



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

March 29, 1984

OFFICE OF THE  
EXECUTIVE DIRECTOR  
FOR OPERATIONS

Note to: Commissioner Asselstine

Jim:

As per our discussion, this is the material that Larry Boggs and George Rice left with us when they met with us on Tuesday, March 27.

We advised them to meet with the individual Commissioners and with OGC to discuss the issues contained in the attached material.

A handwritten signature in cursive script, appearing to read "Bill".

Bill Dircks/EDO

Enclosures (3)

CC: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Roberts  
Commissioner Bernthal

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March 27, 1984

**MEMO RE: RESPECTIVE AGENCY AUTHORITIES  
UNDER THE ATOMIC ENERGY ACT, AS AMENDED**

SUMMARY

The Environmental Protection Agency's (EPA) active uranium mill site standards, 48 Fed. Reg. 45,926 (October 7, 1983), promulgated pursuant to section 206 of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), 42 U.S.C. §2022(b), exceed the authority granted EPA by Congress and are, therefore, illegal. In particular, EPA's active site standards intrude upon regulatory authority specifically reserved by statute to the Nuclear Regulatory Commission (NRC).

Section 275(b)(1) of the Atomic Energy Act (AEA), as amended by UMTRCA, authorizes EPA "to promulgate standards of general application for the protection of public health, safety, and the environmental [sic] from radiological and non-radiological hazards associated with" uranium mill tailings. Section 275(b)(2) states that such "generally applicable standards promulgated pursuant to this subsection for non-radiological hazards" shall be "consistent with standards required under subtitle C of the Solid Waste Disposal Act, as amended, which are applicable to such hazards." Finally, section 275(d) states that "implementation and enforcement" of EPA's radiological and non-radiological standards "shall" be the responsibility of NRC<sup>1/</sup> and Agreement States, respectively.

As demonstrated by the legislative history, Congress carefully chose the language of section 275 to limit EPA's jurisdiction with respect to both the potential radiological and non-radiological hazards of uranium mill tailings. By the use of the term "standards

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<sup>1/</sup> In 1974, Congress transferred the licensing and related regulatory functions of AEC to NRC. See 42 U.S.C. §5801, et seq.

of general applicability," Congress precluded EPA from setting standards that were effective within the boundary of facilities licensed by NRC or that established site specific design, engineering, or implementation criteria. In short, Congress affirmed in UMTRCA the traditional division of responsibility between EPA and NRC established in Reorganization Plan No. 3 of 1970 (1970 Reorganization Plan) and extended it to include non-radiological, as well as radiological, standards.

Thus, where EPA's active site standards require implementation of specific engineering and design criteria — such as installation of liners for the protection of groundwater — rather than generally applicable standards, and where EPA's standards regulate inside the licensed boundaries of a uranium mill tailings site — such as at the edge of the pile, EPA has usurped the authority Congress reserved specifically to NRC.

**L    The 1970 Reorganization Plan Established That EPA Could Promulgate Only Generally Applicable Environmental Standards To Be Effective Outside Site Boundaries Which AEC (NRC) Would Implement**

Prior to 1970, the Atomic Energy Commission (AEC) exercised exclusive regulatory authority in the field of nuclear energy. AEC's authority over the production and use of atomic energy was first exercised pursuant to the Atomic Energy Act of 1946, 60 Stat. 755. Congress substantially broadened AEC's authority in the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, as amended, 42 U.S.C. §2011, et seq. (1976 and Supp. V 1981). Pursuant to this authority, AEC established by regulation maximum permissible releases of source, byproduct, and special nuclear materials into the environment by licensees. 10 C.F.R. §20 (1960). These general radiation protection standards, as amended periodically, governed, and continue to govern, licensee activities although the primary authority to promulgate such standards for the protection of the general public and environment was subsequently transferred from AEC to EPA.

In 1970, the President established EPA and, in so doing, consolidated various diverse federal environmental regulatory programs. See 1970 Reorganization Plan, 5

U.S.C. App., p. 1132. Among the functions transferred to EPA were the non-regulatory, guidance functions of the Federal Radiation Council (FRC). 5 U.S.C. App., p. 1133. Additionally, the 1970 Reorganization Plan transferred to EPA certain responsibilities formerly exercised by AEC. Section 2 of the 1970 Reorganization Plan states:

[T]here are hereby transferred to the Administrator:

\* \* \*

(6) The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended, administered through its Division of Radiation Protection Standards, to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive materials, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

5 U.S.C. App., p. 1133 (emphasis added). In his message accompanying the 1970 Reorganization Plan, the President emphasized that AEC was to "retain responsibility for the implementation and enforcement of radiation standards through its licensing authority." 5 U.S.C. App., p. 1135 (emphasis added).

Thus, both the 1970 Reorganization Plan and the President's accompanying statement establish a clear dichotomy between EPA's regulatory authority with respect to radiation standards and AEC's implementation and enforcement duties to be carried out through its retained licensing authority. Congress' adoption of the 1970 Reorganization Plan specifically recognized and codified this division of authority. 116 Cong. Rec. 33,871-33,884 (1970).

In Congressional hearings on the 1970 Reorganization Plan, Dr. Glenn Seaborg, Chairman of AEC, testifying before a Subcommittee of the House Committee on Government Operations, stated that AEC would retain its traditional implementation role while transferring its authority to set generally applicable environmental standards to EPA:



I would now like to discuss the relationship which has existed between AEC and the FRC and the transfer of certain AEC functions to the new agency.

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That part of the AEC's authority, as administered by its Division of Radiation Protection Standards, to develop and set generally applicable environmental radiation standards for the protection of the general environment would be transferred under Reorganization Plan No. 3 to the Environmental Protection Agency. The Division of Radiation Protection Standards presently has a staff of 19 persons and less than half of the total manpower available in this division is devoted to this function.

The AEC would continue to have the responsibility for the implementation and enforcement through its licensing and regulatory authority of the environmental radiation standards which would be developed by EPA. In implementing these standards the AEC would establish regulatory requirements which would be applied to persons who receive, possess, use or transfer byproduct, source, or special nuclear material, or who conduct or operate nuclear facilities. These requirements would include such items as design criteria, operating procedures, limits on radioactivity in the effluents released outside the boundaries of locations under the control of the user and monitoring to develop data to demonstrate compliance with AEC requirements.

As part of its enforcement function, the AEC would require its licensees to carry out such monitoring programs — both within and outside the boundaries of locations under the control of the licensee — as may be necessary to demonstrate compliance with AEC limits imposed on the licensee. These limits would, of course, be compatible with the standards developed by EPA. The AEC would carry out such independent monitoring programs as deemed necessary to verify that AEC limits are met, and would collect, collate, and publish monitoring data developed by its licensees in its regulatory programs and data developed by its contractors in its operating program.

Our understanding is that the Environmental Protection Agency would be responsible for carrying out such monitoring programs as it deems necessary in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive materials. EPA would also be responsible for collecting, collating, and publishing monitoring data gathered in its programs. If data developed by EPA should indicate that its environmental quality standards are not being met, the matter would be referred to the AEC for appropriate enforcement action.

Reorganization Plan No. 3 of 1970 (Environmental Protection Agency): Hearings Before a Subcommittee of the House Committee on Government Operations, 91st Cong., 2d Sess. 131-132 (August 4, 1970) (emphasis added).

Similarly, Paul C. Tompkins, Executive Director of the Federal Radiation Council, testifying at the same hearing, confirmed that EPA's role would be to set general environmental standards. He stated:

The Administrator of EPA, as I understand, will conduct activities similar to the FRC and provide for the establishment of broad radiation protection guides. He will also develop secondary standards to be processed through the Administrative Procedures Act; that is, among other things, formal public hearings.

I would expect that the appropriateness of criteria promulgated by the EPA would be determined and continuously reexamined as is done now by the FRC by use of panels of scientists from inside and outside the Federal Government to review and study data produced by investigators in the scientific community and to recommend specific areas where existing guidance may not be appropriate.

The EPA will use these primary radiation protection guides in setting general environmental standards. By standards we mean limits on radiation exposures, or levels, or concentrations, or quantities of radioactive material in the general environment outside the boundaries of locations under the control of persons possessing and/or using radioactive material.

Id. at 134 (emphasis added).

After 1970, the precise division of authority between EPA and NRC established in the 1970 Reorganization Plan was affirmed on numerous occasions by the Office of Management and Budget, the two agencies, and the U.S. General Accounting Office.

In October, 1973, AEC objected to EPA's proposed uranium fuel cycle standards. As a result, both agencies submitted memoranda to the President for his resolution of the dispute. AEC contended that EPA's proposed fuel cycle standards violated the division of responsibilities established in the 1970 Reorganization Plan. AEC argued that EPA's proposed standards set forth specific rather than generally applicable

standards for specific facilities within the nuclear fuel cycle, such as standards for planned controlled discharges from light-water-cooled nuclear power reactors. In addition, AEC argued, the proposed standards would impose "radionuclide release limits," dose limits and requirements for implementing such limits — matters which AEC claimed were to be addressed specifically in AEC's licensing and regulatory process. Thus, AEC contended, EPA should restrict itself to setting general ambient standards. See memorandum from Dixy Lee Ray, Chairman, Atomic Energy Commission, to the President re: AEC Position on Division of Responsibilities Between the Atomic Energy Commission and the Environmental Protection Agency, dated October 19, 1973.

EPA disputed AEC's contentions and argued that the 1970 Reorganization Plan recognized the need for specific environmental standards to be set by EPA. However, EPA recognized that its authority to set such standards for exposure, concentration and quantity of radioactive materials could be effective only outside license boundaries. Further, EPA argued, its proposed standards constituted "generally applicable standards." EPA based this view on the fact that it had not proposed to set standards facility by facility. Rather, EPA claimed, it proposed to set standards for categories of materials. See memorandum from Russell E. Train, Administrator, Environmental Protection Agency, to the President re: AEC opposition to EPA Radiation Standards, dated October 19, 1973.

On December 7, 1973, Roy L. Ash, Director of the Office of Management and Budget, speaking for the President, resolved this jurisdictional dispute. Specifically, Ash stated:

EPA has construed too broadly its responsibilities, as set forth in Reorganization Plan No. 3 of 1970, to set "generally applicable environmental standards for the protection of the general environment from radioactive material."

On behalf of the President, this memorandum is to advise you that the decision is that AEC should proceed with its plans for issuing uranium fuel cycle standards, taking into account the comments received from all sources, including EPA; that EPA should discontinue its preparations for issuing, now or in the future, any standards for types of facilities; and that EPA should continue, under its current authority, to have responsibility for setting standards for the total amount of radiation in the general environment from all facilities combined in the uranium fuel cycle, i.e., an ambient standard which would have to reflect AEC's findings as to the practicability of emission controls.

EPA can continue to have a major impact upon standards for facilities set by AEC through EPA's review of proposed standards, during which EPA can bring to bear its knowledge and perspective derived from its responsibility for setting ambient radiation standards.

Memorandum from Roy L. Ash, Director, Office of Management and Budget, to Administrator Train and Chairman Ray re: Responsibility for setting radiation protection standards, dated December 7, 1973 (emphasis added).

The division of authority between NRC and EPA was reaffirmed in an August 27, 1973, Memorandum of Understanding (MOU) between the two agencies concerning special studies for the purpose of obtaining necessary information for establishing generally applicable environmental standards. This MOU again referred to the agencies' respective authorities as set out in the 1970 Reorganization Plan. Thus, the MOU states:

1. AEC - licensed facilities are subject through AEC licensing authority and requirements to EPA's generally applicable radiation standards, as defined in Reorganization Plan No. 3 of 1970. AEC will take appropriate action to assure that AEC-licensed facilities are operated in such a manner that routine radioactive discharges therefrom do not exceed generally applicable environmental standards established by EPA, outside the site boundary, for the protection of the general environment from radioactive material.



38 Fed. Reg. 24,936 (September 11, 1973) (emphasis added).

In a second 1973 MOU, the 1970 division of authority between the two agencies is affirmed. This MOU, which consisted of guidelines for EPA entry into AEC facilities, states:

1. AEC facilities are subject to generally applicable environmental radiation standards established by the EPA, outside the site boundary, and such facilities will be operated under applicable law so as to comply with such standards.

38 Fed. Reg. 32,965 (November 29, 1973) (emphasis added).

In 1975, EPA stated the scope of its jurisdiction versus that of NRC in its proposed standards for "Environmental Radiation Protection for Nuclear Power Operations" (the "25 millirem standard"). 40 C.F.R. §190. See 40 Fed. Reg. 23,420 (May 29, 1975). In its proposal, EPA stated:

Interagency relationships. Reorganization Plan No. 3 transferred to the Environmental Protection Agency (EPA) the broad guidance responsibilities of the former Federal Radiation Council and also transferred from the former Atomic Energy Commission (AEC) the more explicit responsibility to establish generally applicable radiation standards for the environment. However, the responsibility for the implementation and enforcement of both this guidance and these standards lies, in most cases, in agencies other than EPA as a part of their normal regulatory functions. For nuclear power operations, this responsibility, which had been vested in AEC, is now vested in the Nuclear Regulatory Commission (NRC), which will exercise the responsibility for implementation of these generally applicable standards through the issuance and enforcement of regulations, regulatory guides, licenses, and other requirements for individual facilities.

40 Fed. Reg. at 23,420 (emphasis added).

The Final Environmental Impact Statement for EPA's 25 millirem standard explains (at pages 19-20):

Two points are relevant to EPA's authority to set environmental radiation standards. First, although EPA is not limited to specific criteria for setting such standards (e.g., requirements for "best practicable" or "best available" technology, or for effluent levels having "no health effects"), the standards can apply only outside the boundaries of facilities producing radioactive effluents. The required environmental protection can be provided within this constraint. By the same token, this authority may not be used to set limits on the amount of radiation exposure inside these boundaries, consequently regulation of occupational exposures of workers inside the boundary is carried out by the AEC (now the NRC) operating under existing Federal Radiation Protection Guides for occupational exposure.

Secondly, EPA can only set standards; the authority to regulate specific facilities was not transferred by Reorganization Plan No. 3 (2). Application and enforcement of these standards against specific facilities is the responsibility of the NRC. The division of responsibilities between EPA and AEC (whose regulatory responsibilities are now carried out by NRC) for carrying out these objectives was addressed specifically by the President's message transmitting Reorganization Plan No. 3 to the Congress as follows:

Environmental radiation standards programs. The Atomic Energy Commission is now responsible for establishing environmental radiation standards and emission limits for radioactivity. Those standards have been based largely on broad guidelines recommended by the Federal Radiation Council. The Atomic Energy Commission's authority to set standards for the protection of the general environment from radioactive material would be transferred to the Environmental Protection Agency. The functions of the Federal Radiation Council would also be transferred. AEC would retain responsibility for the implementation and enforcement of radiation standards through its licensing authority.

This division of responsibility is not expected to interfere with effective administration and achievement of these proposed environmental standards (see, also, Chapter VI, Section D).

In 1976, the U.S. General Accounting Office's Office of General Counsel recognized the limit on EPA's authority established by the 1970 Reorganization Plan:



The EPA is not authorized to establish any standards for radiation producing facilities. It is responsible for setting standards for the total amount of radiation in the general environment, outside the boundaries of any specific facilities, i.e., an ambient standard which would have to reflect AEC's findings as to the practicability of emission controls.

Memorandum from Geraldine M. Rubar, Senior Attorney, GAO-OGC, to Robert E. L. Allen, Jr., Assistant Director, CEDD, re: EPA Radiation Programs Standards Setting and Monitoring (GAO No. B-166506), dated July 30, 1976.

As the foregoing discussion demonstrates, it has been repeatedly recognized that EPA's jurisdiction is limited to establishing generally applicable radiation standards outside the boundaries of NRC licensed facilities, and NRC's role is to implement and enforce those standards.

II. The Uranium Mill Tailings Radiation Control Act Of 1978 (UMTRCA) Adopts The Traditional Division Of Authority Between EPA And NRC Established In The 1970 Reorganization Plan

In 1978, Congress enacted UMTRCA. UMTRCA specifically adopted the traditional division of authority between EPA and NRC that was set forth in the 1970 Reorganization Plan and consistently affirmed by both agencies. As noted above, section 275(b)(1) of the AEA, as amended by UMTRCA, authorizes EPA "to promulgate standards of general application for the protection of public health, safety, and the environmental [sic] from radiological and non-radiological hazards associated with" uranium mill tailings. Section 275(b)(2) states that such generally applicable standards promulgated pursuant to this section for non-radiological hazards shall be "consistent with standards required under subtitle C of the Solid Waste Disposal Act, as amended, which are applicable to such hazards." As a further limitation on EPA's authority, section 275(d) of the AEA states explicitly that "implementation and enforcement" of EPA's radiological and non-radiological standards shall be the responsibility of NRC and Agreement States, respectively.

Congressional intent to adopt the division of authority established in the 1970 Reorganization Plan is stated not only in the express language of UMTRC. , but also in its legislative history with respect to both radiological and non-radiological hazards. Discussing EPA's authority under UMTRCA, the House Report of the Committee on Interior and Insular Affairs states:

AUTHORITY OF THE ENVIRONMENTAL  
PROTECTION AGENCY

It is the responsibility of the Environmental Protection [sic] Agency to establish generally applicable standards and criteria for the protection of the general environment, considering radiological and non-radiological aspects of tailings. The EPA standards and criteria should be developed to limit the exposure (or potential exposure) of the public and to protect the general environment from either radiological or non-radiological substances to acceptable levels through such means as allowable concentrations in air or water, quantities of the substances released over a period of time, or by specifying maximum allowable doses or levels to individuals in the general population. The EPA standards and criteria should not interject any detailed or site specific requirements for management, technology or engineering methods on licensees or on the Department of Energy. Nor should EPA incorporate any requirements for permits on licenses for activities concerning uranium mill tailings which would duplicate NRC regulatory authority over the tailings sites.

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Section 206 requires the Environmental Protection Agency to set general standards and criteria for the protection of the environment outside the boundaries of mill tailings disposal sites. The standards and criteria would be applicable to both radiological and non-radiological hazards in the piles. Authorities of the EPA under other laws would not be abridged by the new requirements.

H.R. Rep. No. 1480, Part 1, 95th Cong., 2d Sess. 16-17, 21 (emphasis added).

Discussing NRC's authority under UMTRCA, the House Report states:

AUTHORITY OF THE NUCLEAR  
REGULATORY COMMISSION

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**D** In establishing requirements for promulgating regulations for licensing or for oversight of the Department's [Department of Energy] remedial activities, the Commission must set all standards and requirements relating to management concepts, specific technology, engineering methods, and procedures to be employed to achieve desired levels of control for limiting public exposure, and for protecting the general environment. The Commission's standards and requirements should be of such nature as to specify, for example, exclusion area restrictions on site boundaries, surveillance requirements, detailed engineering requirements, including lining for tailings ponds, depth, and types of tailings covers, population limitations, or institutional arrangements such as financial surety requirements or site security measures. The Commission should issue all necessary permits or licenses for uranium mill tailings sites.

The NRC is also responsible for implementing general standards and criteria promulgated by the Administrator of the Environmental Protection Agency. NRC must assure that the technology, engineering methods, operational controls, surveillance requirements and institutional arrangements employed at the sites provide the necessary barriers and levels of control to limit public exposure, and protect the environment from radiological and toxic non-radiological substances associated with uranium mill tailings materials, as specified by the EPA standards and criteria.

H.R. Rep. No. 1480, Part 1, 95th Cong., 2d Sess. 16 (emphasis added).

In August 2, 1978, hearings on proposed uranium mill tailings legislation, held before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, Joseph M. Hendrie, Chairman of NRC, and William D. Rowe, EPA Deputy Assistant Administrator for Radiation Programs, testified that the language of H.R. 13650 had been drawn largely from the 1970 Reorganization Plan. In so doing, Hendrie and Rowe provided a contemporaneous construction of their respective duties which demonstrated that their traditional roles had been retained. Dr. Rowe testified:

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D To better assure the control of uranium mill tailings, we recommend that uranium mill tailings themselves be named as licensable material under the Atomic Energy Act. This could be done by specifically naming residual radioactive materials from the production of source material as licensable, or by broadening the definition of byproduct material to include uranium mill tailings.

However, any such legislative proposal should also provide for EPA to promulgate general environmental standards for such material so that there will be consistency with the present authority of the Atomic Energy Act and Reorganization Plan No. 3 of 1970 which gives EPA such authority over present licensable material.

Such authority for EPA standard setting and NRC regulatory authority should extend both to the radioactive and non-radioactive aspects of hazardous materials so that the control of environmental impacts from these materials will be handled in a consistent manner with similar material from other extraction industries which EPA may control under the authorities of the RCRA and the Clean Air Act.

The proposed legislation, H.R. 13382, which is the subject of these hearings, attempts to address this problem. However, it falls short of resolving many of the problems we have noted.

Furthermore, the administration does not support this legislation since we have not had the opportunity to fully resolve the issues inherent in H.R. 13382. Let me point out some of the deficiencies in this bill.

First, the proposed legislation does not provide for EPA to set standards for either radioactive material or non-radiation hazards associated with the tailings material. We are concerned about consistency of regulatory control relative to both of these types of materials.

At present EPA sets the generally applicable environmental radiation standard under the authority of the Atomic Energy Act of 1954, as amended, and 1970 Reorganization Plan 3 of 1970. These standards are implemented by NRC in its licensing and regulation of source, special nuclear and byproduct material, as currently defined.

Furthermore, the Clean Air Act Amendments of 1977 have given authority to EPA to establish air pollution standards for these same materials. It should be indicated in the proposed legislation that there is no intent to supersede or negate these authorities.



Uranium Mill Tailings Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049 and H.R. 13650 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 368 (August 2, 1978) (emphasis added).

That Congress intended to adopt the traditional division of authority between the two agencies in UMTRCA is indicated by the following exchange between Subcommittee on Energy and Power Counsel Finnegan and Deputy Assistant Administrator Rowe and Commissioner Hendrie:

MR. FINNEGAN. . . . Is it your intention to set standards for actions beyond the boundaries of the active and inactive mill at the depository sites?

MR. ROWE. In general, when we set applicable environmental standards, they are outside the boundaries of the sites. What we are concerned with is the exposure to the general public who are outside the site boundaries.

MR. FINNEGAN. In the same provision there are the words "generally applicable standards," which is a term that you use yourself on page 7 of your testimony. What is encompassed by that?

MR. ROWE. General[ly] applicable standard is defined in the Atomic Energy Act. This is where the language comes from, and it is the section that we use to set the standards outside the boundaries. It covers standards which can be quantities, concentrations, and it is particularly defined here as concentrations or quantities of material into the general environment. That is how it has been defined.

MR. FINNEGAN. Mr. Chairman, I wanted to ask you whether you had any comments to make concerning section 275 language at page 27 of the bill and how EPA would set standards and how they would apply to sites, either active or inactive.

MR. HENDRIE. Yes, Mr. Finnegan, I would like to comment. It seems to me the language I now read in H.R. 13650 under section 206 of the bill is an appropriate definition. I believe the language has been drawn largely from the Reorganization Plan of 1970 which assigned to the EPA the authority for radiological health protection in the sense of the establishment of ambient standards, generally applicable standards for

D the protection of health and it now comes down to NRC, from AEC to regulate under those general standards and to lay specific requirements for licensing upon the facilities that we license to make sure that each of those facilities then meets the general standards.

It seems to me that the language, as laid out here, defines that in a way which is compatible with the Reorganization Plan 3 and that makes clear their authority to establish those generally applicable standards and at the same time also makes clear that, as you come inside the site boundary and begin to talk about features of the particular facility being licensed, that that becomes then the proper province of the NRC to deal with specific license provisions, means, methods, and so on to meet EPA's ambient standards at the site.

The language which you read a while ago to Mr. Rowe, I was a little concerned. It seemed to me that might lead to, in effect, a mixing of the two jurisdictions and a confusion of the interface between us by in effect bringing EPA down into the facility, the specific provisions that ought to be made in licensing a facility and I think that would indeed be undesirable in the statute language.

I would give a vote for the language now in that section 206.

MR. FINNEGAN. I am not sure I totally agree with your interpretation of the language, that it is limited to outside the boundaries, as I understand what you are saying.

I agree with you that paragraph 2, line 21, is limited to outside the boundaries but I don't think paragraph 1 is. As a matter of fact, at least the structure of the language in paragraph 1 is a separate paragraph and it lies both within and outside the boundaries and I think could be interpreted as allowing EPA to set standards that apply to the sites themselves and going down to how much earth and everything else you are concerned about.

Is it your desire that the provisions of paragraphs 1 and 2 apply to such standards only outside the boundaries and therefore anything within the sites to meet those standards would be done through NRC — through its own rulemaking or licensing process?

MR. HENDRIE. That is the way I would both prefer that the arrangement be set up and would feel it would be an important feature in making clear the jurisdictions between the two agencies.

I think as we come within site boundaries and begin to deal with specific aspects of facilities that you are very much into the NRC licensing domain and it is desirable that the



interface between the agencies be outside that specific licensing.

**D** On our difference in reading subsection (a)(1), I will have to give you legal precedence, Mr. Finnegan. I am not a lawyer and can only say it seemed to our people that it read off the preceding language, EPA shall, by rule, promulgate and so on — generally applicable criteria and standards, such standards shall apply to these sites. I didn't quite read it that way.

MR. FINNEGAN. Mr. Rowe, do you have any comments?

MR. ROWE. Yes; I agree with Mr. Hendrie. Our intention is to work outside the site boundary.

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MR. FINNEGAN. You are also in agreement that generally paragraphs 1 and 2 should be prefaced by the idea it means outside the boundaries.

Id. at 392-393, 396-397 (emphasis added).

The statutory language, the House Report and agency testimony demonstrate that: the 1970 Reorganization Plan division of authority with respect to radiological standards remained unchanged and was extended to include non-radiological standards; EPA was to promulgate only generally applicable environmental standards effective outside the licensed boundaries of mill tailings sites; and NRC was to implement and enforce those standards through site specific design and engineering requirements.

This contemporaneous administrative construction is also evident in an August 9, 1978, letter from Carlton Stroiber, NRC Assistant General Counsel to James K. Asselstine, then Minority Counsel, Subcommittee on Nuclear Regulation, Senate Committee on the Environment and Public Works. In that letter, Stroiber describes an agreement between the Administrator of EPA, Douglas McCastle, and the Chairman of NRC, Joseph M. Hendries, regarding their agencies' respective roles under which EPA would promulgate generally applicable environmental standards, which NRC ~~would then~~ implement. Stroiber states:

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**D** Under Title II of the proposed legislation, EPA would be responsible for establishing generally applicable standards and criteria for the protection of the general environment, considering radiological and non-radiological aspects outside the boundaries of the tailings sites.

The EPA standards and criteria would be developed to limit the exposure (or potential exposure) of the public and to protect the general environment from either radiological or non-radiological substances to acceptable levels through such means as allowable concentrations in air or water, quantities of the substances released over a period of time, or by specifying maximum allowable doses or levels to individuals in the general population. Generally applicable environmental standards would not incorporate specific technology, engineering methods, or procedures to be employed to achieve the desired level of controls for limiting public exposure and protecting the general environment. For example, the standards and criteria should not be of a nature that would specify exclusion area restrictions on site boundaries, surveillance requirements, detailed engineering methods (such as linings for tailings ponds, depth, and type of tailings cover), population limitations, or institutional arrangements such as financial surety requirements or site security measures. The EPA standards and criteria would not incorporate any requirements for permits or licenses to avoid duplication of NRC regulatory authority over the tailings sites. The NRC would be responsible for implementing these EPA standards and criteria.

Through its regulations and licensing process, NRC must assure that the technology, engineering methods, operational controls, surveillance requirements and institutional arrangements employed at the sites provide the necessary barriers and controls to limit public exposure and protect the environment from radiological and toxic non-radiological substances associated with mill tailings materials. With respect to non-radiological matters, the NRC, through its environmental review under NEPA mandate, has the authority to impose controls on toxic non-radiological materials. Title II of the bill would clarify the relation of NRC and EPA authority in this area, by providing that NRC would develop and apply general requirements for mill tailings which, to the maximum extent possible, are consistent with those adopted by EPA for similar substances under the Solid Waste Disposal Act. EPA would have a concurrence [NRC prefers consultation] role in the NRC's development of such requirements, which could include engineering methods, management practices and other institutional arrangements. NRC Agreement States would be expected to establish comparable controls on toxic non-radiological materials in tailings through their required environmental analyses.

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(Emphasis added).

The particular responsibilities allocated to each agency by the 1970 Reorganization Plan also have been preserved in other environmental statutes, such as the Clean Water Act, 33 U.S.C. §1251, et seq. In Train v. Colorado Public Interest Research Group, Inc. (CPIRG), 426 U.S. 1, 48 L.Ed.2d 434 (1976), the Supreme Court, referring specifically to the 1970 Reorganization Plan, held that the legislative history of the Clean Water Act demonstrated that EPA had no authority to regulate the discharge into the nation's waterways of particular nuclear waste materials subject to regulation by AEC and its successors. The Supreme Court's conclusion was based, in part, on the legislative history of the Clean Water Act which, it ruled, reflected Congress' intention to preserve the pre-existing regulatory plan under which AEC was given sole authority to regulate such materials.

To have included these materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme embodied in the AEA. Far from containing the clear indication of legislative intent . . . the legislative history reflects, on balance, an intention to preserve the pre-existing regulatory plan.

426 U.S. at 24 (emphasis added).

Congress has also specified the same limits on EPA's authority to regulate radioactive materials in the Clean Air Act, 42 U.S.C. §7401, et seq. The Conference Report on the Clean Air Act Amendments of 1977 states that EPA's authority to regulate radioactive air pollutants is limited to setting "outside-the-fence-limits emission standard[s]." Clean Air Conference Report (1977); Statement of Intent; Clarification of Select Provisions as appears in Senate Committee on Environment and Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Air Act Amendments of 1977, 320 (Comm. Print 1978).

In 1983, Congress adopted amendments to UMTRCA, which emphasize NRC's and Agreement State's special interest in and authority over site specific implementation

of EPA general environmental standards. Nuclear Regulatory Commission Authorization Act of 1982 and 1983, Pub. L. No. 97-415, 96 Stat. 2067 (1983). Under these amendments, Congress authorized Agreement States to adopt "alternatives" to NRC requirements, subject to NRC determination that such alternatives are "equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose and any final standards promulgated by the Administrator of the Environmental Protection Agency in accordance with section 275." Similarly, the 1983 amendments authorized individual licensees to propose site specific alternatives to NRC requirements subject to NRC approval. Sections 19 and 20, Pub. L. No. 97-415, 96 Stat. 2067, 2078-2079. In considering Agreement State alternatives and alternatives proposed by licensees, NRC is directed to take into account local or regional conditions, including geology, topography, hydrology and meteorology. Id.

A recent letter to Nunzio Palladino, Chairman of NRC, from Senator Simpson, Chairman of the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, and Senator Domenici, sheds additional light on Congress' intent in enacting the 1982 and 1983 UMTRCA amendments. In particular, they state:

The principal purpose of the 1983 amendments to UMTRCA was to restore order to a regulatory scheme that had fallen into disarray as a result of insufficient coordination between EPA and NRC in the regulation of uranium mill tailings. Indeed, we have taken great care in the legislative history to point out that UMTRCA establishes a process for the orderly integration of EPA's general environmental standards with NRC's detailed regulatory requirements that, if followed, should serve to avoid the unfortunate absurdities that have already needlessly delayed this program and, in the process, generated a good deal of confusion for the Agreement States and licensees.

It is for this reason that the Congress set out, in considerable detail, the steps to be taken by EPA and NRC in establishing the regulatory program for uranium mill tailings. The legislation makes it abundantly clear that UMTRCA requires a regulatory program consisting of both general environmental standards and detailed regulatory requirements, the former to be promulgated by EPA, the latter by NRC. And more

D importantly, we have gone to great length to point out that the process for coordinating the EPA and NRC requirements — the so-called "conforming" process — is to be completed first, prior to implementation of the regulatory program. To approach this process in any other fashion — including the approach recommended by your staff — is not only contrary to what the legislation calls for, but will also subject licensees and Agreement States to the very same regulatory uncertainty that we were trying to avoid in the first place. Accordingly, we earnestly urge you to reconsider this matter.

Letter from Sen. Pete V. Domenici and Sen. Alan K. Simpson to Nunzio J. Palladino, Chairman, U.S. Nuclear Regulatory Commission re: 1983 amendments to UMTRCA, dated March 12, 1984 (emphasis added).

R Since its inception, EPA has been limited to establishing generally applicable environmental standards outside the boundaries of the licensed facility. EPA has been given no implementation authority because this authority was reserved to NRC.

A These particular divisions of authority were set forth in the 1970 Reorganization Plan which was affirmed by Congress. They have been consistently reaffirmed by the agencies themselves and their principals. Finally, they have been reaffirmed by Congress and extended to regulation of non-radiological hazards under UMTRCA, as amended.

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

August 9, 1978

Mr. James K. Asselstine  
Minority Counsel  
Subcommittee on Nuclear Regulation  
Committee on the Environment and  
Public Works  
United States Senate  
Washington, D. C. 20510

*Jim*  
Dear Mr. Asselstine:

As I promised this afternoon, I have attached the following two documents relating to the agreement reached between the Environmental Protection Agency and the Nuclear Regulatory Commission on the division of responsibility between the two agencies for the continuing regulation of mill tailings:

- (1) Statutory language (modeled on provisions of the Udall and Dingell bills in the House) describing the division of responsibilities.
- (2) A short statement of how NRC believes the responsibilities of the agencies should be discharged, in practice.

This approach was agreed upon by EPA and NRC staff members and ratified in telephone conversations between EPA Administrator Costle and NRC Chairman Hendrie yesterday. As you know, however, the Commission would prefer that the EPA have a consultative, rather than concurring role in the development of NRC's Solid Waste Disposal Act requirements.

If you have further questions, do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carl", is written above the typed name.

Carlton R. Stoiber  
Assistant General Counsel

Attachments as stated

8506260139 1080



"Sec. 84. Authorities of Commission Respecting Certain  
Byproduct Material.--

"a. The Commission shall insure that the management of  
any byproduct material as defined in section 11 e. (2) is  
carried out in such manner as--

"(1) the Commission deems appropriate to protect  
the public health and safety and the environment;

"(2) conforms with applicable standards promul-  
gated by the Administrator of the Environmental  
Protection Agency under section 275 of the Act; and

"(3) conforms to general requirements, established  
by the Commission with the concurrence of the Adminis-  
trator, which are to the maximum extent practicable con-  
sistent with requirements applicable to the possession,  
transfer, and disposal of similar hazardous material  
regulated by the Administrator under the Solid Waste  
Disposal Act.

"b. In carrying out its authority under this section,  
the Commission is authorized to:

"(1) by rule, regulation, or order require persons,  
officers, or instrumentalities exempted from licensing  
under section 81 of this Act to conduct monitoring,  
perform remedial work, and to comply with such other  
measures as it may deem necessary or desirable to

protect health or to minimize danger to life or property; and

"(2) make such studies and inspections and to conduct such monitoring as may be necessary.

"Any violation by any person other than the United States or any officer or employee of the United States of any rule or order of the Commission established under this section shall be subject to a civil penalty in the same manner and in the same amount as violations subject to a civil penalty under section 234. Nothing in this section affects any authority of the Commission under any other provision of this Act."

(b) The table of contents for such chapter 8 is amended by inserting the following new item after the item relating to section 83:

"Sec. 84. Authorities of Commission respecting certain byproduct material."

Authority of EPA Respecting Certain Byproduct Material

Section 206. Chapter 19 of the Atomic Energy Act of 1954 is amended by inserting after section 274 the following new section:

"Sec. 275. Health and Environmental Standards for Uranium Mill Tailings.--

"(a)(1) As soon as practicable, but not later than one year after the date of enactment of this section, the

Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the 'Administrator') shall, by rule, promulgate standards of general application for the protection of the public health, safety, and the environment from radiological and non-radiological hazards associated with residual radioactive materials (as defined in section 101 of the Uranium Mill Tailings Radiation Control Act of 1978) located at inactive uranium mill tailings sites and depository sites for such materials selected by the Secretary of Energy, pursuant to title I of the Uranium Mill Tailings Radiation Control Act of 1978.

"(2) As soon as practicable, but not later than eighteen months after the enactment of this section, the Administrator shall, by rule, promulgate generally applicable standards for the protection of the public health, safety, and the environment from radiological and non-radiological hazards associated with the processing and with the possession and transfer of byproduct material, as defined in section 11 e. (2) of the Act at sites at which ores are processed primarily for their source material content, or which are used for the disposal of such byproduct material.

"(3) The Administrator may from time to time amend, modify, or change any standard promulgated under this section, except that any amendment, modification, or change in a

standard promulgated pursuant to subsection b. shall only be applied by the Commission to any person holding a license issued by the Commission for byproduct material, as defined in section 11 e. (2) of this Act, prior to such promulgation upon renewal of such license.

## Uranium Mill Tailings Control Act of 1978

Under Title II of the proposed legislation, EPA would be responsible for establishing generally applicable standards and criteria for the protection of the general environment, considering radiological and non-radiological aspects outside the boundaries of the tailings sites.

The EPA standards and criteria would be developed to limit the exposure (or potential exposure) of the public and to protect the general environment from either radiological or non-radiological substances to acceptable levels through such means as allowable concentrations in air or water, quantities of the substances released over a period of time, or by specifying maximum allowable doses or levels to individuals in the general population. Generally applicable environmental standards would not incorporate specific technology, engineering methods, or procedures to be employed to achieve the desired level of controls for limiting public exposure and protecting the general environment. For example, the standards and criteria should not be of a nature that would specify exclusion area restrictions on site boundaries, surveillance requirements, detailed engineering methods (such as linings for tailings ponds, depth, and type of tailings cover), population limitations, or institutional

arrangements such as financial surety requirements or site security measures. The EPA standards and criteria would not incorporate any requirements for permits or licenses to avoid duplication of NRC regulatory authority over the tailings sites. The NRC would be responsible for implementing these EPA standards and criteria.

Through its regulations and licensing process, NRC must assure that the technology, engineering methods, operational controls, surveillance requirements and institutional arrangements employed at the sites provide the necessary barriers and controls to limit public exposure and protect the environment from radiological and toxic non-radiological substances associated with mill tailings materials. With respect to non-radiological matters, the NRC, through its environmental review under NEPA mandate, has the authority to impose controls on toxic non-radiological materials. Title II of the bill would clarify the relation of NRC and EPA authority in this area, by providing that NRC would develop and apply general requirements for mill tailings which, to the maximum extent possible, are consistent with those adopted by EPA for similar substances under the Solid Waste Disposal Act. EPA would have a concurrence [NRC prefers consultation] role in the NRC's development of such requirements, which could include engineering methods, management



practices and other institutional arrangements. NRC Agreement States would be expected to establish comparable controls on toxic non-radiological materials in tailings through their required environmental analyses.

JUL 30 1976

Assistant Director, CEDD - Robert E. L. Allen, Jr.

ALAN S. GOLDBERG

Senior Attorney, OGC - Geraldine M. Rubar

EPA Radiation Programs for Standards Setting and Monitoring  
(B-166506)

Recently, you asked several legal questions relating to the Environmental Protection Agency's (EPA) function in the field of radiation protection. Since then, Bob Crystal of my staff has spoken with Bev Daniel of your staff and refined those questions as follows:

QUESTION 1:

Does the law provide for EPA to assume a leadership role in radiation protection in terms of directing and coordinating the work of other Federal agencies?

QUESTION 2:

Is EPA's role in formulating radiation standards limited to establishing an ambient standard which would have to reflect AEC's [Atomic Energy Commission] findings as to the practicability of emission controls?

ANSWER 1:

The law does not provide for leadership by EPA in terms of directing and coordinating the work of other agencies. However, it does provide that the Administrator of EPA shall consult experts and shall advise the President with respect to radiation matters, including guidance for Federal agencies. 42 U.S.C. §2021(h) provides:

"The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The

Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order."

ANSWER 2:

The EPA is not authorized to establish any standards for radiation producing facilities. It is responsible for setting standards for the total amount of radiation in the general environment, outside the boundaries of any specific facilities - i.e., an ambient standard which would have to reflect AEC's findings as to the practicability of emission controls.

Section 6 of Reorganization Plan No. 3 of 1970 specifically limits EPA's function in this area to establishing standards for the general environment outside individual facilities. Section 6 transfers to EPA:

"The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended, administer through its Division of Radiation Protection Standards, to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material."

According to page 5 of Senate Report No. 91-250, September 29, 1970, pertaining to Reorganization Plan No. 3 of 1970, the AEC "would retain its responsibility for the implementation and enforcement of facility radiation standards through its licensure authority."

Since EPA is not authorized to establish radiation standards for individual facilities, but is to pass that function to another agency, it must be sure that any radiation standards it sets for the general environment are practicable in terms of standards established for a facility by the other agency.

cc: Mr. Eschwege, CEDD  
Mr. Pierson, OGC  
Index and Files  
Index Digest

# ENVIRONMENTAL POLICY INSTITUTE

August 29, 1984

Director  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

FREEDOM OF INFORMATION  
ACT REQUEST  
**FOIA-84-709**  
*Rec'd 8-31-84*

## Freedom of Information Act Request

Dear Director,

This is a Freedom of Information Act request by the Environmental Policy Institute pursuant to 5 U.S.C. 552.

The Environmental Policy Institute requests the following information and documents:

- 1) All vote sheets, instructions to staff, policy and implementation statements, decision documents, corrections, editorial changes, substantive revisions, and all other documentation considered or approved or transmitted by any Commissioner in his consideration of, or by the Commission in its consideration of, SECY-83-523/523A--"Proposed Amendments to Uranium Mill Tailings Regulations and Advance Notice of Proposed Rulemaking" and/or the proposed rules.
- 2) All memoranda, directions to staff, revisions, editorial or other corrections transmitted by any Commissioner, the Commission, or any Office of the Commission including the Office of the Secretary and the Office of General Counsel to the NRC staff related to, or requesting revision of SECY-83-523/523A or the proposed revisions to the Commission's uranium mill tailings regulations discussed in SECY-83-523/523A.
- 3) The July 10, 1984 memorandum from Samuel J. Chilk to William J. Dircks transmitting the Commission's approved course of action regarding SECY-83-523/523A and revision of the Commission's uranium mill tailings regulations, and all subsequent communications from any Commissioner or any Office of the Commission including the Office of General Counsel and the Office of the Secretary related to, or modifying, or amending, this memorandum and the approved course of action described in the memorandum.
- 4) Any and all revisions of the proposed uranium mill tailings regulations and policy and implementation statements related thereto developed in response to the approved course of action described in the July 10, 1984 memorandum or subsequent directive from the Commission or any Commissioner prepared by the NRC staff or any Office of the Commission including the Office of General Counsel related to the revision of the Commission's

uranium mill tailings regulations and related policy and implementation statements.

5) All communications, invoices, manifests from the Nuclear Regulatory Commission transmitting the proposed revisions of the Commission's uranium mill tailings regulations and related policy and implementation statements to the Office of the Federal Register for subsequent publication including all notices and letters to the public, interested parties, and members of congress announcing this action.

6) All communications, invoices, manifests from the Nuclear Regulatory Commission to the Office of the Federal Register requesting suspension of publication of the Commission's proposed revisions of its uranium mill tailings regulations and related policy and implementation statements and any communications from the Commission or any Office of the Commission announcing this action.

7) All communications from the Commission, the Chairman, or any other Commissioner or Office of the Commission including the Office of General Counsel concerning the decision to suspend publication of the proposed revisions of the Commission's uranium mill tailings regulations and related policy and implementation statements.

8) All meeting minutes and communications from the Commission, the Chairman, the Office of General Counsel, the Office of the Secretary or from any Commissioner concerning revision, modification, continued suspension, reconsideration and any other action related to the suspended revisions of the Commission's uranium mill tailings regulations and related policy and implementation statements including minutes from the August 1, 1984 meeting of Commissioners Bernthal, Palladino, and Asselstine. These communications should include the August 3, 1984 memo from Chairman Palladino to the other Commissioners explaining his vote and understanding of the Commission's course of action taken upon consideration of SECY-83-523/523A.

9) All entries in phone logs, meeting logs, correspondence logs, and visitor logs of the Commission or any Commissioner related to the Commission's consideration of SECY-83-523/523A and the proposed revisions of the Commission's uranium mill tailings regulations, the subsequent decision to publish the proposed revisions and related policy and implementation statements entries, and the subsequent decision to suspend publication including contacts from congressional staff and members of congress.

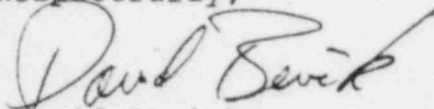
The Environmental Policy Institute is a non-profit, tax exempt public interest organization located in the District of Columbia. The Institute has monitored and participated in the Commission's development of uranium mill tailings regulations and implementation of the Uranium Mill Tailings Radiation Control Act of 1978 and subsequent amendments since 1978.



The information the Institute hereby requests will be used exclusively in the public interest to assure that the Commission complies with P.L. 95-604 and P.L. 97-415 requiring it to promulgate regulations to protect public health and safety and the environment from the the hazards of uranium mill tailings in a timely manner.

The Institute therefore requests a waiver of fees under 5 U.S.C. 552(a)(4)(A).

Respectfully,

A handwritten signature in cursive script, appearing to read "David Berick".

David Berick  
Director, Nuclear Waste and  
Safety Project