Natural Resources Defense Council, Inc.
664 HAMILTON AVENUE
PALO ALTO, CALIF. 94301
415 327-1080

Washington Office
917 15TH STREET, N.W.
WASHINGTON, D.C. 20005
202 737-5000

New York Office
15 WEST 44TH STREET
NEW YORK, N.Y. 10036
212 869-0150

October 9, 1975

Mr. Richard E. Cunningham
Acting Director
Division of Materials and
Fuel Cycle Facility Licensing
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Cunningham:

This is a followup to our letter of September 3, 1975, responding to the State of Texas' comments on our request and petition to the NRC regarding uranium mill tailings. We have several additional questions concerning the authority of the NRC to require holders of existing source material licenses for uranium milling operations to comply with new regulations or conditions not in force at the time the licenses were issued.

This critical issue arises in connection with efforts to devise appropriate long-term solutions to the problems posed by the storage and disposal of uranium mill tailings. That is, in communications we have received as a result of our request for a generic environmental impact statement (EIS) on uranium milling regulation, we have repeatedly been assured by the NRC and several members of the uranium milling industry that the NRC has plenary authority to impose new regulations or requirements on existing licensees. If this authority is indeed plenary, then it would go a long way toward allaying our fears that current operations could escape compliance with newly-formulated requirements. As our request for an EIS warned, the latter situation would impose a substantial financial burden on federal and state governments as well as allow significant potential health hazards to exist for a long period of time.

We will first discuss the basis for our concern, and then request that you supply responses to the attached series of specific questions exploring the source and nature of the NRC's authority in this regard.

You recently informed us that:

> "NRC is able to prevent a licensee from avoiding the effect of any new regulations promulgated at any time as a

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> result of any findings of a programmatic EIS. In addition, conditions to a license can be added at the time of issuance or renewal, or by initiating a license amendment at an earlier time if essential to public health and safety."1/

Similarly, Westinghouse Electric Corporation, in commenting on our request, stated:

> "[T]he Commission may impose such conditions and require such actions as it finds justified before it releases a licensee from his obligations by terminating a license. To the extent that some custodial or remedial actions are necessary, they can be determined and enforced under existing rules."2/

While such statements are superficially soothing to our concerns, we are disturbed by the fact that, upon closer analysis, the NRC's authority in this regard may not be so clear-cut as asserted above. For example, while you have assured us that the NRC has adequate authority to require licensees to take appropriate steps to effect ultimate disposal of tailings, your predecessor at NRC was not so positive. When we asked Howard Larson who would pay the the implementation of new techniques for uranium mill tailings disposal (after they are developed), he responded:

> "When new techniques for disposing of mill tailings are adopted, the NRC will have to work out the arrangements for paying the cost of implementation. We do expect that <u>licenses will be worded</u> in such a way as to permit implementation of new tailings disposition techniques, but <u>not to require the licensee to commit himself to perform some presently</u>

1/ Letter to NRDC from Richard Cunningham, Chief, Fuel Cycle Environmental Projects Branch, NRC, September 22, 1975.

2/ Letter from Westinghouse Electric Corporation to NRC, September 3, 1975, p. 2 (Docket No. PRM-40-21). See also letter from Western Nuclear, Inc., August 27, 1975, p. 3.

unknown action which may be desired in the future."3/

Likewise, Western Nuclear Corporation's response to our request -- after noting that the NRC has "ample authority under existing regulations to amend licenses . . . to protect health and welfare" -- protests that it will not commit itself "to perform some presently unknown action which may be desired in the future. . . ."4/

The inconsistency is apparent: Even without closely analyzing NRC's regulatory powers, it seems that both NRC and industry agree that NRC may have some authority to impose additional requirements on existing licenses, but that the cost of implementing these new requirements may not be borne by the licensee.

This possibility disturbs us. We are concerned because if the licensee does not have to bear this cost, the taxpayer will. The expenditures required are not small,5/ and such a subsidy to the nuclear power industry is not warranted, or in any event should be fully debated and consciously adopted as a matter of policy, rather than result from a failure of regulatory action. More important than that, however, is our concern that if the licensee does not bear the cost of ultimate disposal, it may not be accomplished at all -- to the detriment of the public health and safety. That is, public money for this disposal would have to be first authorized and then appropriated by Congress. And, if past practice is followed,6/ the state governments would have to be involved as well. All this means that a lengthy excursion through the political process is required, with uncertain results. On the other hand, if the cost were borne by the licensee, it could be directly passed on to the energy

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3/ Letter to NRDC from Howard J. Larson, Director, Division of Materials and Fuel Cycle Facility Licensing, February 20, 1975 (at p. 6 of enclosure)(emphasis added).

4/ Letter to NRC, cited in note 2, supra, pp. 2, 3 (emphasis in original).

5/ In our March 28, 1975 request and petition, we calculated the cost of site decontamination, moving tailings to ultimate disposal sites, and annual maintenance at one billion dollars by the year 2005. (p. 16).

6/ See Pub. L. No. 92-314, 86 Stat. 222 (Grand Junction, Colorado Remedial Action Authorization Act).

consumer. Moreover, the tailings disposal itself could probably be accomplished much more expeditiously, certainly and fairly, as an integral part of the milling process.

A related concern of ours is the possibility that tailings piles might be abandoned or the terms of licenses otherwise violated, that licensees might go bankrupt, that the land underlying the tailings might be sold, or that other occurrences may lead to violations of whatever conditions for ultimate tailings disposal are eventually included in the licenses. It was this concern which prompted us to petition the NRC to adopt regulations requiring operators of existing mills to post bonds to cover the cost of interim stabilization and ultimate disposal of the tailings. (This petition accompanied our request for a generic EIS, dated March 28, 1975.)

It would seem that the vague assurances we have received concerning NRC's authority to impose new conditions on existing licensees would not reach these questions arising from license abandonment, licensee bankruptcy, and the like. For this reason, we have included queries about the NRC's authority in this regard in the attached list of questions.

We would appreciate your prompt consideration of, and response to, the matters we raise in the attached questions. In addition, we would appreciate receiving a copy of a legal memorandum prepared by Howard K. Shapar, AEC Office of General Counsel, dated September 22, 1965, and entitled, "Commission's Regulatory Authority Over Uranium Mill Tailings". This memorandum is cited in the Memorandum of R. B. Chitwood to L. C. Rouse, July 10, 1974, which you enclosed in your September 19, 1975 letter to us regarding the Susquehanna-Western mill.

We are grateful for your continuing cooperation in furnishing us with information and assistance on this important matter.

Sincerely,

John D. Leshy

John D. Leshy, Esq.

Terry R. Lash

Terry R. Lash, Ph.D.

JDL/TRL/ak
Attachment

cc: Martin C. Wukasch
John A. Green - EPA Denver
William A. Rowe - EPA Washington
Richard Turley
Robert D. Siek
Melvin O. Nelson
A. J. Hazle
Jerry Apodaca
Bill Christiansen
Richard D. Lamm

QUESTIONS TO NRC REGARDING ITS AUTHORITY
TO REQUIRE LICENSEES TO TAKE STEPS TO EFFECT
ULTIMATE DISPOSAL OF URANIUM MILL TAILINGS

Submitted by
Natural Resources Defense Council, Inc.

October 9, 1975

A. Existing Licenses

1. Does every source material license for uranium mills issued to date (by agreement states as well as the NRC[1/]) contain a clause expressly obligating the licensee to comply with all regulations promulgated by the NRC (and the agreement state licensing authority, where applicable) after its issuance?

2. If not, please list the exceptions.

3. If so, are there any variations in language of this clause from the language in the license for the Susquehanna-Western mill (SUA-652); i.e.:

> "This license . . . is subject to all applicable rules, regulations, and orders of the Atomic Energy Commission, now or hereafter in effect. . . ."

B. Procedures and Authority to Impose New Conditions in Existing Licenses

10 C.F.R. § 40.41 deals with terms and conditions of source material licenses. In particular, § 40.41(e) provides:

> "(e) The Commission may incorporate in any license at the time of issuance, or thereafter by appropriate rule, regulation or order, such additional requirements and conditions with respect to the licensee's receipt, possession, use, transfer, import and

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1/ According to Mr. Larson's letter to us dated February 20, 1975, there are currently 11 NRC-licensed mills and 7 agreement state-licensed mills (pp. 4-5 of attachment to that letter). We would appreciate either confirmation that that list is still current, or a list of any changes since the date of that letter.

export of source material as it deems appropriate or necessary in order to:

(2) Protect health or to minimize danger to life or property;
. . ."

4. How does the Commission define "appropriate" as it is used in 40.41(e); i.e., does it refer only to the process by which the condition is imposed, or is it a limitation on the type or substance of conditions which can be imposed?

5. What is the procedure which the Commission follows in incorporating a new condition or requirem in a source material license; e.g., is there a notice of lemaking, publication of a draft proposal, solicitation of comments, public hearings, and so forth?

6. How long does it typically take to complete this process?

7. Does § 40.41(e) allow the imposition of new requirements and conditions with respect to source material only, or does it permit imposition of conditions on uranium mill tailings (which, because they typically contain less than 0.05% source material, have been considered "unimportant" by the Commission)?

8. Does the Commission consider a condition which requires the licensee to take steps to effect ultimate disposal of mill tailings "appropriate or necessary in order to . . . [p]rotect health or minimize danger to life or property"? § 40.41(e)(2)

9. Does the Commission consider a condition which requires the licensee to bear the cost of ultimate disposal of the tailings "appropriate or necessary in order to . . . [p]rotect health or minimize danger to life or property"? § 40.41(e)(2)

10. Has the Commission ever acted pursuant to this section, by imposing a new condition or requirement on existing licensees? If so, please provide relevant examples and details. In particular, we would appreciate learning of cases where the Commission imposed new conditions which required the expenditure of significant amounts of money by licensees.

11. Has the Commission's authority to impose such conditions ever been questioned by licensees, either formally or informally? If so, please provide details.

12. Does the Commission have any authority to insert new terms and conditions in existing licenses issued by agreement states? If so, please provide details as to the basis of this authority, and examples, if any, where such has been done.

C. Amendment, Revision or Modification of Licenses

Section 40.71(a) of 10 C.F.R. provides:

> "§ 40.71 Modification, revocation and termination of licenses.
>
> (a) The terms and conditions of each license shall be subject to amendment, revision, or modification by reason of amendments to the act, or by reason of rules, regulations, or orders issued in accordance with the act."

13. How does this authority to amend, revise or modify terms and conditions in existing licenses relate the Commission's authority under § 40.41(e) to add additional requirements and conditions to existing licenses; i.e., is it identical? If different, please explain in what way it differs.

14. What is the procedure by which such an amendment, revision or modification is effected, under § 40.71(a)? Does it differ from the procedure contemplated by § 40.41(e), and how long does it take to complete this process? (See questions ## 5 and 6, above.)

15. Does "amendment, revision, or modification" of terms and conditions permit the imposition of entirely new terms and conditions; e.g., adding restrictions on mill tailings disposal where none previously existed?

16. Has the Commission ever acted pursuant to this section by imposing a new condition or requirement on existing licensees? If so, please provide relevant examples and details. In particular, we would appreciate learning of cases where the Commission imposed new conditions which required the expenditure of significant amounts of money by licensees.

17. Has the Commission's authority to impose such conditions ever been questioned by licensees, either formally or informally? If so, please provide details.

18. Does the Commission have any authority to amend, revise or modify new terms and conditions in existing licenses issued by agreement states? If so, please provide details as to the basis of this authority, and examples, if any, where such has been done.

D. Penalties for Violation of Conditions

19. What are the penalties for violating any terms and conditions in source material licenses, apart from the revocation,

suspension or modification of a license pursuant to § 40.71(b) and the civil penalty provision of § 40.81?

20. Has the civil penalty provision of § 40.81 ever been invoked? If so, please provide details and relevant examples.

21. What are the penalties for violating these terms and conditions in agreement states? Do the penalties vary from state to state, and does the NRC impose minimum requirements or otherwise participate in the enforcement process in agreement states?

E. Expiration and Termination

22. Do all source material licenses for uranium milling have a specific expiration date?

23. Please list the expiration date of each and explain the exceptions, if any.

24. Assuming no application for renewal is received before expiration, do these licenses automatically expire on such date, or are any further proceedings or actions required, either by the licensee or the Commission?

25. How is expiration and termination of licenses handled in agreement states? Do the procedures vary from state to state, and does the NRC impose minimum requirements or otherwise participate in the state's procedures in this regard?

F. Restrictions on A Licensee's Alienation of Land Underlying Mill Tailings

26. Are there any restrictions on the power of any of the current licensees, in agreement as well as non-agreement states, to alienate land underlying or containing mill tailings piles? For example, is approval by the NRC required before the land can be sold?

27. If so, do the restrictions on alienation which are currently in force run with the land; i.e., do they apply to the licensee or to the land? Expressed another way, would the purchaser of land containing a tailings pile be required to abide by the terms and conditions of the source material license insofar as it restricts access to and use of the land? Does this raise questions of state law?

28. If not, can the licensee be required to enter on the land after it has been sold to comply with the terms and conditions of its license regarding safeguards and disposal of tailings?

29. How would necessary monitoring activities be performed if the underlying land were sold? Could personnel from the NRC or the licensee be liable for trespass if they entered the land to monitor radiation levels, water quality, etc.?

G. Licensee Bankruptcy, Dissolution or Abandonment

30. How can such action as necessary to "clean up" a milling site be taken if the licensee-operator goes bankrupt, dissolves as a corporation, or otherwise abandons its operation? For example, is there any bond or other form of financial assurance required of licensees to provide for such an eventuality?

31. Has such a situation ever occurred? If so, please provide details.