOR THE COORDINATION OF U.S. NUCLEAR REGULATORY COMMISSION (NRC) AND U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) REGULATION OF URANIUM MILL TAILINGS. RESPONDING TO THAT CONCERN, NRC AND EPA STAFF HAVE BEEN DISCUSSING WAYS TO CLARIFY OUR RESPECTIVE RESPONSIBILITIES AND IMPROVE OUR COORDINATION. CAPPING THE FIRST MILESTONE IN THAT PROCESS, WE RECENTLY MET WITH EACH OTHER TO APPROVE THE ENCLOSED CONCEPTUAL AGREEMENT, WHICH SETS FORTH A NUMBER OF INTERAGENCY COMMITMENTS IN THE DEVELOPMENT OF OUR RESPECTIVE REGULATORY ACTIONS IN THE MILL TAILINGS AREA.

A KEY ELEMENT OF THE AGREEMENT THAT WILL ALLOW AN ORDERLY AND NONDISRUPTIVE NRC RULEMAKING PROCESS IS THAT EPA WILL DEFER THE EFFECTIVE DATE OF THOSE PORTIONS OF ITS STANDARD THAT ARE GROUNDWATER-RELATED. WE EXPECT THE COMMISSION RULEMAKING TO TAKE ABOUT THREE YEARS. DURING THIS TIME PERIOD, COGNIZANT SENIOR NRC AND EPA MANAGEMENT STAFF WILL MEET AT LEAST QUARTERLY TO COORDINATE PLANS FOR MILL TAILINGS-RELATED REGULATORY ACTION, INCLUDING DEVELOPMENT OF COORDINATED RULEMAKING AND

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STANDARD-SETTING SCHEDULES SPECIFICALLY PROVIDING FOR EACH OTHER'S COMMENTS OR CONCURRENCE, AS APPROPRIATE.

RECOGNIZING THE OVERLAPPING STATUTORY RESPONSIBILITIES OF EACH AGENCY IN REGULATING COMMINGLED HAZARDOUS AND RADIOACTIVE LOW-LEVEL WASTES, WE ALSO INTEND TO ADOPT A COORDINATED APPROACH WITH CONSULTATIVE PROCEDURES SIMILAR TO THOSE OUTLINED IN THE AGREEMENT FOR ANY FUTURE NRC-LICENSED LOW-LEVEL WASTE DISPOSAL SITES.

WHILE WE RECOGNIZE THAT THE DIFFERENCES IN NRC AND EPA STATUTORY RESPONSIBILITIES MAY TRANSCEND OUR ABILITY TO COPE WITH THEM BY ADMINISTRATIVE MEANS, WE BELIEVE IT IS IN THE BEST INTEREST OF THE NATION AS A WHOLE TO BEGIN ADDRESSING THESE DIFFERENCES IN A WAY THAT RUNS LEAST RISK OF DISRUPTING THE PLANNING OF THE STATES, INDUSTRIES, AND OTHER PARTIES INVOLVED. WE HOPE THAT THE COOPERATIVE ARRANGEMENTS WE HAVE OUTLINED HERE WILL ENABLE BOTH AGENCIES TO FULFILL THEIR RESPECTIVE STATUTORY RESPONSIBILITIES WITHOUT THE NEED FOR FURTHER LEGISLATIVE ACTION.

SINCERELY,

WILLIAM RUCKELSHAUS,
ADMINISTRATOR
U.S. ENVIRONMENTAL
PROTECTION AGENCY
ENCLOSURE:
NRC-EPA PROGRAMMATIC
AGREEMENT

NUNZIO J. PALLADINO
CHAIRMAN
U.S. NUCLEAR REGULATORY
COMMISSION

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CONCEPTS FOR INTERAGENCY PROGRAMMATIC AGREEMENT
BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION
AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY
ON URANIUM MILL TAILINGS REGULATION

A MAJOR GOAL OF NRC'S CONFORMING RULEMAKING WILL BE TO DEVELOP REGULATIONS THAT CAN BE IMPLEMENTED BY NRC OR AGREEMENT STATES, AS APPLICABLE, WITHOUT INVOLVING EPA IN ANY NRC OR AGREEMENT STATE REGULATORY DECISIONS ON MILL TAILINGS DISPOSAL.

BASED ON NEGOTIATIONS TO DATE, THE U.S. NUCLEAR REGULATORY COMMISSION (NRC) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) BELIEVE IT IS APPROPRIATE TO PURSUE A PROGRAMMATIC AGREEMENT TO DEFINE INTERAGENCY RESPONSIBILITIES ASSOCIATED WITH IMPLEMENTATION OF THE SOLID WASTE DISPOSAL ACT (SWDA), AS AMENDED BY THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), IN THE REGULATION OF MILL TAILINGS DISPOSAL. THIS PROGRAMMATIC AGREEMENT WILL ESTABLISH THE FOLLOWING PRINCIPLES FOR INTERAGENCY COORDINATION ON MILL TAILINGS REGULATION:

1. FOR THOSE URANIUM MILLS CURRENTLY UNDER NRC LICENSE, EPA WILL DEFER THE EFFECTIVE DATE IN 40 CFR 192 SUBPART D, AS IT RELATES TO THE GROUNDWATER PORTIONS OF ITS REQUIREMENTS, UNTIL NRC COMPLETES ITS CONFORMING RULEMAKING. THIS

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RULEMAKING WILL ESTABLISH AT NRC-LICENSED MILL TAILINGS SITES THE NRC REGULATIONS REQUIRED BY STATUTE FOR THOSE HAZARDOUS MATERIALS NORMALLY SUBJECT TO EPA JURISDICTION UNDER THE SOLID WASTE DISPOSAL ACT, AS AMENDED. CONSISTENT WITH THE REQUIREMENT OF SECTION 84A.(3) THAT NRC REGULATIONS BE "TO THE MAXIMUM EXTENT PRACTICABLE, AT LEAST COMPARABLE" TO EPA REGULATIONS IN THIS AREA, THIS DEFERRAL FOR MILL TAILINGS SITES CURRENTLY UNDER NRC LICENSE IS TO BE NO MORE THAN THE MINIMUM NECESSARY AS DETERMINED BY EPA IN CONSULTATION WITH NRC. IF NO OTHER OPTIONS ARE AVAILABLE FOR POSTPONING THE EFFECTIVENESS OF THOSE RCRA-RELATED PORTIONS OF ITS MILL TAILINGS STANDARDS WHOSE IMPLEMENTATION IS TO BE DELAYED FOR EXISTING SITES, EPA AGREES TO PURSUE A RULEMAKING TO ACCOMPLISH THIS PURPOSE.

(2) NRC AGREES THAT THE FINAL CONFORMING RULE WILL INCORPORATE PROVISIONS FOR PROTECTION OF GROUNDWATER THAT ARE, TO THE MAXIMUM EXTENT PRACTICABLE, AT LEAST COMPARABLE TO SWDA REQUIREMENTS. NRC'S FINAL RULE INCORPORATING GROUNDWATER PROTECTION PROVISIONS WILL BE SUBJECT TO EPA CONCURRENCE AS REQUIRED BY LAW. AVAILABLE IMPLEMENTING DOCUMENTS, SUCH AS REGULATORY GUIDES, WILL BE GIVEN TO EPA FOR REVIEW AND COORDINATION IN CONJUNCTION WITH ITS CONCURRENCE.

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(3) DURING THE INTERIM WHILE NRC IS CONFORMING ITS REGULATION, NRC WILL ENFORCE AT EXISTING NRC-LICENSED MILL TAILINGS SITES THOSE PORTIONS OF THE EPA STANDARD WHOSE EFFECTIVE DATE HAS NOT BEEN DEFERRED PENDING COMPLETION OF THE NRC RULEMAKING. NRC ALSO AGREES TO CONTINUE TO ENFORCE (AND MODIFY AS NECESSARY) ITS ONGOING GROUNDWATER MONITORING AND MITIGATION REQUIREMENTS AT EXISTING MILL TAILINGS SITES TO ENSURE PROTECTION OF PUBLIC HEALTH AND SAFETY AND THE ENVIRONMENT. ALSO DURING THIS INTERIM, NRC AGREES TO ENFORCE IN FULL EPA STANDARDS IN 40 CFR 192 FOR GROUNDWATER PROTECTION AT ANY NEW URANIUM RECOVERY FACILITIES NOT CURRENTLY UNDER LICENSE.

(4) EPA AND NRC JOINTLY AGREE TO COOPERATE DURING THIS INTERIM PERIOD IN THE DEVELOPMENT OF A DATA BASE FOR HAZARDOUS CONSTITUENTS AT MILL TAILINGS SITES AS PART OF THE TECHNICAL BASIS FOR NRC'S CONFORMING RULE AND EPA'S CONCURRENCE. EPA AGREES TO PROVIDE TECHNICAL CONSULTATION AND SERVICES TO NRC FOR THE DEVELOPMENT OF THE NECESSARY TECHNICAL SUPPORT FOR THE CONFORMING RULE. NRC AGREES TO REIMBURSE EPA FOR ALL NECESSARY AND REASONABLE COSTS ARISING FROM SUCH CONSULTATION AND SERVICES AS MUTUALLY ESTABLISHED BY THE TWO AGENCIES.

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(5) EPA AND NRC AGREE THAT, IN ORDER TO ELIMINATE DUAL REGULATION, NRC SHOULD BE ABLE TO APPROVE ALTERNATE REGULATORY REQUIREMENTS SUBMITTED BY APPLICANTS UNDER SECTION 84C. OF THE ATOMIC ENERGY ACT, AS AMENDED, WITHOUT ANY SITE-RELATED SPECIFIC EPA CONCURRENCE. SUCH ALTERNATE REGULATORY REQUIREMENTS COULD INCLUDE, AMONG OTHER THINGS, ALTERNATE CONCENTRATION LIMITS FOR OFF-SITE CONTAMINATION BY HAZARDOUS MATERIALS, ALTERNATE LISTS OF HAZARDOUS MATERIALS, AND ALTERNATE TYPES OF LINERS. NRC AGREES THAT EPA WILL CONCUR IN THE METHODOLOGY NRC WOULD EXPECT TO USE IN MAKING DECISIONS ON SUCH ALTERNATE REGULATORY REQUIREMENTS. APPROPRIATE PROTOCOLS DEFINING THE METHODOLOGY WILL BE DEVELOPED AND JOINTLY APPROVED BY EPA AND NRC AS AN INTEGRAL PART OF NRC'S RULEMAKING.

(6) EPA AGREES THAT AGREEMENT STATE IMPLEMENTATION OF EPA STANDARDS AT MILL TAILINGS SITES MAY TAKE PLACE PURSUANT TO THE SAME UNDERSTANDINGS AND AGREEMENTS APPLICABLE TO NRC LICENSING AND REGULATION.

(7) AT LEAST UNTIL THE CONCLUSION OF THE NRC CONFORMING RULEMAKING, THE COMMISSION CHAIRMAN AND EPA ADMINISTRATOR AGREE TO MEET AT LEAST ANNUALLY TO APPROVE COORDINATED REGULATORY PLANS AND DISCUSS ANY ISSUES ARISING FROM

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IMPLEMENTATION OF ANY OF THE MATTERS AGREED TO UNDER THE
RESULTING PROGRAMMATIC AGREEMENT, WHICH WE PLAN TO INSTRUCT
OUR STAFFS TO COMPLETE BY _____.

INITIALED BY:

WILLIAM RUCKELSHAUS
ADMINISTRATOR
U.S. ENVIRONMENTAL
PROTECTION AGENCY

NUNZIO J. PALLADINO
CHAIRMAN
U.S. NUCLEAR REGULATORY
COMMISSION

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MEMORANDUM FOR: William J. Dircks
Executive Director for Operations

FROM: Nunzio J. Palladino, Chairman

SUBJECT: IMPLEMENTATION OF INTERAGENCY PROGRAMMATIC
AGREEMENT WITH THE U.S ENVIRONMENTAL PROTECTION
AGENCY ON MILL TAILINGS REGULATIONS

Please be advised that all appropriate NRC staff should be instructed to begin preparing an interagency programmatic agreement conforming to the attached conceptual paper, which contains the principles agreed to at my recent meeting with EPA Administrator Ruckelshaus. Mr. Ruckelshaus is issuing these instructions to his staff concurrently.

Nunzio J. Palladino

Attachment: Conceptual
EPA-NRC Agreement

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PR 40

49 FR 46418

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PDR

In the matter of:

COMMISSION MEETING

Discussion and Oral
Presentations on
Uranium Mill Tailings
Regulations

(Public Meeting)

Docket No.



Location: Washington, D. C.

Date: Tuesday, September 10, 1985

Pages: 1 - 66

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DISCUSSION AND ORAL PRESENTATIONS
ON URANIUM MILL TAILINGS REGULATIONS

- - -

PUBLIC MEETING

Room 1130
1717 H Street, N.W.
Washington, D.C.

Tuesday, September 10, 1985

The Commission met, pursuant to notice, at
10:08 a.m.

COMMISSIONERS PRESENT:

NUNZIO PALLADINO, Chairman of the Commission
THOMAS ROBERTS, Commissioner
JAMES ASSELSTINE, Commissioner
FREDERICK BERNTHAL, Commissioner
LANDO ZECH, Commissioner

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

S. CHILK
L. BOGGS
A. THOMPSON
R. MESERVE
S. WINNER
C. SLITER
R. YUHNKE
D. BERRICK
D. FORT
S. MEYERS
W. PEDERSEN
S. TRUBATCH
H. PLAINE

FROM THE AUDIENCE:

R. FONNER

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P R O C E E D I N G S

CHAIRMAN PALLADINO: Good morning, ladies and gentlemen. Commissioner Asselstine will join us in a couple of minutes, but he suggested we proceed without him for the moment.

The purpose of this meeting is to have the Commission hear the views of representatives of the American Mining Congress, the Environmental Defense Fund, the State of New Mexico, and the Environmental Protection Agency on uranium and thorium mill tailing regulations.

This meeting, which was requested by Commissioner Roberts, should help the Commission reach a decision on the publication of final amendments to 10 CFR Part 40, conforming to and implementing stability in radon release provisions of the EPA final standards for uranium and thorium mill tailings.

Each group will be allowed ten minutes to present its views. I do understand that Mining Congress will share its time with representatives of Kerr-McGee. But in advance, let me express our appreciation for your willingness to come down -- the willingness of each group to come down -- and share their thoughts with us.

(Commissioner Asselstine joins meeting.)

Are there any additional remarks by other Commissioners?

1 COMMISSIONER ZECH: No.

2 CHAIRMAN PALLADINO: If not, then let me turn to
3 our first speakers, the representatives of American Mining
4 Congress and Kerr-McGee.

5 MR. THOMPSON: Mr. Chairman, Commissioners, my
6 name is Anthony Thompson. I am here on behalf of the
7 American Mining Congress.

8 I would first like to thank the Commission for
9 providing us this opportunity to appear before you today.
10 As noted, I am going to surrender and share some of my time
11 with Mr. Meserve who represents a number of AMC member
12 companies, including Homestake, United Nuclear, and Kerr-
13 McGee.

14 At the conclusion of our presentation, unless the
15 Commission wishes otherwise, we will be happy to try to
16 answer any questions that may arise.

17 The American Mining Congress requested this
18 opportunity to discuss the important question of the
19 respective jurisdiction of NRC and EPA under UMTRCA. As
20 the Commission is now aware, the 10th Circuit has ruled
21 adversely to our position.

22 AMC continues to believe that it is correct on
23 this basic jurisdictional issue and that the 10th Circuit
24 decision is wrong.

25 AMC is currently exploring with its member

1 companies the possibility of petitioning the 10th Circuit
2 for a rehearing en banc or petitioning the Supreme Court
3 for a writ of certiorari. In short, the 10th Circuit
4 opinion is not a final determination of the jurisdictional
5 issue.

6 I would remind the Commission that certain aspects
7 of the jurisdictional issue are being raised in an
8 adjudicatory context here at the Commission. Licensees we
9 represent have requested hearings on license amendments
10 incorporating EPA groundwater monitoring requirements. NRC
11 should take no position in this conformance rulemaking
12 proceeding that would prejudice consideration in that
13 adjudicatory proceeding.

14 AMC's position is that under UMTRCA NRC has,
15 consistent with the traditional division of authority
16 between this agency and EPA, exclusive jurisdiction within
17 license site boundaries and determine all management
18 practices for mill tailing sites.

19 Our position is based on the well-established rule
20 of statutory construction. When Congress uses the same
21 term in two acts, the same meaning is to be applied in both
22 cases absent clear and convincing evidence of a contrary
23 congressional intent.

24 In UMTRCA, Congress limited EPA's authority to
25 generally applicable standards, a term drawn from the

1 Reorganization Plan No. 3 of 1970. We have provided the
2 Commissioners with some tabs that show what the
3 reorganization plan said and what the statutory provisions,
4 the language in the statutory provisions of UMTRCA is.

5 All of the affirmative legislative and
6 administrative evidence confirms that Congress intended to
7 limit EPA's authority in UMTRCA along the lines specified
8 in the 1970 reorganization plan.

9 There are two good examples of this. Your Office
10 of General Counsel in the original mill tailings case in
11 the 10th Circuit, argued by Mr. Trubatch of the Office of
12 General Counsel, took the very same position that AMC now
13 takes.

14 I quote from the 1981 NRC brief at pages 93 and
15 94. "It is also plain from the legislative history of
16 UMTRCA that Congress intended the Commission to be the lead
17 Federal agency in regulating uranium mill tailings, and
18 that Congress sought to preserve the traditional regulatory
19 relationship between NRC and EPA." The relationship where,
20 again, NRC has not been constrained to wait EPA issuance of
21 general standards.

22 Under UMTRCA, the NRC was designated as the
23 principal regulator of mill tailings, and to be given
24 specific licensing authority over mill tailings while EPA
25 was authorized to promulgate general environmental

standards for mill tailings consistent with its authority under Reorganization Plan No. 3 of 1970.

Again the NRC brief states, "The plain congressional understanding was for NRC to be the lead agency in regulation, oversight, and management of uranium mill tailings related activities, while EPA had the responsibility, consistent with Reorganization Plan No. 3 of 1970, to establish generally applicable standards and criteria for the protection of the environment."

The relevant pages of the NRC brief are in Tab C.

EPA's general counsel has written a memorandum that states the same position. EPA's general counsel has acknowledged in a legal opinion that EPA's authority to promulgate generally applicable standards under UMTRCA was, "Modelled closely on comparable authority contained in the Atomic Energy Act as transferred to EPA in Reorganization Plan No. 3 of 1970."

"For this reason" -- the general counsel concluded, and I quote -- "the concept of generally applicable standards in UMTRCA should be understood, therefore, in light of the same term as used in that plan."

We have also included that general counsel's opinion.

The NRC general counsel now apparently is taking a position opposite to that taken in the NRC brief to the

1 10th Circuit, and it's our understanding that NRC asserts
2 that AMC's analysis of the legislative and administrative
3 materials on this jurisdictional issue is "Highly selective
4 and misleading."

5 We request an opportunity to respond to the
6 general counsel's memorandum on an expedited basis because
7 we believe the evidence will show that it is the Office of
8 General Counsel that has been highly selective and
9 misleading in its analysis of the legislative history,
10 UMTRCA, and relevant agency constructions.

11 In conclusion, if the Commission is unwilling to
12 assert its rightful authority, the result will be either
13 NRC will not be the lead agency, as your counsel has said
14 UMTRCA intended, and will be nothing more than the
15 equivalent of EPA's water-boy in uranium mill tailings
16 activities, or EPA will be deeply involved in NRC licensing
17 decisions which will lead to endless disputes between the
18 two agencies. The environmentalists will be involved, and
19 the licensees will be in the middle with everybody taking
20 pot-shots and that, we submit, is chaos.

21 I now would like to turn over the microphone to
22 Mr. Meserve.

23 MR. MESERVE: Thank you very much. I am joined by
24 my colleague Sonya Winter.

25 The position I would like to present to you this

1 morning is that the 10th Circuit recent opinion in the mill
2 tailings cases confirms that the amended UMTRCA criteria
3 which are before you now contain a fatal legal flaw,
4 mainly, a failure to reflect the necessary balancing of
5 costs and benefits.

6 In order to establish that proposition, I need to
7 take you back in time to when the NRC originally
8 promulgated its criteria in 1980. At that time, the
9 industry petitioners before the 10th Circuit argued that
10 the NRC was required to balance costs and benefits in its
11 promulgation, in the process of promulgation.

12 The NRC staff responded before the 10th Circuit by
13 stating that it wasn't required to balance, it needed only
14 to determine there was no undue economic burden that was
15 imposed by these standards. In fact, the 10th Circuit in a
16 panel opinion in that case -- which is the panel opinion
17 with regard to the NRC's original promulgation of these
18 criteria -- described the NRC's position as follows:

19 The NRC position is that it is required only to
20 consider the economic feasibility of the regulations, a far
21 less severe constraint on regulatory action than a cost-
22 benefit analysis requirement. And it described what
23 feasibility analysis meant in terms of a challenge to the
24 economic viability of the industry.

25 Well, as you know, Congress amended UMTRCA in late

1 1982 and it inserted language in UMTRCA in Section 275 as
2 it applies to EPA; in Section 84 as it applies to the NRC,
3 and it was substantially identical language, requiring both
4 agencies to consider costs and benefits.

5 The 10th Circuit has now interpreted that
6 language. The 10th Circuit has said last week, "We agree
7 with the industry petitioners that the UMTRCA does require
8 a consideration of costs relative to benefits, a cost-
9 benefit analysis, by requiring a reasonable relationship
10 between costs and benefits.

11 On the specific point of the difference between
12 feasibility analysis -- which is what the NRC has
13 undertaken with regard to these criteria -- and the cost-
14 benefit analysis that UMTRCA now requires, the 10th Circuit
15 last week said the following:

16 "Feasibility analysis and cost-benefit analysis
17 are mutually exclusive approaches. In light of the
18 language of the 1982 amendment to the UMTRCA we must reject
19 the environmental petitioners' argument that control of
20 mill tailings should be as extensive as it's capable of
21 being performed. The amendment foreclosed the EPA's use of
22 a feasibility standard."

23 The bottom line, where we stand right now, is that
24 the NRC has promulgated criteria which it has defended on
25 the basis that it conducted a feasibility analysis, and

1 that is all that's required.

2 And it is absolutely clear from the 10th Circuit's
3 opinion that that is not adequate. As a result of the
4 succeeding amendments of UMTRCA, NRC is required to
5 balance costs and benefits.

6 Now, this point is not an abstract exercise. EPA
7 sought to justify its standards, and it has stated that the
8 costs associated with its standards were approximately \$260
9 million. Well, the benefits of these --

10 CHAIRMAN PALLADINO: Who said that?

11 MR. MESERVE: EPA said that in its promulgation.
12 Assistant Secretary Vaughan from the Department of Energy
13 testified before Congress this summer about the costs of
14 stabilizing tailings at active sites. He testified this
15 summer before a joint hearing of the Congress that the
16 costs would exceed \$4 billion.

17 We are in a situation now where the mill tailings
18 companies are in very hard straits and the kinds of
19 regulatory requirements that are being imposed on them have
20 threatened to cripple the industry.

21 Now, there are some arguments that have been made
22 to say that you need not comply with the requirements of
23 UMTRCA in your repromulgation of the standards. The staff
24 says on the one hand the EPA considered costs and therefore
25 the NRC need not.

1 Well, the fact of the matter is that the language
2 requiring a balancing of costs and benefits applies to both
3 languages, it was put in two separate provisions, one
4 directed at EPA and the other directed at NRC.

5 And perhaps more to the point, if you look and
6 observe these regulations and see how much the staff felt
7 it was required to change them, you will observe that about
8 ten percent of the text has been changed and the remainder,
9 approximately 90 percent of the text, is exactly the same
10 language that the NRC promulgated in 1980.

11 We are in a situation where the regulations, the
12 bulk of these criteria that are before you now, do not
13 comply with the requirements that have been posed on this
14 agency in promulgating its UMTRCA criteria by Congress.

15 The staff has a second argument. They say that
16 NRC may respond on a site-specific basis, it doesn't need
17 to amend its criteria to show that they reflect this
18 balancing that Congress requires, that can be done in
19 individual licensing actions.

20 Unfortunately for that position -- fortunately for
21 the staff with regard to that position -- the legislative
22 history is clear, that Congress intended the NRC in
23 promulgating its criteria to reflect the reasonable
24 relationship between costs and benefits. That was the
25 purpose of the amendment.

1 There are a variety of points in the legislative
2 history with regard to the 1982 amendments where that was
3 explicitly discussed and Congress described what it
4 intended the NRC to do in responding to that amendment.

5 Let me also point out that there was an immense
6 practical problem. The NRC establishes rigid criteria that
7 reflect a feasibility analysis and then says, "We really
8 don't mean it. In an individual licensing action, we'll
9 look at these again and we'll decide which ones we think
10 ought to apply in the given circumstances."

11 What you are really doing is regulating by
12 exception. You are establishing a standard. You are
13 requiring a licensee to present a stabilization plan and
14 it's going to be measured by the wrong yardstick.

15 I suggest to you that this just invites
16 litigation. There are many intervenors, for example, in
17 licensing proceedings who are going to take these criteria,
18 read them to mean what they say, and the result is going to
19 be chaos.

20 Gentlemen, I suggest the NRC criteria do not
21 comply with UMTRCA by your own words and, as a result, you
22 are required to undertake balancing costs and benefits that
23 the legislation requires.

24 Thank you.

25 CHAIRMAN PALLADINO: All right, thank you.

1 I wonder if I might ask one question. You implied
2 that the cost-benefit has to be done on a generic basis, is
3 that what you are saying, the cost-benefit analysis?

4 MR. MESERVE: The legislative history is
5 completely clear, I think, associated with the 1982
6 amendments. That Congress was very troubled about the
7 costs of these UMTRCA criteria that the NRC had
8 promulgated. You may recall that they suspended them, or
9 portions of them, on at least two occasions.

10 In the legislation associated and the history
11 associated with the repromulgation of these amendments
12 there were a number of colloquies where Senators asked,
13 "Does this mean that the NRC in repromulgating its criteria
14 is going to consider costs and benefits?"

15 In every instance the response as, "Yes, they are
16 going to do so."

17 CHAIRMAN PALLADINO: But you said on a case-by-
18 case generic basis.

19 MR. MESERVE: No, this was -- it's clear in the
20 context of the legislative history that this was to be done
21 in a generic basis and that the criteria themselves were to
22 reflect the adequate balancing.

23 We intend, within the next week or so, to submit a
24 legal memorandum to you that will substantiate all these
25 points. It's very difficult in the time allowed to run

1 through the legislative history. We will be happy to
2 provide you with the evidence to back up these assertions.

3 CHAIRMAN PALLADINO: Thank you. Let me ask if OGC
4 has any comment that they might want to make at this time?

5 MR. PLAINE: Well, do you want to make any
6 comments?

7 MR. TRUBATCH: Well, frankly, I'm -- I start from
8 asking why are we considering first the jurisdictional
9 issue now that the 10th Circuit has spoken?

10 As far as the -- let me say for a cost-benefit
11 balance in effect that only ten percent of the Commission's
12 regulations have been modified. All that was modified now
13 was the things that OGC believed could be modified as a
14 ministerial matter to bring the Commission's regulations
15 into compliance with the EPA standard.

16 In other words, things like the radar flux limit
17 which went from 2 peco curies per square meter per second
18 to 20 peco curies per square meter per second were changed,
19 were proposed to be changed to conform to the EPA
20 standard. But all other NRC requirements for which there
21 still is a matter of judgment remaining, OGC recommended
22 that those issues be left to yet another rulemaking, the
23 one which will also consider the groundwater standards.

24 So, to say that the Commission has only changed
25 part of its regulations, that was by design because this is

1 a two-step change that is contemplated. And whether or not
2 a cost-benefit balance is required or a cost-benefit
3 analysis which is somewhat less rigid because, I think, if
4 you read the 10th Circuit decision, they do differentiate
5 between a rigid cost-benefit balance and an analysis in
6 which costs and benefits bear some reasonable relationship
7 to each other. Whether that has to be done or not is a
8 matter of law.

9 If it does have to be done, the time to do it will
10 be in this second round of rulemaking which the Commission
11 contemplated.

12 COMMISSIONER BERNTHAL: Well, but that's a key
13 point, it seems to me -- or at least one key point. I'm
14 not sure I know what all the key points are.

15 A question that I wanted to ask of you, Sheldon,
16 is whether there is some implication in this court
17 decision, perhaps consistent with what Congress has already
18 said, in the amount of cost-benefit work that this agency
19 would have to do in support of any further regulatory
20 action or, for that matter, whether there is anything to be
21 said about cost-benefit work already undertaken in
22 connection with previous regulatory action.

23 MR. TRUBATCH: I don't believe that the
24 legislative history is as crystal clear as has been
25 suggested here today. That's something you hear over and

1 over again.

2 Clearly, there are polarized views and they are
3 reflected in the congressional debates. I believe there
4 are statements from remembrance that indicate that the cost-
5 benefit -- that the agencies had -- Congress had recognized
6 that the agencies had already told them that they did a
7 cost-benefit analysis, and there are statements in which at
8 least some congressman indicated that that was sufficient
9 for the existing regulations.

10 But I think the 10th Circuit characterized
11 legislative history when it looked at the jurisdiction
12 issue. It just said the legislative history is confused,
13 and went on and made a common-sense decision. I think
14 that's what we should be focusing on here.

15 CHAIRMAN PALLADINO: Okay. Other questions?

16 COMMISSIONER ROBERTS: Well, I would like to hear
17 the Office of General Counsel respond to the allegation
18 that the Office of General Counsel has if not reversed,
19 changed its position.

20 Would you comment on that?

21 MR. TRUBATCH: Well, first of all, I don't -- I
22 came in late, I'm sorry. My plane was late coming in from
23 Chicago.

24 But I did not know what was being compared to
25 what. I heard the brief from 1980 was being compared to

1 something else. I don't know what that something else is.
2 But I will point out that anything that this office has
3 sent to the Commission, we have sent under limited
4 distribution, keep under wraps, and if that's out in the
5 public domain, I think that's an issue that also has to be
6 looked at, as to why our advice to you, which would form
7 the next round of briefs if this issue comes back to court,
8 is circulating freely.

9 COMMISSIONER BERNTHAL: Surely, you are not
10 terribly serious. This is the first time that we would
11 ever have attached such great significance to our counsel's
12 briefs being made public.

13 MR. TRUBATCH: No, no, it's not the brief. It's
14 not the brief, it's the --

15 COMMISSIONER BERNTHAL: Or rather, the advice to
16 the Commission, I should say. Not the brief, or course
17 not. The advice to the Commission.

18 This is not the first time this issue has arisen.

19 MR. TRUBATCH: But these memoranda were never
20 asked -- well, were asked for rather late, okay.

21 COMMISSIONER BERNTHAL: I understand. I'm simply
22 making the point --

23 MR. TRUBATCH: Okay.

24 COMMISSIONER BERNTHAL: -- that I think there is
25 not too big a point.

1 COMMISSIONER ROBERTS: (Inaudible)

2 CHAIRMAN PALLADINO: I don't wanted the
3 implication that we treat lightly the advice that we get
4 from our counsel, and we have actually taken steps to try
5 to determine to what extent and why some of this
6 information does get out.

7 COMMISSIONER BERNTHAL: That's quite correct. We
8 don't treat it lightly but unfortunately, some do.

9 MR. TRUBATCH: On the matter of substance, I don't
10 think that this office has been giving inconsistent advice.

11 CHAIRMAN PALLADINO: Well, I'm not sure that's
12 responsive to the question. Did you not hear what they
13 said before when they --

14 MR. TRUBATCH: I heard part of it. I came in
15 late.

16 CHAIRMAN PALLADINO: Do you want to pursue this
17 one?

18 COMMISSIONER ROBERTS: No.

19 COMMISSIONER ASSELSTINE: Maybe OGC can take a
20 look at the transcript --

21 CHAIRMAN PALLADINO: Yes.

22 COMMISSIONER ASSELSTINE: -- and give you further
23 response, Tom.

24 COMMISSIONER ROBERTS: I would appreciate it.

25 CHAIRMAN PALLADINO: Do you have any more

1 questions?

2 COMMISSIONER ROBERTS: No.

3 CHAIRMAN PALLADINO: Jim? Fred?

4 COMMISSIONER BERNTHAL: Well, I have one question
5 and I have to say, I appreciate the chance to sit down and
6 go through this subject because I think it's been one that
7 the Commission probably has not kept itself well enough
8 educated on.

9 That's partly, I think in part responsible for the
10 position we find ourselves in today, and whatever reason we
11 can find to learn more about this issue, which is not one
12 that is often front and center in our considerations, I
13 think, is valuable -- certainly to me and I think to all of
14 us.

15 I'm curious about one point, and this is probably
16 based more on a vague recollection or hearsay, and perhaps
17 you can confirm or deny this recollection.

18 Has the industry's position on this issue always
19 been consistent within itself? Rumor has it and, as I say,
20 this is a vague recollection, that in fact at one point the
21 industry was arguing rather differently. That in fact it
22 was satisfied to leave this issue largely within EPA's
23 purview and would just as soon not have seen the NRC so
24 actively involved in it.

25 Has there been a change in your position over the

1 last few years on that point?

2 MR. BOGGS: Let me answer that question. The
3 position that we have taken, we believe, is consistent.
4 And the question goes to what are the respective roles of
5 the two agencies.

6 In 1980, coming out of the NRC regulations, we
7 took the position that the Environmental Protection Agency
8 had to first promulgate its generally applicable
9 environmental standards before the Commission could issue
10 general requirements implementing those general applicable
11 standards.

12 The result is that we believe that the
13 Environmental Protection Agency has issued standards which
14 are not generally applicable environmental standards.

15 Our position is not inconsistent, it's just now,
16 those are not generally applicable environmental
17 standards. It doesn't affect the role of the two agencies.

18 COMMISSIONER BERNTHAL: So, I see. Your point is
19 that --

20 MR. BOGGS: The original issue was, who was to go
21 first.

22 COMMISSIONER BERNTHAL: And their having gone
23 first now, you find their action to be inconsistent with
24 what your interpretation of their legal mandate would be.

25 MR. BOGGS: That is correct. And what we say is,

1 is --

2 COMMISSIONER ROBERTS: Well, aren't you saying
3 that these so-called guidelines you view as regulations?

4 MR. BOGGS: They are --

5 COMMISSIONER ROBERTS: I don't mean to put words
6 in your mouth.

7 MR. BOGGS: Okay. No, we view these standards as
8 to violate the requirements of UMTRCA in two ways. First,
9 we believe clearly -- and I'll tell you precisely why we
10 believe it -- that EPA can have no jurisdiction within a
11 license site boundary. To allow the two agencies in there
12 will be chaos, and we think that the Congress clearly said,
13 "We adopt the '70 reorganization plan in that regard."

14 The second thing we say is that EPA has no
15 authority to issue management requirements. Now, anyone
16 that looks especially at the groundwater requirements that
17 have been adopted by EPA leaves the Commission -- those
18 standards leave the Commission as nothing more than a
19 regional administrator of the Environmental Protection
20 Agency.

21 Those standards tell this Commission practically
22 everything it must do on groundwater. Now, the legislative
23 history is absolutely clear, that it was the Congress'
24 intent in terms of regulation of mill tailings, that the
25 Commission be the lead agency.

1 Your general counsel said that in his brief to the
2 10th Circuit and the challenge to the NRC regulations. And
3 the way we come to this conclusion is very simple, and I
4 think this is the important issue that has to be faced on
5 the jurisdictional issues: From whence do you begin your
6 analysis?

7 And it is very clear that the purpose of the
8 Commission is to uphold the intent of Congress. How does
9 one determine the intent of Congress?

10 It is very clear that The Mill Tailings Act amends
11 the Atomic Energy Act. It uses its definition of EPA's
12 authority precisely the same terminology as recognized by
13 EPA's general counsel, that is used in the 1970
14 reorganization plan, which is EPA's only Atomic Energy Act
15 authority.

16 By the use of that same terminology the
17 presumption is that Congress intended the same thing, the
18 same limits on EPA's authority unless clear and convincing
19 evidence to the contrary is shown.

20 And as the 10th Circuit opinion on this says, at
21 best the legislative history is unclear. We think that
22 statement in the 10th Circuit opinion is absolutely wrong
23 for at each stage legislative determination -- whether it's
24 the House Interior bill which clearly says EPA has outside
25 the boundaries jurisdiction.

1 And when you go to the Commerce Committee bill, it
2 is equally clear. The Commerce Committee report quotes
3 from a letter from Mr. Costle to the Committee and that
4 letter says, "EPA retains its jurisdiction under the Atomic
5 Energy Act in both Title I and Title II."

6 And then the committee report goes on to say,
7 "This is a satisfactory solution to this very difficult
8 problem."

9 And when one goes to the Senate, it is very clear
10 in the markup of this bill that everyone understood that
11 EPA's authority was to be outside the boundaries of the
12 site, and there were no management requirements.

13 There is a statement in the record by Senator
14 Randolph, a statement that is added to the record. It was
15 not made on the floor of the Senate when the Mill Tailings
16 bill went through, it was added to it, that is confusing at
17 best. It never addresses the issue of inside versus
18 outside the boundary.

19 But it does say very clearly that EPA is to have
20 no management authority. And other than that, it suggests
21 some authority in the Commission -- rather in the EPA, to
22 do certain management functions. As a matter of fact, if
23 you left the -- or if you read the Randolph statement
24 alone, you would assume that EPA had the lead
25 responsibility, which conflicts with everything else in the

1 legislative history.

2 COMMISSIONER BERNTHAL: Well, all other things
3 aside, though, isn't it a fact, though, the point you are
4 arguing is the point that you just lost in court.

5 MR. BOGGS: Let me explain to you. Yes, the 10th
6 Circuit ruled against us on that issue. We believe that it
7 was wrongly. We intend to seek obvious redress of that.

8 But the point is that that decision is certainly
9 not binding on the Commission, it was not a party. And the
10 Commission has every right to determine its jurisdiction
11 under the Mill Tailings Act and to make an independent
12 analysis.

13 And if other people want to seek review of that
14 decision, they can. Let me just --

15 COMMISSIONER ASSELSTINE: In other words, we
16 should take a position and take sued since you guys have
17 now lost in the 10th Circuit.

18 CHAIRMAN PALLADINO: I think --

19 COMMISSIONER ASSELSTINE: Larry, I appreciate the
20 arguments you have made, and you have laid out your case.
21 But the fact is, you had the opportunity to lay out that
22 case and you did lay out that case for the 10th Circuit.
23 The 10th Circuit is hardly a bastion of judicial liberalism
24 and--

25 COMMISSIONER ROBERTS: That's the second time I

1 heard that phrase --

2 (Laughter)

3 COMMISSIONER BERNTHAL: Au contraire.

4 COMMISSIONER ASSELSTINE: The fact is, you had
5 your opportunity, you made your case, and you lost. Maybe
6 you'll win on reversal, maybe you'll get en banc review;
7 maybe you get a cert from the Supreme Court.

8 But at least for right now it seems to me we have
9 a statute that says we are supposed to conform, and in fact
10 we were supposed to conform long, long ago. You yourselves
11 in the hearings that are now on-going have raised as one of
12 the arguments against what the Commission staff has
13 proposed to do the fact that we haven't conformed with the
14 EPA standard.

15 It seems to me we are faced with a decision by the
16 10th Circuit. We are faced with a statutory deadline that
17 is long overdue to promulgate these regulations. If in
18 fact you win at some point down the road, then maybe we
19 would have to reconsider. But --

20 MR. THOMPSON: May I just make one point, though,
21 and I think it is germane to this jurisdictional issue.

22 As we have said, we don't think the system makes
23 any sense if you don't have a boundary line division of
24 jurisdiction, it generates into chaos. The mere fact that
25 the words aren't in the statute probably doesn't limit NRC

1 to inside the boundary, if you want to look at it that way.

2 But I do think that even the EPA acknowledges that
3 NRC is to have the authority to make the management and
4 control, technology, compliance decisions. And that fact
5 has really not been disputed by EPA or ruled adversely on
6 by the 10th Circuit.

7 And I think that's going to be a very, very
8 important issue for the Commission when it considers in
9 this ANPR and subsequent rulemaking the groundwater
10 regulations because EPA in developing its RCRA groundwater
11 standards is both the standard setter, that is, the agency
12 that determines the limits on what kinds of substances can
13 go out; and also the implementer, the person that
14 determines the methods of compliance and the way you go
15 about monitoring and so forth.

16 Therefore, those RCRA standards logically and by
17 definition include a great number of management
18 requirements. And I think it's incumbent on the Commission
19 -- because I think that's the biggest problem that the mill
20 tailings industry is going to face -- to look very
21 carefully at its jurisdiction with respect to management
22 criteria and control of those decisions because --

23 COMMISSIONER ASSELSTINE: I don't disagree with
24 that point. But it does seem to me just the safety valves
25 that we have there is the opportunity for case-by-case

1 review and the opportunity to make case-by-case judgments
2 on what should and should not apply.

3 I recognize that we may have a little different
4 view with EPA on that subject, but I think at least so far
5 the Commission has been pretty clear that in our view we
6 have that case-by-case decision making authority, and I
7 think that's our safety valve.

8 MR. THOMPSON: Well, I think you are going to
9 promote some litigation on that one for sure.

10 COMMISSIONER ASSELSTINE: That may be, but I'd
11 rather promote litigation on that issue than trying to take
12 a position opposite to the 10th Circuit decision.

13 MR. THOMPSON: Well, what I'm suggesting to you,
14 though, is that with respect to your groundwater
15 regulations, looking at EPA's road incorporation of its
16 SWETA criteria, the Commission should exercise judgment
17 about which of those criteria really are appropriate
18 management criteria for mill tailings because the idea, as
19 I understand it, was that the groundwater regulations, the
20 SWETA regulations were supposed to deal -- be consistent
21 with the kind of protection afforded by EPA's SWETA
22 regulations.

23 Now, if the hazards are not as severe as those
24 posed by chemical wastes, then perhaps the management and
25 control requirements need not be as restrictive. And it

1 seems to me it's going to be very important for the
2 Commission to look at that aspect and at least assert its
3 jurisdiction on that aspect of the jurisdictional question.

4 MR. MESERVE: Let me make a comment, if I may. I
5 think that it is true and very important that the
6 Commission retain the authority, as it does in its amended
7 criteria, to deal with these situations on a case-by-case
8 basis.

9 I think the point that we have tried to make here
10 today, that as to this jurisdiction question as it's
11 reflected in the regulations, and as to the cost-benefit
12 balancing point, you are also required through UMTRCA to
13 assure that whatever regulations you promulgate are
14 consistent with the act.

15 And as to both this jurisdictional point and as
16 to, certainly, the cost-benefit point, we feel that the NRC
17 has not done that. In fact, this is one point which the
18 industry petitioners did win in the 10th Circuit, and
19 specifically that EPA under language which was exactly --
20 which was substantially similar to the language that is
21 directed at the NRC, is required to establish a balance
22 between costs and benefits, and you haven't done that in
23 regard to these criteria.

24 CHAIRMAN PALLADINO: Well, you have more?

25 COMMISSIONER ASSELSTINE: No.

1 COMMISSIONER BERNTHAL: EPA has not done that, you
2 mean?

3 MR. MESERVE: No, NRC has not done that.

4 COMMISSIONER BERNTHAL: NRC has not done that.

5 MR. MESERVE: We argued that the EPA had not, and
6 that is on the specific application to EPA standards, the
7 10th Circuit ruled against us.

8 MR. TRUBATCH: But, of course, the NRC wasn't a
9 party to that part of the decision either if it wasn't a
10 party to the first one. I believe that is --

11 MR. MESERVE: Well, I mean -- I guess the point
12 that we are trying to make, I mean, it's been argued here
13 that the jurisdictional point was decided by the 10th
14 Circuit which -- they disagree with that and we'll seek
15 further relief as to that point.

16 But it's also true that the cost-benefit point was
17 decided by the 10th Circuit, and it was decided adversely
18 to the position that the NRC took in 1980 as to what it
19 did.

20 CHAIRMAN PALLADINO: Okay. Let me see if
21 Commissioner Bernthal had --

22 COMMISSIONER BERNTHAL: Yes, I had one other. If
23 I can depart for just a moment here from the legal part of
24 this question. The Commission has discussed this lurking
25 issue in the past and I have a feeling will be discussing

1 it in the future, the question of site boundary and whether
2 that is not the practical consideration that we will have
3 to face at some point.

4 I've attempted to develop some thoughts on what
5 the definition of a site boundary should be. I'm not sure
6 there is any agreement yet within the Commission on that
7 issue.

8 But if that's the key practical issue or becomes
9 the key practical issue on a case-by-case basis, which is
10 where the Commission finds itself right now. And I gather
11 your principal complaint for reasons I'm not entirely clear
12 on yet is that we have not made a broad judgment. Rather,
13 we have chosen to go ahead on a case-by-case basis.

14 I don't necessarily see what's wrong with that in
15 principle as a practical matter, and leave aside the legal
16 arguments for the moment. As a practical matter, the
17 Commission, it seems to me, can proceed on a case-by-case
18 basis with some appropriate working definition of "site
19 boundary."

20 My question for you is, what's so bad about that?
21 What's the matter with that procedure?

22 MR. MESERVE: If the Commission were truly going
23 to proceed on a case-by-case basis, I would have no
24 disagreement with you that that would be a way that you
25 could proceed to promulgate -- to deal with this regulatory

1 problem.

2 The fact of the matter is that you do not intend
3 to proceed on a case-by-case basis.

4 CHAIRMAN PALLADINO: We do --

5 MR. MESERVE: You do not intend to proceed on a
6 case-by-case basis.

7 COMMISSIONER BERNTHAL: Why do you say that, Dick?

8 MR. MESERVE: You are proposing to promulgate some
9 detailed requirement. You are going to say that these are
10 the requirements, these are the yardstick by which we are
11 going to assess what an individual licensee intends to do.

12 These are the criteria against which we are going
13 to judge him. Now, we are going to allow you to depart
14 from them.

15 But the fact of the matter is, the standard
16 against which you are being judged is one that does not, in
17 our view, comply with UMTRCA. That's not case by case.
18 You set -- you are really setting a standard which is an
19 inappropriate standard and then saying, "Well, licensees
20 really don't have to comply with them if they can show
21 particular circumstances that it's justified to depart.

22 It's sort of -- basically it's sort of regulating
23 by exception. The starting point in any licensing
24 proceeding is going to be your criteria. It's not going to
25 be the particular situations of an individual site and one

1 is appropriate given the actual public health and safety
2 concerns that exist here.

3 CHAIRMAN PALLADINO: Do you have more?

4 COMMISSIONER BERNTHAL: No, I think --

5 CHAIRMAN PALLADINO: Yes, let me point out, we've
6 gone three quarters of an hour on just the first group, and
7 we haven't given Commissioner Zech the chance yet.

8 COMMISSIONER ZECH: Just a comment. We are
9 talking about a lot of legal and jurisdictional matters.
10 It seems to me it's important that we focus on our NRC
11 responsibilities for public health and safety. That's what
12 we are really responsible for.

13 And it seems to me that when we consider those
14 responsibilities it's also important for us to focus on
15 what are the NRC responsibilities as given to us by
16 Congress, by the various acts and statutes, and to make
17 sure that we are carrying out and not relinquishing our own
18 responsibilities for public health and safety.

19 To me, that's what I have tried to focus on in
20 this whole matter, and I think it is important that
21 although there are difficulties in defining boundaries and
22 on-site and off-site, I think it is important that we at
23 NRC work with EPA to try to work out understanding so that
24 we can exercise our own individual and joint
25 responsibilities.

1 But it is important to me to recognize and to keep
2 in mind as far as NRC is concerned that we have very
3 important and direct responsibilities for public health and
4 safety at these sites. My emphasis will be to focus on
5 that as we go forward with any discussions in this matter
6 to make sure that we are carrying out our responsibilities
7 for public health and safety because that's our primary
8 responsibility.

9 CHAIRMAN PALLADINO: Okay, anything more?

10 COMMISSIONER ZECH: No.

11 CHAIRMAN PALLADINO: Well, thank you very much,
12 gentlemen and lady.

13 MR. THOMPSON: Thank you.

14 CHAIRMAN PALLADINO: We will ask now for the
15 representatives of the Environmental Defense Fund and
16 Environmental Policy Institute to join us, Yuhnke and
17 Berrick.

18 MR. YUHNKE: Mr. Chairman, my name is Bob Yuhnke.
19 I am an attorney with the Environmental Defense Fund, and I
20 am here today representing not only the Environmental
21 Defense Fund but at the Commission's request the
22 environmental community has selected one spokes person
23 today, and I am also representing the Sierra Club, the
24 Environmental Policy Institute, and the Southwest Research
25 and Information Center.

1 We have two points that we want to focus the
2 Commission's attention on this morning. One is what we
3 feel the very serious need to proceed with the task the
4 Congress Assigned the Commission of protecting the
5 environment from uranium mill tailings.

6 This statute was put on the books in 1978 and to
7 this day this program is not being implemented. It's not
8 just a legal issue of deadlines. What we are talking about
9 is a serious environmental problem that is rapidly growing
10 in the West to the point where we think there is going to
11 be a major environmental crisis.

12 What we are seeing in the West at these uranium
13 tailing sites is contamination at virtually every site for
14 which data are available. The contaminants are leaking
15 from the ponds and they are extending out and reaching
16 groundwater.

17 In some cases, we have good data. In some cases
18 we have seen contaminant levels that are 15 times above the
19 EPA drinking water standards in the groundwater.

20 In some cases the contaminant plume, for example,
21 at one of the facilities in New Mexico, has now extended
22 some 2,900 feet from the tailings facility.

23 COMMISSIONER BERNTHAL: You are talking about
24 radon?

25 MR. YUHNKE: No, we are talking about, at this

1 point, groundwater contamination.

2 COMMISSIONER BERNTHAL: Groundwater plume, okay.

3 MR. YUHNKE: Groundwater plume, right.

4 There is 175 million tons of tailings in the West,
5 covering thousands of acres scattered across some 30
6 licensed facilities, 17 licensed by the states and 15
7 licensed by the Commission.

8 What we don't know is how serious the problem is
9 at a number of other sites where groundwater contamination
10 is not being adequately monitored.

11 In the State of New Mexico where we have the sites
12 with the worst conditions to date, the state has literally
13 been hog-tied by the industry. The state has not been able
14 to proceed with implementation of the EPA standards.

15 The industry has made legal arguments opposing
16 every effort of the state to initiate some implementation
17 of that, and their arguments have turned largely on the
18 point that this Commission has not yet implemented
19 standards to carry out the EPA general standards for
20 groundwater protection.

21 The same thing has now happened with the
22 Commission's efforts. The Denver District Office, the
23 Uranium Recovery Office, has done a good job. We are very
24 pleased with the efforts of your staff. In that office,
25 they have issued license amendments which would require

1 your licensees to begin the monitoring process, to start
2 implementing the EPA standards by at least identifying how
3 serious the contamination is.

4 And even with that initial level, threshold level,
5 of implementation, the industry has filed appeals opposing,
6 in every case, the license amendments on the grounds that
7 this Commission has not yet adopted regulations.

8 This program is in chaos. The industry has taken
9 every opportunity that the law provides it to interpose
10 delay and to oppose any effort to find out how serious this
11 groundwater contamination problem really is. And there are
12 many sites out there for which we do not have adequate
13 data.

14 The program has got to be moved off the dime. And
15 that is the most important message we want to bring to you
16 today.

17 Up until last week, there was the uncertainty
18 about what the law required. EPA had set out some general
19 standards and the industry thought that the EPA was
20 tromping on your turf.

21 Our plea to you is to, please, let's put aside
22 these turf battles. Let's have the Federal government
23 start functioning in a cooperative way. And now, that the
24 court has spoken, move ahead and start implementing this
25 program.

1 The court has clearly given this Commission the
2 green light. The court's decision is the law until it's
3 overturned, and it's likely to be the only court to look at
4 those regulations. There is not going to be a conflict in
5 the circuits and the Supreme Court is not likely to reverse
6 that opinion.

7 The legislative history is ambiguous, just as the
8 court said it was. We argued one position. We felt that
9 EPA did not have authority to do cost-benefit analysis.
10 The industry argued for an altogether different cost-
11 benefit analysis than EPA did. The court said the agency
12 had to consider costs and benefits, and what EPA did was
13 considered by the court to be adequate.

14 When it comes down to the question of your
15 conforming regulations which are really, at the moment, the
16 next step in this process, the next step towards moving the
17 implementation ball along, I think it's important to keep
18 in mind that what Congress contemplated in this process was
19 conforming your 1980 regulations to the EPA standards.

20 Now, Congress had the opportunity in 1982 to say,
21 let's grab the NRC standards and tell the Commission to
22 start over when EPA has finished its job, and Congress
23 didn't do that.

24 What they did was to suspend your regulations for
25 six months and during that period to direct the Commission

1 to identify those portions of your 1980 regulations that
2 were inconsistent with the EPA program.

3 By statute, your 1980 regulations came back into
4 effect. They are now law. Now, they don't happen to be
5 enough to carry out this groundwater program. And until
6 you break this logjam that industry is taking advantage of
7 in New Mexico and with your own licensing proceedings, by
8 finishing the rulemaking process we are going to continue
9 to see delay, and we are going to continue to see this
10 problem grow.

11 Now, I want to remind the Commission that one of
12 the things that got EPA in the most hot water in 1981 and
13 '82 was failing to carry out the groundwater protection
14 requirements, the Super Fund. And I would suggest to you
15 that what we have brewing here is the same kind of a
16 potential scandal.

17 We strongly urge you to please move the ball.

18 COMMISSIONER BERNTHAL: I think that's a gross
19 overstatement, and I want to get on the record as saying
20 that there is nothing remotely resembling the Super Fund
21 issue here. This has been a legitimate and much too on-
22 going -- I will grant you -- dispute over agency
23 jurisdiction. There has been a lot of indecision and
24 perhaps too much slowness attached to that.

25 But it does involve congressional directive that

1 has been ambiguous at best. I don't think the parallel is
2 justified.

3 CHAIRMAN PALLADINO: Let me ask you, are you going
4 to share time with Mr. Berrick?

5 MR. YUHNKE: Well, Mr. Berrick is here to help, I
6 think, respond to questions.

7 The other point that I wanted to focus on today is
8 the need for the NRC to proceed with the rulemaking
9 process, to fill in the gaps -- the gaps left by the EPA
10 program.

11 CHAIRMAN PALLADINO: By the which?

12 MR. YUHNKE: By the EPA standards. The EPA
13 standards are generic in that they apply across the board
14 to all sites. But they don't answer some of the most
15 significant regulatory problems.

16 One of the most important of those is the decision
17 of when the radon control should be put into place. What
18 we now have in the industry are 16 sites that are
19 indefinitely, or have been indefinitely, shut down. Some
20 of these sites have been shut down since 1981, for as long
21 as four years.

22 Many of them appear unlikely to re-open. And what
23 we are facing as a result of this is a significant increase
24 in the risks to people living around the piles resulting
25 from radon.

1 Both the Commission in your 1980 rulemaking and
2 the EPA in its rulemaking indicated that the risks
3 increased by approximately a factor of two as these piles
4 dry out. As the water that is deposited with the tailings
5 into the ponds evaporates, more and more radon is released
6 to the atmosphere.

7 In addition, as the tailings dry, they become
8 subject to wind-blown dispersion which becomes also a
9 significant risk outside the area of the site boundary.

10 Now, with these piles, many of them actually
11 having reached the point of dryness on the surface, what we
12 are facing is a significant increase in the public health
13 risks associated with these piles.

14 But one of the points that EPA clearly decided not
15 to address, a point that EPA felt was clearly within the
16 Commission's jurisdiction and not within its own is this
17 question of when do you begin the installation of the radon
18 controls.

19 Now, given the fact that there are 16 piles out
20 there that are rapidly drying out, we think it is essential
21 that the Commission develop some policy, some guidance for
22 the field office to begin to take action to protect the
23 public from these risks.

24 The risks that we are talking about from a wet
25 pile are approximately one in a hundred, a risk of lung

1 cancer to nearby residents. These are people living in
2 homes outside the tailings piles.

3 The increased risk, after drying out, brings that
4 down to one in fifty. These are probably the highest risks
5 for individuals living near facilities of any facility that
6 the Commission now regulates.

7 Your standards for nuclear power plants and other
8 facilities do not allow anywhere near these kinds of risks,
9 and we think that it is incumbent upon the Commission if
10 you intend to carry out your responsibilities to protect
11 public health, to address this as one of the most serious
12 problems facing you.

13 In addition --

14 CHAIRMAN PALLADINO: Do you have any other points
15 you want to make quickly?

16 MR. YUHNKE: The one other point --

17 CHAIRMAN PALLADINO: You are over time.

18 MR. YUHNKE: Just quickly, I will summarize it --

19 CHAIRMAN PALLADINO: In one minute.

20 MR. YUHNKE: -- is that the EPA details
21 requirements for carrying out a groundwater monitoring and
22 clean-up program have not been incorporated into the EPA
23 standards here. So, there are details of the process that
24 need to be filled in by the Commission, and that is
25 something that you will have to do if you are going to move

1 forward with the groundwater protection program.

2 CHAIRMAN PALLADINO: Okay, thank you.

3 Something you said reminded me that I was told
4 just before I came in that the Denver Office is listening
5 in by telephone, and so is Region IV. Is that correct?

6 MR. CHILK: It is, sir.

7 CHAIRMAN PALLADINO: They can listen, but they
8 can't speak.

9 COMMISSIONER ASSELSTINE: Good.

10 MR. YUHNKE: I hope that's not always the case.

11 CHAIRMAN PALLADINO: Not always the case.

12 COMMISSIONER BERNTHAL: It sounds like it's been
13 arranged.

14 MR. YUHNKE: Well, we would like them to know that
15 we are pleased with their efforts.

16 CHAIRMAN PALLADINO: Well, thank you.

17 I have no questions at the moment. Do you have
18 any questions, Tom? Jim?

19 COMMISSIONER ASSELSTINE: I don't, either. A very
20 good statement, though, I appreciate it.

21 MR. YUHNKE: Thank you.

22 COMMISSIONER BERNTHAL: One question. I'm curious
23 on getting -- I'd like to get some kind of benchmark as to
24 the extent of the risk as you see it here.

25 Have you any benchmarks that you can compare the

1 nature of the risk in the vicinity of these tailing sites
2 with other risky sites in the U.S. including, for example,
3 I'm thinking of the recent discovery in the East here, in
4 Eastern Pennsylvania, running on up into New Jersey of
5 really surprisingly high radon risks from natural sources
6 of radon emission in houses that have been tightened and
7 all conservation measures have been taken.

8 What are we talking about here? Is there a
9 comparative -- qualitative comparison that can be made?

10 MR. YUHNKE: Yes, I think there are some very
11 important comparisons. Included in the written statement
12 that we have submitted to you here today, and also in our
13 earlier comments on this rulemaking, we have included an
14 assessment prepared by a researcher at the School of Public
15 Health at Harvard, Dr. Julie Overbaugh, who prepared an
16 assessment of the risk literature for radon as part -- for
17 your consideration in this rulemaking.

18 One of the things that Dr. Overbaugh points out is
19 that these risks have been identified by, or have been
20 confirmed recently, by new research that was done among
21 iron miners in Sweden where the levels of radon exposure
22 were very near the ambient levels that we are seeing
23 measured around tailings piles.

24 So that while before 1984 when this latest piece
25 of research was published, most of the risk estimates were

1 based upon extrapolations from much higher exposures among
2 uranium miners. We are now seeing similar risks among
3 persons who are exposed to much lower levels of radon.

4 Now, for purposes of comparison, when we talk
5 about a one-in-fifty risk of someone living near a tailings
6 pile, that compares with a one-in-twenty-five risk for a
7 heavy smoker.

8 COMMISSIONER BERNTHAL: That was the next question
9 I had.

10 MR. YUHNKE: All right. And approximately a one-
11 in-2,000 risk of lung cancer for someone who does not smoke
12 and does not live near a tailings pile.

13 COMMISSIONER BERNTHAL: So the risk for those
14 living near the mill tailings sites is roughly comparable
15 to that for someone who is a smoker. That's roughly --

16 MR. YUHNKE: A heavy smoker.

17 COMMISSIONER BERNTHAL: Yes, okay.

18 MR. YUHNKE: That's right.

19 MR. BERRICK: Given this period that we are
20 talking about, this interim period.

21 MR. YUHNKE: Right. And it's a function, then, of
22 how many years the exposure continues.

23 COMMISSIONER BERNTHAL: Sure.

24 MR. YUHNKE: That's one of the things that we are
25 concerned about is making sure that the exposure does not

1 continue for an extended period.

2 But in some of these cases, for example the Uravan
3 facility of UMETCO, the mill has been in operation for 35
4 years and portions of the pile have been in a drying state
5 for many years.

6 CHAIRMAN PALLADINO: They are not covered?

7 MR. YUHNKE: Without cover, right. And they
8 propose to continue to allow it to dry for another few
9 years before any covering activity is commenced.

10 I am very familiar with that one because we have
11 been involved in the licensing proceeding with the state.

12 COMMISSIONER BERNTHAL: When you say "ambient
13 levels," are you talking about levels measured primarily in
14 dwellings, or what does that mean?

15 MR. YUHNKE: Well, the risk that EPA calculates,
16 it counts for the fact that someone lives in a dwelling and
17 that there is infiltration of the radon from the outdoor
18 air into the dwelling.

19 COMMISSIONER BERNTHAL: But I'm asking about
20 actual measurements in these areas.

21 MR. YUHNKE: The measurements, as far as I know,
22 that have been taken have been taken in the ambient air,
23 not in dwellings.

24 COMMISSIONER BERNTHAL: And how do those compare,
25 for example, with the measurements in dwellings that were

1 taken in Eastern Pennsylvania and New Jersey; do you have
2 any idea?

3 MR. YUHNKE: Yes, I have taken a look at the
4 Pennsylvania data, and there are cases in Pennsylvania
5 where the exposures are one-hundred times higher than in
6 some of the instances around the piles.

7 COMMISSIONER BERNTHAL: Yes, that's what I
8 thought.

9 CHAIRMAN PALLADINO: Okay.

10 COMMISSIONER BERNTHAL: Thank you.

11 CHAIRMAN PALLADINO: Commissioner Zech?

12 COMMISSIONER ZECH: No, no questions. Thank you.

13 CHAIRMAN PALLADINO: Okay. Well, thank you,
14 gentlemen.

15 I wonder if we now might have Denise Fort, the
16 State of New Mexico, join us at the table.

17 MS. FORT: Good morning, in my "hog-tied" position
18 here. I don't care to have the state described in that
19 fashion, but I'll comment on how I see us --

20 (Laughter)

21 MS. FORT: I guess there is some -- we are
22 certainly having difficulties carrying out our regulatory
23 program at this time. I concur to that degree.

24 I'm the director of the state's Environmental
25 Improvement Division and very much appreciate our

1 opportunity to appear before the Commission.

2 The decision you reach on this matter is probably
3 of more importance to New Mexico than any other state
4 because we have about 45 percent of all mill tailings
5 within our state. We are an agreement state.

6 We discussed this subject at the request of the
7 agreement state staff with the three other agreement
8 states, and all support quick action by the NRC to
9 promulgate final regulations for tailings disposal.

10 I'm going to just make reference to my written
11 testimony and not refer to all of it.

12 The existing and past problems that we are
13 experiencing at our tailings sites demonstrate the need for
14 isolation and stabilization of mill tailings materials.
15 All five of our active tailings sites have groundwater
16 contamination problems that have necessitated remedial or
17 preventive measures. And as you know, "active" is kind of
18 a misnomer here. In fact, none of the mill sites are in
19 current operation with the exception of the small amount of
20 activity at the Homestake site.

21 Two of the sites have been placed on the national
22 priorities list under the Super Fund program because of
23 groundwater contamination problems. And, in fact, EPA is
24 now under the Super Fund program looking at radon
25 contamination in homes adjoining one of the sites at the

1 Homestake tailings pile.

2 Major dam failures have occurred at these same two
3 facilities, and in one case caused contamination of more
4 than 70 miles of river, including areas in the adjacent
5 site of Arizona, and that was the Church Rock tailings
6 spill. Blowing tailings material has been observed at each
7 of the active sites in New Mexico.

8 We support the incorporation by NRC of EPA's
9 general environmental standards into your requirements for
10 uranium mill licensing. We have independently conducted
11 legal research into the question of whether the EPA
12 standards for active tailing sites are now legally in
13 effect and must be enforced against licensees of NRC in the
14 agreement states.

15 We concur with the conclusion reached by your NRC
16 counsel that under 42 USC, Section 20, 22(d), NRC and the
17 agreement states have both the power and the duty to
18 enforce EPA's active site standards, at least to the extent
19 thus far prescribed in NRC memoranda to the agreement
20 states.

21 However, the uranium industry is vigorously
22 resisting the implementation of the EPA standards in this
23 fashion, and we urge you to move forward as quickly as
24 possible to adopt the standards into NRC regulations.

25 The EPA general standards for uranium mill

1 tailings are necessary to protect human health and the
2 environment and generally adequate from the state's
3 perspective. We view them as a reasonable compromise
4 between the very lax requirements which were advocated by
5 the uranium industry and the even more restrictive
6 requirements originally promulgated by the NRC in 1980.

7 Whether we agree with the EPA standards or not,
8 however, New Mexico believes that Congress has clearly
9 expressed its intention that, with certain limited
10 exceptions, the generally applicable EPA standards should
11 be adopted in force by NRC in the agreement states.

12 We do not believe the Commission is at liberty to
13 substitute its own judgment for that of EPA insofar as the
14 substance of the standards is concerned. Under the
15 statutory framework established by Congress at 42 USC,
16 Sections 20, 22(b) and (d), EPA has been given the primary
17 standard-setting role, while the task of NRC and that of
18 the agreement states is to implement and enforce EPA's
19 standards with due regard to special considerations that
20 may be appropriate for special sites and licensees.

21 Consequently, we see that the NRC and the
22 agreement states are basically in the position of adopting
23 and enforcing EPA's standards. We do not agree that there
24 are serious unresolved disputes as to the appropriate
25 jurisdictional boundaries between the NRC and EPA.

1 We think that Congress has taken considerable care
2 to specify the respective roles that each had played, not
3 only in the original 1980 UMTRCA legislation but also in
4 subsequent amendments to that legislation.

5 We do in those very few areas of dispute agree
6 with NRC staff's position that NRC does have some
7 jurisdictions, as in the review of individual licenses and
8 disagree with EPA on that.

9 Turning to why we are here today and why all this
10 makes a difference. We agree with the American Mining
11 Congress that the regulations are of critical importance at
12 this time because most of the domestic uranium industry is
13 shut down.

14 We have companies which are now requesting final
15 approval of their reclamation plans, and we need definitive
16 Federal requirements for review and approval of such
17 plants.

18 We also need promulgation of these final
19 requirements because we are looking at the potential
20 abandonment of tailings sites by licensees. The 1978
21 legislation placed responsibility for the tailings
22 reclamation control at the active site on the licensee.
23 The intended mechanism to ensure proper disposal and
24 reclamation was:

- 25 1. The adoption by the EPA and NRC agreement

1 states of appropriate standards and regulations for
2 disposal and,

3 2. The requirement by NRC or the agreement state
4 of adequate financial sureties.

5 We are afraid that the intended mechanism may fail
6 due to the delays in promulgation of final definitive
7 Federal requirements and the current state of the industry.

8 Let me ask you to refer to the last table that we
9 have presented. What we have done there is, done a
10 comparison of the financial sureties versus the estimated
11 costs. And then, in the second column, what we have used
12 for estimated costs are the fairly moderate \$3.75 per ton
13 of tailings that DOE has used in the past.

14 Now, when DOE appeared before Congress and its
15 recent testimony on the proposed Federal legislation in
16 this area, they have used a \$4 billion figure if one
17 assumes that about half the tailings are in New Mexico and
18 the \$2 billion would be an appropriate number, then our
19 sureties that we are using of \$35 million can't even be
20 called a drop in the bucket. They are not even significant
21 in any amount.

22 This Commission provided information to the
23 General Accounting Office with information about the sort
24 of sureties which you have required from your licensees,
25 and I would say that those numbers also appear, the amount

1 which you have under surety also appears very low and may
2 amount to half or less of the projected clean-up costs.

3 From a state perspective financials, you may be
4 asking why as a state regulator I am sitting here and
5 showing you that our sureties are so much less than what
6 any reasonable estimate would indicate they ought to be.

7 The state is in a difficult position in the
8 absence of some sort of definitive Federal regulations to
9 refer to. We don't feel because our state regulations are
10 a great deal less stringent than the proposed EPA/NRC
11 standards, we don't feel that we can proceed to rulemaking
12 until we know to what we ought to conform as an agreement
13 state.

14 So, we are unable under the current state of our
15 law to require greater sureties. We will, as reference has
16 been made, we could attempt to say that the EPA standards
17 are now in effect, as we have been informed as agreement
18 states. But we are sure to face legal challenge by the
19 industry in doing so.

20 So we have basically felt that we should wait in
21 adopting conforming regulations until we know what NRC's
22 position is going to be and to what we ought to conform.

23 We believe that the issue of cost to the EPA
24 standards for tailings disposal should not be considered by
25 the Commission -- again because we think that you are bound

1 by congressional action in looking at the EPA standards.

2 The current state of the uranium market will no
3 doubt affect the ability of some licensees to pay the cost
4 of reclamation and clean-up. For that reason, and as we
5 look at the fact that these regulations are being
6 promulgated in some instances 20 to 30 years after the
7 uranium was actually milled, we are supporting legislation
8 before the United States Congress which would assist and,
9 we think, fairly apportion the cost of clean-up. But while
10 we are supporting that as vigorously as we can in another
11 form before the U.S. Congress, we don't think that ought to
12 enter into the consideration of the standards which are
13 adopted.

14 In conclusion, we believe that promulgation of
15 definitive Federal regulation governing reclamation is long
16 overdue. Recent closures of most of the uranium mills in
17 New Mexico and throughout the United States have made it
18 critical that both industry and responsible regulatory
19 agencies know where they stand with respect to reclamation
20 requirement.

21 Financial sureties are also inadequate and should
22 be revised soon after promulgation of the reclamation
23 requirements.

24 That concludes my statement. I would urge your
25 prompt adoption of the final rule to be promulgated as soon

1 as can be. Thank you.

2 CHAIRMAN PALLADINO: All right, thank you.

3 When Mr. Meserve -- no, I'm sorry. When Mr.
4 Yuhnke was speaking, he pointed out that a number of mill
5 tailings piles were drying out and some of the fine
6 particles were being blown off-site.

7 Is that a problem that you see in New Mexico at
8 the present time?

9 MS. FORT: Well, it certainly -- I would say from
10 the state's perspective, we are becoming increasingly
11 convinced that groundwater contamination is really a
12 greater issue. So, of course the same factor which is
13 desirable for preventing further groundwater contamination
14 is not desirable for some sort of rough stabilization.

15 There are not a lot of people who currently live
16 near tailings piles, though there are exceptions like the
17 Homestake pile where there is an area nearby.

18 But because the piles are not stabilized, all we
19 are doing by permitting them blowing around the countryside
20 and so on is making the eventual cost of stabilization
21 higher as the material has to be retrieved from wherever it
22 has blown to and put back on the pile.

23 CHAIRMAN PALLADINO: You have answered my second
24 question, which did you see as the bigger problem, the
25 groundwater or the particles blowing around.

1 Have you found significant contamination?

2 MS. FORT: As I had mentioned, two of the sites
3 are currently on EPA's Superfund list and EPA has felt, and
4 we felt -- we nominated them for inclusion and felt that
5 the problems there were significant enough to warrant
6 Superfund treatment.

7 If a public water supply becomes contaminated, the
8 cost of reclamation of that water supply are enormous. So
9 we think that is very significant.

10 I think some mention has been made of the term
11 "boundary," and how that might apply. We in our ground
12 water regulations basically measure contamination at the
13 boundary. By acquiring additional land, of course, the
14 company is able to say that the boundary spread further and
15 further, and in fact we were in a enforcement action with
16 the company which was essentially -- the company want and
17 just moved the boundary in essence by acquiring some
18 further land.

19 Again, it is so ironic that the very action that
20 one would want from the point of view of radon control,
21 which is acquiring as much land as possible and keeping the
22 site as isolated as possible when one comes to apply
23 groundwater regulations, really doesn't work very well
24 because you know that the contamination -- assuming the
25 modeling supports this -- one knows that the contamination

1 will eventually move offsite, but regulatory action under
2 our State regulations may be stayed until the contamination
3 has moved.

4 So I regard that kind of boundary as somewhat an
5 artificial device in our attempting to regulate for the
6 long haul.

7 CHAIRMAN PALLADINO: Okay. Thank you.

8 Commissioner Roberts?

9 (No response.)

10 CHAIRMAN PALLADINO: Jim?

11 COMMISSIONER ASSELSTINE: I don't have any
12 questions, Denise. Maybe just a comment. I think if
13 anything is clear about the Mill Tailings Act right from
14 the outset, and I will admit there are a lot of things
15 about it that aren't clear, the one thing I think that is
16 clear is the whole purpose of the Title II program was to
17 ensure that for the active sites, those that had current
18 licenses, that we wouldn't get into the kind of mess that
19 we had for the old abandoned sites, that is with companies
20 that had walked away with the tailings in an unstabilized
21 condition and not having anyone who was financially
22 responsible or be able to identify the money or someone who
23 had the liability and responsibility to clean up the
24 tailings piles and put them in a stabilized condition.

25 I think if anything is clear, it is that the Act

1 was directed to make sure that for the active sites that
2 never happened in the literature.

3 And I think your point on the comparison of your
4 ability to put aside funds and, indeed, our ability to
5 assure that the funds will be there to pay for the cleanup
6 and the present situation in the industry with many
7 financial entities saying we are basically through with
8 these operations and want to walk away from them now
9 presents a real danger.

10 To come back to the point that Commissioner Zech
11 raised earlier, this is a health and safety matter, and I
12 think if we had the situation in the next few years of
13 companies walking away from these sites and the money not
14 being there to pay to clean them up to an adequate level,
15 we are all going to have a lot of explaining to do.

16
17 MS. FORT: I appreciate that. I think the
18 comments to the General Accounting Office's report on this
19 subject, which was prepared with the NRC's information,
20 certainly indicates companies where you have already got
21 numbers in parens indicating there is already a loss
22 situation for the companies which are involved there. We
23 also have a number of licensees operating through
24 subsidiaries, which puts us at some risk in attempting to
25 enforce obligations against the parent corporation, and

1 there are too many instances like that where I think
2 questions will be asked in the future of whether or not the
3 regulatory agencies were awake in essence when they should
4 have been.

5 CHAIRMAN PALLADINO: Any more?

6 COMMISSIONER ASSELSTINE: No.

7 CHAIRMAN PALLADINO: Fred?

8 COMMISSIONER BERNTHAL: Well, I just want to
9 congratulate the State of New Mexico for their
10 Environmental Improvement Division. It seems to go one
11 step beyond what the Federal Government has attempted and
12 perhaps the shoe fits in this particular area.

13 Is there an Environmental Protection Division?

14 MS. FORT: No, there is not. We are improving the
15 environment, but I am not sure how our environment can be
16 improved in those lovely mountains, but that is what we are
17 about.

18 CHAIRMAN PALLADINO: Thank you very much.

19 Oh, Commissioner Zech, do you have any questions?

20 COMMISSIONER ZECH: No. Thank you very much.
21 Appreciate it.

22 CHAIRMAN PALLADINO: All right. I wonder if we
23 might have Mr. Sheldon Myers of EPA and colleagues.

24 MR. MEYERS: Mr. Chairman, members of the
25 Commission and Commission staff, my name is Sheldon Meyers

1 and I am the Acting Director of EPA's Office of Radiation
2 Programs.

3 With me today on my right is William Pederson, who
4 is a senior attorney in our Office of General Counsel, and
5 the gentleman handing out all the papers is Dr. Stanley
6 Lichtman, who had a major role in writing the mill tailings
7 regulations.

8 I would like to make a very short statement, and
9 it is as follows.

10 When the American Mining Congress first asked for
11 this hearing on jurisdictional issues related to EPA's
12 standards for licensed uranium mill tailing sites, those
13 very same issues had already been thoroughly aired before
14 the appropriate authority for deciding them, and that was
15 the U.S. Court of Appeals for the 10th Circuit.

16 We now know that the 10th Circuit Court last week
17 unanimously, and I repeat, unanimously decided to uphold
18 EPA's position on every contested issue concerning licensed
19 mills.

20 This Appeals Court ruling covers more than
21 jurisdictional issues. The Court also upheld EPA's
22 position against industry claims that the standards are
23 unjustifiably stringent and against arguments by States and
24 environmental groups that they were not stringent enough.

25 The Court has remanded to EPA for reconsideration

1 only a single issue which involves groundwater protection
2 requirements for inactive sites.

3 The jurisdictional issues that prompted this
4 hearing have been resolved by the 10th Circuit. We believe
5 it appropriate now that the Commission proceed with the
6 rulemaking necessary to implement and enforce the EPA
7 standards.

8 I want to note with a good deal of satisfaction
9 that our respective staffs have worked well together on
10 this subject for many years. We stand ready to continue
11 cooperating towards achieving the effective oversight of
12 uranium mill tailings that Congress intended the Act to
13 provide.

14 Mr. Chairman, for your information and convenience
15 we have distributed various documents to you. One was the
16 recent rulemaking notice concerning implementation of our
17 standards, the government briefs in the 10th Circuit case
18 and the Court's decision.

19 Thank you.

20 CHAIRMAN PALLADINO: Thank you.

21 Let me ask you, did you have any specific comments
22 on the proposed action that the Commission would be taking
23 if it approved the staff's approach?

24 MR. MEYERS: We did submit comments in writing to
25 you.

1 CHAIRMAN PALLADINO: And what is your general
2 reaction to what is being proposed by the staff?

3 MR. MEYERS: Well, we had some concerns which are
4 outlined in the statement that was made in writing, and
5 thus far, as far as I know, we have not had a response from
6 the Commission staff on our comments.

7 CHAIRMAN PALLADINO: Would it be difficult to just
8 refresh my memory a little bit on some of the major points
9 at issue? I mean the points at issue.

10 COMMISSIONER ASSELSTINE: I take it these are the
11 points that are made in the January 14th and March 8th
12 letter that you just handed out?

13 MR. MEYERS: That we just handed out, yes.

14 CHAIRMAN PALLADINO: Which is it?

15 MR. MEYERS: This is the January 14th, 1985
16 letter.

17 CHAIRMAN PALLADINO: And March 8th. Okay.

18 MR. MEYERS: It is not a long letter. It is a
19 little over three pages.

20 CHAIRMAN PALLADINO: Are you suggesting I read
21 this? I was just trying to fix in my mind the key elements
22 over which there is still controversy.

23 MR. MEYERS: Well, one of the key elements that
24 comes to my mind is your interpretation of Section 84(c) of
25 the Atomic Energy Act and our interpretation. We have

1 differed on that for a while.

2 COMMISSIONER ASSELSTINE: That issue being that we
3 have said we think we have case-by-case authority to make
4 these decisions on deviations and I think EPA is saying
5 well, there ought to at least be some coordination on on
6 those aspects.

7 MR. TRUBATCH: If I could sharpen that just a bit.

8 (Laughter.)

9 The issue is whether the Commission has authority
10 to grant case-by-case exemptions from EPA's standards or
11 whether the Commission is limited to case-by-case
12 exemptions only from its own regulations.

13 MR. MEYERS: That is one way of putting it, yes.

14 CHAIRMAN PALLADINO: Any other points that come
15 strongly to mind? I will read it again. I thought maybe
16 you had them so fixed in your mind that you could just
17 identify them.

18 MR. MEYERS: Just that one.

19 COMMISSIONER ASSELSTINE: I suspect that is
20 probably the most significant one.

21 CHAIRMAN PALLADINO: Commissioner Roberts?

22 (No response.)

23 CHAIRMAN PALLADINO: Commissioner Asselstine?

24 COMMISSIONER ASSELSTINE: No.

25 CHAIRMAN PALLADINO: Commissioner Bernthal?

1 COMMISSIONER BERNTHAL: No.

2 CHAIRMAN PALLADINO: Commissioner Zech?

3 COMMISSIONER ZECH: No. Thank you very much.

4 CHAIRMAN PALLADINO: All right. Well, we
5 appreciate your appearing here and we appreciate the
6 submittal of these documents.

7 I guess the next thing before us then is to reach
8 our respective decisions. I know that some of us had made
9 preliminary decisions, but I think the information that we
10 got today may be reason to look at them again.

11 COMMISSIONER ASSELSTINE: Joe, I note the NRC
12 staff is here. I would be interested in giving them an
13 opportunity to see if there is anything that they have
14 heard today that would have them differ their
15 recommendation or change their recommendation that the
16 Commission ought to move ahead with the rulemaking package.

17 CHAIRMAN PALLADINO: I would, too.

18 COMMISSIONER ASSELSTINE: If they have any
19 comments.

20 MR. FONNER: (Nodding negatively.)

21 COMMISSIONER ASSELSTINE: I take it from shaking
22 your heads you mean no, you didn't hear anything different
23 that would change your view that the Commission should move
24 ahead expeditiously?

25 MR. FONNER: Right.

1 COMMISSIONER ASSELSTINE: All right. Anything
2 else you want to make comments on?

3 MR. FONNER: No.

4 (Laughter.)

5 CHAIRMAN PALLADINO: Let's see, who is here from
6 the staff? I can't see them.

7 MR. FONNER: Robert Fonner from OELD and Kitty
8 Dragonette from ONMSS, and we are the contact persons on
9 the rule.

10 COMMISSIONER ASSELSTINE: I don't know if OGC has
11 any other comments they want to add. I know they made some
12 comments earlier.

13 MR. TRUBATCH: Since this is my last Commission
14 meeting from this end of the table.

15 (Laughter.)

16 COMMISSIONER BERNTHAL: You are sure?

17 MR. TRUBATCH: I am sure. We have been involved
18 in this now since before 1978, and of course there was a
19 long lead-up to the actual enactment of the legislation,
20 there has been a lot of tangling over legal issues,
21 especially the jurisdictional issue. There is a lot of
22 concern that there might be inconsistencies if both EPA and
23 the NRC were to simultaneously have authority.

24 But I think I have to agree with Commissioner Zech
25 that the focus has to be on public health and safety, and

1 in fact nothing has been done in the name of public health
2 and safety since the Congress was concerned about this
3 issue.

4 Now I think instead of these contentious and
5 confrontational postures, if everyone would make a stronger
6 resolve to cooperate, a lot of the problems of potential
7 inconsistencies would go away by just cooperating and not
8 letting them get in the way. And that is where I would
9 like to leave it hoping that there would be a new beginning
10 now with everyone just trying to get in there and clean up
11 what needs to be cleaned up.

12 CHAIRMAN PALLADINO: Well, thank you, Sheldon. I
13 think that was a very statesmanlike remark, and I do
14 appreciate also Commissioner Zech's point which you
15 emphasized, that we need to give attention to public health
16 and safety aspects of this question.

17 COMMISSIONER BERNTHAL: Let me just make a
18 comment.

19 CHAIRMAN PALLADINO: Just let me finish. I would
20 urge the Commissioners to submit their votes by notation or
21 affirm the previous vote. That can be done verbally.

22 COMMISSIONER ASSELSTINE: So you want us to, if we
23 still stick with the four of us that had voted for the rule
24 as of about the middle of July, to just reaffirm that that
25 is our position or if we have changed?

1 CHAIRMAN PALLADINO: Yes, just reaffirm it
2 verbally to SECY so we don't wait unnecessarily.

3 COMMISSIONER ASSELSTINE: Sure.

4 CHAIRMAN PALLADINO: Go ahead.

5 COMMISSIONER BERNTHAL: I just wanted to say that
6 I appreciate the opportunity to sit down and listen to
7 these groups. And I think Commissioner Roberts correctly
8 perceived the need for the Commission to continue to be
9 educated on this subject, and if we find the opportunity
10 every several months or few months to continue our
11 education, I would suggest that we should do that. This
12 has been useful for me and I hope for everyone else.

13 CHAIRMAN PALLADINO: Okay. Any other remarks?

14 (No response.)

15 Well, we thank all the participants in this
16 morning's meeting, and we will stand adjourned.

17 (Whereupon, at 11:32 a.m., the meeting adjourned.)

18 * * * * *

1 CERTIFICATE OF OFFICIAL REPORTER

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4
5 This is to certify that the attached proceedings
6 before the United States Nuclear Regulatory Commission in the
7 matter of: COMMISSION MEETING

8
9 Name of Proceeding: Discussion and Oral Presentations on
10 Uranium Mill Tailings Regulations
(Public Meeting)

11 Docket No.:

12 Place: Washington, D. C.

13 Date: Tuesday, September 10, 1985

14
15 were held as herein appears and that this is the original
16 transcript thereof for the file of the United States Nuclear
17 Regulatory Commission.

18
19 (Signature)

(Typed Name of Reporter) Mary C. Simons
20 Mary C. Simons

21
22
23 Ann Riley & Associates, Ltd.
24
25

9/10/85

SCHEDULING NOTES

TITLE: DISCUSSION AND ORAL PRESENTATIONS ON URANIUM MILL
TAILINGS REGULATIONS

SCHEDULED: 10:00 A.M., TUESDAY, SEPTEMBER 10, 1985 (OPEN)

DURATION: APPROX 1-1/2 HRS

PARTICIPANTS: ° LARRY BOGGS (10 MINUTES)
ANTHONY J. THOMPSON
AMERICAN MINING CONGRESS
AND
RICHARD MESERVE
KERR-MCGEE

° ROBERT YUHNKE (10 MINUTES)
ENVIRONMENTAL DEFENSE FUND
AND
DAVID BERRICK
ENVIRONMENTAL POLICY INSTITUTE

° DENISE FORT (10 MINUTES)
STATE OF NEW MEXICO

° SHELDON MEYERS, ACTING DIRECTOR (10 MINUTES)
OFFICE OF RADIATION PROGRAMS
EPA
AND
WILLIAM PEDERSEN
OFFICE OF THE GENERAL COUNSEL
EPA