


ATLAS CORPORATION | 

Republic Plaza, 370 Seventeenth Street, Suite 3150
Denver, CO 80202
Telephone: (303) 825-1200 Fax: (303) 892-8808

November 3, 1989

FEDERAL EXPRESS

Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Re: Reply and Answer to Notice of Violation

Dear Sir:

Enclosed please find the Reply and Answer on behalf of the Atlas Corporation, Atlas Minerals Division ("Atlas") to the Notice of Violation and Proposed Imposition of Civil Penalty ("NOV") issued to Atlas by Mr. John Montgomery, Regional Administrator for Region IV of NRC. As described in detail in the Reply, Atlas does not believe it has violated 10 C.F.R. § 20.106(a) and therefore requests that the NOV be dismissed. In addition, as described in the Answer, Atlas believes that imposition of any penalty, and certainly a penalty of \$6,250, is unwarranted under the circumstances and does not comport with the NRC's own penalty policy.

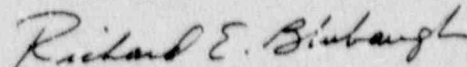
Both the NRC and Atlas have devoted considerable resources toward developing a corrective action plan and accelerating reclamation plans to address radon emanation issues at the site. It is counterproductive and unjustifiable for NRC to now issue an NOV for the exact same matter and force both parties to devote additional resources to administrative hearings and legal proceedings. Accordingly, as described more fully in Section III of the Reply, Atlas hereby proposes that an arrangement be made between the NRC and Atlas to withdraw the NOV during the pendency of corrective action and accelerated reclamation plan implementation. NRC could then reinstate the NOV should it find that Atlas has not undertaken steps required in these plans. We believe that this proposal would direct our collective resources toward addressing the actual concern rather than toward further contested proceedings.

B911070353 B91103
PDR ADOCK 04003453
C PNU

IE14
1/1

Please contact us with questions or comments regarding the enclosed Reply and Answer and the statements and proposals contained therein. We would hope that this disagreement over this narrow issue will not affect the generally cooperative relationship that has developed between Atlas and the NRC.

Sincerely,



Richard E. Blubaugh
Vice President
Regulatory and Environmental
Affairs

cc: Mr. John M. Montgomery
Acting Regional Administrator
Nuclear Regulatory Commission
Region IV
Suite 1000
611 Ryan Plaza Drive
Arlington, Texas 76011

REPLY TO NOTICE OF VIOLATION AND
PROPOSED IMPOSITION OF CIVIL PENALTY

NRC Inspection Report No. 40-3453/89-01

Pursuant to 10 C.F.R. § 2.201 (1989), the Atlas Corporation, Atlas Minerals Division ("Atlas") hereby files this Reply to Notice of Violation and Proposed Imposition of Civil Penalty ("Reply"). This Reply is submitted in response to the Notice of Violation ("NOV") transmitted to Atlas by John Montgomery, Acting Regional Administrator for Region IV, U.S. Nuclear Regulatory Commission ("NRC").^{1/}

I. Denial of the Alleged Violation

For the reasons stated below, Atlas denies that it violated 10 C.F.R. § 20.106(a), which requires that no radioactive material be released to an unrestricted area in concentrations above those specified in Appendix B, Table II of 10 C.F.R. Part 20, when averaged over one year. Further, Atlas believes that the NRC waived and foreclosed the option of issuing an NOV by virtue of the course of action pursued by the NRC in addressing this matter.

A. The NRC Has Incorrectly Characterized Data From Sample Point S-2 As Indicative of Radon-222 Concentrations in an Unrestricted Area.

The NRC lacks sufficient information to demonstrate that Radon-222 was released to an unrestricted area in concentrations above the maximum permissible concentration ("MPC") for the calendar year 1988. The data upon which the NRC bases the NOV, derived from sample point S-2, was not taken within an "unrestricted area" as defined in 10 C.F.R. § 20.3(a)(14) (1989). Data collection point S-2 is located within the fenced, confined area of the site which runs along the banks of the Colorado River. Thus, data from S-2 represents ambient air concentrations within an area which is "controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials." Id.; see also Atlas' License Renewal Application (May 1984) (S-2 results not identified as indicative of unrestricted area). Therefore, the appropriate standard for Radon-222 in assessing the data compiled from S-2 is the MPC applicable to a restricted area. It is

^{1/} The NOV itself was undated, but the cover letter to the NOV from Mr. Montgomery (the "Montgomery Letter") was dated October 5, 1989. As requested by NRC, this Reply is submitted within 30 days thereof.

undisputed that the 1988 Radon-222 levels compiled at data point S-2 did not exceed the MPC for a restricted area.

As you know, the area encompassed by Atlas' Source Material License No. SUA-917 (the "License") includes riparian lands buttressing the Colorado River. For purposes of protecting individuals from radiation exposure, Atlas maintains control over those riverlands on the west bank of the Colorado River.^{2/} Thus, the appropriate location or boundary for determining ambient Radon-222 concentrations in the unrestricted area is at a sample point taken immediately across the Colorado River from sample point S-2. Data collected at this sampling point confirms that Radon-222 concentrations in the representative "unrestricted area" did not exceed the MPC for 1988.

The NRC has acknowledged the appropriateness of using air concentrations at a location across the Colorado River as a monitoring point for unrestricted areas. When Atlas personnel were apprised that unusually high Radon-222 levels had been recorded at S-2 during the third quarter of 1987, Atlas discussed the matter with Mr. Harry Pettengill of the NRC's Uranium Field Recovery Office. Mr. Pettengill recommended that Atlas perform additional sampling at this exact point immediately across the Colorado River from S-2, along the boundary of the unrestricted area. The results confirmed that the MPC levels were not being exceeded at this boundary. Thus, the NRC's informal approach to this matter underscores that no MPC exceedance within an unrestricted area has occurred.

Further evidence that MPC values within the unrestricted area were not exceeded can be gleaned from data generated from sample point S-1. Sample point S-1, due to its location on the boundary of both Atlas' northeast property line and the uncontrolled area (Tex's Tour Center is nearby), serves as an appropriate unrestricted area checkpoint. See 10 C.F.R. § 20.106(d) (identifying the actual boundary of the restricted area as an appropriate sample point). Data from this sample point confirms that no exceedance has occurred along the boundary of the unrestricted area. Thus, even if S-2 data were indicative of unrestricted area boundary concentrations of Radon-222, such data should be evaluated by the NRC in light of concentrations below the MPC obtained from sample point S-1 (and S-3).

^{2/} Therefore, the true boundary of the unrestricted area near S-2 is the east bank of the Colorado River. The pertinent segment of the Colorado River is not accessible, and the only use of the river on this segment is by rafters who pass by momentarily, posing no threat of "exposure" as that term is used in 10 C.F.R. § 20.3(a)(14) (1989).

B. NRC Has Pursued A Course Of Action Entirely Inconsistent With Issuance Of An NOV.

Despite Atlas' belief that it has not violated ambient Radon-222 MPC standards in an unrestricted area, Atlas has implemented several initiatives to address this issue. Atlas' development of these responsive activities, which are described in Section II below, was triggered in part by discussions between Atlas and the NRC at the Enforcement Conference on June 2, 1989. These discussions led the NRC to issue a June 8, 1989 Confirmation of Action Letter ("CAL"), reiterating that the NRC and Atlas had agreed to a course of action designed to address and eventually minimize radon emanation from the Licensed Area.^{3/} As the NRC acknowledges, see Montgomery Letter at 1-2, and as further detailed in Section II below, Atlas has promptly and effectively implemented the measures discussed during the Enforcement Conference and developed further this summer.

Given the approach adopted by NRC, the NRC has waived the right to issue an NOV that contravenes the compliance track established under the CAL. The NRC's penalty policy (the "NRC Policy"), 10 C.F.R. Part 2, Appendix C (1989), describes the different avenues available to NRC in selecting enforcement sanctions. The NRC Policy first notes that basic sanctions available to NRC include NOV's, civil penalties and orders, then describes several "related administrative mechanisms" which are "additionally" available. NRC Policy, Section V. Among those additional "administrative mechanisms" is the CAL letter, which is characterized as an enforcement sanction which the NRC may select in addressing a particular incident or matter. Id. Thus, the enforcement scheme outlined in the NRC Policy is designed to either lead to an NOV--when appropriate under the Policy--or result in use of alternative administrative mechanisms such as a CAL. Id.

The NRC's decision in this case to (1) issue a CAL to address a complex and fluctuating radon emanation concern; (2) approve specific measures required by the CAL; and (3) acknowledge that such actions are being completed, then turn around and issue an NOV for the exact same conduct, contradicts NRC Policy and is legally unsupportable. In fact, the CAL itself recognizes the inconsistency in such an approach by stating that issuance of the CAL "does not preclude the issuance of an order

^{3/} In this regard, NRC recognized that measures to be implemented by Atlas, including acceleration of its reclamation plan, "may not be immediately effective in controlling radon emanation." CAL at 1. Thus, the radon emanation concerns raised by NRC are not "quick-fix" items that are susceptible to simple remedial measures.

formalizing the above commitments." CAL at 2. By this statement, NRC preserves its right to formalize the CAL process and underlying commitments, but waives its right to pursue the divergent approach of issuing an NOV and initiating an adversarial proceeding. Had the NRC intended to preserve the latter option, it could have so stated in the CAL.

II. Corrective Actions

There is no dispute that Atlas has been cooperative and responsive to NRC's concerns in establishing measures at the Licensed facility to mitigate airborne Radon-222 concentrations. First, as acknowledged in the Montgomery Letter, Atlas submitted a Corrective Action Plan ("CAP") within the 45-day period prescribed by the CAL aimed at reducing radon emanation rates from both the ore stockpiles and exposed tailings surfaces. NRC has not only approved the steps outlined in the CAP, but now characterizes Atlas' overall efforts as "extensive." Montgomery Letter at 2. Atlas has also augmented the CAP with a License amendment request providing supporting information regarding measures to be undertaken at the site. See August 16 and 25, 1989 Letters from Atlas to NRC, referenced in Montgomery Letter at 2. The results of these measures will be discussed in a Completion Report to be submitted by Atlas' consultant, Canonic Environmental Services Corporation, within 30 days.

Second, Atlas has implemented an enhanced radon sampling program, yielding monthly readings which are then forwarded to NRC. Enhanced sampling is being performed at all sampling stations.

Third, Atlas has developed and implemented measures to address Radon-222 emanation on a long-term basis through acceleration of its reclamation plan, which is integrated with the CAP. Clearly, the willingness of Atlas to accelerate reclamation work reflects its overall responsiveness to the NRC's concerns. The fact that Atlas has performed accelerated reclamation work notwithstanding NRC's delay in formally approving the plan (which was submitted over one year ago) further demonstrates Atlas' responsive approach to this matter.

In light of (1) Atlas' denial of the alleged violation; (2) the extensive nature of actions performed to date by Atlas and approved in the CAL; and (3) Atlas' commitment in the CAP to assess the need for further action, depending on monitoring results, once corrective action has been implemented, Atlas is unwilling at this time to accept the imposition of the NOV or any penalties. NRC could certainly contribute to implementation of long-term protective measures by approving the reclamation plan submitted by Atlas in August 1988.

III. Conclusion

For the reasons discussed in this Reply, Atlas denies that it has violated 10 C.F.R. § 20.106(a) and hereby requests that the NOV be dismissed under 10 C.F.R. § 2.205(d). Given the circumstances and facts described above, it would be impermissibly punitive and wholly unproductive--as well as contradictory to the NRC Policy--for the NRC to issue an NOV for this matter.

However, Atlas recognizes that steps required by the CAL and under the accelerated reclamation plan are an important aspect of NRC's selected enforcement approach to this matter. Thus, Atlas would agree to an arrangement whereby the NOV would be withdrawn until completion of those activities required by the NRC under the CAL and reclamation plan which are designed to minimize radon emanation. (Under the CAP, this includes evaluation of monitoring results once corrective action has been implemented.) NRC would have the option of reinstating the NOV should it find that Atlas has not undertaken those remedial steps required in these plans. Under this arrangement, the resources of Atlas and NRC would be directed towards implementation of measures to minimize environmental releases rather than administrative hearings and other legal proceedings which, under these circumstances, would yield no benefit to either party.

An additional measure which could be folded into the arrangement described above would involve relocation of sample point S-2, which as currently located is unsuitable for monitoring unrestricted areas. Atlas would propose a license amendment which would permit relocation of sample point S-2 to a more suitable area, subject to NRC approval, for monitoring unrestricted area concentrations of Radon-222. Samples could be taken on the current monthly basis while corrective action/accelerated reclamation work is being performed. These samples could then be used, along with data from S-1 and S-3, as a better measure of radon concentrations in unrestricted areas.

AFFIRMATION

STATE OF Colorado)
) ss.
COUNTY OF Denver)

The undersigned, being duly sworn, states as follows:
The facts set forth in the foregoing Reply to Notice of Violation
and Proposed Imposition of Civil Penalty are true to the best of
the undersigned's knowledge, information and belief.

Signature Richard E. Blubaugh
Name Richard E. Blubaugh
Title Vice-President Regulatory and Environmental Affairs

The foregoing instrument was acknowledged before me
this 3^d day of November, 1989 by
Richard E. Blubaugh.

Witness my hand and official seal.

My commission expires: 10-2-91

Kathleen A. Leibering
Notary Public

**ANSWER TO NOTICE OF VIOLATION AND
PROPOSED IMPOSITION OF CIVIL PENALTY**

NRC Inspection Report No. 40-3453/89-01

Pursuant to 10 C.F.R. § 2.205 (1989) and 10 C.F.R. Part 2, Appendix C (1989) (the "NRC Policy"), Atlas Corporation, Atlas Minerals Division ("Atlas") hereby files the enclosed Answer to Notice of Violation and Proposed Imposition of Civil Penalty ("Answer"). This Answer is submitted in response to the Notice of Violation ("NOV") transmitted to Atlas by John Montgomery, Acting Regional Administrator for Region IV, U.S. Nuclear Regulatory Commission ("NRC").^{1/}

I. Denial Of The Alleged Violation

For reasons stated in the Reply to Notice of Violation and Proposed Imposition of Civil Penalty ("Reply") filed herewith, Atlas hereby denies that it has violated 10 C.F.R. § 20.106(a). The Reply is hereby incorporated by reference as if fully set forth in this Answer.

II. Extenuating Circumstances Requiring
That No NOV or Penalty Be Imposed

A. Issuance Of An NRC Order Requiring Dewatering Of
Tailings Led To Increased Radon-222 Concentrations.

In 1987, the NRC issued a specific order, over Atlas' objections, which triggered the increase in Radon-222 concentrations of which the NRC now complains. This order effectively rescinded an earlier License Amendment No. 28, dated June 5, 1987, which specifically directed Atlas to control airborne emissions "by maintaining water cover over the tailings."

Thus, the difficulty began in July 1987 when NRC ordered that Atlas must discontinue pumping water into tailings piles so as to decrease the hydrostatic head allegedly driving groundwater migration towards the Colorado River. Atlas argued vehemently at the time that concentrations of radionuclides in groundwater and surface water samples indicated (and continue to indicate) that the waters of the Colorado River have not been

^{1/} The NOV itself was undated, but the cover letter to the NOV from Mr. Montgomery (the "Montgomery Letter") was dated October 5, 1989. As requested by NRC, this Answer is submitted within 30 days thereof.

impaired or otherwise impacted by Atlas' activities. Accordingly, Atlas asserted that it was far more protective of the environment and the public health to continue pumping water into the tailings, so as to minimize air concentrations of Radon-222 and airborne particulates, than to discontinue this practice to address an insignificant hydrological issue. Atlas specifically noted that despite all best efforts, the NRC's dewatering order would result in higher radon levels which would require an accelerated reclamation program.

NRC's rigid insistence upon the dewatering of tailings has now resulted in the predicted increase in airborne Radon-222 concentrations. This factor, in conjunction with the NRC's overall approach to this matter described in Section II of the Reply, constitutes extenuating circumstances warranting that the NOV be dismissed altogether or that no penalty be imposed.

B. Complications Regarding Stockpiled Ore Contributed to Increased Radon Concentrations.

As discussed during the June 2, 1989 Enforcement Conference, Atlas believes that a contributing factor to increased Radon-222 readings is the presence of stockpiled ore that accumulated on the Licensed site as a result of ore crushing activities. Atlas has been aware of the need to consolidate and/or remove this material and has diligently pursued this matter. First, a company named Rio Algom agreed to take the crushed ore, and a portion of the material was removed in August and October of 1988.^{2/} Rio Algom then declined to remove the remainder of the tailings. At this juncture, Atlas decided to include within its reclamation plan a proposal for depositing stockpiled material onto the tailings impoundment. During discussions with NRC in regard to this plan, NRC staff never indicated that implementation of these measures on an expedited basis was critical. (In contrast, NRC's initiative to rescind Amendment No. 28 was given top priority.)

In short, the attendant lag in consolidating this potential source of Radon-222 with the tailings has been a contributing factor to higher Radon-222 levels. This extenuating circumstance, largely outside of Atlas' control, should be considered in assessing the appropriateness of imposing a penalty for this matter.

^{2/} This removal process itself could well have triggered the higher Radon-222 reading recorded in late 1988, as the process of breaking up and transporting crushed and hardened ore often results in the release of radon gas previously trapped in the interstices of the tailings.

III. Additional Reasons Warranting Remission/Mitigation of the Proposed Penalty

A. NRC's 100% Increase In The Base Penalty Under The "Prior Notice" Criteria Is Unwarranted.

The NRC summarizes its rationale for assessing a \$6,250 penalty for this matter on page 2 of the Montgomery Letter. According to the NRC, the \$5,000 base value for this "Severity Level III" violation was initially increased by 100% due to Atlas' "prior notice of a potential problem from environmental monitoring results." Id. at 2.

This "prior notice" factor is discussed in Section V.B.4 of the NRC Policy. The NRC states therein that an increase from the base value is appropriate where the licensee "had failed to take effective preventive steps" in regard to a potential problem of which the licensee had prior knowledge.

In fact, Atlas did take "effective preventive steps" to address this issue, such that no increase is warranted under this factor, much less a 100% escalation. As described in Section I.A. of the Reply, Atlas immediately discussed the anomalous reading with the NRC during the latter portion of 1987. Subsequently, an annual ALARA audit report was provided on May 3, 1988 which discussed the increasing radon trends and noted that "soil cover may be required to effectively reduce Radon-222 concentration since NRC will not allow addition of water to the pond." These soil cover measures were subsequently developed in 1988 as discussed above.

As noted above, Atlas was told by NRC that additional sampling within the unrestricted area across the Colorado River from sample point S-2 would be an appropriate initial response to assessing the importance of the 1987 reading. This sampling program gave Atlas no reason to suspect that unrestricted area concentrations of Radon-222 would exceed the maximum permissible concentration ("MPC") in the future. Thus, all available evidence, up until the second significant Radon-222 spike occurred in late 1988, indicated that high radon levels in last quarter of 1987 was a fleeting concern at the Site.

In short, Atlas not only lacked prior notice that a potentially violative condition actually existed, but also began to take effective preventive steps to minimize the likelihood that, even if such a condition existed, it would persevere. As NRC itself acknowledges in the CAL, increased radon emanation is a multifaceted, fluctuating problem which requires initiation of measures which may not be immediately effective in reducing concentrations. In light of these and other factors discussed in

this Answer and the Reply, it is arbitrary and unjustifiable for NRC to invoke the 100% maximum increase under the "prior notice" criterion of the NRC Policy.

B. The Allegedly Violative Condition Was Promptly Reported By Atlas.

The NRC Policy states that a 50% reduction is warranted in circumstances where the licensee "identifies the violation and promptly reports the violation to the NRC." NRC Policy, Section V.B.1. Such a reduction is warranted here given that (1) the initial anomalous reading in 1987 was promptly reported through oral communications to NRC; and (2) subsequent 1988 data was reported through filing of environmental monitoring program results to NRC in February 1989, shortly after last quarter 1988 data became available in early 1989. At minimum, this factor should offset NRC's cumulative 25% escalation of the base penalty under the NRC Policy, which resulted in an increase in the penalty from \$5,000 to \$6,250. See Montgomery Letter at 2.

C. Application of NRC's Discretionary Factors Suggests That NRC Should Refrain From Imposing Any Civil Penalty for This Violation.

Section V.G. of the NRC Policy provides that the NRC may refrain from imposing any civil penalty for certain Severity Level III violations which do not involve an "overexposure" or related "release of radioactive material." (Certainly, no such "overexposure" to any specific individual has occurred here). Exercise of such discretion is warranted here, since the four factors identified by NRC in determining whether this provision is applicable are satisfied. First, as discussed above, this sporadic, fluctuating concern was clearly flagged by Atlas and reported to NRC. Id. at V.G.3.a. Second, there is no dispute that comprehensive action has been taken within a reasonable time following identification of the concern. Id. at V.G.3.b. Third, the alleged violation meets the dual test that it be neither "reasonably preventable" or "reasonably correctable" based on similar concerns or the licensee's prior notice of the problem. V.G.3.c. Fourth, there is no dispute that the violation was not "willful" or indicative of "a breakdown of management controls." V.G.3.d. Under these circumstances, where the NRC has established a specific methodology for determining when no penalty should be imposed and Atlas' activities meet this test, no penalty is warranted.

IV. Conclusion

For reasons described herein and in the Reply, Atlas submits that should the NOV be affirmed, no penalty should be

imposed. Alternatively, the penalty should be significantly reduced according to the factors identified above.

AFFIRMATION

STATE OF Colorado)
) ss.
COUNTY OF Denver)

The undersigned, being duly sworn, states as follows:
The facts set forth in the foregoing Answer to Notice of Violation and Proposed Imposition of Civil Penalty are true to the best of the undersigned's knowledge, information and belief.

Signature Richard E. Blubaugh
Name Richard E. Blubaugh
Title Vice-President Regulatory and Environmental Affairs

The foregoing instrument was acknowledged before me
this 3rd day of November, 1989 by Richard E. Blubaugh.

Witness my hand and official seal.

My commission expires: 10-2-91

Kathleen A. LaPrade
Notary Public