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RECEIVED AUG 13 1985 U.S. Nuclear Regulatory Commission Mail Section

Mr. R. Dale Smith
Director
Uranium Recovery Field Office
Region IV
U.S. Nuclear Regulatory Commission
730 Simms Street
Suite 100
Lakewood, Colorado 80215

RE: Demand for hearing on July 19, 1985, orders implementing 40 CFR 192.32(a)(2)

Dear Mr. Smith:

On July 19, 1985, your office issued orders amending licenses for uranium mills under direct jurisdiction of the Nuclear Regulatory Commission (NRC) to implement a groundwater detection monitoring program to ensure compliance with 40 CFR 192.32(a)(2), as published by the Environmental Protection Agency (EPA). Hamel & Park has been retained as legal counsel to request a hearing on these orders on behalf of licensees named on the attached schedule. Pursuant to 10 CFR § 2.204, we request such a hearing and request that all future correspondence related to this matter be directed to our attention.

The July 19 orders assert that the groundwater monitoring requirements that they impose are authorized by sections 61, 81, 84, 161 (b and o) and 275 of the Atomic Energy Act of 1954, as amended, and regulations of the Commission published at 10 CFR § 2.204 and 10 CFR Part 40. For reasons summarized below, the July 19 orders are inconsistent with procedural and substantive requirements of the Atomic Energy Act and applicable NRC regulations. Therefore, the orders and the license amendments they impose must be withdrawn.

First, section 61 of the Atomic Energy Act provides no authority to NRC to impose the requirements stated in the July 19 orders. Section 61 states only that the Commission may define materials as source material in addition to those specifically defined as such in section 11z of that Act. Nowhere do the July 19 orders define new

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materials as source material under the Act, much less meet the procedural requirements of section 61 necessary to do so.[1]

Second, neither section 275 nor section 84 of the Atomic Energy Act — both of which were added by the Uranium Mill Tailings Radiation Control Act of 1978, as amended (UMTRCA) — authorize NRC to impose the requirements stated in the July 19 orders.

Section 275d states:

> Implementation and enforcement of the standards promulgated pursuant to subsection b. of this section shall be the responsibility of the Commission in the conduct of its licensing authority under this act.

Under section 275b, EPA is authorized to develop "generally applicable standards" for active, licensed uranium processing and uranium mill tailings disposal sites. The standards published by EPA on October 7, 1983, are not "generally applicable standards" within the meaning of the Atomic Energy Act, as amended. Those standards, on their face, impose on-site and design, engineering, and management requirements that exceed the authority of that agency and intrude on authority reserved expressly by UMTRCA to NRC. As such, those standards are a mere nullity of no legal force and effect. Consequently, NRC is under no obligation, under section 275d, section 84a(2) or any other provision of law to implement or enforce EPA standards as asserted in the July 19 orders.

As for section 84 of the Atomic Energy Act, NRC has ignored or violated mandatory requirements of this provision of law in issuing the July 19 orders. Section 84a(1) states that the Commission shall ensure that management of mill tailings is carried out in such a manner as the Commission deems appropriate to protect the public health, safety and the environment "taking into account the risk to the public health, safety and the environment, with due consideration of the economic costs and such other factors as the commission determines to be appropriate." Notwithstanding this express congressional directive, nowhere in the July 19 orders or their supporting documentation has NRC made the independent technical evaluation of potential risks to public health and the environment or the economic costs of the requirements imposed

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1/ Before NRC may define a new material as source material, it must find (1) that such material is essential to the production of special nuclear material and (2) that the determination that such material is source material is in the interest of the common defense and security of the country. Moreover, the President must assent in writing to NRC's action.

by these orders.2/ In view of this NRC failure, the July 19 orders are fatally defective.

Section 84a(3) similarly mandates that NRC actions with respect to mill tailings shall conform:

> . . . to general requirements established by the Commission, with the concurrence of the Administrator, which are, to the maximum extent practicable, at least comparable to requirements applicable to the possession, transfer, and disposal of similar hazardous material regulated by the Administrator under the Solid Waste Disposal Act, as amended.

Pursuant to this authority, NRC on October 3, 1980, issued regulatory requirements for uranium mills and mill tailings, including groundwater protection requirements that mandate a groundwater monitoring program. These regulations state unequivocally that they specify the licensing requirements for uranium milling activities, including tailings and other wastes generated from these activities. 10 CFR § 40.1(a). See also 40 Federal Register 65,521 (col. 3), 65,522 (col. 2) (October 3, 1980). Neither during the development of these regulations nor after their adoption did EPA object to NRC's groundwater protection and monitoring requirements or assert that they were not comparable to requirements of the Solid Waste Disposal Act or contrary to UMTRCA.

Each licensee now has a groundwater protection program with monitoring provisions consistent with NRC's 10 CFR Part 40. Unless and until NRC's regulations governing uranium mill licensing are changed, licenses in conformity with those regulations cannot be amended by order on NRC's whim. That EPA has issued standards — even assuming they are "generally applicable standards" — cannot alter this fact. EPA standards cannot apply directly to the licensing process. Before they may be applied to licensees, EPA standards must be adopted by the Commission through notice and comment rulemaking. This is precisely the procedure followed by the Commission with respect to 40 CFR Part 190. In this case, NRC has not adopted any EPA groundwater standards. Indeed, the Commission has issued only an advanced notice of proposed rulemaking on groundwater and indicated that several years will be required to establish new regulations.

Third, NRC's general Atomic Energy Act authority — Sections 81 and 161 (b and o) — cannot support the July 19 orders. If the Commission is to invoke these authorities, it must develop a record to justify the standards that it would adopt, which it has not done.

2/ NRC cannot shirk its obligation by asserting that EPA has conducted a general evaluation of risks and costs. Had Congress intended only EPA to perform such an evaluation, it would not have included the above quoted language in section 84 of the Atomic Energy Act (dealing with NRC's authority) as it specifically did in 1982 amendments to that provision of law.

Fourth, the Commission has failed to justify the need to make the July 19 orders immediately effective. NRC regulations (10 CFR § 2.204) provide that orders can be made effective immediately "[w]hen the Commission finds that the public health, safety, or interest so requires . . . ." Beyond a mere statement in the order signed by the Director of the Uranium Recovery Field Office, nothing in the record justifies a finding of an imminent, potential threat to public health, safety or interest requiring the orders to become effective immediately. That there is no imminent or serious threat to public health and safety requiring immediate effectiveness is confirmed by the Commission's actions. EPA's standards were issued nearly two years ago, yet at no time during that period has the Commission taken any action indicating a need to protect against an imminent threat to public health from uranium mill tailings through the groundwater pathway. Indeed, its original orders to licensees adopting 40 CFR 192.32(a)(3) in April, 1985, gave no indication of any need for immediate action. NRC's only action to conform its groundwater requirements to those of EPA has been the issuance of an advanced notice of proposed rulemaking that the Commission has indicated will take several years to complete. In short, the July 19 orders have been made immediately effective, we believe, to discourage licensees from exercising their right to request hearings.

Finally, the attempt by the staff (contained in the last paragraph of the July 19 orders) to limit the scope of inquiry in the hearings is arbitrary and illegal. The staff cannot base its orders on purportedly binding EPA standards, but then attempt to avoid consideration of basic legal issues concerning the Commission's authority to impose those standards through the July 19 orders.

The issues we raise are legal and may be resolved through summary procedures. We look forward to the prompt resolution of these issues.

Sincerely,

Anthony J. Thompson

AJT/kw

cc: Executive Legal Director
Regional Administrator, Region IV

Licensees Reqesting Hearings

Licensee	Docket No.	License No.	Amendment No.
Atlas Minerals	40-3453	SUA-917	22
Bear Creek Uranium Co.	40-8452	SUA-1310	7
Exxon Minerals Co.	40-8102	SUA-1139	13
Pathfinder Mines Corp.	40-2259	SUA-672	5
Pathfinder Mines Corp.	40-6622	SUA-442	7
Plateau Resources Ltd.	40-8698	SUA-1371	24
Rio Algom Mining Corp.	40-8084	SUA-1119	5
UMETCO Minerals Corp.	40-0299	SUA-648	36
UMETCO Minerals Corp.	40-8681	SUA-1358	29
Western Nuclear Inc.	40-1162	SUA-56	27