

"WITHHOLD ALL" EX. 5

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RUSSELL F. RHOADES, M.P.H., DIRECTOR

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MEMORANDUM

TO: Russell F. Rhoades, Director  
FROM: Bruce S. Garber, Chief Attorney *B.S.G.*  
SUBJECT: UNC Enforcement  
DATE: November 1, 1982

You have asked me to evaluate the enforcement options for the seepage from Union Nuclear Corporation's Churchrock Uranium Milling Facility. I have reviewed a substantial portion of the files of the Water Quality Bureau and the Radiation Protection Bureau and base the following discussion on several assumptions:

1. UNC's discharge of seepage from its uranium mill tailings retention area has caused groundwater to exceed maximum permissible concentrations under the Radiation Protection Regulations at at least one point beyond UNC's property.
2. UNC has caused the groundwater standards in Section 3-103 of the Water Quality Control Regulations to be exceeded at a place or places of reasonably foreseeable future use.
3. No domestic or agricultural well currently being used is being contaminated beyond the Water Quality or Radiation Standards.
4. No domestic or agricultural well which currently being used is in imminent danger of being contaminated beyond the standards.
5. We are not aware of any plans to place a domestic or agricultural well into the contaminated area in the immediate future.

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6. There are economically and technically feasible remedial actions which would mitigate or eliminate the contamination which is above the standards.
7. UNC has not demonstrated, to date, that it has or will adequately control seepage or the spread of contamination material from its facility.

ENFORCEMENT OF PART III OF THE  
WATER QUALITY CONTROL COMMISSION REGULATIONS

An attempt to enforce the groundwater regulations is not likely to bring the desired remedial action. There are two difficult legal issues involved in applying the groundwater regulations to United Nuclear in this case. The first issue is "when the regulations affect UNC." The regulations became effective on February 17, 1977. Under Section 3-106.A of these regulations, United Nuclear Corporation qualifies as an existing discharger for purposes of the regulations. There is no obligation in the regulations for an existing discharger until such time as a discharge plan is required by the Director. The Director formally requested a discharge plan on October 31, 1979. Under the Regulations § 3-106.A, UNC was then obligated to submit a discharge plan within 120 days and not discharge without an approved plan after 240 days. These time frames may be extended by the Director for good cause for any period of time. Section 3-104 of the regulations, states in part:

"Unless otherwise provided by these regulations no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into groundwater unless he is discharging pursuant to a discharge plan approved by the Director. When a plan has been approved, discharges must be consistent with the terms and conditions of the plan." [emphasis added]

Under § 3-104, UNC has consistently fallen under the "unless otherwise provided by these regulations" language. Section 3-106 does not require anything of an existing discharger until a discharge plan is required. After a discharge plan is required, an existing discharger may discharge for 240 additional days. After its 240 days expired, UNC was given numerous extensions, which permitted the discharge to continue until August 27, 1982. The mill has not operated since that date, nor has any new material been added illegally to the tailings disposal area since that date to the best of my knowledge. UNC has a compelling argument that all of its discharges were under the "unless otherwise provided by these regulations" clause of Section 3-104

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and therefore in compliance with the regulations and there has been no violation of the groundwater regulations. Although there are arguments we can raise concerning the effective date of the requirements of the groundwater regulations for UNC, the likelihood of success is not great.

Another concern under the groundwater regulations is the point of discharge" issue. A conservative view of the regulations sets the point of discharge at the place where the material is released into the tailings disposal area or, in other words, at the end of the pipe. Under the language of the regulations, it is arguable that another point, such as, the border of the tailings area or the border of the property owned or controlled by UNC, or the very edge of the plume of contamination is the proper measuring point for a discharge. However, any interpretation other than the end of the pipe is subject to inequitable application. For example, if the property line point is used to measure the point of discharge, a discharger could arrange to control as little property as possible and to limit its liability. As soon as the effluent left its property an existing discharger would no longer be responsible.

If we were able to establish that some point other than the end of the pipe is the proper place to measure a discharge, then any UNC discharges beyond that point, after August 27, 1982, would be in violation of Part III of the Water Quality Control Commission Regulations. There then remains a difficult technical problem in ascertaining which contamination was due to illegal discharges and which contamination was due to discharges occurring before August 27, 1982. Because of this technical problem, and because of the difficulty in ascertaining the point of discharge, it does not appear that a lawsuit for discharges after August 27, 1982, under the groundwater regulations would be highly likely to meet with success in obtaining comprehensive and effective pollution abatement.

#### WATER QUALITY CONTROL COMMISSION REGULATION 1-203

Regulation 1-203 states in part:

"Any person in charge of a facility, as soon as he has notice or knowledge of a discharge from the facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property shall immediately . . . take appropriate and necessary steps to contain and remove or mitigate the damage caused by the discharge."  
(emphasis added)

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While this appears to be a viable option for enforcement there are two difficult problems. First, this regulation was adopted primarily with the intention of protecting streams from emergency spills. Second, and more difficult, is the problem of establishing that there is "reasonable probability" of injury or detriment to human health, animal and plant life, or an unreasonable interference with the public welfare or the use of property. The fact that there are no wells in imminent danger, no people currently using any wells which are currently adversely affected by the contamination and the fact that an extensive record with numerous correspondence from the Division finds that good faith efforts have been made and that there has been good cause to allow the discharge to continue and statements from the governor to the effect that it was in the state's best interest that the discharge continue will make it difficult to establish the immediate threat or detrimental interference with the requisite "reasonable probability". Therefore litigation to enforce § 1-203 is not highly likely to be successful.

#### THE PUBLIC NUISANCE ACT

Section 30-8-2 NMSA 1978, makes polluting water a public nuisance punishable as a misdemeanor. Polluting water is defined as: "Polluting water consists of knowingly and unlawfully introducing any substance into any body of water causing it to be offensive or dangerous for human or consumption or use." [emphasis added] That section includes groundwaters in the definition of "body of water". Section 30-8-8 NMSA 1978, gives the Environmental Improvement Division and the Water Quality Control Commission or any other public officer the authority to seek court action to abate public nuisances.

There are a number of factors in the file which would be of assistance in pursuing a public nuisance lawsuit. They include the UNC's ongoing commitment to restore and reclaim contaminated ground waters. This commitment is made in repeated letters by the company and its consultants to the Division. These representations will be helpful in establishing that UNC was knowingly introducing contaminants into the body of water.

In attempting to establish that UNC was acting unlawfully, we will be confronted with the argument that every action taken by UNC was legal under the groundwater regulations. In order to rebut this argument we will have to establish that regardless of legality under the groundwater regulations, the discharges were illegal under the Public Nuisance Act since they created a public nuisance.

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The Public Nuisance Law is somewhat lacking in specificity and clarity. It is not an easy law to enforce. However, it seems better suited to the circumstances in the UNC case than the FCCC regulations. If we can establish that UNC's actions in polluting water were unlawful, because they violate the public nuisance law, it is my opinion that we have a reasonable chance of prevailing in a public nuisance action, at least to the point where the Judge determines that UNC has created a public nuisance. The relief which we will obtain is not as certain. There are other issues involved in public nuisance litigation, such as, the primary jurisdiction reasoning in the State ex rel. Norvell v. Arizona Public Service Co., 85 NM 165 (1973) case. We should be able to overcome such objections in most cases.

#### THE RADIATION PROTECTION REGULATIONS

The Radiation Protection Bureau has detected a violation of the maximum permissible concentration (MPC) for TH-230 in unrestricted areas. The well which produced the samples exceeding the MPC is located outside of the UNC property boundaries but not in near proximity to the outer boundaries of the contamination plume which has been defined by the Groundwater Section. This clear violation is actionable in a number of ways including amendment of the license or court enforcement. The crucial question is whether appropriate remedial action for this limited problem will have a substantial beneficial impact on the overall contamination problem defined by the groundwater section. If that is the case, enforcement of the Radiation MPC should be vigorously pursued.

#### PART 12 OF THE RADIATION PROTECTION REGULATIONS

Part 12 of the Radiation Protection Regulations provides for stabilization of inactive uranium mill waste retention systems. The definition of an inactive waste retention system is a tailings disposal site "to which material is not being presently added and, unless an exemption pursuant to Section 1-110 is granted, for which there are no plans for additions to the pile within a year". The UNC tailings retention area will fit this definition on May 3, 1983, the first anniversary of the closing of the Churchrock Uranium Mill. An exception may be granted by the Director upon request by UNC or upon his own initiative. I recommend that no exception be granted under any circumstances until it is determined whether early compliance with the Part 12 reclamation requirements will benefit water quality.

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#### CONCLUSION

A stern enforcement letter is in order. That letter should at a minimum discuss the following:

- (1) Scope of contamination;
- (2) Violation of Radiation MPC for Th-230;
- (3) UNC's continuing commitment to reclamation;
- (4) The need for intensified efforts for remedial action;
- (5) The possibility of legal action if UNC's efforts are inadequate
- (6) The fact that UNC has not reported on its alternate tailings site location efforts in a timely manner.

Following the letter and, depending on UNC's response, the following enforcement options should be evaluated:

- (1) Administrative and then court enforcement of the Radiation license violation;
- (2) Court Enforcement of the Public Nuisance Law
- (3) Encouraging EPA to enforce superfund
- (4) Administrative action to accelerate reclamation under the Radiation Regulations.

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