

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of )  
NUCLEAR ENGINEERING COMPANY, INC. ) Docket No. 27-39  
(Sheffield, Illinois Low-Level )  
Radioactive Waste Disposal Site) )

NRC STAFF'S RESPONSE TO NECO'S SECOND SUPPLEMENT  
TO ITS MOTION FOR RECONSIDERATION

NECO has again supplemented its motion for reconsideration of the Commission's Memorandum and Order of June 6, 1979, and Notice of Hearing of the same date in this proceeding.<sup>1/</sup> The Staff maintains that no valid ground is set forth for such reconsideration and that the supplement is not probative of any issue pertinent to the validity of the Commission's actions of June 6, 1979.

The Commission Memorandum and Order affirmed the Director of the Office of Nuclear Material Safeguards and Safety's immediately effective show cause order of March 20, 1979, which set for hearing the following issue:

Whether NECO may unilaterally terminate License No. 13-10042-01 for activities at Sheffield.

<sup>1/</sup> By Order of October 23, 1979, the Commission accepted this motion to supplement, and granted the Staff 12 days to reply thereto if it wished.

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It stated that NECO is ordered to show cause why it should not resume its responsibilities and obligations under that license. The Show Cause Order further provided that in view of the importance to the public health and safety of required monitoring and maintenance at the Sheffield site and NECO's willful acts in seeking to terminate its license without authorization, the Show Cause Order was made immediately effective requiring NECO to resume its responsibilities under the license until further order of the Commission.

As a predicate for this action, the Show Cause Order recited that NECO lacked authority to unilaterally terminate its license; that by letter of March 8, 1979, NECO had stated it was terminating its license and stopping all its activities at Sheffield; that under the terms of the license NECO was obligated to provide security, maintenance and monitoring of the site; and that NRC inspection had confirmed that NECO had stopped these activities. As legal basis for the Show Cause Order, and the finding that NECO could not unilaterally terminate its license and leave a site where it had buried low-level nuclear waste the Director cited sections 2(d), 53, 62, 81, 161(b), 183, and 184 of the Atomic Energy Act (42 U.S.C. 2012(d), 2073, 2092, 2111, 2201(b), 2233, and 2234) and the Commission's regulations (10 CFR 2.107, 30.34(e), 30.37(b), 30.41(c), 40.51(c), and 70.42(c)).

The Commission in its Memorandum and Order of June 6, 1979, found that there was the requisite basis in the Director's order for understanding the grounds of his decision.

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It stated the paramount consideration in the Commission's licensing actions is safety. It pointed to the requirements on NECO in its license for providing security, maintenance and monitoring of the site, and how NECO's action in seeking to unilaterally terminate its license and in abandoning the site ended these activities and could reasonably be expected to lead to off-site exposure of persons to radioactivity. It recited the un rebutted evidence that NECO had abandoned the site; that the security fence was in need of repair; that buried waste was exposed in sinkholes; and that NECO was not monitoring sumps and surface water runoff. It further found that under Commission regulations and under general law, NECO's conduct in purposefully leaving the Sheffield site and the possible consequences of that action provided the basis for an immediately effective order mandating that NECO return to the site until it could be determined in hearing whether NECO could unilaterally terminate its obligations under its license. The Commission then set for hearing the issue--

whether NECO can unilaterally terminate License No.  
13-10042-01 for activities at Sheffield without affirmative  
action by the Commission

NECO now seeks to again supplement its motion for reconsideration of the Commission action affirming the immediate effectiveness order--by "newly discovered" documents which it claims show that the Commission formerly determined that buried low-level radioactive waste is no longer "possessed." It says that for this reason the Commission is estopped from pursuing this matter and this proceeding should be dismissed.

For the reasons set forth below, the Staff does not believe that the "newly discovered" evidence provides a legally sufficient basis for reconsideration by the Commission of its order previously entered in this matter, or a basis for concluding that the Commission is estopped from conducting further proceedings in this action.

First, it should be noted that the cited writings do not purport to set out Commission policy, but only thoughts and questions the Staff suggested in the preliminary consideration of a deep salt mine for the burial of waste.

Next, the documents cited do not reflect any Staff or Commission policy providing that burying radioactive waste automatically relieves a licensee of possession or responsibility for that material. Rather, the first document relied on by the Licensee, "Enclosure 1," only states that:

If the facility is a disposal facility, the above limit would apply to the wastes stored above ground. Facility utilization plans and procedures for sealing tunnels may also have to be considered in determining when SNM is finally disposed of and no longer in the licensee's possession. If the facility is a retrievable storage facility, all material in storage (above and below ground) is considered to be in the licensee's possession.

Plainly it is contemplated that a licensee may put material in a disposal facility and still have responsibility for that material. As the writing says-- plans and procedures may also have to be considered so that material put in the ground can be determined to be finally disposed of and no longer in the licensee's possession. Thus, this Staff document concerning the storage of waste in deep salt mines is not probative of Commission policy on whether NECO had responsibility for the waste it buried in the shallow trenches at Sheffield.<sup>-2/</sup>

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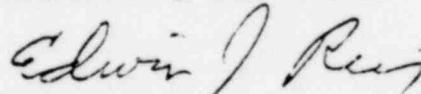
<sup>-2/</sup> The recognition in the paper that the impacts of storage and disposal may be comparable, also shows no intent to relieve a licensee of its responsibilities merely because it buries radioactive material.

Similarly "Enclosure 2" is not probative of NECO's duties under its license. The Commission license to NECO as we have indicated in previous filings was granted on the knowledge that NECO had a 99-year lease for the land for the facility. The arrangements between the State of Illinois (which does not have an NRC license for Sheffield) and NECO, is not probative of NECO's duties to the NRC under NECO's NRC license. Moreover, the suggestion in the documents that the applicant provide a decommissioning plan and estimate of costs of decommissioning, shows that the applicant will bear responsibilities for the material and the site even after the material is buried. Certainly the Staff questions quoted cannot be used to support any theory that NECO could escape responsibility by mailing back its license and abandoning the site.

On the basis of these documents NECO has argued that the Commission is estopped from trying to make NECO meet the responsibilities the Staff believes NECO has under its license and under the law. As we have shown, the documents on which NECO premises its arguments do not support its assertions. Moreover, there can be no estoppel against the government in this situation. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917). The law requires, as we have detailed and as here pertinent, that controlled material may not be transferred from ones control or abandoned. A license may not be disposed of without Commission approval. The regulations of the Commission similarly continue responsibilities under a license until the Commission relieves the licensee of such responsibility. Thus, as a matter of law there can be no estoppel against the Staff's action in seeking to have NECO abide by its license and the law.

For all of the above reasons, NECO's supplemental filing provides no additional basis for the grant of its motion for reconsideration. Moreover, there can be no estoppel against the government to enforce requirements imposed by statute, regulation and license.

Respectfully submitted,



Edwin J. Rejs  
Counsel for NRC Staff

Dated at Bethesda, Maryland,  
this 5th day of November, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO NECO'S SECOND SUPPLEMENT TO ITS MOTION FOR RECONSIDERATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk by deposit in the Nuclear Regulatory Commission internal mail system, this 5th day of November, 1979:

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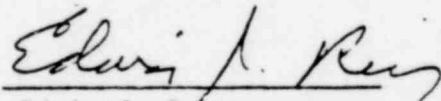
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