

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter

NUCLEAR ENGINEERING COMPANY, INC.

(Sheffield, Illinois Low-Level Waste  
Radioactive Waste Disposal Site)

License No. 13-10042-01

MEMORANDUM AND ORDER

The Nuclear Engineering Company, Inc. (NECO), a materials licensee under License No. 13-10042-01, operates the low-level radioactive waste disposal site near Sheffield, Illinois. NECO filed a timely application for license renewal in August, 1968, and its license has been continued in effect pending final Commission action. 10 CFR 2.109. A Licensing Board was established to consider NECO's application. 43 Fed. Reg. 9892 (March 10, 1978). On December 27, 1978, NECO moved the Licensing Board to suspend further proceedings concerning its application. After hearing from the parties, the Licensing Board scheduled oral argument for March 27, 1979, to consider NECO's motion. Licensing Board Order of March 7, 1979. On March 8, 1979, NECO filed a "Notice to Atomic Safety and Licensing Board of Withdrawal of Application and Termination of License for Activities at Sheffield." In response the Licensing Board on March 13, 1979, issued an Amended Order Setting Oral Argument in which it treated NECO's notice as a motion pursuant to 10 CFR 2.730, and expanded the scope of hearing to include NECO's motion and any answers thereto.

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On March 8, 1979, NECO also notified the Director, Nuclear Materials Safety and Safeguards (NMSS), that as of that date it was (1) withdrawing its pending application to renew its license and expand the Sheffield site, and (2) was unilaterally terminating its license for all activities at the Sheffield site. The Director, NMSS, informed NECO on March 9, 1979, that it could not unilaterally terminate its Sheffield license, and directed NECO to take all necessary action to assure public health and safety at the site. NECO responded on March 14, 1979, stating that, in its view, NRC lacked authority to hold NECO to its materials license because NECO had discharged its license responsibilities and that the Sheffield site presented no danger to public health and safety.

On March 20, 1979, the Director, NMSS, ordered NECO to show cause why it should not resume its responsibilities under its license for the Sheffield site, and required NECO to resume its responsibilities immediately. The Director based his order on NECO's obligation to act in a safe and responsible manner with respect to its license for receipt and possession of nuclear materials at the Sheffield site. These obligations include maintenance of site security and trenches in which the low-level radioactive material is buried. The Director explained that under the Commission's regulatory scheme no licensee can terminate its obligations and responsibilities under an NRC license except under terms and conditions established by the Commission, and that such termination must be preceded by appropriate Commission review to assure protection of public

health and safety. Furthermore, he pointed out that licensees could not transfer materials to a third party, such as the State of Illinois which owns the site, without prior Commission approval.

NECO's general failure to hold in force terms and conditions of its license were confirmed by two on-site visits on March 9, and 16 by inspectors from the Commission's Office of Inspection and Enforcement (Region III). The show cause order also gave NECO twenty days to request a hearing to consider the issues involved.

On March 22, 1979, NECO moved for emergency action by the Commission to stay the immediate effectiveness of the Director's show cause order, and to delegate the Commission's review functions in this matter to the Licensing Board now considering NECO's withdrawal of its application to renew and expand its Sheffield license. NECO sought prompt action on its motion because it wanted its objections to the show cause order to be considered by the Licensing Board at the oral argument scheduled for March 27, 1979.

Under the Commission's rules, unless the Secretary prescribed other time periods, the response times to NECO's motion were twenty days for the NRC staff and fifteen days for the State of Illinois. Both participants informed us they could not reply by March 27, 1979. In view of this circumstance, and the unique nature of the issues raised by NECO's motion, we did not shorten the participants' response times.

On March 23, 1979, NECO filed Answer of Nuclear Engineering Company, Inc. to Order to Show Cause and Demand for Hearing pursuant to 10 CFR 2.202(b). All participants agree that resolution of the issues raised

by the show cause order would be most expeditiously and effeciently handled by the Licensing Board now in existence. Pursuant to 10 CFR 202(c) we are today issuing a separate Notice of Hearing directing the Licensing Board to consider the issue of NECO's unilateral termination of its license.

NECO contends that the immediate effectiveness of the Director's order does not satisfy the Commission criteria<sup>1/</sup> for determining that the Director acted within his discretion because the order did not allege that NECO's withdrawal created an immediate threat to public

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<sup>1/</sup> Consolidated Edison Company of New York, (Indian Point, Units 1, 2, and 3), CLI 75-8, 2 NRC 173, 175 (1975).

That decision sets out five points of inquiry relevant to determining whether the Director has abused his discretion in the issuance of an order to show cause:

- (1) whether the statement of reasons given permits rational understanding of the basis for his decision;
- (2) whether the Director has correctly understood governing law, regulations, and policy;
- (3) whether all necessary factors have been considered, and extraneous factors excluded, from the decision;
- (4) whether inquiry appropriate to the facts asserted has been made; and
- (5) whether the Director's decision is demonstrably untenable on the basis of all information available to him.

In this case, we have also applied these criteria to the issue of the immediate effectiveness of the Director's order because that issue is inextricably intertwined with the Director's decision to issue the order.

health and safety. The NRC staff and the State of Illinois oppose NECO's request that we vacate the immediate effectiveness of the show cause order because it was based on the need to preserve public health and safety.

The reasons stated by the Director in his order provide the requisite basis for understanding his decision. As he noted, the fundamental principle guiding all Commission licensing actions is the paramount consideration of public safety. This principle pervades the regulatory scheme established by the Atomic Energy Act and requires all persons to act with respect to nuclear materials in a manner which does not constitute a threat to public health and safety. For Sheffield, NECO developed a set of procedures for protecting public health and safety. These were incorporated by reference into the Sheffield license. These procedures included provision of a perimeter fence and guard patrol, maintenance of burial trenches, and ongoing environmental monitoring. The public health and safety reasons for these procedures are explained in several of NECO's filings with the NRC in support of its license application. NECO recognized that unauthorized access could lead to exposure to radioactivity or unauthorized removal of radioactive material; that defects in trench caps would allow surface water to enter the burial trenches, become contaminated with radioactive materials, and migrate off-site exposing the public; and that soil contaminated with radioactive materials from leaking packages could be blown about and

inhaled by NECO personnel on its adjacent site. In spite of these well-known possible consequences, NECO unilaterally terminated all Sheffield activities on March 8, 1979. NRC inspectors visited the site on March 9, and 16, and confirmed NECO's general failure to hold in force its license terms and conditions. In our view, the Director's reasons and NECO's understanding of their implications provided it with a sufficient basis for understanding the order.

The Director's authority to issue an immediately effective order is contained in 10 CFR 2.202(f). That regulation provides that an order may be immediately effective if:

- \* public health and safety requires the order;
- \* public interest requires the order;
- \* the Licensee's violations are willful.

We believe that all of the prerequisites for an immediately effective order are present.

As we have discussed above, NECO's refusal to maintain and monitor the Sheffield site could reasonably be expected to lead to off-site migration of radioactive materials which could expose the public. The Commission has previously found that latent conditions which may potentially cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where the consequences might not be subject to correction in the future. Consumers Power Co. (Midland Plants, Units 1&2), CLI-74-3, 7 AEC 10-12 (1974). Consequently, the

possibility of off-site migration, its potential for adverse impact on the public, and the impossibility of recalling such material once it escapes off-site support the Director's finding that public health and safety required an immediately effective order.

Public interest in an orderly licensing process also supported the Director's decision. Courts have found that purported violations of agency regulations support an immediately effective order even where no adverse public health consequences are threatened. Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950). Here, the Director was concerned with possible violations of health and safety regulations which could reasonably be expected to have adverse public consequences. Under these circumstances, the Director reasonably concluded that NECO's unilateral action required an immediate response to ensue that license termination would be preceded by appropriate Commission review. Consequently, we believe that the public interest justified an immediately effective order which simply required NECO to resume safety-related on site activities.

There is also no question that the Licensee acted willfully by its unilateral action. On March 9, the Director informed NECO that, in his opinion, the license could not be unilaterally terminated. In spite of this opinion, NECO on March 14, reiterated its determination to unilaterally terminate all license obligations. Such purposeful

action by NECO supports the Director's finding of willfulness. Air Transport Associates v. Civil Aeronautics Board, 199 F.2d 181, 186 (D.C. Cir. 1952), cert. denied, 344 U.S. 922 (1953), Cf. United States v. Illinois Central R.Co., 303 U.S. 239, 242-243 (1938). In civil proceedings, action taken by a licensee in the belief that it was legal does not preclude a finding of willfulness. Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971). Thus, NECO's belief that it had no further obligation under the license does not invalidate the Director's finding of willfulness.

NECO's mere assertion that it could unilaterally terminate its license presents significant questions of law and policy beyond the scope of the Director to decide in the context of the need for action to protect public health and safety. NECO's novel legal theories have not been subject to scrutiny by any independent tribunal. Thus, even though at this time we offer no opinions on NECO's legal theories, we find that the Director was justified in believing that NECO's license was still in force, and that NECO's unilateral termination of its obligations under that license constituted willful violation supporting an immediately effective order.

The Director's decision to issue an immediately effective order was made after two NRC inspection visits to the Sheffield facility. These visits confirmed NRCO's general failure to hold in force the terms and conditions of its license. The inspectors found that the security fence was in need of repair, that the licensee was not providing security,

that the burial trench area contained sinkholes at several locations, that NECO had not been monitoring sumps in burial trenches and surface water runoff, and that buried waste had been exposed in some sinkholes. Consequently, we find that all necessary factors have been considered and inquiry appropriate to the facts asserted had been made.

In view of the foregoing discussion, we find that the Director's decision was not demonstrably untenable on the basis of all the information available to him. Consequently, we find that the Director acted well within his discretion in issuing an immediately effective show cause order. Furthermore, we also find that these same reasons require that the order remain in effect at least until the issues have been resolved by a Licensing Board. Of course, at this time we make no determination on the merits of the issues in the show cause proceeding. If the decision on any of those issues should come before us for review, we will at that time reach our conclusions on the basis of the record then before us.

We note in passing that we are not alone in finding that conditions at the Sheffield site are such as to render reasonable a requirement that NECO immediately resume responsibility for that site. An Illinois Circuit Court found that preliminary injunctive relief requiring NECO to resume site maintenance activities was clearly justified, necessary, and appropriate.<sup>2/</sup> Even though that Court's criteria for enjoining NECO were

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<sup>2/</sup> People of the State of Illinois v. Teledyne Ind, et al., No. 78-MR-25 (Ill. Cir. Ct. for the 13th Cir., filed March 27, 1979).

somewhat different, it is clear that the basic factor motivating that Court was the same concern with public health and safety which motivated the Director to issue an immediately effective show cause order.

It is so ORDERED.

For the Commission

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SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.,  
this        day of April, 1979.