

Sollenberger, Dennis

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FSME

**From:** Taylor, Torre  
**Sent:** Monday, August 03, 2009 1:39 PM  
**To:** Sollenberger, Dennis  
**Subject:** revision 1 alternative lang for comment C aug 3.doc  
**Attachments:** revision 1 alternative lang for comment C aug 3.doc

here's my revision - I added in more specifics on what the Comm approved and I modified the last paragraph from your language - trying to get a little more specific.

I'll have copies at the meeting.

8/03

## Replacement of Comment C NRC Staff Response

Upon the effective date of a State Agreement authorized under Section 274 of the AEA, NRC relinquishes regulatory authority and the Agreement State assumes regulatory authority over the radioactive materials and activities specified in the Agreement. The legislative history for this statutory provision specifically states that Congress did not intend to allow concurrent regulatory authority over licensees for public health and safety. If the NJ Agreement is approved by the Commission, upon the effective date of the Agreement, all NRC licensees within the categories of materials for which the State requested authority will transfer to the State.

SMC commented that should NRC decide to enter into the proposed Agreement with NJ, NRC has the power to exclude the Newfield site from the transfer of authority to the State. Retaining a license or licenses within a category of material that will be transferring to a State under an Agreement pursuant to Section 274 of the AEA was considered by the Commission in 1997 (SECY-97-087, "Oklahoma Agreement State Negotiations: State Requests That Major Facilities Undergoing Site Decommissioning not be Relinquished to State," April 22, 1997). In this SECY paper, staff indicated that the Oklahoma proposed Agreement approach would be inappropriate from a policy perspective and that implementation of this approach may be inconsistent with the Commission's authority under the AEA. The staff raised several concerns with this approach, including a form of dual regulation being put in place and that the pattern of NRC and Agreement State regulation could become confusing.

The staff recommended an approach to handle similar requests in the future. The staff would consider whether the proposed Agreement would jeopardize:

"... an orderly regulatory pattern between the Commission and the State governments..." as indicated by Section 274a(3) of the AEA. In particular, requests for limited Agreements would have to identify discrete categories of material or classes of licensed activity that (1) can be reserved to NRC authority without undue confusion to the regulated community or burden to NRC resources, and (2) can be applied logically and consistently to existing and future licensees over time. Under this approach, NRC would not reserve authority over a single license unless that license clearly constituted a single class of activity or category of material meeting the criteria described above."

The Commission approved the staff's proposal to deny the State of Oklahoma's request to withhold certain source material licenses from their Agreement and approved the staff's general approach for handling requests for limited Agreements.

If NRC retained this license, one source material licensee would be regulated by NRC and all other source material licensees in NJ would be regulated by NJ. This situation would not meet the criteria discussed above – there could be undue confusion to the regulation community and burden on NRC resources and this would be difficult to apply logically and consistently to existing and future licensees over time. The SMC Newfield site license is not a "single class of activity or category of material meeting the criteria described above in SECY-97-087 for the Oklahoma Agreement.

Section 274m. of the AEA does allow for NRC to retain authority based on common defense and security; NRC has used this authority to implement increased controls regulatory

requirements for certain categories of radioactive material licensees and retain regulatory authority over conversion facilities in Agreement States. However, the SMC site does not raise these common defense and security concerns.

The *Kerr-McGee* case SMC cited does involve a complex decommissioning site that was affected by the transition of a NRC license to a new Agreement State. However the case does not have precedence in this matter. The Commission terminated the Kerr-McGee proceeding as moot and vacated the previous Licensing and Appeals Boards' decisions after the parties reached a settlement to dispose of the mill tailings material off-site. In vacating the decisions, the Commission eliminated as precedent all three underlying decisions in the proceedings and specifically stated that:

In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.

By vacating the decisions, the Commission does not intimate any opinion on their soundness. Without engaging in a full inquiry into the merits—which no party any longer requests, and the Commission sees no compelling reason to undertake on its own—the Commission cannot properly evaluate the analyses of the Licensing and Appeal Boards. *In the Matter of Kerr-McGee Chemical Corporation*, CLI-96-2, 43 NRC 13 (1996)

Please see the response to comment A.6, above, for a discussion of Criterion 25.

No changes were made to the NRC Staff Assessment based on this comment.