

NM File 3

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May 8, 1986

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Mr. Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Proposed Assertion of NRC Regulatory Authority over
Uranium Mill Tailings in New Mexico

Dear Chairman Palladino:

I am enclosing several copies of a memorandum outlining the reasons why the Nuclear Regulatory Commission should afford an opportunity for interested persons to comment or participate in a hearing on the commission's action in response to New Mexico Governor Anaya's letter of March 18, 1986 regarding the above matter. I would appreciate your distributing the memorandum to the members of the commission before they act on Governor Anaya's letter.

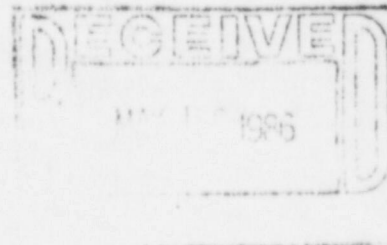
Thank you very much for your cooperation.

Sincerely yours,

Michael S. Yesley
Michael S. Yesley

MSY/jrb

Enclosures



CRC 86-0453 to OGC for appropriate action.

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MEMORANDUM

Question Presented

Governor Anaya of New Mexico has written a letter to the Nuclear Regulatory Commission stating the State of New Mexico is withdrawing its application to the Commission to regulate uranium mill tailings in New Mexico. What procedures must the Commission follow to regulate uranium mill tailings in New Mexico?

Summary of Conclusion

In order for the Nuclear Regulatory Commission to regulate uranium mill tailings in New Mexico, the Commission must comply with the provisions of Section 274(j) of the Atomic Energy Act (42 U.S.C. § 2021(j)). Section 274(j) allows to Commission to regulate uranium mill tailings in New Mexico only if the Commission finds:

- (1) the termination or suspension of regulation by New Mexico is required to protect the public health or safety, or
- (2) New Mexico has not complied with one or more of the requirements of certain portions of the Atomic Energy Act.

In connection with making one or the other of the required findings, the Commission must give notice and afford interested persons an opportunity to participate in any hearing or to submit comments.

Discussion

Background

Historically, the Atomic Energy Commission regulated mill tailings at uranium mills. The regulatory power was exercised under Section 161(i) of

the Atomic Energy Act (42 U.S.C. § 2201(i)), which provides that the Commission is authorized to:

"prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

There were two exceptions to regulation by AEC. The first was in the situation where mill tailings were removed from the licensed mill. See Opinion, dated April 15, 1960, from L.K. Olson, General Counsel, to H.L. Price, Director, Division of Licensing and Regulation, AEC (subject: Commission Jurisdiction of Waste Production from Uranium Milling Operations); letter, dated March 7, 1961, from H.L. Price, Director, Division of Licensing and Regulation, AEC, to health departments of uranium producing states. The other exception was where the mill license had expired. See Opinion, dated September 22, 1965, from H.K. Shapar, Asst. General Counsel, Licensing and Regulation, to J.A. McBride, Director, Division of Materials Licensing, AEC (subject: Commission's Regulatory Authority over Uranium Mill Tailings).

The Nuclear Regulatory Commission also believed it had additional authority over uranium mill tailings after the passage of the National Environmental Policy Act.

In 1959, Congress enacted Section 274 of the Atomic Energy Act (42 U.S.C. § 2021), which allowed a state to enter into an agreement with the Commission whereby the Commission discontinued regulatory authority, and the state regulated, among other things, uranium mills and tailings. The legislative history of Section 274 is very clear that in case of an agreement, there is no dual jurisdiction: the commission discontinues its authority.

The legislative history provides:

"It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating by-product, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both."

Rep. No. 870, 86th Cong., 1st Sess., reprinted in 1959 *U.S. Code Cong. & Adm. News* 2879.

In 1974, the AEC and New Mexico entered into a discontinuance of authority Agreement. The New Mexico Radiation Protection Act clearly covers the licensing of uranium mill tailings, and since the agreement, New Mexico has regulated them. Any question in this regard was certainly resolved by the *per curiam* Order of the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, No. 77-1570. The Order of January 6, 1978, held that where an agreement is in effect, the Commission has no residual authority over individual licensing actions in New Mexico. (The Court did not consider the matter of the residual authority of the Commission to determine whether the New Mexico regulations were compatible with the federal regulatory frameworks.)

Uranium Mill Tailings Radiation Control Act

The passage of the Uranium Mill Tailings Radiation Control Act in 1978 added an element of confusion. In 1979, Congress used the Transportation Assistance Act to attempt to clear-up the different interpretations being placed by the Commission and others on the language of the 1978 Act. Section 204(h) was amended to provide even more clearly that for the three-year period following the amendment, an agreement state could exercise the

authority over uranium mill tailings that it had exercised under its original agreement. The 1979 amendment also provided that as to an agreement state before 1978, the Commission would not have licensing authority over uranium mill tailings for three years unless the agreement was terminated, suspended, or amended to provide for Federal licensing. The 1979 amendment further provided that if, after the end of the three year period, the agreement state had not entered into an agreement with respect to uranium mill tailings, the Commission would have authority over them.

The 1979 amendment did not solve the issue in New Mexico. Some NRC staffers thought New Mexico would have to enter a new agreement on mill tailings within the three year period following the 1979 amendment, or the Commission would have authority. The New Mexico producers reached a different construction of the 1979 amendment. Since New Mexico already had entered an agreement back in 1974, there was no need for a new agreement. The producers contended the original agreement met the qualification of an agreement. The 1979 amendment did not specify "new" agreement.

1981 New Mexico Environmental Improvement Board Radiation Regulations

This whole matter came to a head at the 1981 hearings on radiation regulations before the New Mexico Environmental Improvement Board. NRC staffers appeared before the Environmental Improvement Board and stated that if the Board did not adopt substantially the same regulations for mill tailings that the Commission had adopted in 1980, the Commission would not approve the New Mexico program.

The Environmental Improvement Board and the New Mexico producers took up the NRC staff challenge. They pointed out that New Mexico was required to adopt federal regulations only to the extent they were practicable

in New Mexico. The Environmental Improvement Board found certain NRC regulations were not practicable in New Mexico, and further found that the uranium mill tailings regulations adopted by the Environmental Improvement Board protected the public health and welfare.

NRC elected not to appeal the findings of the New Mexico Environmental Improvement Board within the time period prescribed by law.

1982 NRC Authorization Act

Because of the position taken by the NRC staff at the 1981 New Mexico Environmental Improvement Board hearing, there was concern that NRC would in some manner attempt to end the New Mexico jurisdiction over mill tailings. In response to these concerns, the NRC Authorization Act adopted in 1982 provided clearly that an agreement state was not required to adopt federal standards that it determined were not practicable under the conditions in that state, and the NRC could terminate a state's authority only by following the procedures specified in Section 274(j) of the Atomic Energy Act. To eliminate the NRC staff's claim that a new agreement for New Mexico was required in the three-year period, the Congress in 1982 amended, via the NRC Authorization Act, Section 204(h) of UMTRCA to provide that where a state had exercised control over mill tailings, that state's authority can be terminated only after compliance by the Commission with the procedures that are applicable in the case of termination of agreements under Section 274(j) of the Atomic Energy Act.

Section 204(h) of UMTRCA (42 U.S.C. § 2021(h)(3)), after the 1982 amendment, now reads in part:

"if at the end of such three year period, a State has not entered into such an agreement with respect to byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act of 1954, the Commission shall have authority

over such byproduct material: provided, however, That, in the case of a State which has exercised any authority under State law pursuant to an Agreement entered under Section 274 of the Atomic Energy Act of 1954, the State authority over such byproduct material may be terminated, and the Commission authority over such material may be exercised, only after compliance by the Commission with the same procedures as are applicable in the case of termination of agreements under Section 274(j) of the Atomic Energy Act of 1954."

Since New Mexico had exercised authority over uranium mill tailings under State law pursuant to an agreement entered under Section 274, the state authority over tailings can be terminated, and Commission authority exercised, only after the Commission complies with the Section 274(j) procedures. The 1982 amendment specifically and deliberately grandfathered the authority of existing agreement states which exercised control over mill tailings without regard to whether a new agreement was entered after the three year period following the 1979 amendment. Of course, in a state such as Wyoming, which was not an existing agreement state, the 1982 amendment did not grandfather anything. It is noteworthy that the 1982 amendment was Congressional response to the threat by the NRC staff in 1981 not to approve the New Mexico program.

It should be noted that the United States and New Mexico successfully argued to the United States Court of Appeals for the District of Columbia Circuit that in a non-emergency situation, the Commission can only exercise authority over mill tailings in New Mexico " . . . after notice and hearing . Id. § 2021(j)(1)." See *Eagle-Pitcher Industries v. E.P.A.*, 759 F.2nd 922, 934-935 (1985). The issue arose over the listing of two New Mexico and one Colorado uranium mill tailings sites on the National Priority List under the Superfund Act. By EPA regulation, uranium mill tailings sites in

non-agreement states are not included on the National Priority List, but those in agreement states may be. The petitioners contended there was no rational basis for this distinction. The Court found the New Mexico and Colorado sites were not subject to the financial protection requirements of the NRC because of the agreement state status, and NRC authority could be asserted only after notice and hearing under Section 274(j)(1).

The Procedural Requirements of Section 274(j)

Since New Mexico authority can only be terminated, and Commission authority exercised, if the Commission follows the procedures of Section 274(j), an analysis of that section is appropriate. Section 274(j) allows termination in three circumstances. These are:

- (1) The Commission on its own initiative;
- (2) The Commission, at the request of the Governor; or
- (3) Temporary emergency suspension upon the initiative of the Commission or at the request of the Governor.

The emergency-temporary suspension is not applicable here, but it is noteworthy that Section 274(j)(2) specifically allows such action "... without notice or hearing ..."

Where the Commission seeks permanent termination in whole or in part on its own initiative, it must provide reasonable notice and opportunity for hearing to the state, and must find that (1) such termination or suspension is required to protect the public health and safety, or (2) that the State has not complied with one or more of statutory requirements.

Upon request of the Governor, a non-emergency termination can occur only if the Commission finds (1) such termination or suspension is required to protect the public health and safety, or (2) that the State has not complied

with one or more of the statutory requirements. Where the Governor makes a non-emergency request, there still must be the necessary finding by the Commission. There is no language authorizing the Commission to make such findings " . . . without notice or hearing . . ." as is the case in emergency temporary suspension.

Can the Commission make the necessary findings without an opportunity for comment or hearing? It would seem some form of hearing is required.

If the necessary findings are "rule making," then notice of the proposed rule and an opportunity to participate in the rule making would be required under (1) the Atomic Energy Act, (2) the Administrative Procedure Act, and (3) the NRC's own Rules of Practice. The relevant provisions are as follows: (1) Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), provides that the NRC shall grant a hearing upon the request of any person whose interest may be affected by a proceeding "for the issuance or modification of rules and regulations dealing with the activities of licensees" and shall admit such person as a party to the proceeding. (2) The Administrative Procedure Act requires that notice of proposed rule making be published and interested persons be given an opportunity to participate in the rule making by submission of comments, with or without a hearing. 5 U.S.C. § 553. The Administrative Procedure Act defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). (3) In addition, the NRC's Rules of Practice provide that when participation by interested persons is prescribed by 5 U.S.C. § 553, i.e., in cases of proposed rule making, notice of proposed rule making shall be published, 10 C.F.R. § 2.804, and interested persons shall be given an opportunity to participate

by submitting comments in writing or orally at informal hearings, 10 C.F.R. § 2.805.

All three of these requirements were found to have been violated by the Nuclear Regulatory Commission when it promulgated an interim rule amending all operating licenses for nuclear power plants, without affording notice and an opportunity to comment. The court held that any one of these procedural irregularities was sufficient ground for reversal of the rule. See *Union of Concerned Scientists v. Nuclear Reg. Com'n*, 771 F.2d 370 (D.C.Cir. 1983). If the finding required by Section 272(j), 43 U.S.C. § 2021(j), constitutes a proceeding "for the issuance or modification of rules and regulations dealing with the activities of licensees," or comes within the definition of "rule" under the Administrative Procedure Act, the notice-and-comment requirements will apply.

Alternatively, notice and an opportunity for interested persons to participate in a hearing on the proposed finding are required under the Administrative Procedure Act if the finding is an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554. The Court of Appeals for the District of Columbia Circuit has stated that "in a non-emergency, the NRC can exercise [regulatory] authority [in an Agreement State] only after notice and hearing. [42 U.S.C.] § 2021(j)(1)." *Eagle-Pitcher Industries v. United States E.P.A.*, 759 F.2d 922, 934 (D.C.Cir. 1985). Thus, the court found that the Atomic Energy Act requires a hearing, thereby invoking the adjudication procedures under the Administrative Procedure Act. More generally, the same Court has noted "the cardinal importance of the right to be heard where

one's interests are acutely affected by the actions of an administrative agency. It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law require that a hearing be held." *National Broadcasting Co. v. F.C.C.*, 362 F.2d 946 (D.C.Cir. 1966). Furthermore, the Due Process Clause of the Fifth Amendment could supply the "statutory" hearing requirement that invokes the adjudication procedures under the Administrative Procedure Act. Since the finding will result in the imposition of unnecessarily stringent federal regulations in New Mexico, it could be considered a "deprivation of property" of those who will be subject to the regulations. Any such deprivation requires due process, *i.e.*, a hearing.

Other Factors

The letter from Governor Anaya to the Commission which occasions this memorandum does not request the Commission to terminate or suspend the New Mexico authority over uranium mill tailings. Rather, it withdraws an application for a new agreement. Under this circumstance, the 1982 amendment specifically provides New Mexico's authority continues unless there is Commission compliance with Section 274(j). In such a circumstance a hearing is required in order to make the necessary findings under Section 274(j)(1).

Section 274(j)(1) specifically provides that the Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance. Since 1981, the Commission staff is believed to have reviewed the New Mexico program and found compliance.