UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

MAY 27 1994

MEMORANDUM FOR: Cheryl A. Trottier, Section Leader
Radiation Protection and Health
Effects Branch
Office of Nuclear Regulatory Research

FROM: Martin G. Malsch
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SUBJECT: FUNDING OF GDP DECOMMISSIONING COSTS

Among the areas receiving the most comments concerning the Draft 10 CFR Part 76 is the question of whether the USEC and its successors should be required to provide some form of Decontamination and Decommissioning (D&D) funding during the period of operation of the Gaseous Diffusion Plants (GDP). In general, the USEC maintains that, because the DOE is charged with responsibility for D&D for the original GDP facilities being transferred under Title II of the Atomic Energy Act of 1954, as amended, (AEA) no financial assurance requirements should apply to USEC. Most other commenters addressing this issue, including the DOE, maintain that USEC should be required to provide financial assurance for D&D costs. In particular, DOE notes that its responsibilities are limited under both the Atomic Energy Act of 1954, as amended, and the actual terms of its lease with USEC.

As a result of these comments, the staff has requested OGC's evaluation of USEC responsibilities for decommissioning funding. This memorandum addresses the legal responsibilities of DOE and USEC under the statutes and the DOE/USEC lease applicable to the GDPs.

The AEA has specific provisions which address the financial responsibility of DOE with respect to D&D. Referring to the GDPs to be leased to USEC, Section 1403 (d) of the Atomic Energy Act of 1954, as amended, (AEA) states that:

> **Section 1403. LEASING OF GASEOUS DIFFUSION FACILITIES OF DEPARTMENT**
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> ...
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> (d) DOE RESPONSIBILITY FOR PREEXISTING CONDITIONS.-The payment of any costs of decontamination and decommissioning, response actions, or corrective actions with respect to conditions existing before the transition

> date, in connection with property of the Department leased under subsection (a), shall remain the sole responsibility of the Department.

Chapter 28 of the AEA, sections 1801 through 1805 provides for the establishment by DOE of a Decontamination and Decommissioning Fund in the amount of 2.26 billion dollars, indexed for inflation, which is to be used to fund DOE's D&D responsibilities at the GDPs. Specifically, it is stated:

> **Section 1803. DEPARTMENT FACILITIES**
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> ...
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> (b) PAYMENT OF DECONTAMINATION AND DECOMMISSIONING COSTS.-The costs of all decontamination and decommissioning activities of the Department shall be paid from the Fund until such time as the Secretary certifies and the Congress concurs, by law, that such activities are complete.

The above provisions make it clear that DOE, not USEC, is to be responsible for, and is to provide funding for, D&D activities associated with the GDPs facilities turned over to USEC under the AEA. It would appear contrary to the above AEA provisions, therefore, to require financial assurance from USEC for these activities. However, DOE financial responsibilities are explicitly limited to costs associated with "conditions existing before the transition date". Accordingly, there is a question as to responsibility for conditions created during USEC's, or its successors', lease term.

The AEA does not specifically address USEC's responsibilities for D&D costs that relate to conditions not existing before the transition date. It does, however, have a general provision addressing USEC liabilities with respect to operations after the transition date. The AEA states:

> **Section 1406. LIABILITIES.**
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> ...
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> (d) Judgements Based On Operations After Transition.-Any judgement entered against the Corporation arising from operations of the Corporation on or after the transition date shall be payable solely by the Corporation from its own funds...

Although this provision does not specifically address D&D funding liabilities, it does create the implication that USEC is to be liable for activities occurring during its operation of the GDPs. Therefore, although not explicitly stated in the AEA, it appears reasonable to conclude that the AEA implies that USEC is to be responsible for D&D costs solely attributable to operation of the GDPs during USEC's leasing of the facilities.[1] The terms of the lease between the DOE and USEC appear to confirm that both parties to that lease interpret the AEA in a similar manner.

The agreement between DOE and USEC is entitled "LEASE AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES ENRICHMENT CORPORATION", and is dated July 1, 1993 (hereinafter "Lease"). With respect to DOE and USEC responsibilities at the end of the lease term, the Lease provides:

> Section 4.4 Turnover Requirements At the end of the Lease Term or at any time the Corporation exercises its option in Section 3.4(b) hereof or terminates this Lease pursuant to Section 9.3 hereof (except that in the case of termination under such Section 9.3, only with respect to facilities which are not destroyed), the Corporation shall, prior to returning to the Department any facility which constitutes the Leased Premises, take the following actions with respect to such facility (collectively such actions being referred to as the "Turnover Requirements"):
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> ...
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> > (c) Remove all waste generated by the Corporation in such facility (including any material that is subject to classification as hazardous waste under the Solid Waste Disposal Act, as amended) and which is subject to and authorized by Laws and Regulations for offsite disposal. The Corporation will remain responsible for the ultimate treatment and disposal of waste generated by the Corporation, and for which the Department is not responsible, except as may otherwise be provided in this Lease.

Lease, Section 4.4 (c)

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[1] A review of the various Congressional committee reports in support of the Energy Policy Act, which amended the AEA to include Title II addressing the United States Enrichment Corporation, did not reveal any support for a contrary interpretation of the above language.

Further, Section 4.5 of the lease addresses the ability of the Corporation to make capital improvements or changes to the GDPs during the lease term and provides:

> Section 4.5 Permissible Changes
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> ...
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> (c) The Corporation shall become the owner of and shall take title to each and every Capital Improvement. The Corporation will have the right to remove any Capital Improvement; provided however, that if such removal increases the costs of the Department for the Decontamination and Decommissioning of the Leased Premises to which any such Capital Improvement was attached, the Corporation will pay any such increase in Decontamination and Decommissioning costs. The Corporation and the Department shall agree on the amount of such Decontamination and Decommissioning costs, if any exist, and the time and method of their payment when such Capital Improvement is removed. Title to any Capital Improvement which is not removed by the Corporation will transfer to the Department at the end of the Lease Term, without the need for the Corporation to take any further action, whether under this Lease or otherwise.

Lease, Section 4.5 (c).

Finally, Section 4.6 of the Lease provides:

> Section 4.6 Decontamination and Decommissioning
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> Except as provided in Section 4.5(c) of this Lease, the Department will be responsible for and will pay the costs of all Decontamination and Decommissioning, including the costs of all Decontamination and Decommissioning of the Leased Premises, the Leased Personality, any personal property found on the Leased Premises, regardless of ownership, and any Capital Improvement. The Department may initiate action for the Decontamination and Decommissioning of property any time property of any kind is returned to the Department by the Corporation pursuant to a provision of this Lease.

Lease, Section 4.6.

In view of the above Lease provisions, and consistent with the AEA provisions noted above, it appears that, although DOE will have

responsibility for conducting D&D activities at the GDPs, there is some areas where the USEC will have financial responsibility for D&D. Specifically, USEC will be responsible for disposal of wastes it creates during the lease term plus any increased D&D costs associated to DOE resulting from USEC's removal of Capital Improvements it makes at the GDPs. Under the Lease, DOE will assume financial responsibility for D&D of Capital Improvements, added by USEC during the lease term, if those Capital Improvements are turned over to DOE upon the termination of the lease. At this point, it is not possible to determine whether or not the costs which are the responsibility of USEC will be substantial. In fact, it is possible that no such costs will remain outstanding at the time the GDPs are returned to DOE for D&D.[2] However, the staff may want to consider retaining the financial assurance requirements in the draft Part 76, at least to the extent of evaluating the existence of any D&D costs which are the responsibility of USEC and assuring financial resources consistent with those responsibilities are provided by USEC before it ceases to operate the GDPs.

As currently drafted, 10 CFR §§ 76.35(k) and (l), which require that USEC provide a description of how wastes will be handled and financial assurance for waste activities, go beyond the limited liability of USEC described above. In response to USEC's comments, therefore, it would reasonable to provide that financial assurance need not be provided for D&D activities that are the financial responsibility of DOE. The staff may, however, want to consider including financial assurance for the limited area, as described above, where USEC will be responsible for D&D costs.

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[2] It is to be noted that DOE, based on its comments, is primarily concerned with the costs associated with the waste disposal responsibilities of USEC discussed above. DOE has not evidenced a particular concern with D&D of capital improvements which it will gain title to at the time of return of the GDP's to DOE under the lease terms.

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NRC ends comment period

Nuclear commission says time limits block further debate

Times Staff Report

The Nuclear Regulatory Commission has decided not to extend the formal public comment period on its proposed standards for the uranium enrichment plant in Piketon, despite protests by environmentalists.

However, since NRC staff members have not completed their review of public comments received thus far, they will consider additional comments until mid-July, when they plan to make recommendations to the commission, according to a written statement from the NRC.

The Energy Policy Act, passed on Oct. 24, 1992, requires the NRC to issue public safety and health standards for the Portsmouth Gaseous Diffusion Plant, as well as the uranium enrichment plant in Paducah, Ky., within two years. Due to this Congressionally mandated deadline, the statement said, there is insufficient time to formally reopen the public comment period.

The additional comments will be assessed as much as possible before the deadline, the statement said.

Proposed regulations on this subject were published in the Federal Register on Feb. 11, with 60 days allowed for public comment.

Several environmental groups, however, said they did not receive their copies of the Register until after the comment period closed. They petitioned the government to reopen the comment period.

Before the U.S. Enrichment Corporation began leasing the plants from the Department of Energy, the DOE controlled health and safety at the facilities. With the change in management, the NRC is scheduled to begin overseeing those areas.

NRC also is authorized to establish a process under which USEC's operations at the Portsmouth and Paducah plants will be annually reviewed by NRC, in consultation with the Environmental Protection Agency, to determine whether they are in compliance with NRC standards.

Until those rules are approved, DOE will continue its regulatory oversight of nuclear safety, safeguards and security

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for the two plants.

According to the written statement, NRC will publish in the Federal Register a notice of the filing of the application for a certificate, and copies of the application would be made available for public inspection and comment. A public meeting will be held on the first certification application, and on future applications if NRC officials decide there is enough public interest or that a meeting is in the public interest.

The technical standards would include requirements regarding criticality safety, emergency procedures, employee protection against discrimination by USEC if the employee engages in certain protected activities, such as providing the NRC with information about alleged violations of the regulations, completeness and accuracy of information provided by USEC to NRC, sanctions for deliberate misconduct, and material control and accounting.

In addition, the new regulations would require the plants to follow other general NRC rules regarding radiation protection, reporting of defects, and standards for packaging and transporting radioactive material.

Comments should be sent to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch.

Single copies of the proposed regulation may be obtained from Roberta Gordon, Radiation Protection and Health Effects Branch Secretary, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; telephone, (301) 415-5385.

All documents related to the rule making may be examined at the NRC Public Document Room, 2120 L Street, N.W., Washington, D.C. In addition, the NRC is in the preliminary stages of establishing local public document rooms near the plants.