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March 31, 1980

MEMORANDUM FOR: William J. Dircks, Director
Office of Nuclear Material Safety and Safeguards

FROM: Howard K. Shapar
Executive Legal Director

SUBJECT: NRC - AUTHORITY TO ORDER CLEAN UP OF OFFSITE TAILINGS CONTAMINATION

Attached is a legal note responding to the questions asked in your memorandum to me of February 27, 1980. You may use the legal note as an attachment to your proposed Commission paper.

Original signed
by H. K. Shapar

Howard K. Shapar
Executive Legal Director

Enclosure: As stated

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OELD LEGAL NOTE

At several ~~other~~ places in the western states in the vicinity of licensed uranium mills, radioactive contamination has been found off-site.[1/] In many instances the offsite contamination has been found to be due to tailings materials generated in the mill processing of uranium ore. The mode of transport of the tailings offsite is not always known, but could have resulted from either natural phenomena, such as wind and water erosion, or from human transportation activity. Against this background the licensing staff (ONMSS) has asked two questions and requested a legal opinion. The two questions are:

(1) What is the role of the NRC in the control of tailings in offsite locations, e.g., could the NRC staff conduct monitoring and measurement programs utilizing NRC owned equipment, and

(2) Does NRC have authority to order either present or past licensees to clean up 'offsite' tailings contamination from uranium milling, (a) with respect to tailings that were moved offsite prior to the enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), and (b) with respect to tailings that were moved offsite after the

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1/ "Off-site" means outside of the boundaries of the land area under the possession and control of the licensee.

enactment of UMTRCA. Or, in other words, what is the relationship that should exist between the conduct of a past or present licensee and the presence of offsite tailings contamination that would support an order to the licensee to conduct an offsite cleanup program.

The answer to the first question is clear. Pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (UMTCRA), tailings from conventional uranium milling are byproduct material and subject to regulation and licensing by the NRC.[2/] Because tailings are now covered by the Atomic Energy Act of 1954 (AEA), all of the authority available under the AEA may be used by the NRC to resolve problems with respect to possession and use of tailings by persons subject to NRC jurisdiction. Section 81 of the AEA authorizes the issuance of licenses for byproduct material. Section 161b. of the AEA authorizes the issuance of orders and regulations with respect to byproduct material to protect health and to minimize danger to life or property. Section 161c. authorizes such studies and investigations as are necessary to assist the NRC in exercising any authority provided in the AEA. Section 84b.(2) authorizes studies, inspections, and monitoring with specific reference to tailings. Accordingly, the NRC may conduct monitoring and measurement programs to assess the health hazard of offsite tailings in order to develop a program of regulation (including orders, licenses, and regulations) as necessary and appropriate to alleviate the discerned public

2/ See Section 11e(2) of the AEA of 1954, as amended by Pub. L. 95-604 (UMTCRA).

health and safety hazards. The orders and rules may be applied to any person in possession of tailings.[3/]

The second question is more complex. As noted in the question, there are two time periods to consider, pre- and post-enactment of UMTRCA (November 8, 1978). After enactment of UMTRCA, there is no question of authority over tailings. In a proper case, that statute would permit NRC to issue an order requiring offsite cleanup with respect to offsite contamination or use of tailings occurring after November 8, 1978.[4/] What is a proper case, however, has to be determined by measuring the licensee's actions, or omissions, against the requirements of the statute, the regulations and his license conditions for safe storage and disposal of tailings.

Under the current general license in 10 CFR 40.26 only a person with a specific source material license for production of uranium from uranium ore may possess tailings, and no authority is given in the general license to transfer tailings. Thus, a deliberate transfer offsite to another person, either by the licensee, or countenanced by him, would be a violation of the regulations and subject to enforcement action that could include an order to return the material to licensed possession.

3/ Section 84b. of the AEA authorizes the issuance of regulations and orders applicable to persons exempted from licensing.

4/ While other sanctions are also available under the AEA, they would not necessarily lead to clean up. See e.g., Sections 223, 232, 234 of the AEA.

Offsite contamination due to natural phenomena such as wind and water erosion may also result in an order to clean up, depending equally upon what is stated in regulations and the license at the time the offsite contamination occurred. Current regulations, however, do not contain provisions imposing a duty to protect tailings from dispersion by natural phenomena, although proposed regulations would establish this as a licensing requirement (Criterion 2 in proposed Appendix A to 10 CFR Part 40, 44 FR 50015).

Failure of an engineered structure, such as a tailings pond dam, may also provide a basis for an order to clean up resulting offsite contamination, on the ground that the continuing safety of engineered structures is a commitment of the licensee, and a condition of issuing the license. The order to clean up offsite (as well as onsite) contamination would normally be a consequence of violation of a license condition. An accident that led to a public health hazard could also warrant a clean up order under Section 161b. of the AEA.

As to offsite tailings contamination that occurred prior to November 8, 1978, there appears to be no legal basis to order a mill operator to clean up. Prior to that date tailings were not material subject to regulation under the AEA as amended. Accordingly, the position was taken early by the AEC that there was no jurisdiction over the transfer of tailings to others for purposes unrelated to milling activity, and no jurisdiction over the

tailings after the milling activity shut down and the need for a source material license ceased.[5/]

The consequence of this position is clear; if transfer of tailings offsite for uses unrelated to source material processing was not subject to regulation under the AEA, there is no basis to order either a present or past licensee to clean up offsite.

Nor does UMTRCA provide new authority to NRC to remedy pre-November 8, 1978 offsite contamination resulting from unregulated tailings uses. It is a settled principle of law that statutes will not be applied retroactively to the detriment of persons who relied in good faith upon prior law, absent a clear legislative expression that retroactive application was intended. (See Sutherland, Statutory Construction, §41.04). There is nothing in UMTRCA to support the view that it should be applied retroactively.

5/ See (1) memorandum of Acting General Counsel, AEC, dated December 7, 1960, stating that AEC had no authority over mill tailings use by others for construction purposes, (2) memorandum of April 15, 1960, by L. K. Olson, General Counsel of AEC, stating that the discharge of tailings, when an integral part of milling, is under AEC control, but AEC has no jurisdiction over the transfer of tailings to others and uses unrelated to the milling of ore, and (3) memorandum of September 22, 1966, by Howard K. Shapar, Assistant General Counsel, Licensing and Regulation, concluding that jurisdiction over tailings at the mill site, based on mill operations, was highly questionable after the mill shut down.

In the same vein see Section 201, Public Law 91-314 (86 Stat. 222), in which the Congress assumed the compassionate responsibility for remedial action at Grand Junction, Colorado, where tailings were extensively used in building construction. The United States did not accept legal responsibility for offsite use of tailings generated by its contractors.

Titles I and II of UMTRCA are both germane to this question. Title I deals with a DOE administered remedial action program covering former uranium mill tailings disposal sites unlicensed as of January 1, 1978, including nearby areas contaminated with tailings. Section 115(b) of Title I requires the Department of Justice to study the potential legal responsibilities of past operators of mill sites included within the scope of Title I for reclamation or remedial action at the site. The Attorney General is also authorized to take appropriate legal action, based upon his study, under any provision of law in effect when the uranium was produced at the site, to require reimbursement to the United States of costs incurred in the remedial action for which the operator is liable. It is clear that past law, not present law, will guide legal responsibility for past conduct under Title I.

Title II of UMTRCA expands NRC and EPA authority to cover mill tailings disposal sites. It contains nothing indicating that a retroactive application of authority was contemplated. The land ownership requirements (§202), the Agreement State procedures requirements (§204), the new NRC authorities (§§203, 205), the new EPA authority (§206) all apply to future regulation of tailings. Further, it would be unconstitutional to apply retroactively the provisions of UMTRCA that are incorporated into the AEA if that application led to the imposition of a criminal penalty under §223 of the AEA (Const. art. I, §9, cl. 3). Thus, while present possession of tailings may be licensed under UMTRCA, that act does not give authority to go back in time and retroactively make illegal what was previously legal conduct.[6/]

6/ We are not, in this memorandum, expressing any opinion as to whether other remedies leading to offsite clean up may be available under State law or other Federal law. We are concerned only with the single question of whether NRC can order such a clean up under the various circumstances described here.