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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE TO THE STATE'S MOTION FOR RECONSIDERATION

On December 21, 1989, the State of Illinois ("State") filed a motion seeking the reconsideration of those portions of the Board's Memorandum and Order of November 22, 1989, granting summary disposition of contentions 4(c), 4(d), 4(e), and 4(g) in favor of Kerr-McGee Chemical Corporation ("Kerr-McGee").^{1/} Kerr-McGee hereby responds and urges the denial of the State's motion.

In order to prevail on its motion, the State must establish that the Board failed adequately to consider facts or arguments that were previously presented, or that important new facts have come to light. See, e.g., Nuclear Eng'g Co.

^{1/} The State has also asked the Board to reconsider its decision with regard to "all other Contentions which have been ruled upon adversely to Illinois in the Memorandum and Order of November 22, 1989." State's Motion For Reconsideration at 2. Because the State has offered no justification whatsoever to show that other portions of the Board's decision are erroneous, this aspect of the State's motion obviously must be denied and will not be discussed herein. Cf. 10 C.F.R. § 2.771 (1989).

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(Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414-15 (1984). The State has not even attempted to satisfy these requirements. As will be seen, the arguments now advanced by the State are identical to those already considered by the Board. Moreover, the State has failed to demonstrate the existence of error, let alone the "egregious error" required in the instant circumstances, that would justify this Board's reconsideration of its decision.^{2/}

The sole foundation for the State's motion is the written statement of Dr. Gerald R. Thiers, which originally was submitted as testimony in response to the Board's November 14, 1989 Order and which has now been resubmitted without change as an attachment to the State's motion.

^{2/} The State requested the opportunity to file a motion for reconsideration during a conference call with the Board on December 6, 1989. Memorandum and Order, 3-4 (Dec. 6, 1989). Although, as NRC counsel indicated at the time, there is no regulatory requirement setting a time limit for such a motion, NRC case law teaches that such a motion is timely only if filed within 10 days of the date of the Board's Memorandum and Order. See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-110, 16 NRC 1895, 1896 (1982); cf. 10 C.F.R. § 2.771 (1989). Hence, at the time of the conference call, the period within which to file a motion for reconsideration had already ended. Although the Board in its discretion set a date for the State to file its motion, it did not relieve the State of the consequences of its tardiness. In order to prevail on an out-of-time motion for reconsideration, the State must demonstrate that the Board committed egregious error in its earlier determination. See Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 283-84 (1982).

Dr. Thiers criticizes the sophisticated computer models that were used to analyze the potential for erosion of Kerr-McGee's proposed cell cover. He argues that the analyses are inadequate because they "do not include snow-melt or storms as large as the PMP [probable maximum precipitation], and do not consider gully erosion." Thiers Statement at 2. Dr. Thiers also asserts that the equations applied by Kerr-McGee were not the equations "approved" by the NRC for cell cover design. In his opinion, an alternative calculational method, the Horton method, should have been used.

Dr. Thiers' statement presents exactly the same arguments and information that had been submitted by the State in connection with the motions for summary disposition. State Opposition, 12, 41-42, 43, 45 (Sept. 21, 1989); Affidavit of Gerald R. Thiers, ¶¶ 3(c), 3(e), 4(a), 4(b), 5(b), 5(d), 5(1), and 6(a)(1) (Sept. 11, 1989); Affidavit of Gerald R. Thiers, ¶¶ 6(a), 6(d), 8(a)(4), 8(a)(5), and 8(b) (July 21, 1989). The Board's decision shows that the Board has already fully considered all the matters that are raised by Dr. Thiers. Memorandum and Order, 20, 22-23 (Nov. 22, 1989). The State has not even attempted to justify reconsideration by pointing to new information or to errors in the Board's analysis.

Moreover, in addressing Dr. Thiers' claims in its November 22 Memorandum, the Board articulated the showing that was required by the State to prevail on the erosion issue.

The Board stated:

The bare allegation that a larger storm event should have been considered is

insufficient to call into question the analyses performed by Kerr-McGee and Staff. Dr. Thiers has provided no technical basis for his conclusion that gullies will form leading to a breach of containment and release of the tailings.

Id. at 23; see also id. at 17 ("Illinois' assertion in its brief that the flanks of the waste cell are too steep to prevent erosion must be dismissed as speculative."). Yet the State now urges this Board to reconsider its decision without any showing whatsoever that a PMP event would have altered the erosion estimates or that significant gully formation would be likely to occur. Dr. Thiers' arguments are just as insufficient on their resubmission as they were on their initial filing.

Dr. Thiers' assertion that Kerr-McGee failed to apply procedures for erosion analysis that are "approved" by the NRC (Thiers Statement at 2) is also simply wrong. As this Board has already found, the NRC criteria do not "specify particular criteria for assessing longevity based on a design flood or storm." Memorandum and Order, 22 (Nov. 22, 1989). In fact, the 1989 Management Position that Dr. Thiers cites in support of his arguments shows that a design requirement based on the PMP is entirely inappropriate. The Management Position states:

In evaluating the magnitude of a design basis event or the acceptability of a particular design criteria, reasonable ranges and distributions of parameters should be used as appropriate. For well known or accepted parameters with narrow empirical distributions or very narrow ranges, expected values should be used as appropriate. For less well known

parameters, such as those estimated based on little empirical data or with broad distributions, conservative values should be chosen from within the observed distribution or estimated range. Extreme values should not be used.

NRC, "Uranium Mill Tailings Management Position," 3 (Jan. 10, 1989) (emphasis added).^{3/}

The erosion analyses performed by Kerr-McGee were fully consistent with both NRC criteria and the Management Position and served to demonstrate that the cell will adequately resist erosional effects. Kerr-McGee employed

^{3/} The Management Position also observes:

The design criteria applied to tailings reclamation design should reflect current standard engineering design practices. Examination of similar design situations can help in establishing the type and reasonableness of design criteria applied to tailings reclamation.

Given the general demographic and physiographic characteristics of mill tailings sites, the risk of tailings reclamation failure is not life threatening in the short term and is unlikely to be significantly greater over the long term. Therefore, the engineering criteria should be commensurate with this risk.

Id. at 2-3. The Management Position offers specific guidance on selecting design criteria:

[T]here should be a reasonable and defensible technical basis for the choice of a design basis event or design criteria parameter, with consideration given to phenomena which can be reasonably expected to occur during the period for which the design is required to perform.

Id. at 3.

standard engineering design practices in conducting its erosion calculation. VI Eng. Rep. 6-5, 6-11 to 6-13. The sophisticated computer modeling used conservative values for the parameters controlling erosion and thereby overestimated the potential soil losses from the cell. VI Eng. Rep. 6-13 to 6-15. Even with conservative parameter values, the analysis predicted that soil loss would be minimal over the 1000-year design period. Id. Comparison with measured soil losses at a similar site (the La Crosse, Wisconsin experimental site) showed that the actual soil loss may be considerably less than the amount estimated. VI Eng. Rep. 6-16, App. A at 13.

Dr. Thiers attempts to bolster his criticism of Kerr-McGee's erosion analysis by referring to certain staff documents -- a 1985 Standard Review Plan, a recent "U.S. NRC staff Technical Position," and two reports prepared for the NRC by outside contractors.^{4/} Kerr-McGee disputes that these references show that the erosion analyses performed by Kerr-McGee (or, for that matter, by the NRC staff) are in any

^{4/} Dr. Thiers failed to acknowledge that the Staff Technical Position is a draft document on which the NRC staff has sought comment. 54 Fed. Reg. 33,101 (Aug. 11, 1989); 54 Fed. Reg. 39,484 (Sept. 26, 1989). He also did not acknowledge that the "Standard Review Plan" does not apply to sites, like that at West Chicago, that are regulated under Title II of UMTRCA.

way unacceptable.^{5/} But, even if the references could be so read, these informal staff documents do not "serv[e] as inflexible, legal requirements that must be followed by licensees." Fire Protection For Operating Nuclear Power Plants (10 CFR 50.48), CLI-81-11, 13 NRC 778, 782 n.2 (1981). Such documents are only "meant to give guidance to licensees concerning those methods the staff finds acceptable for implementing the general criteria embodied in the NRC's rules." Id. (commenting on regulatory guides and branch technical positions); see also Pacific Gas & Elec. Co (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458 n.11 (1987) (commenting on Standard Review Plans); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986) (noting that an NRC report "is not a Commission regulation that compels obedience Rather, it serves as guidance, setting forth but one method for meeting the applicable regulatory requirements"); Commonwealth Edison Co. (Bryon Station, Units 1 and

^{5/} Indeed, one of Dr. Thiers' references specifically endorses the use of the Modified Universal Soil Loss Equation -- the equation applied by Kerr-McGee and criticized by Dr. Thiers -- to estimate soil erosion from tailings impoundments. See Walters, W.H., "Overland Erosion of Uranium Mill Tailings Impoundments: Physical Processes And Computational Methods," 4 (1982) (NUREG CR-3027).

2), DD-81-5, 13 NRC 728, 739 (1981) ("[C]onformance with Regulatory Guides is not a prerequisite to the issuance of any Commission license.").^{6/}

Finally, it must be noted that all of these documents were available at the time of the briefing on the motions for summary disposition. Indeed, the State in its briefing on those motions has already referred the Board to some of them. State Opposition at 41-42 (Sept. 21, 1989); Thiers Affidavit, ¶¶ 3(c), 3(e) (Sept. 11, 1989). There can thus be no argument that Dr. Thiers' references constitute new evidence that justifies reconsideration of the Board's decision.

^{6/} As the Commission has explained:

There are a variety of methods for demonstrating compliance with GDC [General Design Criteria]. Through regulatory guides, standard format and content guides for safety analysis reports, Standard Review Plan provisions, and Branch Technical Positions, license applicants are given guidance as to acceptable methods for implementing the general criteria. However, applicants are free to select other methods to achieve the same goal. If there is conformance with regulatory guides, there is likely to be compliance with the GDC. Even if there is nonconformance with staff's guidance to licensees, the GDC may still be met.

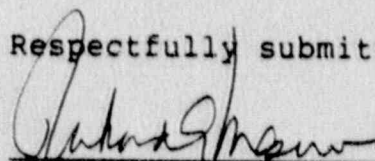
Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 406-07 (1978), aff'd on reconsideration, CLI-80-21, 11 NRC 707 (1980); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1161, 1169-70 (1984), affirming LBP-83-57, 18 NRC 445 (1983); Gulf States Utils Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

Under the circumstances, the State's motion must be denied. The Commission in the Shoreham proceeding made observations that are apt here:

[T]he opportunity to file motions for reconsideration [should not] become a game in which the resources of the Commission and the parties are wasted in endless reiteration of the same arguments. At some point the adjudicatory process must come to an end.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 4 (1988). The State has failed to provide any basis in law or fact that even suggests error on the part of the Board, and hence the State's motion for reconsideration must be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Response to the State's Motion for Reconsideration to be served by express mail (or, as indicated by an asterisk, by first-class mail), postage prepaid, on this 19th day of January, 1990, as follows:

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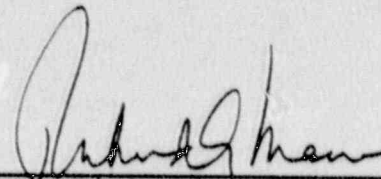
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