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November 17, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE
DOCKETING
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In the Matter of)	
KERR-MCGEE CHEMICAL CORPORATION)	Docket No. 40-2061-ML
(West Chicago Rare Earths)	ASLBP No. 83-495-01-ML
Facility))	

NRC STAFF'S ANSWER OPPOSING KERR-MCGEE'S
MOTION FOR AN ORDER TO PROTECT THE BOARD'S JURISDICTION

I. INTRODUCTION

On October 27, 1989, Kerr-McGee filed a Motion for an Order to Protect the Board's Jurisdiction" (Motion). The thrust of the Motion is a request to the Licensing Board to issue an order to the State of Illinois to "withhold 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." Motion at 20. For the reasons set forth below, the Staff opposes Kerr-McGee's Motion.

II. BACKGROUND

Pursuant to the Notice of Hearing issued in connection with this proceeding, a licensing board was established with the authority to rule on contentions concerning the decommissioning and stabilization of the West Chicago facility. 48 Fed. Reg. 26, 381 (June 7, 1983). The Staff's FES and SFES have been issued and contentions on both those documents as well as contentions on Kerr-McGee's application have been admitted. Cross-Motions for summary disposition have been filed by the Staff of Illinois and Kerr-McGee. All parties have filed responses to the cross-motions. On November 14, 1989,

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the Licensing Board ruled that with respect to certain issues in Contentions 4(a) and 3(g)(2) it would be necessary to have a hearing. Memorandum and Order (Denying Motions for Summary Disposition on Contentions 4(a) and 3(g)(2) and Scheduling a Hearing).

On April 11, 1989, the State of Illinois submitted a formal request for the Commission to amend Illinois' Section 274(b) Agreement to include jurisdiction over Section 11e(2) byproduct material. Subsequent to the State's request, the Staff requested this Board to suspend the proceeding pending the outcome of the Commission's decision to transfer responsibility for the Section 11e(2) byproduct material. Tr. 422-35. The Licensing Board denied the Staff Motion. Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508 (1989).

III. ARGUMENT

This Licensing Board has been delegated the authority under the Commission's regulations to conduct a fair and impartial hearing with respect to those matters delegated to it by the Commission. 10 C.F.R. § 2.718; Public Service Co. of Indiana (Marble Hill Generating Stations, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). In this case, the Licensing Board was delegated the responsibility for considering and deciding the contentions of the State of Illinois raised in connection with Kerr-McGee's application for permanent disposal of certain thorium mill tailings at the site of its West Chicago Rare Earths Facility. This Board was not delegated the responsibility to consider the request of the State of Illinois to amend its Section 274(b) Agreement.

If the Commission approves the transfer of responsibility for the materials that are the subject of this proceeding to the State of Illinois, jurisdiction of the Licensing Board will terminate because the responsibility

for these materials will have passed to the State of Illinois. Kerr-McGee Chemical Corporation (Kress Creek Decontamination), ALAB-885, 27 NRC 59, 71 (1988).

Kerr-McGee relies upon a number of federal court decisions for the proposition that this Licensing Board has the authority to take the action requested. Motion at 2-7. While these authorities may indeed support the proposition that federal courts may take action to protect their jurisdiction, it does not follow from these decisions that Atomic Safety and Licensing Boards possess the authority to take the action requested in this instance since, as indicated below, a Licensing Board has only the authority granted to it by the Notice of Hearing.

Kerr-McGee also relies on the authority conferred on the Licensing Board pursuant to 10 C.F.R. § 2.718, in particular, the authority to conduct a fair and impartial hearing. Included within those powers is the authority to take other action consistent with the Atomic Energy Act, the Commission's regulations and the Administrative Procedure Act. 10 C.F.R. § 2.718(m). Such authority, however, is to be exercised only to the extent necessary to "conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order." Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1238 (1982). Section 2.718(m) does not expand a licensing board's authority to consider matters not within the scope of the notice of hearing.

A licensing board has only the jurisdiction and power that the Commission delegates to it. Kerr-McGee Chemical Corporation (Kress Creek Decontamination), ALAB-885, 27 NRC 59, 71 (1988). The authority in any particular case is defined by the Commission's Notice of Hearing. Id. In this case, the

Notice of Hearing delegates to the Licensing Board the responsibility to preside at the hearing held at the request of Kerr-McGee and the State of Illinois with regard to the amendment of the West Chicago license. This Licensing Board was given no authority over the request filed by the State of Illinois to amend its Section 274(b) Agreement.¹ In CLI-82-31, for example, the Commission considered a situation where a Licensing Board had imposed a civil penalty because it found, among other things, that the Licensee had failed to instill an attitude of respect for the NRC examination process. Id. The subject matter of the hearing involved cheating during an exam. In that case the Commission determined that the Licensing Board did not have the authority to impose a fine because there was no indication in the Order that established the Licensing Board that the Commission intended to give the Board authority to impose a fine, nor were there any NRC regulations conferring jurisdiction on licensing boards to impose fines sua sponte. Id.; see also Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 266-267 (1978) (Licensing Board determined and the Appeal Board agreed that during a construction permit proceeding it was beyond the Licensing Board's jurisdiction to hear witnesses or allow discovery for purposes of reviewing REA's decision to guarantee a construction loan for one of the owners of the facility).

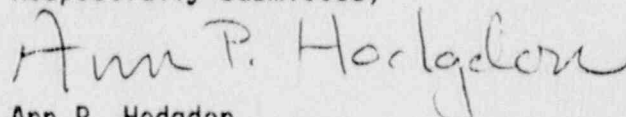
¹The motion of the Staff to hold this proceeding in abeyance pending the resolution of the State's request to amend is different. Granting the Staff's motion would have resulted in the proceeding's being suspended pending resolution of whether the agreement would be approved and, thus, whether this Licensing Board's jurisdiction over the subject matter of this proceeding would terminate. The Motion by Kerr-McGee would, on the other hand, cause this Board to inject itself into a process beyond its jurisdiction by precluding the State of Illinois from pursuing its statutory right to seek to amend its Section 274(b) Agreement.

In fact, the State of Illinois is acting in a manner consistent with Section 274 of the Atomic Energy Act of 1954, as amended, in pursuing its effort to amend its Agreement with the Commission. In a situation somewhat similar to that presented here, the Staff had indicated to the Appeal Board that it expected to execute an agreement with the State of Illinois to transfer regulatory authority over material that was the subject of that proceeding and, once executed, the Staff would move to terminate the proceeding. Kerr-McGee Chemical Corporation (Kress Creek Decontamination), Appeal Board Order of November 13, 1986 (unpublished). In that proceeding, Kerr-McGee had argued that it would be unfair to terminate the Kress Creek Decontamination proceeding because of due process concerns. Id. The Appeal Board held, "In any event, Kerr-McGee's due process argument is really directed to the NRC's proposed agreement with Illinois and the Staff's future motion to terminate this proceeding as a consequence. But as to the former, we have no role whatsoever to play in the negotiation and execution of such state agreements." Id. at 4; see also Kerr-McGee Chemical Corporation (Kress Creek Decontamination), ALAB-887, 25 NRC 900 (1987). If the Licensing Board issued the order requested by Kerr-McGee it would be inserting itself into a process that is beyond the jurisdiction conveyed to it by the Commission.

III. CONCLUSION

As discussed above, the Licensing Board should dismiss Kerr-McGee's Motion for lack of jurisdiction over the subject matter.

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of November, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER OPPOSING KERR-MCGEE'S MOTION FOR AN ORDER TO PROTECT THE BOARD'S JURISDICTION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, this 17th, day of November, 1989:

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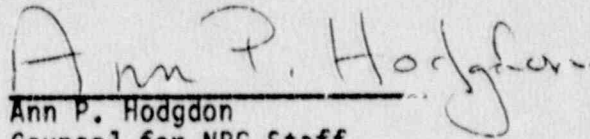
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