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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '89 OCT 30 A10:15

ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF	
KERR-McGEE CHEMICAL CORPORATION	Docket No. 40-2061-ML ASLBP No. 83-495-01-ML
(West Chicago Rare Earths Facility)	

KERR-McGEE MOTION FOR AN ORDER TO PROTECT THE BOARD'S JURISDICTION

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The State of Illinois ("State") has submitted an application for an amendment of its Agreement with the NRC that, if approved, would transfer to the State jurisdiction over byproduct material as defined by section 11e(2) of the Atomic Energy Act. 42 U.S.C. § 2014(e)(2) (1982). The only facility in Illinois that would be affected by the transfer is the West Chicago Rare Earths Facility. The NRC has stated that it is reviewing the State's application "under an expedited process;" the NRC anticipates receiving the State's "final application" in December 1989 and the entry into the new agreement in March 1990.[1/] As will be seen, the sole purpose of the amendment is to enable the State, a party to this proceeding, to usurp this Board's authority to determine

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1/ Letter from Dennis K. Rathbun to J. Dennis Hastert (Aug. 9, 1989) (Exhibit 1).

the appropriate disposition of the West Chicago wastes.[2/] Kerr-McGee Chemical Corporation ("Kerr-McGee") hereby moves that the Board enter an appropriate order to protect its jurisdiction until a final decision is achieved in this proceeding.

We demonstrate first that this Board has authority to preserve its jurisdiction. Second, we show that such action is necessary in the instant circumstances. Finally, we discuss the appropriate form of order.

I. THIS BOARD HAS AUTHORITY TO ISSUE ORDERS TO PRESERVE ITS JURISDICTION

This Board obtained jurisdiction over the decommissioning and stabilization of the West Chicago facility when the notice of hearing was issued. 10 C.F.R. §§ 2.717, 2.104 (1989). It is axiomatic that once an adjudicatory body obtains jurisdiction, it also obtains the corollary power to preserve that jurisdiction. It is exactly that power that this Board should exercise here.

Courts frequently issue orders to preserve their own jurisdiction. F.T.C. v. Dean Foods Co., 384 U.S. 597, 604 (1966); Arrow Transp. Co. v. Southern R.R., 372 U.S. 658, 671 n.22 (1963); Zenith Elecs. Corp. v. United States, No. 89-1186

2/ If the amendment were approved, the Board would be confronted with a motion to terminate that is premised on the withdrawal of NRC jurisdiction. See Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 902 (1986).

(Fed. Cir. 1989) (Exhibit 2); United States v. BNS, Inc., 858 F.2d 456, 460-62 (9th Cir. 1988); In re Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985); American Pub. Gas Ass'n v. FPC, 543 F.2d 356, 357-58 (D.C. Cir. 1976), cert. dismissed, 429 U.S. 1067 (1977); Rudnicki v. McCormack, 210 F. Supp. 905, 909 (D. Mass. 1962), appeal dismissed, 372 U.S. 226 (1963).[3/] The "basic and underlying principle of law" is that "a court by necessity has the power and authority to issue all writs and orders to preserve and maintain [its] jurisdiction . . . ."[4/] United States v. Western Pa. Sand & Gravel Ass'n, 114 F. Supp. 158, 159 (W.D. Pa. 1953).

In situations analogous to that now confronting this Board, courts have frequently prevented a party from taking actions that would interfere with the court's jurisdiction. For example, courts on occasion enjoin parties from bringing

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3/ The "Inherent Powers Doctrine" provides courts with the power to issue orders "required for the performance of [judicial] duties" and "essential to the administration of justice." Ex parte Peterson, 253 U.S. 300, 312-14 (1920). That "doctrine is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978). In the federal judicial system, the All Writs Act, 28 U.S.C. § 1651(a), "provide[s] statutory confirmation of this authority." Sampson v. Murray, 415 U.S. 61, 73-74 (1974); Scripps-Howard Radio v. FCC, 316 U.S. 4, 9-10 (1942).

4/ The Western Pa. Court further stated that "this doctrine has been deeply imbedded into a federal jurisprudence, and through the years has nurtured and fed life-blood to the federal judicial organism." 114 F. Supp. at 159.

parallel actions that would threaten to interfere with the court's jurisdiction. In In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985), the Second Circuit affirmed a district court's order barring the appellants (the representatives of thirty-two states) from bringing parallel actions in state court while the court reviewed a proposed settlement in a consolidated multidistrict class action. The Second Circuit, in concluding that the injunction was proper, reasoned that:

> Given the extensive involvement of the district court in settlement negotiations to date and in the management of this substantial class action, we perceive a major threat to the federal court's ability to manage and resolve the actions against the remaining defendants should the states be free to harass the defendants through state court actions designed to influence the defendant's choices in the federal litigation.

770 F.2d at 338; see also In re Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1334 (5th Cir. 1981). Indeed, the Supreme Court in Atlantic Coastline R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970), although vacating an order issued by the district court, specifically noted that an injunction would be appropriate to prevent a parallel proceeding "from so interfering with a Federal court's consideration or disposition of a case as to seriously impair the Federal court's flexibility and authority to decide that case."

Similarly, Courts have enjoined parties from taking actions that would defeat the court's jurisdiction by altering the subject matter of the judicial proceeding. For example,

the Ninth Circuit in United States v. BNS, Inc., 858 F.2d 456 (9th Cir. 1988), affirmed an order enjoining the defendant from consummating a proposed hostile takeover while the district court was reviewing a consent decree that the defendant had entered with the Justice Department. The Ninth Circuit ruled that the district court had the authority to issue an order to prevent the court's review process from being "undermined." 858 F.2d at 461. In Zenith Elecs. Corp. v. United States, No. 89-1186 (Fed. Cir. 1989) (Exhibit 2), the Federal Circuit affirmed an order issued by the United States Court of International Trade ("CIT") enjoining the Department of Commerce ("Commerce") from making amendments to the final results of an antidumping duty order without the authorization of the court. The CIT had held, and the Federal Circuit agreed, that "basic considerations of court jurisdiction, judicial authority and judicial economy" justified the order. Zenith Elecs. Corp. v. United States, 699 F. Supp. 296, 297 (Ct. Int. Trade 1988); see also In re Uranium Antitrust Litigation, 617 F.2d 1248, 1259-60 (7th Cir. 1980) (order enjoining defendants from transferring assets out of the United States without prior approval of the court); United States v. Western Pa. Sand & Gravel Ass'n, 114 F. Supp. 158, 159 (W.D. Pa. 1953) (injunction necessary to prevent the

"court's jurisdiction over respondent [from] be[ing] in imminent peril").[5/]

Not surprisingly, NRC tribunals also have the authority to act to preserve jurisdiction. See Texas Util. Generating Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334 (1983) (stay of Appeal Board's decision to protect the Commission's jurisdiction); Texas Util. Generating Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-83-8, 17 NRC 339, 339 (1983) (stay of Licensing Board order); Duke Power Co. (Amendment to Materials License SNM-1773), CLI-80-3, 11 NRC 185 (1980) (interim protective order); Kansas Gas & Elec. Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-307, 3 NRC 17 (1976) (stay of Licensing Board order). The Commission and the Boards have supported their authority to issue such orders by drawing analogy to established federal judicial practice. In the Comanche Peak proceeding, for example, the Commission noted that analogous First Circuit law supported its authority to grant a stay to preserve its jurisdiction. 17 NRC at 334.

5/ A court's authority is so extensive that it may issue an injunction to protect its jurisdiction even before the movant has filed suit. See FTC v. Dean Foods Co., 384 U.S. 597, 604 (1966) ("[D]ecisions of this Court 'have recognized a limited judicial power to preserve the Court's jurisdiction or maintain the status quo by injunction pending review of an agency's action . . . .'") (quoting Arrow Transp. Co. v. Southern R.R., 372 U.S. 658, 671 n.22 (1963)); Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir.), cert. denied, 340 U.S. 883 (1950); West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948), cert. dismissed, 336 U.S. 908 (1949).

The authority to issue an order to protect jurisdiction need not expressly be provided by statute or regulation. The Board may rely on the traditional authority vested in adjudicatory fora. See Sheehan v. Purolator Courier Corp., 676 F.2d 877, 884 & n.11 (2d Cir. 1981); cf. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158, 160 (D.C. Cir. 1967).6/ But, in any event, the NRC regulations provide a basis for the Board's issuance of an appropriate order. Section 2.718 grants the Board "all powers necessary" to accomplish its "duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order," including the power to "take any . . . action consistent with" the Atomic Energy Act, the Commission's other regulations, and the Administrative Procedure Act. 10 C.F.R.

6/ The Appeal Board has held that it may issue orders despite the absence of explicit statutory authorization. In considering the propriety of a remand order, the Appeal Board ruled that:

> the fact that a given power falls within the scope of the traditional powers of a court of equity does not preclude an agency from exercising such power, even where it is not expressly given to the agency but only can be "fairly implied" from its statutory authority.

Wisconsin Elec. Power Co. (Point Beach, Unit #2), ALAB-82, 5 AEC 350, 351 (1972). The Appeal Board further stated that "the Commission, as a court . . . may fashion that administrative remedy which appears most appropriate to the end of achieving a fair and just result in a particular set of circumstances." Id. at 352.

§ 2.718 (1989);[7] see Kansas Gas & Elec. Co. (Wolf Creek Station, Unit No. 1), ALAB-321, 3 NRC 293, 302 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977) (issuance of declaratory order authorized under § 2.718); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 150 (1988) (noting that "[i]njunctive relief may be one of the actions we could take by virtue of [§ 2.718(m)]"); Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-[illegible], 15 NRC 48, 53 (1982) issuing a protective order on the basis of the Board's "general power and duty to conduct a fair and impartial hearing, as set forth in 10 C.F.R. § 2.718").

In sum, this Board's authority to act to preserve its jurisdiction over the proceeding is clear. As will be seen, equity and justice require that the Board issue such an order now. See Niagara Mohawk Power Corp. v. FPC, 379 F.2d

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7/ Section 2.718 provides in pertinent part:

> A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the power to:
>
> . . .
>
> (m) Take any other action, consistent with the [AEA], this chapter, and sections 551-558 of Title 5 of the United States Code.

10 C.F.R. § 2.718 (1989).

153, 160 (D.C. Cir. 1967) (principles of equity properly enlighten administrative agencies).

II. THE BOARD SHOULD EXERCISE ITS AUTHORITY TO PROTECT ITS JURISDICTION

The existence of a threat to the Board's jurisdiction is sufficient by itself to justify the entry of an order to protect jurisdiction. See In re Baldwin-United Corp., 770 F.2d at 336; Zenith Elecs. Corp. v. United States, No. 89-1186, slip op. at 13-14 (Fed. Cir. 1989) (Exhibit 2). Although no further considerations need be weighed, a variety of other factors reinforce the propriety of action to prevent the State from usurping this Board's role.[8/]

A. The State's Sole Purpose In Seeking The Amendment Is To Remove This Board's Jurisdiction.

Before the entry into the Agreement, the NRC staff sought to encourage the State to enter an Agreement that would encompass section 11e(2) byproduct material.[9/] The Agreement does not cover such material, evidently because the State

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8/ The traditional factors that are evaluated in considering the entry of a preliminary injunction are: (1) the threat of irreparable injury; (2) the likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on the parties. 11 C. Wright and A. Miller, Federal Practice and Procedure, § 2948 (1973); cf. 10 C.F.R. § 2.788(e) (1982) (factors guiding the consideration of a request for a stay). The likelihood of success on the merits has no bearing on the instant matter. As shown below, the other factors are clearly satisfied and the relief requested by Kerr-McGee should be granted.

9/ Memorandum from R.E. Cunningham to G.W. Kerr (Nov. 26, 1985) (Exhibit 3).

concluded that the NRC should continue to have responsibility for the instant proceeding. The State's view changed, however, after the issuance of the DSFES. The DSFES, of course, provided the first formal indication that the staff had concluded that the Kerr-McGee plan for onsite disposal is the preferred alternative for the disposition of the West Chicago wastes. The DSFES thus provided a clear indication to the State that a neutral and fair observer of the facts might reject the State's arguments in opposition to onsite disposal. The State's newfound interest in amending the Agreement is thus transparently an effort to prevent this Board from resolving this dispute.

Indeed, the State's public pronouncements confirm that the State's purpose in seeking jurisdiction is solely to oust NRC jurisdiction and thereby to thwart onsite disposal. John Cooper, IDNS manager of environmental safety, stated that "[w]e're expecting that state jurisdiction (of byproduct material) will be granted within a year. Then we could begin planning for the waste removal [from the West Chicago facility] all at one time." Parisi, Thorium Removal Moves Closer to Reality, West Chicago Press (Winfield Press), Aug. 25, 1988 (Exhibit 4). Indeed, IDNS officials have been reported as "repeatedly stat[ing] that, given the authority to do so, they would relocate the waste." Biddle, Hopes Rise for Waste Cleanup, Chicago Tribune (DuPage Section), May 24, 1988, at 1 (Exhibit 5); see also Szymczak, Kerr-McGee to Clean Up More Waste, Chicago Tribune (DuPage Section), Sept. 29, 1989,

at 1-2 ("[t]he state maintains that it wants to get regulatory control of all of the waste material at the Kerr-McGee plant and throughout the area and force the company to ship it to a disposal site in an uninhabited part of the western United States") (Exhibit 6). Perhaps most revealing, John Cooper, the IDNS Manager of the Office of Environmental Safety, stated in the official IDNS newsletter that "[i]f [IDNS] thought the current [NRC] process would lead to an acceptable long-term solution [for the West Chicago wastes], we wouldn't worry about jurisdiction." IDNS, Radiological Response-Abilities, 4, 5 (Summer 1988) (Exhibit 7). In short, the State's public pronouncements reveal its improper purpose.

The State's efforts to amend its Agreement constitute a bald attack on this Board's jurisdiction. The State's efforts serve no legitimate purpose and should be curtailed by this Board.

B. The Requested Relief Is Necessary To Protect Kerr-McGee From Irreparable Harm.

Unfairness to Kerr-McGee would clearly result if this Board does not act. In this proceeding, the State has vociferously and consistently opposed the proposal for onsite disposal of the West Chicago wastes. It also intervened in the now-completed Kress Creek proceeding in opposition to any disposal of offsite wastes on the site. And, the State is also the plaintiff in a state court action seeking an injunction under state law against onsite disposal of the

wastes. Illinois v. Kerr-McGee Chemical Corp., Dkt. No. 80 CH 298 (Ill. Cir. Ct. DuPage County).

There has been no impropriety in the State's participation in these legal proceedings or in its forceful assertion, as a party, of its position on both factual and policy issues. But it has asserted its opposition to onsite disposal with such force and such frequency that it is plain that the State is incapable of addressing the subject with an open mind.[10/] In light of the IDNS's participation as a party, and in particular its strenuous assertion of a fixed position on vital contested issues, Kerr-McGee will be subjected to irreparable harm if the IDNS were to become the ultimate decision-maker on those same issues.[11/]

10/ This is clearly not an issue for which it could be argued that the State's position is incontestable and that absence of an open mind on the part of a proposed decision-maker is therefore "harmless." To the contrary, in taking its position the State has placed itself in direct opposition, not only to Kerr-McGee, but also to the expert NRC staff, which has been studying the issue for more than ten years and favors onsite disposal.

11/ Kerr-McGee challenged the transfer to the State of jurisdiction over the "offsite" wastes in West Chicago because, among other grounds, the transfer would deprive Kerr-McGee of an impartial decision-maker with regard to those materials. The Commission rejected Kerr-McGee's argument, not because the State was seen to be impartial, but because the NRC was said to lack the authority to disqualify an officer or agency of a state. State of Illinois (Section 274 Agreement), CLI-88-1, 28 NRC 75, 88 (1988). The Commission's decision, including its refusal to protect Kerr-McGee's due-process rights, is now under review by the D.C. Circuit. Kerr-McGee Chemical Corp. v. NRC, Nos. 87-1254 and 88-1636. In any event, Kerr-McGee is not seeking here to disqualify the State solely on the basis of prejudice, but rather to urge this Board to

(footnote cont'd)

The State's oft-repeated position firmly opposing onsite disposal of the West Chicago wastes is particularly troublesome in this context because the IDNS has made it clear that nothing will change its mind with regard to onsite disposal. Soon after the State's intervention in this proceeding, the State filed an affidavit from Terry Lash, Director of the IDNS, in which Mr. Lash asserted that IDNS:

> will not agree that Kerr-McGee's West Chicago site is a proper location for the disposal of radioactive wastes. In my opinion, the site cannot be expected to provide adequate protection from radiation hazards over the long term.

Affidavit of Terry R. Lash, ¶ 9 (August 2, 1984) (Exhibit 8). During the trial in state court of the State's action to compel disposal of the wastes elsewhere, Mr. Lash testified at length with regard to onsite disposal. He expressed his firmly held belief that the West Chicago site is an inappropriate one for waste disposal and that the wastes should be moved.[12/] Mr. Lash agreed that site selection is a complex matter requiring evaluation and study of many site-specific factors, id. at 2409-10, and expressed his awareness that the NRC staff, as a result of the State's insistence, was then preparing such a study. Id. at 2409. Yet he asserted --

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(footnote cont'd)

protect the jurisdiction delegated to it on the basis of a variety of different considerations.

12/ Testimony of Terry R. Lash, Illinois v. Kerr-McGee Chemical Corp., Docket No. 80 CH 298 (Ill. Cir. Ct. DuPage County), at 2369, 2375, 2377, 2395 (Exhibit 9).

several times -- that nothing in that study could possibly change his conclusion that onsite disposal should not be permitted. Id. at 2404, 2409, 2433-34, 2459. He saw that study as having little value to IDNS on the issue, although he admitted that it might have "value" to a decision-maker who had an open mind on the matter. Id. at 2434. Indeed, Mr. Lash stated that NRC approval of onsite disposal would not alter his opposition to the proposal. Id. at 2458-59.

The prejudgment of issues is not limited to Mr. Lash. As this Board is aware, the IDNS, as a party in this proceeding, has expressed its opposition to onsite disposal on numerous occasions. But, IDNS will be the agency assuming regulatory jurisdiction over the West Chicago wastes if a transfer occurs. IDNS would thus be transformed from a principal advocate on the most important regulatory issues concerning the site to the sole decision-maker on those same issues. And the final decision officer for IDNS on those issues would be the IDNS Director, Terry Lash, who has openly admitted that his mind is closed. See Ill. Adm. Code tit. 35, §§ 200.220, 200.230 (1986).

If this Board does not maintain jurisdiction, the disposition of the West Chicago wastes will be determined by an agency with an open and pervasive bias. Indeed, the State's sole purpose in seeking jurisdiction is to allow the exercise of that bias. See supra pp. 9-11. The protection of Kerr-McGee from irreparable injury and considerations of fundamental fairness compel action by this Board to halt the

State's efforts to deny Kerr-McGee a neutral and unbiased decision-maker.[13/]

C. The Retention Of Jurisdiction Is Necessary To Conserve Resources.

This matter has been pending for twelve years and the review of Kerr-McGee's application has been proceeding for ten years. The withdrawal of jurisdiction from this Board at this juncture would be extraordinarily wasteful because all the work undertaken by the Board and the parti- would become irrelevant. This is so because the focus of this proceeding -- the Kerr-McGee proposal for onsite disposal -- will clearly not be entertained by the State. See supra pp. 9-11. Considerations of judicial efficiency require this Board's retention of jurisdiction.

At this point, both the parties and the Board have an extensive investment in this proceeding. The staff has incurred the expense of preparing both a final and, at the insistence of the State, a supplemental environmental statement. The drafts of both statements required the expenditure of time and effort in generating comments and in the analysis of comments. Kerr-McGee, for its part, prepared the 12-volume West Chicago Project Engineering Report and commissioned

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13/ An assumption of jurisdiction by the State raises profound due process concerns. See, e.g., Marshall v. Jerrico, Inc., 444 U.S. 238, 242-43 (1980); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); In re Murchison, 349 U.S. 133, 136 (1955).

numerous reports from experts from around the country. The parties have engaged in extensive discovery and the Board has been closely involved in resolving discovery disputes. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-1, 21 NRC 11 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-38, 22 NRC 604 (1985); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75 (1986). The parties' contentions were thoroughly briefed in 1984 and 1989 and were and are subject to careful analysis by the Board. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296 (1984), on reconsideration, LBP-85-3, 21 NRC 244 (1985). The parties have engaged expert witnesses and are even now preparing testimony for a hearing. With the dispute on the edge of final resolution -- after years of effort -- the State seeks to abort the proceeding. The State's campaign to transfer jurisdiction should be stopped because it would render worthless the significant expenditure of time and effort by the Board and the parties.

D. The Public Interest Would Be Served By Prompt Resolution Of The Disposition Of The Kerr-McGee Wastes.

The transfer of jurisdiction to the State would clearly bring to a halt the substantial progress that has been made in defining the disposition of the West Chicago wastes. Indeed, in light of the intransigence of the State with regard to onsite disposal, it is inevitable, if jurisdiction were transferred, that the West Chicago wastes would remain in the

present state for years until the political climate changes or until an alternative site for disposal could be located and regulatory approval achieved.[14/] Although the present disposition of the materials does not present any significant risk to the public health, the publicity and uncertainty concerning the site has resulted in heightened (and unwarranted) anxiety about the materials and has created a contentious political issue in the local community. The prompt resolution of the propriety of onsite stabilization would serve the public good as it may enable the community to put this issue behind it and to move on to more real and productive concerns.

E. No Harm Would Result To The State From This Board's Retention of Jurisdiction.

While denial of Kerr-McGee's request that the State should be barred from seeking regulatory jurisdiction over the West Chicago facility during the pendency of this proceeding would result in irreparable harm to Kerr-McGee, it is difficult to discern any legally cognizable harm that would befall the State. (Of course, the State's scheme for scuttling this proceeding would be stopped, but that "harm" is entitled to no weight.) The State's arguments against onsite disposal will

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14/ In authorizing an alternative site, the State would have to conduct an environmental assessment like that required of the NRC under NEPA. See 42 U.S.C. § 2021(o) (1982). As the Board is aware, the analysis of the Kerr-McGee site consumed years of time and extensive resources.

be subject to thorough and neutral scrutiny by this Board and will be fully and fairly evaluated. Under an appropriately narrow order, the State would not be precluded from proceeding with any other facet of its regulatory application for an amendment of its Section 274(b) Agreement. In short, consideration of the balance of harms fully justifies the entry of an order to preserve jurisdiction.

F. The State's Assertion Of Jurisdiction Is Contrary To The Purposes Of Section 274(b).

The State seeks to assert jurisdiction over the West Chicago wastes pursuant to section 274(b). 42 U.S.C. § 2021(b) (1982). But the State's proposed assertion of jurisdiction over the West Chicago facility is flatly inconsistent with the efficiencies Congress sought to advance in authorizing the Agreement State program.

Section 274(b) was not intended to provide a mechanism whereby a party to an ongoing ASLB proceeding could scuttle that proceeding and assume the mantle of the judge in resolving the dispute for itself. Nor does section 274(b) "authorize a wholesale relinquishment or abdication by the [NRC] of its regulatory responsibilities," S. Rep. No. 870, 86th Cong., 1st Sess., 8, reprinted in 1959 U.S. Code Cong. & Admin. News 2872, 2879, that would result if the State should assume jurisdiction over the West Chicago facility while the NRC is reviewing Kerr-McGee's disposal plan. Rather, the goal of the statute is "to promote an orderly regulatory pattern" between the NRC and the States. 42 U.S.C. § 2021(a)(3)

(1982). As part of that goal, Congress intended to avoid subjecting licensees to "conflicting, overlapping, and inconsistent standards." S. Rep. No. 870, at 9. Congress recognized that "subjecting users of [nuclear] materials to the burdens of procedural dealing with a great many different agencies on the same questions" "would be unfortunate" and sought to ensure that "industrial firms" would not have "to go through [regulatory] procedure twice or perhaps more often." Hearings on Federal-State Relationships In the Atomic Energy Field Before the Joint Committee on Atomic Energy, 86th Cong., 1st Sess. 315 (1959) (statement of Robert Lowenstein, Office of General Counsel, U.S. Atomic Energy Commission).[15/] The precise danger that Congress sought to avoid will result if Kerr-McGee, having proceeded this far in the NRC review process, is forced to commence yet again with the State.

III. THE FORM OF THE ORDER

As indicated by the Rathbun letter (see supra note 1), the State is expected to submit its "final application" in December 1989. The Board can thus retain jurisdiction by issuing an order directing the State to withhold

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15/ Mr. Lowenstein's statement was directed at a bill that would have provided for concurrent jurisdiction over certain radiological materials by the NRC and the states. The same considerations that prompted Congress to reject a dual jurisdictional scheme -- the efficient utilization of resources and the prevention of wasteful duplicative regulatory effort -- argue against a transfer of jurisdiction to the State in these circumstances.

submission of a final application to assume jurisdiction over materials that are subject to this Board's jurisdiction until a final decision is achieved in this case. If the order is framed in this way, there can be no issue as to whether the Board is directing the staff in the performance of its independent responsibilities.[16/] Moreover, if the order were limited to West Chicago wastes, there would be no needless interference with any other aspect of the State's or the NRC's regulatory program.

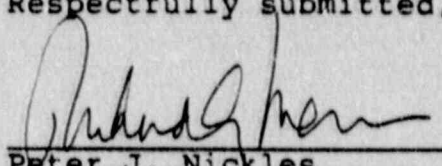
The requested relief would do no more than delay the State's request that its Agreement be amended to include the West Chicago wastes. Given the importance of the matters to be resolved here and the variety of considerations discussed above urging this Board's continued exercise of jurisdiction, the issuance of an order is amply justified.

16/ Even if the Board order were directed at the staff, no impropriety would result. A Board does not overstep its authority merely because its orders incidentally impact the staff's performance of a function. See In re Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), LBP-88-5, 27 NRC 241, 243, 244 n.1 (1988) (Presiding Officer directed staff to establish a local public document room (LPDR) required by regulations governing the proceeding.). The staff does not operate in an insular fashion, rather "the boards and staff must coordinate their operations." Offshore Power Sys. (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 202-03 (1978) (noting the proper relationship between the licensing boards and the staff is "a 'partnership' in furtherance of the public interest [between] 'collaborative instrumentalities of justice,'" id. at 203 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

CONCLUSION

In light of the foregoing, Kerr-McGee urges that the Board grant the requested relief.

Respectfully submitted,



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October 27, 1989

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

August 9, 1989

The Honorable J. Dennis Hastert
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Hastert:

This is in response to your July 20, 1989 letter to Mr. Lando Zech requesting a status report on our review of the State of Illinois application for an amendment to their Agreement State program. As you may know, Mr. Kenneth Carr has succeeded Mr. Zech as Chairman.

The NRC is now in the process of reviewing the Illinois application at the request of Governor James Thompson. The request is being considered under an expedited process that allows us to review the application based on proposed rather than final regulations. This process permits Illinois to obtain what could be our final comments while at the same time soliciting the views of the public. The State's deadline for receiving public comments is August 28, 1989 and we are intent upon submitting our comments prior to that date.

Assuming the State is able to reconcile the comments it receives, we anticipate receiving their final application sometime in December 1989. As required by law, we must publish the final agreement in the Federal Register for four consecutive weeks. Based on this timetable we expect to have a signature package prepared for both parties by March 1990. Should the schedule change, I will inform your staff.

I hope this information is of assistance. Should you have further questions, please feel free to contact me.

Sincerely,

Dennis K. Rathbun

Dennis K. Rathbun, Director
Congressional Affairs
Office of Governmental and
Public Affairs

United States Court of Appeals for the Federal Circuit

89-1186

ZENITH ELECTRONICS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellee,

DAEWOO ELECTRONICS CO., LTD.,

Defendant-Appellant.

Frederick L. Ikenson, of Frederick L. Ikenson, P.C., of Washington, D.C., argued for plaintiff-appellee. With him on the brief were J. Eric Nissley and Larry Hampel.

Velta A. Melnbrencis, Department of Justice, of Washington, D.C., represented defendant-appellee.

David A. Gantz, Oppenheimer Wolff & Donnelly, of Washington, D.C., argued for defendant-appellant. Timothy A. Harr, Oppenheimer Wolff & Donnelly, of Washington, D.C., of counsel.

Appealed from: U.S. Court of International Trade

Judge Watson

United States Court of Appeals for the Federal Circuit

89-1186

ZENITH ELECTRONICS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellee,

DAEWOO ELECTRONICS CO., LTD.,

Defendant-Appellant.

DECIDED: August 24, 1989

Before FRIEDMAN, RICH, and ARCHER, Circuit Judges.

FRIEDMAN, Circuit Judge.

This is an appeal from a preliminary injunction issued by the United States Court of International Trade under the authority of the All Writs Act, 28 U.S.C. § 1651(a) (1982). The injunction bars the Department of Commerce (Commerce) from implementing changes in its determination of the level of duties resulting from administrative review of an antidumping duty order, without the authorization of the court. The changes were designed to correct alleged clerical errors in the determination. Zenith Electronics Corp. v. United States, 699 F. Supp. 296 (Ct. Int'l Trade 1988). We affirm.

I

A. Commerce is authorized under 19 U.S.C. § 1673a (1982 & Supp. V 1987), to conduct formal investigations of whether any imported merchandise should be subject to antidumping duties. If, as a result of such proceedings, (1) Commerce concludes that merchandise is being, or is likely to be, sold in the United States at less than its fair value, and (2) the United States International Trade Commission determines that the importation of such merchandise materially injures or threatens so to injure a domestic industry, then (3) Commerce must publish an antidumping order directing the Customs Service to assess antidumping duties on present entries of such merchandise, 19 U.S.C. § 1673e(a), and to require the deposit of estimated antidumping duties on future entries. 19 U.S.C. § 1673e(a)(3) (1982).

Under 19 U.S.C. § 1675(a) (1982 & Supp. V 1987), Commerce is required, if requested, to review at least annually the amount of duty to be assessed under an antidumping order, and to publish in the Federal Register a notice of "Final Results of Antidumping Duty Administrative Review," for each such review. 19 U.S.C. § 1675(a)(1),(2); 19 C.F.R. § 353.53a(c)(8) (1988). Commerce is then required to instruct the Customs Service to assess antidumping duties on entries of merchandise made during the review period and to collect a cash deposit of estimated antidumping duties on future entries, on the basis of those results. 19 U.S.C. § 1675(a)(2); 19 C.F.R. § 353.53a(c)(9).

Under 19 U.S.C. § 1516a (1982 & Supp. V 1987), an interested party, defined by 19 U.S.C. § 1677(9) to include a domestic manufacturer, who participated in the administrative proceedings, may seek judicial review of the final antidumping determination or the results of the annual administrative review by filing a summons in the United States Court of International Trade within thirty days after the publication in the Federal Register of the determination or review. 19 U.S.C. § 1516a(a)(2)(B). The Court of International Trade has "exclusive jurisdiction of any civil action commenced" under that section. 28 U.S.C. § 1581(c) (1982).

B. On July 1, 1988, Commerce published the final results of an annual administrative review of the antidumping order covering color television receivers from Korea. Color Television Receivers From Korea; Final Results of Antidumping Administrative Review, 53 Fed. Reg. 24,975 (1988). On July 12, 1988, Commerce issued instructions to the Customs Service setting the cash deposit rates of estimated antidumping duties based upon that determination that will be required on subsequent importations of color television receivers from Korea.

On the same day following the publication of the final results in the Federal Register (July 1, 1988), the appellee, Zenith Electronics Corporation (Zenith), a domestic television manufacturer, filed its summons in the Court of International Trade and, on July 13, 1988, filed its complaint challenging the final results. Three Korean manufacturers and a domestic labor union filed similar separate suits. Each complaint alleged that

there were certain "clerical" errors in the calculations supporting those results.

The appellant Daewoo Electronics Company, Ltd. (Daewoo), a Korean television manufacturer, filed a request with Commerce that Commerce correct certain computer and clerical errors in that portion of the final results that related to Daewoo's imports. Daewoo asserted that the calculation of its dumping margins was erroneous because in making the calculation Commerce had improperly compared the sale prices of Daewoo sets in the American market with Daewoo's sales prices in the Korean market of different screen size sets.

On September 26, 1988, Commerce signed a notice of amended results proposing to correct certain "clerical errors" in the final results of the earlier administrative review. Commerce concluded that three ministerial errors had been made in the final results, that certain dumping margins were actually lower than had been determined, and that Daewoo's cash deposit rates should be lowered from 23.30 percent to 15.23 percent.

Two days later the Court of International Trade issued a temporary restraining order barring Commerce from "rescinding, revising, or otherwise altering" the final results or from altering the cash deposit instructions Commerce had issued to the Customs Service. The next day, after Zenith had informed the court that publication of amended results was "imminent," the court amended the restraining order to bar Commerce from publishing the proposed notice of amended results in the Federal Register.

Following oral argument, the court issued a preliminary injunction. In its opinion, the court held that "basic considerations of court jurisdiction, judicial authority and judicial economy dictate that alteration of an administrative result while it is under court review cannot be done without the approval of the Court." The court stated that it "further finds that [Zenith] was not given a fair opportunity to present its views regarding the asserted errors." 699 F. Supp. at 297. The court explained:

> The need to obtain the approval of the Court in order to change the administrative result is simply a recognition of the Court's jurisdiction over the action. One of the ways in which jurisdiction is exercised is by the power of the Court over the subject matter of the action. When a party to a judicial action contemplates doing anything to directly alter the subject matter of the judicial proceeding a proper regard for the authority of the Court requires that the permission of the Court be obtained. [Citation omitted.]

Id. The court further stated that "the administrative authority to correct clerical errors is not absolute . . . . [O]nce a judicial review has been commenced . . . the authority of an administrative agency to correct its clerical errors must be exercised in a way that is consistent with the fundamental obligations which flow from subjection to judicial review." Id.

> This does not mean that Commerce cannot continue the process of identifying ministerial errors while a judicial proceeding is underway. But it does mean, that in order to effectuate corrections in a way that acknowledges the jurisdiction of the Court over the underlying determination and in order to give the Court its proper authority over the question of whether the corrections should be made and, if so, how judicial review should be conducted

> thereafter, Commerce must apply to the Court for permission to make amendments to the final determinations.

Id. at 298.

The court ruled that "it does not appear that counsel for plaintiff had sufficient time and access to the relevant material to make a meaningful response." Id. The court further noted that "there is also an element of irreparable injury to plaintiff in that it has not been given the benefit of adequate procedural safeguards and consequently faces the prospect that the cash deposit rates required of someone who has been found to be dumping and causing injury will be lowered in a manner which is not in accordance with law." Id. at 299.

The court

> conclude[d] that, in order to aid and preserve this Court's jurisdiction, it is necessary and appropriate to prevent any alteration of the Final Results from being undertaken without the authorization and approval of this Court.

Id.

The court's order enjoined Commerce from "rescinding, revising, or otherwise altering" either the final results of the administrative review or the cash deposit instructions issued to Customs. The order further provided that the

> injunction shall remain in effect during the pendency of this litigation or until such earlier time as this Court determines that the defects it has found in the proposed amendment of the Final Results have been remedied, that the amendment of the Final Results is appropriate and the Court specifically authorizes and approves such amendment.

Id. at 299-300.

Although the United States was a party defendant in the Court of International Trade and participated in the proceedings there in opposition to the motion for a preliminary injunction, the United States has not appealed from that injunction or otherwise participated in this appeal. Only Daewoo has appealed.

II

Upon the filing of Zenith's suit challenging the final results of Commerce's annual review of the antidumping order, the Court of International Trade acquired "exclusive jurisdiction" to review that determination. 28 U.S.C. § 1581(c) (1982). The court conducts that review on the basis of the administrative record upon which Commerce based its final results. See Ceramica Regiomontana, S.A. v. United States, 557 F. Supp. 593 (Ct. Int'l Trade 1982); East Chilliwack Fruit Growers Coop. v. United States, 655 F. Supp. 499 (Ct. Int'l Trade 1987). The question before us is whether the Court of International Trade exceeded its authority or abused its discretion in requiring that, before Commerce may change its final results to correct alleged clerical error, the agency first must obtain the authorization of the court to do so. We hold that the court committed no error in imposing that requirement and that it properly implemented that requirement by issuing the preliminary injunction.

A. 1. A number of cases have recognized the authority of an administrative agency to correct inadvertent, ministerial

errors. See, e.g., American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 145 (1958); City of Long Beach v. Department of Energy, 754 F.2d 379, 387 (Temp. Emer. Ct. App. 1985); Chlorine Inst. v. Occupational Safety & Health Admin., 613 F.2d 120, 123 (5th Cir.), cert. denied, 449 U.S. 826 (1980); Howard Sober, Inc. v. I.C.C., 628 F.2d 36, 40-42 (D.C. Cir. 1980); United States v. Civil Aeronautics Bd., 510 F.2d 769, 772-73 (D.C. Cir. 1975).

Those cases, however, have not addressed the issue here: whether, where the agency decision is under judicial review, the agency may take corrective action without prior judicial approval.

In holding that the Interstate Commerce Commission had the power to modify certificates of public convenience and necessity it had issued, to correct inadvertent errors in those certificates, the Supreme Court stated that the Commission's "power" to do so was "similar" to the "power and the duty" of courts "to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake." American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 145 (1958). The Court quoted the first sentence of Rule 60(a) of the Federal Rules of Civil Procedure, which it stated "recognizes this power and specifically provides that '[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the

motion of any party and after such notice, if any, as the court orders.'" Id.

The second sentence of Rule 60(a) provides:

> During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Once an appeal has been docketed, this provision requires the district court to obtain the permission of the appellate court before correcting clerical errors. See, e.g., Smith v. Lujan, 588 F.2d 1304, 1308 (9th Cir. 1979).

By analogy, the same principle supports the conclusion of the Court of International Trade that once that court's exclusive jurisdiction has been invoked, Commerce may correct clerical errors only with the court's prior authorization. In the situation of either the Court of International Trade or a court of appeals, the effect of any correction of clerical error is to change either the decision under review or the factual basis upon which that decision was based.

2. Daewoo contends, however, that section 751(f) of the Tariff Act, as added by section 1333(b) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1209 (to be codified at 19 U.S.C. § 1675(f)), authorizes Commerce to correct clerical errors in final determinations after the commencement of a judicial review proceeding, without first obtaining the court's authorization. That section states:

> Correction of Ministerial Errors. -- The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section [section 751]. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection [(f)], the term 'ministerial error' includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

Section 751(f) does not give Commerce the authority that Daewoo believes it does. A condition of that authority is that Commerce may act only pursuant to the "procedures" it has "establish[ed]." On the critical dates in this case, Commerce had no "establish[ed] procedures for the correction of ministerial errors."

Section 751(f) was enacted and became effective on August 23, 1988. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1337(a), 102 Stat. 1211. Commerce had promulgated six-month temporary procedures for correcting clerical errors on February 26, 1988. See Antidumping and Countervailing Duty Proceedings; Proposed Procedures for Review of Calculations and Correction of Clerical Errors, 53 Fed. Reg. 5,813 (1988). Those procedures, however, expired on August 26, 1988, three days after the Act became effective and 31 days before Commerce, on September 26, 1988, signed the notice of amended results that incorporated the correction of the alleged clerical errors. Commerce reinstated the temporary procedures, which did not refer to section 751(f), on October 24, 1988,

eleven days after the Court of International Trade issued its preliminary injunction. See Procedures for Review of Calculations and Correction of Ministerial Errors, 53 Fed. Reg. 41,617 (1988).

Thus, the procedures that section 751(f) required as a prerequisite to the exercise of Commerce's statutory authority to correct ministerial errors were not in effect on the date of either Commerce's action that Zenith challenges or the court's preliminary injunction. Daewoo, therefore, cannot rely upon that section as a ground for challenging the Court of International Trade's preliminary injunction.

In any event, section 751(f) did not address the question of Commerce's authority to make ministerial changes without prior judicial authorization after judicial review of Commerce's determination had been instituted. The statutory language addresses only the general authority of Commerce to correct such errors. There is nothing in the statute's unambiguous language or legislative history that even suggests that Congress thereby intended to authorize Commerce to correct clerical errors without prior judicial authorization when the determination that the agency sought to change already was subject to the exclusive jurisdiction of the Court of International Trade.

3. Commerce makes no contention before us that requiring it to obtain prior judicial approval before correcting clerical errors in final results that are under judicial review would cause serious difficulties or problems in conducting Commerce's annual review of antidumping orders. Indeed, it is

difficult to see how Commerce's compliance with that requirement would or even could have that effect.

B. The remaining question is whether the Court of International Trade acted within its authority under the All Writs Act and within its discretion by prohibiting Commerce from correcting clerical errors in the final results without prior judicial approval. The answer is yes.

The All Writs Act, 28 U.S.C. § 1651(a) (1982), authorizes courts to issue "all writs necessary or appropriate" in aid of their respective jurisdictions and "agreeable to the usages and principles of law." The invocation of the Court of International Trade's exclusive jurisdiction by the filing of Zenith's suit also gave the court the "'limited judicial power to preserve the court's jurisdiction . . . by injunction pending review of an agency's action through the prescribed statutory channels.'" F.T.C. v. Dean Foods Co., 384 U.S. 597, 604 (1966) (quoting Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 n.22 (1963)). The "only real question involved" is "whether the exercise of the power by the [court] was proper in the case[] now before us." La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

The preliminary injunction here is intended to insure that Commerce does not alter the final results that are now before the court for review, without the court's prior authorization. It was a proper exercise of the All Writs Act's "broad grant of authority to federal courts," Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 367 (7th Cir.), cert. denied, 461 U.S. 960

(1983), "to issue writs 'appropriate' to the proper exercise of their jurisdiction. . . ." United States v. New York Tel. Co., 434 U.S. 159, 173 (1977).

1. The injunction was a reasonable and appropriate implementation of the Court of International Trade's ruling that changes by Commerce in its final results without prior court authorization would be improper because those changes would impair the court's jurisdiction to review the final results that Zenith's suit challenged. The injunction protects the court's jurisdiction by preventing Commerce from taking action that would impinge upon and interfere with that jurisdiction. A mere declaration by the court that Commerce's proposed unilateral changes in the final results, in the absence of any effective order barring those changes, would not adequately protect the court's jurisdiction. The preliminary injunction prohibiting Commerce from making those changes without prior judicial approval thus was "appropriate in aid of" the court's jurisdiction and "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

2. Since, as the Court of International Trade stated, "the impairment of the Court's jurisdiction is the primary ground of injunctive relief in this action," 699 F. Supp. at 299, there is no occasion to consider Daewoo's contention that the Court of International Trade abused its discretion in issuing the preliminary injunction because Zenith had not established the four traditional criteria for injunctive relief.

See, e.g., S.J. Stile Assoc. Ltd. v. Snyder, 646 F.2d 522, 525 (C.C.P.A. 1981). The court was not required to address those criteria (although it discussed three of them) when it issued a preliminary injunction to protect its own jurisdiction.

CONCLUSION

The preliminary injunction of the United States Court of International Trade is

AFFIRMED.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 20 1985

MEMORANDUM FOR: G. Wayne Kerr, Director
Office of State Programs

FROM: Richard E. Cunningham, Director
Division of Fuel Cycle and Material Safety

SUBJECT: STATE OF ILLINOIS AGREEMENT

This refers to your memorandum of November 15, 1985, summarizing the November 12 meeting with state representatives on the proposed Illinois 274b Agreement and the follow-up letter to Mr. Lash.

As you know, we want to include the Kerr-McGee West Chicago site as part of the Agreement. We firmly believe that the decontamination/waste management issues at several West Chicago locations can best be resolved by management under a single regulatory agency rather than dividing it between a federal and a state agency. We further believe it can best be handled by the state because of their close coupling with satisfactory resolution of the issues. Therefore, we suggest an early meeting to develop criteria for including the the Kerr-McGree West Chicago site in the Agreement. We can offer Illinois technical support to reduce their resource requirements for this specific case. William T. Crow will represent the Office of Nuclear Material Safety and Safeguards.

In your next letter to Mr. Lash on the proposed Agreement, it might be useful to note that we are exploring the West Chicago matter with the objective of including the Kerr-McGee site in the Agreement.

Richard E. Cunningham, Director
Division of Fuel Cycle and
Material Safety

cc: Mr. Davis
Mr. Mausshardt
Mr. Crow

West Chicago Press • Winfield Press Thursday, August 25, 1988

Thorium removal moves closer to reality

New NRC decision puts waste in hands of Illinois department

By Tom Parisi

Ten-year efforts to remove thorium wastes from West Chicago may have moved another step closer to reality.

A new Nuclear Regulatory Commission (NRC) decision has given the Illinois Department of Nuclear Safety jurisdiction over all radioactive material buried at Reed-Keppler Park as well as a portion of the massive stockpile of waste at the Kerr-McGee Chemical Co. plant at Ann and Factory Streets.

Mayor A. Eugene Rennels said Monday that under the state agency's jurisdiction, 3 million to 5 million cubic feet of waste at Reed-Keppler Park on the north side of town and at the Kerr-McGee plant must be excavated and removed from West Chicago.

The NRC ruling came in a complicated, 26-page differentiation between "source" material and "byproduct."

Physically, the composition of byproduct and source material is almost identical, John Cooper, manager of environmental safety for the Illinois Department of Nuclear Safety, explained. Source material, however, falls under state jurisdiction, and state law prohibits it from being disposed of in a municipality.

West Chicago thorium is the result of almost 50 years of operation of the plant at Factory and Ann Streets under a number of company ownerships. Thorium was extracted from ore sands brought here from South America and India.

Tailings were accumulated in discard piles at the plant.

Thorium is principally used in the manufacture of mantels for gas lanterns. It was briefly studied as a research element in the World War II development of the atomic bomb.

Disposal of wastes became an issue when Kerr-McGee shut down operations in West Chicago more than a decade ago and asked the NRC for permission to "decommission" or close the facility. The NRC has jurisdiction over medical and industrial use of radioactive materials and licenses facilities which use them.

The definition for West Chicago's purposes was the result of a request by Rennels that the NRC review a staff appeal regarding radioactive waste in Kress Creek and to also identify "source" and "byproduct" material at the park and at the factory.

The Reed-Keppler Park thorium deposit is the result of the common use of processed thorium sands as ordinary fill in times before concern for low-level radioactivity developed. Much of the thorium fill used in the city was removed and stored at the factory in a cleanup operation conducted by Kerr-McGee and the [illegible].

The park fill area, fenced and marked with radioactivity warning signs, was excluded because of its volume.

Rennels was notified Friday of the NRC's Aug. 5 decision. He said the action is as important as Gov. James Thompson's signing of a bill earlier this month seeking state jurisdiction over all the radioactive waste.

"This is extremely good news for the city. It's very significant," Rennels said. "At the very least, the source material must go."

Specifically, the NRC concluded low-level radioactive waste buried outside the city limits, waste buried in the fenced-in landfill at Reed-Keppler Park and waste extracted from residential areas and the city's sewage treatment plant and stockpiled at Kerr-McGee's factory site from 1983 to 1987 is source material.

West Chicago Director of Parks David Thomas said the NRC decision was a pleasant surprise. The landfill is a public eyesore in the southwest corner of the park. It is overgrown with weeds.

"We've been caught between rock and hard place because we have no authority to have it removed," Thomas said.

When and where the waste will be relocated remains uncertain because Kerr-McGee is expected to appeal the NRC's decision. Company officials Monday said they are reviewing the decision.

A continuing problem in dealing with West Chicago thorium is limited space in existing low-level waste disposal facilities in the U.S.

Illinois and neighboring states currently are negotiating a compact to establish a facility to serve their need.

Meanwhile, the Illinois Department of Nuclear Safety will wait for a decision by Congress next spring on a bill that would give the state jurisdiction of all the byproduct radioactive waste as well. Gov. Thompson signed that legislation in ceremonies in West Chicago earlier this month.

"We'll try to deal with it all at once rather than piece-meal it," Cooper said "We're expecting that state jurisdiction (of byproduct material) will be granted within a year. Then we could begin planning for the waste removal all at one time."

An estimated 5 million cubic feet of waste material in Kress Creek as well as another 4 million to 5 million cubic feet at the factory site was ruled to be byproduct by the NRC, and consequently remains under NRC jurisdiction for the time being. On-site burial of low-level radioactive byproduct material is permitted under NRC regulations.

Cooper said that, at the earliest, radioactive waste removal could begin in three years. "Realistically, we're still a ways off," he said. "But every decision gets us closer to the final one."

CHICAGO TRIBUNE 5-24-88 PAGE 1 DuPAGE SECTION

Hopes rise for waste cleanup

West Chicago sees light at end of radioactive tunnel

By Fred Marc Biddle

West Chicago Mayor Eugene Rennels calls it a "herculean" step for his town, the best news in years regarding a chapter of local history everyone would rather forget.

Yet he warns that the story "is a long way from being over."

The Illinois House voted 71-34 Friday to approve a bill giving state officials the nod to ask the U.S. Nuclear Regulatory Commission for jurisdiction over 13 million cubic feet of radioactive thorium residue produced by a factory owned by Kerr-McGee Chemical Corp., at Ann and Factory Streets in West Chicago. The factory has since been razed.

If the request is granted, residents can reasonably expect that the thorium residue, which has been blamed for everything from health problems to lowered home values in West Chicago, will someday be hauled from their town. Illinois Department of Nuclear Safety officials have repeatedly stated that, given the authority to do so, they would relocate the waste.

But a spool of red tape has made it all but impossible to say when.

Kerr-McGee maintains that the residue should be buried on site and has the backing of the NRC's technical experts. Meanwhile, the legal minds of that same agency have helped Illinois and West Chicago officials press their own case.

And that has left both sides working as hard as ever to get what they want—but at arm's length. Says Molly Schmidt, a spokeswoman for the Illinois Department of Nuclear Safety: "Quite frankly, this agency is waiting to see what happens with the legislation before setting a time line for ourselves."

Before the thorium residue can be hauled from West Chicago, a sheaf of legal documents will have to be signed—and nobody is taking the signatures for granted. First:

- The bill passed by the House must also be passed by the Illinois Senate, and then be signed by Gov. James Thompson.
- The Illinois Department of Nuclear Safety must make good on the new law, petitioning the NRC for jurisdiction over the residue. The NRC must approve the request. Schmidt said her agency would not expect a decision until

See Radioactive, pg. 6

Radioactive

Continued from page 1

fall, 1989.

● With jurisdiction over the residue, the Illinois agency must then approve a proposal from Kerr-McGee to bury the waste.

both sides claim the support of the NRC. The agency in 1982 jointly proposed a disposal plan with Kerr-McGee that calls for burying the waste on the factory site.

But six years later, "the NRC's going to take the easiest way out of this," Resnick says. "They're going to set the [real issue] aside, and the stuff is not going to be in the municipality."

In fact, the NRC helped draft the pending legislation. Don Nussbaumer, assistant director of the NRC's state agreements program, said the agency is not bound by the recommendations of its technical or legal staffs. He explained that both branches are simply doing their jobs.

Despite the finding of the agency's technical staff, it is the job of the NRC's legal staff to help states meet the criteria to get jurisdiction over radioactive materials. During the Reagan administration, Illinois has become one of 29 "agreement states" that can exercise its own authority over materials involving radioactivity, from X-ray machines to low-level nuclear waste dumps.

The thorium residue is mill tailings produced at the West Chicago factory as a byproduct of the manufacture of gas lanterns in the 1930s and, later, atomic bomb research.

Nussbaumer said that if Illinois meets the criteria, "I see no reason why they won't get" jurisdiction over the thorium mill tailings.

Should that happen, Illinois will pressure Kerr-McGee to remove the waste. But it will be left to Kerr-McGee to actually apply to the Department of Nuclear Safety for the necessary disposal license.

Kerr-McGee has already applied for a license to bury the waste, right where it sits—and against the wishes of state officials.

Du Page

Chicago Tribune Friday, September 29, 1989

Kerr-McGee to clean up more waste

By Patricia M. Szymczak

Kerr-McGee Corp. plans to clean up nearly a half-dozen recently discovered radioactive hot spots in unincorporated Du Page County and may move at least some of the waste to its West Chicago plant site, according to a company spokeswoman.

Protected at least temporarily by a court order that allows the company to bypass a West Chicago ordinance against trucking radioactive material through town, Kerr-McGee began again Thursday to remove thorium-tainted dirt from a yard outside the city limits and bring it to the old Factory and Ann Streets plant.

And when that work is finished—probably in the next two weeks, company spokeswoman Annita Bridges said, "Our plan is to survey some of the other sites and to take whatever action may be appropriate . . . which may include excavation."

U.S. District Judge Milton Shadur issued a temporary restraining order Wednesday to block the city from enforcing an ordinance passed by the City Council, which feared West Chicago was being turned into a radioactive dumping ground.

Kerr-McGee sued, arguing that the city has no authority to regulate radioactive waste and therefore its ordinance was unconstitutional. Shadur's order remains in

13 Another

And though Bridges acknowledges that the restraining order applies only to the yard on Pomeroy Street that currently is being excavated, a ruling on the case itself in Kerr-McGee's favor would make it possible for the company to bring contaminated material from any of the other five sites to the closed-down factory grounds, she said.

West Chicago Ald. Colin Perry said Thursday that "the council is really intent on keeping the stuff out of here" and that at Monday's regular City Council meeting, aldermen "can decide how we're going to pursue defending our ordinance in the future."

In addition, Mayor Paul Netzel is attempting to arrange a meeting for next week involving city officials, Kerr-McGee, the U.S. Environmental Protection Agency, the Illinois Department of Nuclear Safety

See Waste, pg. 2

Waste

Continued from page 1

and the U.S. Nuclear Regulatory Commission.

"We've cooperated with Mayor Netzel in the past, and we wouldn't think of doing anything less," said Bridges, who added that the company will be sending a representative.

Dale Swinford, spokesman for the state Department of Nuclear Safety, said however, that he didn't know if his agency would participate. "We don't know what the purpose of the meeting is. It's not something we can just sit down about and say let's discuss this."

The state maintains that it wants to get regulatory control of all of the waste material at the Kerr-McGee plant and throughout the area and force the company to ship it to a disposal site in an uninhabited part of the western United States.

The administrative proceeding to give Illinois that authority is before the NRC and won't be decided until next spring, state nuclear safety officials said. Meanwhile, Kerr-McGee's appeal of another court case isn't scheduled for oral argument until November in the U.S. Court of Appeals in Washington, D.C.

And until that case is decided, any move by the state to take control of material like that which is being moved now from unincorporated Du Page County would jeopardize Illinois' position, nuclear safety officials have said.

The material is a low level radioactive waste that was generated in the processing of thorium for the manufacture of gas mantles before World War II and, after the war, for defense use in the early Atomic Age.

Seen as a suitable yardfill, it found its way into the yards of homes throughout West Chicago and nearby areas over the years. The federal EPA has since said that the material, if inhaled, can irradiate lung tissue and travel in the bloodstream to other organs.

The Continuing Story of the Rare Earths Facility in West Chicago

The site of the former rare earths processing facility at Ann and Factory Streets in West Chicago. The facility was closed in 1971.

Radiological Response-Abilities spoke to Dr. John Cooper, Manager of the Office of Environmental Safety about the Kerr-McGee Chemical Corporation's Rare Earths Facility in West Chicago. Dr. Cooper came to IDNS in 1981 from the U.S. Nuclear Regulatory Commission's (NRC) Region III office in Glen Ellyn, Illinois, where he had spent the previous six years. Dr. Cooper earned his doctorate in radiation biology from the University of Iowa in 1971 and is the author of numerous publications.

Radiological Response-Abilities: What is the history behind the Kerr-McGee facility in West Chicago?

Dr. Cooper: The facility was started by the Lindsay Light and Chemical Company in the 1930s. It was later purchased by the American Potash Company, and in 1967 the Kerr-McGee Chemical Corporation acquired the facility when it purchased American Potash. In 1971, the facility ceased operations.

RR: What activities took place on the site?

C: The Lindsay Light Company imported monazite sands, which had high concentrations of rare earths, uranium, and thorium. The thorium was extracted for use in lantern mantles. During World War II, the federal government was Lindsay's largest customer. Also, Kerr-McGee extracted the rare earths from the same ore and used that material for phosphors in early color TVs and in lighter flints.

RR: What processes were used on the site?

C: The crushed rock was mixed in a whole series of chemical procedures, but one of them used hot sulfuric acid to extract the thorium or rare earths from the ore. Workers would pump the remaining slurry in a long pipe from the northern part of the site to the southern part of the site and would dump it out in piles. That allowed the sulfuric acid residues to soak into the ground.

RR: What has Kerr-McGee proposed to do with the contaminated material on the site?

C: Kerr-McGee had essentially left the site in caretaker status for several years after 1971. The site in West Chicago was inspected basically as a closed industrial facility. Fences were collapsing and buildings were actually deteriorating. NRC Region III began to get concerned that someone was going to get hurt. One of the buildings was five stories tall and you could walk up to the top and walk around. If you didn't watch what you were doing, you could walk right into an empty elevator shaft. The NRC Region III office began pushing the NRC Washington, DC, office to require Kerr-McGee to decommission the site for safety reasons. NRC finally required Kerr-McGee to submit a decommissioning plan for the facility. When I left the NRC, I thought I left Kerr-McGee totally behind.

Basically, the plan called for dismantling the structures. It originally didn't include much in the way of site clean-up because Kerr-McGee hadn't identified the extent of contaminated soil and other materials on the site. They have proposed disposing of the structural materials and the tailings in a disposal cell—their term—on that site. In the ensuing characterizations, the volume of estimated waste went from about 5 million cubic feet to the last estimate of somewhere between 13 to 15 million cubic feet.

RR: Why does IDNS/State not agree with Kerr-McGee's proposal to dispose of materials on-site?

C: The basic contention is this: because of the very long half-life of the material—something like 14 billion years for thorium-232—long-term disposal of the material in West Chicago is inadequate. It's not an ideal site anyway. Because the site is located in an urban area and DuPage County is so densely populated, there are more chances that any waste disposal may be violated by intruders. DuPage County was included in the very early screening for the low-level radioactive waste (LLW) disposal facility, and had we looked for a disposal site there, we would have rejected it on the basis of hydrology: it has an aquifer 40 feet down and appears to have a direct connection to that aquifer. Also, the flood plain is fairly close. The criteria that the site should be remote from population areas to prevent

(Please see next page)

Dr. John Cooper, Manager of IDNS's Office of Environmental Safety.

Rare Earths Facility

(Continued from preceding page)

them from disturbing the site obviously does not fit in West Chicago. Maintaining compliance over 1,000 years in West Chicago would be very difficult. Kerr-McGee's plan is to use the southernmost 27 acres for waste disposal. Leaving an open, 27-acre plot with a 40 foot or taller hill, even though fenced, in the middle of West Chicago undisturbed for a few million years, is an impossible dream.

RR: Where will the waste go?

C: I don't know, but Kerr-McGee has several options. The licensee, Kerr-McGee, is required to find a suitable site in Illinois or another state. We had offered, when we began the LLW disposal facility siting process, to look for an area large enough to include a site for the Kerr-McGee materials. The waste wouldn't have been actually disposed of on the site licensed for LLW disposal. In fact, the NRC's Part 61 regulations require a separate disposal for LLW. But a lot of the siting considerations are the same. Our goals are groundwater protection, protection of the environment, protection from airborne releases, and protection of the disposal site itself from intrusion. Those are the same whether you're looking at disposal of tailings or LLW. We thought when looking for an area for the LLW disposal facility that we could simply look for one that was a few hundred acres larger, and part of it could be licensed for disposal of the Kerr-McGee waste. Kerr-McGee wasn't interested, the idea didn't go anywhere, and we didn't pursue it. In fact, some of the current sites we are looking at are not large enough to take Kerr-McGee's material.

RR: What is the extent of contamination from the Kerr-McGee facility?

C: There is contamination in Kress Creek and the West Branch of the DuPage River from the site, and U.S. EPA monitoring has revealed elevated radon levels off-site. Kerr-McGee took corrective action for that. Ninety-two residential areas off-site were also contaminated. Apparently in the Lindsay Light and American Potash days, the tailings were used as fill materials for anyone who wanted them. We surveyed items released from the site—timbers and things—but the tailings were taken off wholesale. In the 92 properties, the contamination ranged from an entire yard to areas where they probably filled in stump holes or something. Some obviously spilled from trucks and there are still streets that have contamination in the soil along the sides. There were fairly large deposits in Reed-Keppler Park, on the north side of West Chicago. There was a very large deposit which was obviously dumped as a disposal site—a pit about 14 feet deep.

RR: Has the Kress Creek or DuPage River contamination had any effect on vegetation or wildlife?

C: No, it's fairly spotty contamination. There doesn't appear to be any residual effect we can find. The issue of whether that is to be cleaned up, along with any remaining off-site material, still has to be resolved.

RR: Is the contaminated groundwater in West Chicago used as a source of drinking water?

C: No, currently the drinking water comes from bedrock aquifers. The near surface aquifers haven't been used. Apparently, they have limited capacity. However, as areas have grown, DuPage County has faced the same stresses as the rest of the collar counties regarding water. Some have run out of groundwater for wells and have tapped into Lake Michigan and city of Chicago system. If the problem is capacity, fine, but a city shouldn't have to preclude the use of that groundwater because it has been made unsuitable by contamination.

RR: Who has regulatory responsibility for the contaminated material?

C: There are two issues left in West Chicago. One is still being decided in court. Under the NRC's Agreement State program, regulatory authority for LLW and byproduct material, source material, and special nuclear material in quantities less than a critical mass was transferred to the State in June 1987. The NRC staff said that authority for most of the off-site materials was transferred to the State based on the definition of those as source materials. The on-site material was defined as mill tailings, referred to as byproduct material under Section 11e.(2) of the Atomic Energy Act, and left under NRC jurisdiction. This would create a split jurisdiction in West Chicago, which we believe should be under single jurisdiction. Kerr-McGee filed suit to block that transfer which is still in process. The State will be applying under the NRC Agreement State program for regulatory authority over 11e.(2) byproduct material. If IDNS is granted regulatory authority for such material, both off-site and on-site material would be under our jurisdiction.

The other issue, apart from split jurisdiction, is permanent disposal in West Chicago, and that is really the significant issue. If we thought the current process would lead to an acceptable long-term solution, we wouldn't worry about jurisdiction.

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Rare Earths Facility

(Continued from page 5)

RR: Is there any advantage to be gained from split jurisdiction?

C: No, there are a lot of disadvantages. Kerr-McGee could be in a spot where we [the State] required Kerr-McGee to dispose of the material we license off-site and the NRC could approve disposal of waste under its jurisdiction on-site. Most of the tailings and sludges that have the highest activity are those that have stayed on-site, so it would make very little sense to put the lesser contaminated materials in a more remote area and leave the most contaminated materials in an urban area, which is exactly what we've been trying to avoid. If the State is granted regulatory authority for 11e.(2) byproduct material, the problem of jurisdiction will be eliminated.

RR: Have any studies been done of the health effects of the Kerr-McGee facility on the West Chicago populace?

C: No. Because it's a relatively small population and hard to study, there haven't been any epidemiological studies done on the West Chicago population. There was one study done on workers at the facility by Argonne National Laboratory. It didn't really show any differences, but it was a relatively small sample—less than 1,000.

RR: What about the local population? How have they responded?

C: Most of the people in West Chicago would like to have the waste moved. The facility has been deteriorating for years with nothing happening—it's been a real eyesore. West Chicago did get hurt in the recession and the facility has affected property values close to the site. The citizens would like not to be studied anymore. There have been endless studies done. They would like to see some action and I agree with them. You can fine tune some points but you ought to do something eventually. Occasionally, you find someone who worked at the facility that doesn't think it's a problem. But the vast majority would like it disposed of somewhere other than West Chicago. It is a very localized problem that has not aroused a great deal of interest outside the city. Very few other people have picked it up.

RR: How will the problem ultimately be resolved?

C: I think it will probably wind up in court again. I think the State has the qualifications to take authority over the site, and I think we will. I think the NRC will eventually award us Agreement State status for mill tailings, probably within a year roughly. I think that we will be successful with the application. Regardless of the licensing actions, Kerr-McGee will challenge the State in court. But it will probably only delay the inevitable and the tailings will eventually be sent for safe disposal. ❑

—Tammi E. Gengenbacher

Radiological
Response-Abilities
Illinois Department of Nuclear Safety
1035 Outer Park Drive
Springfield, IL 62704

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

AFFIDAVIT

I, TERRY R. LASH, having been sworn on oath do depose and state as follows:

1. I am the Deputy Director of the Illinois Department of Nuclear Safety ("Department"). The Department is the state agency primarily responsible for protecting the public from the hazards of radiation and radioactive materials. Under the supervision of the Director, my duties include oversight and coordination of all Departmental activities, including policy making, administrative rulemaking, environmental monitoring, emergency preparedness planning, interagency cooperation, and regulation of low-level radioactive waste ma ɜment and disposal. My background includes substantial experience pertinent to the regulation and control of radioactive wastes. For instance, I currently serve on the Low Level Radioactive Waste Program Review Committee, which reports to EG & G Idaho, Inc., the lead contractor to the U.S. Department of Energy for the national low level radioactive waste management program.

2. I have visited the Kerr-McGee facility in West Chicago and I am generally familiar with the documents pertinent to this proceeding. In particular, I have reviewed the Final Environmental Statement related to the decommissioning of the Rare Earths Facility, West Chicago, Illinois, NUREG-0904, including the discussion of final disposal alternatives for the radioactive waste.

3. Under the Illinois Low Level Radioactive Waste Management Act ("Waste Management Act"), Ill. Rev. Stat. ch. 111 1/2, para. 241-1 et seq. (December 12, 1983), the Department is required to promulgate rules and regulations governing all aspects of the development and operation of low-level radioactive waste storage, treatment and disposal facilities in Illinois, including the siting and design standards and decommissioning and postclosure care requirements for disposal facilities.

4. In order to meet its responsibilities under the Waste Management Act, the Governor is authorized by that statute to take those steps necessary for Illinois to become an "Agreement State." Specifically, Illinois intends to enter into an agreement with the federal government for the purpose of substituting the state's regulatory authority in place of the Nuclear Regulatory Commission (NRC)'s over the storage, treatment and disposal of low-level radioactive waste. The Department now is in the process of preparing the application for Agreement State status which will be submitted to the NRC. The State's regulations must be compatible with the federal regulations and adequate to protect the public health and safety. The Department intends that such regulations be at least as stringent and restrictive for the design, siting and operation of low-level radioactive waste disposal facilities as the NRC's.

5. In connection with its responsibilities under the Waste Management Act and in order to prepare the application for Agreement State status, the Department is presently formulating its policies and regulations for the siting of low-level radioactive waste disposal facilities. These siting regulations will be consistent with the NRC's "Licensing Requirements for Land Disposal of Radioactive Wastes (10 CFR Part 61)," and they will provide greater protection of the public health and safety, particularly over the long term, than Part 61.

6. Preparatory to proposing its regulations, the Department has determined that as a matter of general policy it will not authorize the siting of a low-level radioactive waste disposal facility in or near a densely populated area. The bases for this policy, which is intended to provide long-term protection of the public from the radiation hazards posed by radioactive wastes such as those located at the Kerr-McGee facility in West Chicago, are as follows:

a. Isolation of radioactive wastes from population centers is a means of compensating for uncertainties in predictions of future releases of radioactivity. Predictions of the performance of a waste disposal facility's level of protection over the long term require making specific assumptions about future climatological, hydrogeological and other environmental conditions. These assumptions may not prove to be accurate. Such predictions also presume that models based largely on short term experience are valid for projections of long-term behavior. Moreover, such models are necessarily based on data from studies of situations that are not identical to any other waste disposal system. Assessing the overall level of uncertainty in predictions regarding the future behavior of buried radioactive waste is impossible to gauge precisely.

To compensate for the uncertainty in the natural behavior of buried radioactive wastes, the Department believes that waste disposal sites should be located distant from population centers. In this way, even if predictions of low future releases of radioactivity later prove to be incorrect, the risk that releases of radioactivity would quickly or easily expose many people to a radiation hazard would be minimized. Requiring a significant distance between a disposal site and a large population center allows a future radioactive release to be detected by a monitoring program and allows for corrective action to stop the release before a population is actually exposed. If a population is concentrated around a disposal site, a release would cause

radiological exposure at the same time it was detected, preventing authorities from adopting corrective measures soon enough to protect the populace adequately.

b. Urban development near a waste disposal site can itself lead to releases of radioactivity. For example, a growing population center may seek additional land and resources for economic development. As land and resource values increase, the pressure to utilize land immediately adjacent to buried waste, or indeed the surface area on top of the waste, will increase. The situation would increase the chances of inadvertent or purposeful land uses leading to releases of radioactivity. The Department believes that locating radioactive waste disposal sites away from the economic pressures of urban development is the best means for guarding against accidental man-induced releases of radioactivity in the future.

c. Under the current provisions of State and Federal law, a low-level radioactive waste disposal site will ultimately be owned by the State or the Federal government. Location of a waste disposal site in or near a population center would greatly increase the site owner's risk of liability in the event of an unforeseen release of radioactivity. As a potential owner of waste disposal sites, the State of Illinois will not agree to subject Illinois taxpayers to this increased risk by approving a site in or near a population center.

7. The radioactive wastes at the Kerr-McGee facility in West Chicago will contain significantly elevated levels of radioactivity for many hundreds of years. Over that long span of time, predictions of the behavior of buried waste are uncertain, depending on, among other things, future activity of the large growing population located near the site. Any releases of radioactivity into the surrounding air or into the underlying groundwater would quickly lead to radiological exposure of people.

8. The Waste Management Act requires, among other things, that a site for the disposal of low-level radioactive wastes shall minimize the possibility of radioactive releases into groundwaters utilized as public water supplies. The disposal of radioactive wastes at the Kerr-McGee facility in West Chicago enhances the possibility of contaminating an increasingly rare and valuable groundwater supply.

9. Based on the above, the Department will not agree that Kerr-McGee Chemical Corporation's West Chicago site is a proper location for the disposal of radioactive wastes. In my opinion, the site cannot be expected to provide adequate protection from radiation hazards over the long term. Onsite stabilization of the West Chicago wastes would be inconsistent with both Illinois law and the policies of this Department

Further affiant sayeth naught.

TERRY R. LASH

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 21st DAY
OF August, 1984.

NOTARY PUBLIC

0000136

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.) 80 CH 299
)
KERR-McGEE CHEMICAL CORPORATION,)
a Delaware corporation,)
)
Defendant.)

Court convened pursuant to adjournment.

Before the Honorable Fredrick Henzi,
Judge of said Court

Wednesday, May 14, 1986
1:30 o'clock p.m.

0000137

I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
TERRY R. LASH	2341	2397	2453	2458

E X H I B I T S

PLAINTIFF'S EXHIBIT NO.	FOR IDENT.	IN EVIDENCE
157	2351	2353

DEFENDANT'S EXHIBIT NO.	FOR IDENT.	IN EVIDENCE
21		2353
28	2444	2447
29	2444	2447
30	2444	2449
31	2444	2450

* * *

waste disposal facility. And then there is a substantial amount of contaminated material, the 5 to 11 million cubic feet I mentioned, that they wish to dispose of on site in an above ground disposal cell.

Q. Were you present in this courtroom yesterday, Dr. Lash?

A. Yes, I was.

Q. And did you hear the testimony that was given by Dr. Cooper?

A. I did.

Q. Did you hear Dr. Cooper express an opinion as to the inappropriateness of the Kerr-McGee site in West Chicago for the disposal of radioactive waste?

A. Yes, I heard him give that opinion and I agree with it.

Q. Why do you agree with it?

A. For the same reasons that Dr. Cooper gave.

One, I do not believe that an above ground disposal cell, particularly in an urban area, is an appropriate means of disposing of materials that will remain radioactive for a very

long time into the future. And I also believe that that particular site from a hydrogeologic point of view is not appropriate.

Q. Is it your understanding that the Kerr-McGee plan does call for an above grade disposal cell?

A. Yes, most of the material would be above grade in the -- as it is proposed in the stabilization plan.

Q. Is it your opinion that an above grade disposal cell is an inappropriate method for the disposal of radioactive waste?

A. Generally that is true. And that is particularly true at this particular location, so close to an urbanized area.

Q. Why is that?

A. Well, it means that if waste does get --

The reason that it is inappropriate to have waste disposed of in an urban area is that if it gets out, it immediately would cause exposure to human beings.

And in that particular location, I think there is a chance of human activity, including outright intrusion that could cause dispersal of

the material and exposure to people.

MR. NICKLES: Your Honor, will all deference to Dr. Lash's expertise, I believe we are right into a cumulative area.

Basically the questioning started by asking the witness if he agreed with Dr. Cooper and he said he did for the same reasons.

I think I the witness ought to contribute something independently, or, this is really in the nature of repetitive or cumulative testimony.

MR. FOSTER: I do plan to get into some different areas, your Honor.

THE COURT: I am trying to interpret the objection to be a promise that you would not get into anything redundant for the defense.

MR. NICKLES: No, your Honor.

What I am saying is that the questions and answers thus far that relate --

THE COURT: You would not make a promise that you would not be redundant for the defense?

MR. NICKLES: I try not to be redundant, your Honor.

But what I am saying is that the court issued a directive at the beginning of the trial

that counsel should make every effort to keep repetitive or cumulative --

THE COURT: If I recall I mentioned that testimony does often become redundant.

MR. NICKLES: I was reminding the record of that fact.

THE COURT: Your objection is noted. I will permit counsel to proceed, though.

MR. NICKLES: Thank you, your Honor.

MR. FOSTER: Thank you, your Honor.

Q. Do you have an opinion, Dr. Lash, as an expert in radioactive waste management as to whether below grade disposal of radioactive waste is generally preferable to above grade disposal of radioactive waste?

A. Yes.

My opinion is that below grade disposal is generally preferable to above grade disposal.

Q. Why is that?

A. Because below grade disposal can be conducted in a way to more securely contain the waste, due to less erosion of the features that contain the waste.

In above grade disposal, you have the

covering materials exposed to wind and water, precipitation, more thawing and freezing, as in the case of Illinois, and you have a feature that is more susceptible in my opinion to human intrusion.

Q. Dr. Lash, considering the natural erosional forces that you have described, do you have an opinion to a reasonable of scientific certainty as to whether an above grade disposal cell can be designed to provide reasonable assurance that it will maintain its structural integrity over the period of time that the radioactive wastes at West Chicago can be expected to be radioactive?

A. My opinion is that an above grade disposal cell in the West Chicago setting is unlikely to provide containment of the materials over the long time that they will remain hazardous.

Q. In your opinion, is there a general consensus of agreement among radioactive waste management experts as to whether radioactive wastes should be disposed of in below grade rather than above grade disposal structures?

MR. NICKLES: I am going to object to that question, your Honor.

I don't think that this individual can speak for the entire body of radioactive waste managers. That question has not asked for the gentleman's opinion, but it asks for the opinions of others who are not before the court.

THE COURT: Objection overruled.

It is his opinion as to whether or not everybody agrees or there is some disagreement. I don't think any answer that he will give will surprise you.

MR. NICKLES: I don't think anything surprises me, your Honor.

I don't know that it is a proper question. The court has ruled.

BY MR. FOSTER:

Q. Is there such a general consensus in your opinion, Dr. Lash?

A. I believe there is general agreement that it is highly preferable to have disposition of radioactive materials below grade rather than above grade.

For example, the US Nuclear Regulatory

Commission in analyzing the -- what should be done with uranium mill tailings, advises that the tailings should be below grade and should be located in areas where the natural forces depose or deposit further materials on top of the tailings rather than lead to erosion and exposure of the tailings.

Q. Considering the opinion that you have expressed relative to below grade disposal of radioactive waste, do you have an opinion as to whether it would be appropriate from the standpoint of proper radioactive waste management to dispose of the Kerr-McGee wastes on site but in a below grade disposal cell?

A. I don't think it would be possible to properly dispose of the wastes at the West Chicago facility below grade, and the reason is that the watertable is too close to the surface to take the volume of wastes that are there and given the aerial extent in which you would have to work.

Q. Dr. Lash, given that you agree with Dr. Cooper's opinion that the Kerr-McGee site in West Chicago is an inappropriate site for the disposal of radioactive wastes, do you have an opinion to a

reasonable degree of scientific certainty as to whether the wastes should be moved to a more suitable site?

MR. NICKLES: Your Honor, I am just going to object to the speech before the question.

I think whatever Dr. Cooper said is in the record. I think it is inappropriate to be referring this witness to another witness' testimony as a prelude to a separate question.

THE COURT: I don't understand the objection.

MR. NICKLES: Your Honor, I am objecting to the form of the question.

The questioner started by reciting an alleged opinion by Dr. Cooper, and the alleged agreement by their expert with Dr. Cooper. It had nothing to do with the question.

I don't think counsel in asking questions should be characterizing prior testimony.

MR. FOSTER: If I may respond to that, your Honor.

I don't think I was characterizing prior testimony. The witness I believe stated that he heard Dr. Cooper's opinion yesterday as to the inappropriateness of the West Chicago site for

radioactive waste disposal.

This witness testified that he agrees with that opinion.

And I was just asking him, given that he agrees with the opinion that the West Chicago site is inappropriate for the disposal of radioactive waste, does he believe that the waste should be moved.

I believe that is an appropriate question.

THE COURT: Objection is overruled.

MR. FOSTER: Thank you, your Honor.

A. ~~I believe the wastes should be moved.~~

Q. What is the basis for your opinion that you believe the wastes should be moved?

A. Well, first, the Kerr-McGee site in West Chicago is inappropriate as we have discussed earlier. Secondly, I believe that there are preferable sites within Illinois and undoubtedly in other parts of the country as well.

Q. Given that you agree with Dr. Cooper's opinion that the West Chicago site is inappropriate for the disposal of radioactive waste, do you have an opinion as to what the

characteristics would be of a site that would be appropriate for the disposal of the Kerr-McGee waste?

A. Yes. I have such an opinion.

I think the characteristics of an appropriate site for the Kerr-McGee wastes are very similar to the characteristics that would be appropriate for a low-level radioactive waste disposal facility, which we are going to try to site here in the State of Illinois.

Briefly, those characteristics would include, of course, a nonurban setting. A parcel of land sufficiently large to allow an adequate buffer zone around the disposal cell. A relatively simple hydrogeologic system, so that computer models would be expected to be relatively accurate.

A substantial distance from the disposal cell to an aquifer that might provide a resource either for farming or drinking. A substantial absence -- or, I shouldn't absence. An absence of the potentially available natural resources, so there wouldn't be a possibility, or a reduced possibility of future human activity that would

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* * *

A. Oh, yes. It would have to be identified several years before. At least the potential sites would have to be identified several years before that date.

That is because you have to characterize the site, which would take about a year or so. Then you have to have a facility designed, and then license review of the design in conjunction with the site. And then actual construction of the facility. And then a final review to assure that the facility has been constructed as designed.

So we should have potential sites identified in Illinois within about two years.

Q. Dr. Lash, in your opinion, is there any reason why the radioactive wastes present at the Kerr-McGee site in West Chicago should not be moved to a more suitable site?

A. Well, there is no reason I can think of that it shouldn't be moved to a more appropriate site.

The only basis I would think for not having the waste moved is if you couldn't find such a suitable site.

* * *

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A. No, I don't think you can do it without any study. Particularly in the sense that I think the purpose of the study should be to find ways to mitigate identified risks or potential hazards associated with the removal and transportation of the material.

Q. But, Dr. Lash, we can all agree that it is appropriate to do the studies in order to mitigate the risks. But can we also agree that it is appropriate to do the study so we know what the risks are?

A. I certainly think that a study could be useful. But I don't think a study will reveal information that would change my opinion that the material should be removed.

Q. You know that in advance of the study?

A. Yes.

Q. And you know that despite the fact that the NRC staff, which is the only agency that looked at this matter, concluded that on-site disposal was better than movement of the material to an alternative site; is that your testimony?

A. I don't believe that they conclude that on-site disposal was preferable to any

alternative.

Q. What do you believe they concluded?

A. I believe they concluded that they wanted to -- that their preferred approach for the time being was to allow on-site storage.

Q. Now, do you agree with on-site storage?

A. Not indefinite on-site storage.

We have had on-site storage for [illegible] time, and regardless of what happens, there will be on-site storage for some period of time. But I don't think indefinite long-term storage is an appropriate approach.

Q. Dr. Lash, when do you intend to do this study of the risks and costs of moving the material to another site, so that the court and the administrative agencies, whoever is in a decision-making position, can assess the risks versus the benefits of the alternative site versus the current site?

A. I didn't indicate that I was going to do such a quantitative study.

Q. I see.

So while you think it is appropriate, you have no plans now to do such a study?

A. Not personally or the Department of Nuclear Safety. No.

Q. How about the Department of Geological Survey, are they doing the study?

A. I have no idea. I am not informed that they are.

Q. How about the Attorney General's office, are you informed that they are doing the study?

A. I have not been informed that they are doing a study like that.

Q. And the Illinois EPA, are they doing a study?

A. I have not been informed that they are doing such a study.

Q. In fact, a study is being performed right now of these very facts and these very issues, isn't that the fact?

Do you know that a study is going on right now, sir?

A. I know that the -- if you are referring to the work being done by the Argonne National Laboratory under contract to the US Nuclear Regulatory Commission. I know that they are preparing some supplement to the existing

environmental impact statement.

Q. And that is a study that will do, among other things, the kind of cost-benefit analysis with respect to alternative sites that you have testified would be appropriate; isn't that correct sir?

A. I do not know if that is correct.

Q. Your counsel and your deputies have not informed you of the objectives of the Argonne study?

A. I know that part of their objective, at least, is to see if they can identify potential sites or areas that might contain potential appropriate sites for the Kerr-McGee waste.

Q. Now, you have great confidence in Argonne, don't you, sir?

A. I don't know what you mean by that.

The Argonne National Laboratory is a ver large organization that has many different individuals in it, that works on a wide variety o projects.

Q. Isn't it a fact that with regard to the decommissioning of the Luminous Process facility in Ottawa that you have talked about, that the

state used Argonne in regard to that project?

A. We hired Argonne National Labs to provide specific individuals to us to give advice to the -- technical advice to the department, in connection with the decontamination and decommissioning of the Luminous Processes facility in Ottawa.

Q. Have you been made privy to the scope of working performed by Argonne in its assessment of alternative sites to be compared to on-site disposal, Dr. Lash?

A. I am only generally aware of the fact that they are doing some kind of investigation as part of the supplementary EIS to find potential sites outside of West Chicago for disposal of the materials.

Q. Are you aware, Dr. Lash, that the supplementation of the impact statement is being performed because of the insistence by the state that it be performed?

A. I would certainly hope that the state's opinion in that matter carried some weight. I don't know the actual reasons that the NRC decided to do a supplementary statement, but I certainly

support that position.

Q. So you support it.

Don't you think that a decision maker who is going to decide where this waste should go should have the benefit of the work that the state has set in progress by insisting that it be done?

A. I am not sure.

Q. If you were a decision maker, with the power to make a decision as to what and in what fashion one would deal with the waste, wouldn't you want to have the Argonne study that has been set into motion by the state's insistence that such a study be done?

A. I think the Argonne study can be helpful. But, as I said before, I do not believe that such a detailed study is necessary at this time in order for me to have the opinion that the material should be moved.

Q. You can come to an opinion without the study?

A. Without that particular study, yes, I can.

Q. Without any study?

A. Without a specific study of transporting

the waste to a specific site. Yes.

Q. Are you of the view, Dr. Lash, that when you determine how to deal with radioactive wastes or hazardous wastes that one should take into account the benefits and the disadvantages and the costs of doing it one way versus another way?

A. Certainly that should be considered.

Q. And in fact Congress has mandated that the EPA when it sets its standards for active or inactive sites, that it explicitly should conduct some type of weighing of the costs versus the benefits of any particular standard, isn't that correct?

A. Yes. Cost is always a factor to consider.

Q. Risks also?

A. Risks also.

Q. Benefit also?

A. Yes.

Q. And you would agree, would you not, Dr. Lash, that the process of selecting a site for hazardous waste or for radioactive waste is a process that involves social issues, political issues, hydrological issues, geological issues,

and many other issues; isn't that correct?

A. Yes, there are very many factors to consider.

Q. And you have to consider all of those factors?

A. I am not sure what you mean by all those factors. But you have to consider many factors of the nature that you mentioned, technical and nontechnical.

Q. That's right.

And, in fact, in the process of the state's consideration of selecting a low-level waste site, the state, through its Geological Survey, has indicated that factors such as the social, political, geologic, hydrologic are all relevant considerations in making that determination, isn't that correct?

A. They offered that opinion to us, but it is an opinion I happen to agree with.

Q. So we are all in agreement?

A. I guess on that point, sir, we are.

Q. Now, it is a fact, isn't it, Dr. Lash, that if a site were to be located by the Argonne process or three sites located by the Argonne

Do you see that, sir?

A. I see the attachment, yes. The intra-laboratory memo.

Q. Yes.

Have your staff brought this memo to your attention?

A. I have not seen this memo before.

Q. And in what fashion, sir, have you become familiar with the work being done by Argonne?

A. Staff and counsel have mentioned it to me, told me that it is going on.

Q. Did you think it might be relevant to your testimony to know what Argonne is doing?

A. I didn't think it was necessary to learn specifically what Argonne was doing, the supplementary.

Q. You think you knew enough about what Argonne was doing to give the opinions you did today?

A. On Argonne? Or, I am sorry. I don't understand.

Q. You felt you knew enough about what Argonne was doing in connection with the supplementation of the EIS to render the opinions

you did today?

A. Yes, I believe so.

As I indicated before, I don't believe I need the numerical results of the Argonne study in order to hold the opinion that I do.

Q. Do you think Argonne simply is going to provide a bunch of numbers?

A. I doubt that they will provide just a bunch of numbers.

Q. Then why do you simply toss off the Argonne report by saying I don't need their numbers to give the opinions I had given today?

A. I don't need their study.

Q. You don't need their study?

A. In order to have the opinions I have today.

Q. Why did the state suggest the study be done then, if you don't need the study to render an opinion?

A. I don't know the details of the state's argument in the case.

I would support such a study, because I think we are trying to persuade individuals and organizations who do not hold the view that I hold

that the wastes should be moved.

And there are going to be some people, I believe, who will be more influenced by such studies than I am.

Q. Let me piece that answer together, Dr. Lash.

You are saying that the study may be useful in persuading other people about the benefits of moving the material, but you are already convinced?

A. Yes.

Q. Might it be useful to Judge Wenzi, for example?

A. I suggest you ask the Judge.

Q. Might it be useful to a decision maker who has an open mind on the matter, sir?

A. It can have value, yes.

Q. Now, let's look at the scoping document, Dr. Lash.

I would like to turn your attention first to the list of potential off-site disposal categories, which is the last -- two pages next to the last.

Do you see the chart set up, sir?

A. I am not sure what you are talking about.

Q. Let me show you. You have it. Yes.

A. Okay.

Q. You have the chart.

And you see on the one page, this is not numbered, but it is the third page in on the Argonne document, it has Illinois sites on one page and on the other page out-of-state sites. Do you see that, sir?

A. Yes, I do.

Q. Now, do you think it is appropriate to consider the benefits versus the risks and costs of on-site disposal versus existing low-level disposal sites?

A. This is not how I would go about it. But, I think it can provide some useful information.

Q. Do you think it would provide useful information to compare the costs and benefits of locating the wastes on site versus new Illinois Kentucky low-level waste disposal sites, the ones you are working on?

A. I didn't hear the first part of your question.

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* * *

radon or other radioactive materials during the proper transportation.

Q. Dr. Lash, if the NRC were to give its sanctions to on-site disposal of the Kerr-McGee waste, would that change your opinion that the Kerr-McGee waste should be moved to a more appropriate site?

A. No.

Q. Why not?

A. Because I believe that that is an inappropriate site, and the NRC's opinion on it would not persuade me otherwise.

MR. FOSTER: I have no further questions on redirect for this witness, your Honor.

THE COURT: Thank you.

Any recross?

RECROSS EXAMINATION

BY MR. NICKLES:

Q. Dr. Lash, if the NRC were to decide that on-site disposal made the most sense after receiving the Argonne report, the views of all the experts, and having a hearing; are you saying before even reviewing the report, sitting here today, not knowing what they would say, what

Argonne would say, what the expert would say, you would disagree with it; is that your testimony?

A. My testimony is that I cannot see how they would provide information, new information, that would persuade me either that the current site is inappropriate or that there aren't suitable sites available for the disposal of the material.

Q. Dr. Lash, you are not saying as a scientist that you would foreordain your opinion before looking at the results of the work that is going on, are you?

A. I think that it is sensible to make -- you have to determine when you have enough information to make a decision. In my opinion, there is enough information available to a person such as myself to have the opinion that the material should be moved as a matter of public policy.

Q. Now, you expressed a view, for example, the transportation risk was not great; and you haven't even looked at that, have you?

You haven't even looked at the routes that are involved, whether they go on freeways or

through small opportunities? You haven't compared the movement from the Kerr-McGee site to the Salt Lake City situation at all, have you?

MR. FOSTER: Your Honor, I object to this as now going beyond the scope of the redirect.

THE COURT: Objection overruled

BY MR. NICKLES:

Q. What route and how are the wastes being moved from Salt Lake City?

It is being moved by a train directly to to the wilderness, isn't it? There is nothing out there.

A. It is being moved by a train, although the environmental impact statement also considers movement by truck.

Q. What is outside of Salt Lake City?

Do you know where it is going, what route it is taking?

A. Generally.

Q. How does it compare to the route that would be taken to move the West Chicago?

A. I don't know where the wastes from West Chicago are going to be moved specifically.

Q. And without knowing that, you are

prepared to say today that the transportation risks are negligible, is that correct?

A. I am prepared to say that they are going to be very low, yes.

Q. Without knowing the facts regarding the alternative site and how the materials would be moved, you are prepared to say today that the radiological releases would be deminimis, wouldn't you, sir?

A. I didn't use the word deminimis. I said there would be no significant risks from the release of radioactive materials during transportation.

Q. I see. No significant release versus deminimis?

A. I didn't say versus anything. I said, my words were, I believe that there was no significant risk.

Q. Do you have any idea of how many truckloads -- I just quickly calculated the number of truckloads that would be involved in moving 11 million cubic feet wherever. Any idea of how many truckloads we are talking about?

A. Thousands.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
Kerr-McGee Chemical Corporation	)	Docket No. 40-2061-ML
(West Chicago Rare Earths Facility)	)	ASLBP No. 83-495-01-ML

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Kerr-McGee Motion For An Order To Protect The Board's Jurisdiction to be served by express mail (or, as indicated by an asterisk, by first class mail), postage pre-paid, on this 27th day of October, 1989, as follows:

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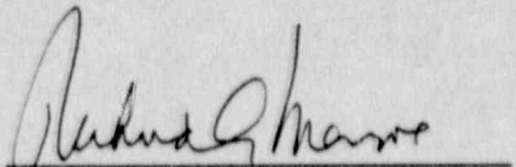

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