

Did Colorado share blame?

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The Daily Record News Group
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DENVER - In late 1983, the State of Colorado sued the Cotter Corporation for \$50 million, claiming the company's Cañon City uranium mill had polluted the land, air and water surrounding the mill site just south of the city.

But records show the state -- accused by Cotter of knowing about and allowing the alleged pollution of the Lincoln Park area - later settled the suit for \$11 million dollars against the advice of the Environmental Protection Agency.

Records also show the state was the owner of the 640-acre mill site during much of the period when the pollution was alleged to have occurred.

The suit, which was settled in 1987 and finalized in 1988, was filed only months after federal officials determined that Lincoln Park was among the most polluted areas in the country and placed it on the National Priority, or Superfund, list.

The suit and the settlement also came on the heels of two studies that were commissioned by the EPA and which were highly critical of both Cotter and the Colorado Department of Health and Environment -- the agency that regulates radioactive practices at Cotter.

Although Cotter had in the 1970s been sued by and made a settlement with a Lincoln Park farmer who claimed molybdenum discharges had killed some of his cattle, the 1983 suit was the first major legal action taken against the mill since its opening in 1958.

But Cotter's legal problems began to surface in May 1983 when the EPA announced it was placing Lincoln Park on the Superfund list. According to an EPA report issued that month, groundwater supplies in Lincoln Park had become polluted by the "waste disposal activities" at Cotter. The EPA claimed liquid waste containing radioactive material and heavy metals had been discharged for years into unlined tailings ponds and said Cotter's own data indicated a "plume" of contaminants that included molybdenum, uranium and selenium had spread along the so-called Sand Creek drainage extending east to the Fawn Hollow area several miles away.

Cotter did not go quietly in accepting the Superfund listing that would open it up to possible lawsuits. Three months after the issuance of the report, the company went to federal court to block the designation. After a federal judge refused to issue an injunction prohibiting the EPA from placing the area on the Superfund list, Cotter appealed that decision to the 10th Circuit Court of Appeals. The appeals

People coming and going from the Cotter site in Cañon City are tested when they leave with an alpha meter, which measures radiation. (This was taken Friday, Sept. 27, at the guard shack) Times-Call/Jeff Haller

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court also refused to block the listing and in September 1983 the EPA formally added the area to its National Priorities List.

In early 1984, Cotter took its case to a federal district court in Washington, D.C., the home of the EPA, but again failed to block the listing.

The state, which was and still is in charge of regulating Cotter, found itself in a precarious position when Lincoln Park was placed on the Superfund list. Under the 1980 Comprehensive Environmental Response and Liability Act - also referred to as CERCLA or the Superfund Act -- both the state and Cotter could have been sued by the federal government.

The state was the longtime owner of the land on which Cotter was built in 1958. The State Board of Land Commissioners that year agreed to lease the old 640-acre "school section" to Cotter, but in June 1983 -- a month after the EPA announced it was going to list the property as a Superfund site - the site was sold to Cotter for \$38,400. State law at the time required the Land Board to solicit bids and advertise the sale of the land in a newspaper for a month, but there is no record of that happening.

Six months later, in December 1983, the state filed suit against Cotter. But its previous ownership of the mill property may have hastened the settlement of the suit.

In July 1984 a lawyer for Cotter wrote a letter to then-Colorado Attorney General Duane Woodard reminding the state of its alleged role in the pollution and announcing that Cotter would countersue the state.

"The mill is located on lands which were owned by the state during the period 1957-1983," Cotter attorney Marilyn Alkire wrote to Woodard. "Such damages, if any, have occurred with the knowledge and consent of the state. The state has admitted these facts in its reply to the counterclaim of Cotter."

Alkire's letter also put the health department on the hot seat.

"Moreover, the state, by and through the Colorado Department of Health, has formally approved the Cotter milling operations by issuance and subsequent renewal of a radioactive material license," she wrote. "As a consequence of the ownership by the state lands on which the Cotter mill is located and the knowledge, consent and approval by the state of the mill operations, the state is liable to the same extent as Cotter for any damage which may have resulted from Cotter's milling operations."

Alkire's letter wasn't the first criticism of the health department. In 1979 the EPA, after receiving an inquiry from union mill workers about employee safety, issued a report highly critical of both Cotter and the health department. It recommended the department take its

enforcement duties more seriously and hinted the department had been lax in the past.

As part of its suit against Cotter, the state in 1985 contracted for a study of pollutants believed to have come from Cotter. That study criticized Cotter's monitoring of its own radiation.

"During the 28 years of regulation, there has been a continuum of and citations for the lack of, or inadequacy of, surveys to ascertain the quantities of radioactive materials and other waste releases to the air, groundwater and surface water," it said, adding that airborne contamination was coming from uncovered ore piles and contaminated soil at the site.

The report identified the "major pathway" of the groundwater contamination as a gap in the ridge of the Soil Conservation Service dam located just north of the mill -- a pathway leading to Lincoln Park and carrying high levels of radiation.

"The contaminant plume in the groundwater of Lincoln Park contains levels of uranium and molybdenum in excess of the drinking water levels recommended by the National Academy of Science," it said. "These levels are up to 2,000 times above background (natural levels). This groundwater emerges in springs and seeps in lower Sand Creek, which flows to the Arkansas River, and in other springs near the Arkansas River."

Radiation wasn't the only problem found in the investigation. Sediments in Sand Creek, Willow Creek and Forked Gulch were found to contain -- in addition to radioactive materials - molybdenum, cobalt, nickel, copper, arsenic, cadmium, lead and zinc. Part of the pollution was attributed to the long-abandoned New Jersey Zinc smelter located between Cotter and Canon City.

The study also found that sediment in the Arkansas River contained molybdenum, cobalt, nickel, copper, arsenic, cadmium, lead and zinc "identified with the Cotter site."

The mill site - including its then-new "leak-proof" impoundment ponds - also came under attack in the report. The 136-acre new ponds, completed in 1979 as part of the construction of a new mill, were lined with a thick layer of rubber-like Hypalon. That, in turn, was covered with clay. Five years later, both the new impoundment and old tailings-pond area were leaking pollutants into the ground, according to the report.

"The new impoundments are leaking and are a continuing source of contamination to the underlying ground water," the report said. "This conclusion is supported by the increasing levels of uranium and molybdenum in the underdrains of the impoundments." The report also claimed the soil in the old tailings area contained "elevated levels of uranium and molybdenum, nickel and lead to depth in excess of 15 feet -- resulting in contaminants

leaching into the ground water.

Years later Cotter employee Louis DiOrio, in a sworn deposition, would testify that he saw workers cutting holes up to 18 inches long in the Hypalon barrier to deflate air bubbles that were forming in it during installation. Cotter executive vice president Rich Ziegler, when asked about holes in the liner, said, "They were all repaired."

After four years of legal wrangling, the state and Cotter arrived at a settlement in the suit. That settlement called for Cotter to pay \$4.5 million in penalties and \$11 million for future monitoring and cleanup -- a task that was estimated to take about 20 years. In the months before U.S. District Judge Jim Carrigan approved the settlement, it was roundly criticized.

Among the critics was the EPA, the agency that placed the area on the Superfund list. The EPA in early 1988 called the so-called Remedial Action cleanup plan "seriously deficient" and openly questioned the credibility of the proposed cleanup. In a letter to the health department, the EPA said it had "serious concerns about the Remedial Action Plan and the Consent (settlement) Decree."

The EPA called the cleanup plan "loosely defined and open-ended" and said the Remedial Action Plans "have merit as an initial and partial solution to the overall set of possible public health and environmental problems found at the Lincoln Park NPL site." It claimed the settlement plan also left out many pollutants, saying "The only constituents for which standards have been set are uranium and molybdenum."

Cotter responded by saying, "The EPA reviewers are obviously confused and uninformed about essential site characteristics."

Members of the public also criticized the settlement during a series of public meetings. Former Lincoln Park resident Nard Claar, who would later sue Cotter himself, said he wondered how the cleanup cost could be estimated at \$50 million and later be set at \$11 million. He also predicted the lower-end settlement would "shrink" the size of the area to be cleaned up, leaving many Lincoln Park residents still at risk.

Jake Jacobi, who heads the radiation division at the Colorado Department of Public Health and Environment and who participated in state oversight of Cotter at the time of the court case, defended the settlement in a recent interview.

"I think it was great settlement for the people of Colorado," he said. "All the people out there using wells were hooked up to city water. Cotter was made to address the soil contamination. We've conducted a very strong environmental cleanup and Cotter has been required to do several environmental studies and has had to fund a health-risk assessment process."

"It's a very strong settlement."

Carrigan, in April 1988, gave final approval to the settlement, but the debate and the lawsuits were just beginning.

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