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40-4492/CCJ/86/12/2

DEC 0 5 1986

URFO:CCJ
Docket No. 40-4492

American Nuclear Corporation
Gas Hills Project
314 W. Midwest Avenue
Casper, Wyoming 82601

Gentlemen:

Enclosed for your reference is a Decision and Order issued by the Nuclear Regulatory Commission (the Commission) dated November 17, 1986. This Decision reflects the Commission's conclusions regarding the legal issues raised by certain uranium millers and the Environmental Defense Fund in connection with license amendments ordered by the Uranium Recovery Field Office (July 19, 1985, as amended November 7, 1985). The Commission has, on the basis of their conclusions, ordered the license amendments to be effective as of November 17, 1986.

Subparts D through G of the license condition, contained in Section III of the Order of July 19, 1985, impose monitoring and reporting requirements. We understand that some licensees have voluntarily performed essential monitoring in accordance with these requirements during the time that the Commission had their request for a hearing under review. The Uranium Recovery Field Office will accept data gathered during this period, provided it meets the requirements of Subpart D, thereby reducing the monitoring period for such licensees by about a year. License amendment requests, if you have not already requested one, submitted in accordance with Subpart E to establish background levels for indicator parameters and a statistical procedure for identifying significant changes, should be submitted within 60 days of collection of the last of the required monthly samples.

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ME							
TE	86/12/04						

DEC 0 5 1986

Questions regarding compliance with the effective license condition can be directed to your project manager at this office.

Sincerely,

/s/

R. Dale Smith, Director
Uranium Recovery Field Office
Region IV

Enclosure: As stated

URFO	URFO	URFO	RIV			
CJierree/rs	HPettengill	RDSmith	WLBrown			
:86/12/04	12/03	12/5/86	12/2			

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

December 1, 1986

MEMORANDUM FOR: John G. Davis, Director
Nuclear Material Safety and Safeguards

Robert D. Martin, Regional Administrator
Region IV

FROM: James P. Murray
Deputy General Counsel

SUBJECT: COMMISSION DECISION WITH RESPECT TO ELEVEN URANIUM MILL LICENSEES

In American Nuclear Corporation, et al., CLI-86-23, dated November 17, 1986 (copy attached), the Commission upheld URFO's July 19, 1985 Orders applying a new license condition to the source materials licenses of eleven uranium mill licensees. The July 19, 1985 Orders required each licensee to implement a groundwater monitoring program to insure compliance with 40 C.F.R. §192.34(a)(2). URFO's July 19, 1985 Orders were revised in November 1985 to withdraw their immediate effectiveness.

In response to the July 19, 1985 Orders, the millers asked for a hearing with respect to three issues. In an April 18, 1986 unpublished Order the Commission offered its tentative view that the three issues raised by the millers had been resolved by the Commission in its rulemaking conforming NRC requirements to some of the standards promulgated by EPA. The Commission provided an opportunity for the millers to show, contrary to the Commission's tentative view, that the three issues the millers were raising were not resolved by the rulemaking. The Commission held the millers response to that opportunity "inappropriate". The Commission adhered to the tentative view it expressed in its April 18th Order, terminated the hearing, and Ordered that the proposed license conditions were effective November 17, 1986.

James P. Murray
Deputy General Counsel

Attachment: As Stated

cc w/attachment:
J. Taylor, IE
[redacted]

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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SERVED NOV 18 1986

In the Matter of AMERICAN NUCLEAR CORPORATION *et al.* (Revision of Orders to Modify Source Materials Licenses)	Docket No. 40-4492 *et al.* (50 Fed. Reg. 46370)

DECISION

CLI-86-23

We decide today that the briefs submitted by the mill licensees failed meaningfully to address, let alone persuade us that we erred in, our tentative view that the only issues which they sought to litigate were matters already decided by Commission rulemaking and thus prohibited in an adjudicatory proceeding.

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Nature of the Proceeding

This decision culminates a proceeding begun by orders[1] applying a new license condition to the source materials licenses of eleven uranium mill owners ("millers") which are Commission licensees.[2] Each license condition required the licensee to implement a groundwater monitoring

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[1]Orders were issued on July 19, 1985 by the Director of the Nuclear Regulatory Commission's Uranium Recovery Field Office, and were revised by order of November 7, 1985 with respect to the effective date. A hearing was requested on both sets of orders.

[2]The licensees are:

Atlas Minerals, Docket No. 40-3453,
Source Material License No. SUA-917;

Bear Creek Uranium Company, Docket No. 40-8452
Source Material License No. SUA-1310;

Exxon Minerals Co., Docket No. 40-8102
Source Material License No. SUA-1139;

Pathfinder Mines Corp., Docket No. 40-2259
Source Material License No. SUA-672;

Pathfinder Mines Corp. Shirley Basin Mine
Docket No. 40-6622
Source Material License No. SUA-442;

Plateau Resources Ltd., Docket No. 40-8698
Source Material License No. SUA-1371;

Rio Algom Mining Corp., Docket No. 40-8084
Source Material License No. SUA-1119;

UMETCO Minerals Corp., Gas Hills Mill
Docket No. 40-0299
Source Material License No. SUA-648;

UMETCO Minerals Corp., White Mesa Mill
Docket No. 40-8681
Source Material License No. SUA-1358; and

(Footnote Continued)

program to ensure compliance with 40 C.F.R. 192.34(a)(2), a regulation promulgated by the Environmental Protection Agency (EPA) pursuant to EPA's authority under Section 275 of the Atomic Energy Act. 48 Fed. Reg. 45946 (1983). By rulemaking the Commission formally adopted the position that it was statutorily authorized to and would implement the EPA's regulation by imposing groundwater detection license conditions case-by-case at least until the Commission could implement the EPA regulation by its own rulemaking with respect to groundwater detection. See 50 Fed. Reg. 41852, 41853 (1985) (discussing authority pursuant to Section 84 of the Atomic Energy Act.)

Although each miller was separately offered a hearing on the groundwater requirements imposed on its license, the millers chose to act in concert and together requested a hearing solely on three legal issues which we here set forth as we recited them in our Order of April 18, 1986 (unpublished) granting this hearing:

(1) The standards published by EPA are not "generally applicable standards" within the meaning of Section 275 of the AEA because they impose on-site and design, engineering, and management requirements that exceed EPA's jurisdiction and so NRC has no obligation to implement and enforce them.

(Footnote Continued)

Western Nuclear Inc., Docket No. 40-1162
Source Material License No. SUA-56.

American Nuclear Corp., Gas Hills Project,
Docket No. 40-4492
Source Material License No. SUA-667

(2) Under Section 84a(1) of the AEA [Atomic Energy Act], NRC must make an independent technical evaluation of potential risks to public health and the environment and must assess the economic costs of the requirements imposed by the Orders; and

(3) NRC must adopt EPA's groundwater standards through notice and comment rulemaking before enforcing such standards and until such rulemaking is completed, NRC cannot rely on Sections 81 and 161(b and o) of the AEA because NRC has not developed a record to support the standards it would adopt.

In the April 18 Order, we noted as well that the millers along with Environmental Defense Fund (EDF), which is the sole intervenor in this proceeding, were in agreement that only these three legal issues are presented by issuance of the orders and that such issues can be resolved through summary procedures.

The Collateral Attack Issue

On its own initiative, the Commission in its April 18, 1986 Order offered its tentative view that the issues raised by the millers had been resolved by the Commission in its rulemaking conforming NRC requirements to some of the standards promulgated by EPA. The final NRC rule ("conformed mill tailing regulations") on point was published in the Federal Register (50 Fed. Reg. 41852) on October 16, 1985, a date subsequent to the millers' initial request for a hearing. In that rulemaking the same questions were raised as were presented by the millers in their hearing request. The Commission there decided those issues and incorporated its decisions in Criterion 5 of Appendix A to Part 40 of the Commission's rules. It also explicated its decisions on those issues in the preamble that was published in the Federal Register along with the rule. See 50 Fed. Reg. 41852 at 42853-55.[3] In these circumstances the Commission framed a threshold issue, requiring the millers to demonstrate why consideration of the three issues presented in the hearing requests would not involve a collateral attack on the Commission's mill tailing regulations. This was necessary because, as the Commission explained, the Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings.

The Commission was forceful and direct with respect to its view of the burden the collateral attack issue placed on the millers:

> We believe that this means they must show that, contrary to our tentative view expressed above, the issues they now raise were not in fact resolved by the rulemaking.

Commission's Order of April 18, at 5.

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[3]Moreover, as the Commission also emphasized in its April, 1986 Order, on September 3, 1985 a United States Court of Appeals put to rest the issue whether the standards published by EPA are "generally applicable standards" within the meaning of Section 275 of the Atomic Energy Act" and held that they are. American Mining Congress v. Thomas, 772 F.2d 640 (10th Cir. 1985), cert. denied, 54 U.S.L.W. 3790 (June 2, 1986). In that case and its companion case decided the same day, American Mining Congress v. Thomas, 772 F.2d 617, cert. denied, 54 U.S.L.W. 3790 (June 2, 1986), the Court explicitly rejected all industry petitioners' challenges to EPA's groundwater regulations. Notably, petitioners in those cases included some, while not all, of the parties to this action.

Briefs of the Parties on the Collateral Attack Issue

In response to the Commission's directive, the millers devoted one paragraph of their 15 page brief. The brevity of the response permits us to quote it here in its entirety:

> In its April 18, 1986 Order, the Commission asked whether the mill licensees were mounting a collateral attack on the Commission's conformance regulations in this adjudicatory proceeding. There appears to be some confusion here. The conformance regulations referred to in the Commission's April 18 Order do not include the detection monitoring requirements challenged in this proceeding. The Commission deferred consideration of most groundwater issues, including the question whether to issue generic requirements for detection monitoring. To solicit comments on groundwater issues, the Commission published an Advanced Notice of Proposed Rulemaking. 49 Fed. Reg. 46425 (November 26, 1984). Similarly, the EPA active site standards do not specify detection monitoring requirements. EPA acknowledges that this is a compliance activity within NRC's jurisdiction 48 Fed. Reg. 45942 (October 7, 1983). As the mill licensees are not challenging any Commission regulations in this case, the Commission's rule against collateral attack of its regulations in adjudicatory proceedings does not apply.

Miller's Main Brief at 4-5.

In the NRC staff's view, in which we now concur, the millers' entire brief was inappropriate in that it did not clearly address the legal issues and instead challenged the manner in which the staff conducted its licensing activities and argued other facts.[4] Intervenor EDF on the other hand discussed at length its support of the Comission's

[4]The millers in their reply brief maintain that they do not desire an evidentiary hearing and protest in essence that they have but argued undisputed material facts. However, their brief is replete with unsupported testimony. For egregious examples see Brief at 12-14 and Reply Brief at 4 n.3.

tentative view and explained the manner in which the millers were making an impermissible collateral attack on the Commission's rules. EDF Brief at 6-11. To this well developed argument the millers chose merely to say in their reply brief that:

> The mill licensees established that the Commission's rule against collateral attack does not apply because neither EPA's active site standards nor NRC's conforming regulations contain the specific detection monitoring requirements at issue here. [citing Millers' Main Brief at 4-5].

Commission Decision

Because the millers' brief did not meaningfully challenge the view that the Commission had already considered and decided the three issues that they had raised in their requests for a hearing, and because we substantially concur in EDF's analysis, we adhere to the tentative view expressed in our April 18, 1986 Order.

As the millers recognize, the Commission may regulate by rulemaking or adjudication. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974). Typically, the regulatory requirements for any licensee are imposed both by regulation and by specific license condition. The regulation is of general application and is arrived at by the prescribed rulemaking process (see generally 5 U.S.C. 553). It is subject to judicial review, (5 U.S.C. 702), and may not be collaterally attacked in individual proceedings. 506 F.2d at 38; see also 10 C.F.R. 2.758.[5] A license condition governs the activity of

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[5]Intervenor Environmental Defense Fund notes that there is some
(Footnote Continued)

the specific licensee. It is imposed by Order and, as here, is subject to adjudicatory challenge and judicial review, 42 U.S.C. § 2239. While a license condition is specific to the licensee, it is by no means unusual that identical provisions will appear in licenses of different licensees carrying on similar, if not identical, activities. However, even where the identical condition is imposed individually on all of a group of licensees, it is subject to individual challenge by each. For this reason, each separate order modifying a mill licensee's source material license included the opportunity to request a hearing. See 10 C.F.R. § 2.204.

Thus, in an individual evidentiary hearing or one consolidated for some purposes, each licensee was able to make its individual case, if indeed it had one, why the specific groundwater detection program prescribed by the staff would not serve the purposes for which it had been intended or why some other provisions would equally well provide the level of detection needed to serve the same standards. In such a setting millers could have forced staff to the proof of the specific propriety of its licensing actions.[6] And barring health and safety

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(Footnote Continued)
uncertainty with respect to the breadth of the Commission's bar against collateral attack on its regulations in NRC proceedings. EDF correctly urges that reasons of policy support broad application, and the millers do not challenge application of the bar in this informal proceeding, arguing rather that in the absence of a specific groundwater rule they cannot be found to be attacking a Commission regulation. Accordingly, we need not resolve the issue here.

[6]The millers misapprehend the discussion of the Court in the section of Pacific Gas & Electric Co. v. Federal Power Commission that they cite. Here indeed the agency was "prepared to support its action" and meet "its responsibility to present evidence and reasoning" (506
(Footnote Continued)

requirements for immediate effectiveness, only after being tested in adjudication would the licensing order have been enforceable on the licensee. To the extent that any issue was decided in a previous hearing that decision would become binding precedent. In that fashion, the Commission may regulate by order as well as by regulation.

Here, the millers chose not to seek such a hearing but chose rather to challenge the substance of the Commission's rulemaking decision[7] that it must enforce the EPA regulation and would do so by order at least until it developed a rule. By doing so they attacked the Commission's regulations and ran afoul of the bar against such an attack. The millers appear to concede that the general legal issues which they seek to raise were indeed addressed and decided in Commission rulemaking, but argue that in this proceeding the only regulation shielded by the bar on collateral attack would be one which would have established the very groundwater detection requirements being applied by the instant orders. We disagree. In our view, the heading or title of the regulation is not

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(Footnote Continued)
F.2d at 38) insofar as each miller had sought to be heard in a hearing on issues challenging the suitability of the license conditions imposed to the specific licensed activity. It was not prepared, nor need it have been, to rehash the questions of its statutory authority to apply EPA's standards and like issues decided in its rulemaking. As Pacific Gas explains, where the Commission has followed requisite procedures to adopt Commission policy of general application, as it has done in this matter, it need not retry the same issues in an adjudicatory setting.

[7]The same rulemaking decision is under challenge in the Court of Appeals by at least a significant number of the same parties who had participated in the rulemaking and made the same arguments which they made in this proceeding. Quivira Mining Company v. NRC, No. 85-2853 (10th Cir.) (filed Dec. 13, 1985). Moreover, their attachment for our convenience of their arguments on jurisdiction from their rulemaking comments only serves to confirm that they seek now merely to replow the same ground.

important; what is important is what issues did the prior regulation address and resolve. The absence of specific groundwater regulations does not offer the miller the opportunity to re-litigate here those generic decisions that the Commission has made in a legal rulemaking. By raising here only those generic issues that the Commission has considered and decided in rulemaking, the millers have presented no case other than one barred by the collateral attack rule.

The Remaining Issues

While we could decide this matter solely on the basis that it brings a collateral attack on the Commission's rules, we note briefly that nothing the millers have argued with respect to the three other issues causes us to alter our views which were carefully considered in the rulemaking.[8]

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[8] EDF raises as a fifth issue whether given that the millers requested that their appeal proceed by summary disposition, they can now raise license specific factual issues concerning NRC staff's exercise of its discretion. EDF's brief at 4. We think that our decision on this issue is apparent, that they may not. As we noted *supra*, their use of unsupported testimony in legal argument is egregious.

Conclusion

In light of the foregoing, this hearing is terminated. The proposed license conditions are effective as of the date of this Order.

It is so ORDERED.

For the Commission[9]

UNITED STATES NUCLEAR REGULATORY COMMISSION

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
this 17th day of November, 1986.

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[9]Commissioner Asselstine was not present when this item was affirmed. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of AMERICAN NUCLEAR CORPORATION, ET AL. (Revision of Orders to Modify Source Materials Licenses)		Docket No.(s) 40-4492

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comm. DECISION (CLI-86-23) have been served upon the following persons in accordance with the requirements of 10 CFR section 2.712.

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Dated at Washington, D.C. this
18 day of November 1986

Emile L. Julian
Office of the Secretary of the Commission