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MEMORANDUM FOR: K. Dragonette, NMSS
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P. Goldberg, OPE

FROM: S. L. Trubatch, OGC

SUBJECT: DRAFT FINAL RULE TO CONFORM THE NRC'S MILL TAILINGS REQUIREMENTS TO EPA'S ENVIRONMENTAL STANDARDS

I have the following personal comments on the subject proposed final rule. Aside from these few minor points, it is clear to me that whoever worked on this package did yeoman service to come up with such a cohesive result.

Attachment:
Comments on Proposed
Final Rule

Proposed Final Rule/MEMO1 (Trubatch)

MEMORANDUM TO: Files (Mill Tailings)

FROM: Sheldon L. Trubatch

SUBJECT: PROPOSED FINAL RULE

1. Page 7: Is NRC required to conform immediately to EPA's ground-water standards in 40 CFR 192?

I would restructure the response along the following lines:

Immediate conformance is not necessary because the NRC will apply appropriate aspects of Part 192 in individual licensing actions.

a. Section 275d. requires the NRC to implement and enforce the EPA standards during the conduct of NRC licensing activities.

b. Section 275f.(3) required the NRC to conform its tailings regulations to EPA's tailings standards by April 30, 1984.

c. The Commission's general obligations under Section 275d. may be implemented in whole or in part by the NRC's conformed regulations promulgated in accordance with section 275f.(3).

d. In the absence of revised regulations under Section 275f.(3), the Commission must apply EPA's standards on a case-by-case basis as determined to be appropriate in each licensing action.

e. The NRC's responsibility to implement EPA's standards in individual licensing actions, independent of whether the NRC's regulations are conformed to those standards, explains why Congress did not attach any consequences to any NRC failure to meet the deadline in section 275f.(3).

f. Therefore, until the NRC conforms its regulations, the public health, safety and the environment will be protected by the NRC's case-by-case application of EPA's standards. Such case-by-case analysis starts from 40 CFR 192 to determine which of the provisions in those rules are appropriate to a particular licensing action.

2. Page 8: Should NRC delay conforming its rule to EPA's standards until the judicial challenge to those standards has been resolved by the Tenth Circuit?

I would focus the response more clearly on the applicable rule of law: EPA's rules, where consistent with their jurisdiction, must be deemed valid unless and until modified by a Court.

EPA contends that its rules were issued in accordance with the statutory authority and requirements applicable to those rules. Therefore, EPA contends that its rules have the force of law. Because the Commission does not sit as a reviewing court, it must accept EPA's rules as lawful, unless they are based on an interpretation of statutory authority addressed to the Commission, e.g. section 84c. Thus, absent a judicial decision to the contrary, the Commission must exercise its statutory responsibilities by implementing EPA's standards which do not conflict with the Commission's interpretation of its own statutory authority.

3. Pages 8-9: Must the NRC undertake a completely new, independent rulemaking for both the EPA's standards and NRC's regulations so as to take into account risks and economic costs in accordance with section 84a.(1)?

The response needs to address more explicitly whether the 1980 mill tailings regulations are an appropriate starting point for the Commission's current rulemaking.

a. To the extent that commentors have challenged EPA's compliance with section 84a.(1) that challenge is not properly before the Commission. As explained above, except for matters of interpretation of the Commission's statutory authority, the

Commission must take as legally binding EPA's regulations, unless and until they are modified by a court.

b. As for the contention that the 1980 regulations did not properly take into account risks and economic costs, the legislative history of section 84a.(1) clearly showed that Congress had no intention of requiring the Commission to completely redo the rulemaking on uranium mill tailings.

Section 84a.(1) of the Atomic Energy Act of 1954 was amended to explicitly authorize the Commission to consider the risk to public health, safety and the environment with due consideration of the economic costs of its Requirements. In explaining this amendment, the Conference Report explicitly eschewed any attempt to require cost-benefit analysis for the 1980 regulations. The Conferees stated:

> The conferees do not intend and specifically oppose by this language affecting any pending litigation or appeal or judicial decisions based on the fundamental missions or responsibilities of the agencies. The conferees note that this language reflects accurately the current regulatory approach of the agencies. The language agreed to by the conferees should not result in any delays in establishment of remedial action standards. EPA, for example, has already advised the conferees that it is considering costs in formulating its inactive site requirements. In addition, the NRC has testified before Congress that it, too, took costs into account in promulgating its Uranium Mill Licensing Requirements. Moreover, in adopting the language, the conferees intend neither to divert EPA and NRC from their principal focus on protecting the public health and safety nor to require that the agencies engage in cost-benefit analysis or optimization.

> The conferees are of the view that the economic and environmental costs associated with standards and requirements established by the agencies should bear a reasonable relationship to the benefits expected to be derived. This recognition is consistent with the accepted approach to establishing radiation protection standards, and reflects the view of the conferees that, in promulgating such general environmental standards and regulations, EPA and NRC should exercise their best independent technical judgment in making such a determination. At all times, the conferees fully intend that EPA and NRC recognize as their paramount responsibility protection of the public health and safety and the environment.

H.R. Rep. No. 97-884 (Conference Report), 97th Cong., 2d Sess. 471 (1982) (emphasis supplied).

Moreover, it would be duplicative for the NRC to consider again risks and costs as part of the process of conforming its Requirements to EPA's standards. EPA has already taken risks and costs into account in formulating its standards under Section 275b.(1). Recognizing that EPA would take these factors into account, the statute explicitly does not require the NRC to consider the same factors as part of the conformance process. See, Section 275f.(3). This statutory provision, by its simplicity, just emphasizes Congress' intent to make the conformance procedure as straightforward an adoption of the EPA standards as possible.

4. Page 12: Comments on 40 CFR 192.

The Commission will not implement and enforce 40 CFR 192.32(a)(2)(IV), which requires EPA's concurrence on site-specific NRC alternatives to other requirements under Part 192, because that paragraph is contrary to the Commission's statutory authority under Section 84c.

5. Page 16: Comment on the longevity of goal of 1,000 years.

If the Commission is simply conforming to the EPA standard, there should be no element of Commission exercise of discretion. Therefore, I would recast the response which now says:

> The Commission disagrees with any position that would put the goal for protecting man and the environment from tailings at 200 years. The EPA primary design standard is 1,000 years.

to read as follows:

> EPA's primary design standard is 1,000 years. Accordingly, the Commission has no discretion to promulgate a different design standard for a shorter period. Nor is the Commission authorized to establish a longer period as a stabilization requirement. The Commission's authority under section 84a.(1) must be read in conjunction with the limits on that authority in section 84a.(2). Taken together, these provisions authorize the Commission to exercise its discretion within the bounds established by EPA's standards.

6. Pages 17-18. Comments on floods.

The final change to plain "floods" does not appear to take into account risks and economic costs. Surely some floods

would pose very little risk and other floods would be too infrequent to justify the cost of their avoidance. Why isn't the flood avoidance requirement tied to a necessary showing that the tailings pile will remain stabilized for the 1,000 year period?

7. Pages 21-22. Comments on the radon flux limit and minimum cover requirement.

Here, again, by going into the substance of the arguments, the response appears to indicate an exercise of NRC jurisdiction. I would simply rely on EPA's establishment of a radon flux limit of 20 $pCi/m^2/s$.

As for the deletion of the 3 meter cover requirement, I would clarify the response to disentangle the two justifications:

1. A thickness of 3 meters is not necessary to meet the higher EPA radon flux limit.

2. Alternatives to earth or in conjunction with earth may be adequate for meeting the new, higher flux limit.

Therefore, the three meter requirement has been deleted as inflexibly inconsistent with EPA's radon flux standard.