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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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In the Matter of STATE OF ILLINOIS (Amendment Number One to the Section 274 Agreement between the NRC and Illinois)	Docket No. PR MISC 90-1

MEMORANDUM AND ORDER

CLI-90-09

1. Introduction

On March 28, 1990, the NRC issued a notice of a proposed amendment to the agreement which it entered into with the State of Illinois in 1987 for State assumption of regulatory authority over specified radioactive materials. See 55 Fed. Reg. 11459 (March 28, 1990). The amended agreement would empower Illinois to regulate uranium and thorium mill tailings under the Uranium Mill Tailings Radiation Control Act (UMTRCA), as amended, codified in scattered sections of 42 U.S.C.

The Kerr-McGee Chemical Corporation holds an NRC license for the West Chicago Rare Earths Facility, an Illinois site which contains a large quantity of thorium mill tailings. Kerr-McGee's license was recently amended by NRC staff to authorize the company to dispose of the tailings onsite in an earthen cell, but the amendment was contested and no final NRC action on it has yet been taken. See In the Matter of Kerr-McGee Chemical Corporation (West

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Chicago Rare Earths Facility), LBP-90-9, 31 NRC 150 (February 13, 1990). In addition to filing comments on the proposed amendment, together with a request for oral argument on the proposed amendment, Kerr-McGee filed a motion on April 27, 1990 requesting that the Commission comply with section 274o of the Atomic Energy Act (AEA) which Kerr-McGee reads to require a full adjudicatory hearing before deciding whether to amend the agreement with Illinois.

For the reasons given below, the Commission is denying both Kerr-McGee's motion and its request for oral argument on the proposed amendment.

2. Background

Section 274 of the AEA empowers the Commission to enter into an agreement with a state whereby the state exercises regulatory authority over specified nuclear materials in lieu of the NRC. See 42 U.S.C. 2021b and c. Before the agency can transfer any of its authority, it must find

> that the State program is in accordance with the requirements of subsection o. [in cases where the State would regulate mill tailings] and in all other respects compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

42 U.S.C. 2021d(2). Section 274 also empowers the Commission to "terminate or suspend all or part of its agreement with the State and reassert ... regulatory authority ... if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section." See 42 U.S.C. 2021j(1).

Illinois and the NRC entered into a section 274 agreement in 1987. See 52 Fed. Reg. 22864 (June 16, 1987). However, under that agreement, Illinois cannot exercise regulatory authority over mill tailings, or "byproduct" material as defined in section 11e(2) of the AEA (42 U.S.C. 2014e(2)).

Illinois now seeks to have the agreement amended so that the State can exercise such authority. The State has adopted standards for the regulation of section 11e(2) byproduct material which differ in some respects from the Commission's standards for such material. Section 274o explicitly provides that, for the regulation of section 11e(2) byproduct material, the State may adopt alternatives (including site-specific alternatives) to the requirements adopted and enforced by the Commission for the same purpose. 42 U.S.C. 2021o(2).

However, a state may adopt different 11e(2) byproduct material standards only

> if, after notice and opportunity for public hearing the Commission determines that such alternatives will achieve [(1)] a level of stabilization and containment of the sites concerned, and [(2)] a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose ....

42 U.S.C. 2021o (last paragraph).

On March 28, 1990, the NRC staff published for comment its assessment of Illinois' program for the regulation of 11e(2) byproduct material. See 55 Fed. Reg. 11459 (March 28, 1990). As required by section 274o, the staff reviewed those regulations of Illinois' which differed from the NRC. Id. at 11462, col. 2. Considering the standards one by one, the staff concluded that the differing regulations in a general sense (i.e. without reference or application to a specific site or licensee) were equivalent to, or more stringent than, the NRC's corresponding standards, id. at 11462, col. 2 to 11463, col. 1.

The Commission is today approving the amendment to the Illinois agreement. In doing so, the Commission is approving the staff's final analysis of Illinois' generic program for regulation of 11e(2) byproduct material, including its analysis of areas where Illinois' program is more stringent. However, as this analysis makes clear:

> The staff is finding several of the sections discussed above [in the analysis] more stringent and in accord with Section 274o of the Act only for the purpose of finding the Illinois program adequate, compatible and in compliance with statutory requirements so that authority may be relinquished lawfully to the State. In making the findings, NRC staff expressed a programmatic judgment that, in the majority of reasonably forseeably circumstances, the sections would achieve a level of stabilization and containment, and a level of protection of the public health, safety, and the environment from radiological and nonradiological hazards, which is equivalent to, to the extent practicable, or more stringent than the level that must be achieved by NRC's and EPA's requirements. The staff offers no opinion whether, as applied to any particular site, the findings required by the last paragraph of section 274o can necessarily be made.

At the present time, Kerr-McGee is the only 11e(2) byproduct material licensee in Illinois. Moreover, the NRC staff only recently amended Kerr-McGee's license to permit permanent onsite disposal of the tailings at the company's West Chicago Rare Earths Facility. The NRC staff had concluded that Kerr-McGee's proposed method of disposal, with certain modifications, "would have the smallest overall health effects" of all the methods the staff had considered. See NUREG-0904, Supplement No. 1, Supplement to the Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois, April 1989, at 1-19. Illinois opposes permanent onsite disposal. The amendment was contested. While the NRC staff has reaffirmed its position, conditioned on the incorporation into the license amendment of certain design details provided by Kerr-McGee in July 1990, no final agency action has been taken on the license amendment.

In addition to voluminous comments on Illinois' program for 11e(2) byproduct material and the staff's assessment of that program, Kerr McGee filed a motion on April 27, 1990 calling on the NRC to comply with the last paragraph of section 274o by holding a full adjudicatory hearing -- before deciding whether to amend the agreement with Illinois -- to determine whether, as applied to permanent disposal of the West Chicago tailings, Illinois' differing standards in fact achieved a level of protection of the public and the environment at least as high as that achieved by the onsite disposal program authorized by Kerr-McGee's license. Kerr-McGee requests that the Commission issue now a notice for an opportunity for such a hearing, or at least hold the hearing.

3. The positions of Kerr-McGee and Illinois

Kerr-McGee argues first that the Commission must hold a hearing before amending the agreement with Illinois because section 274d(2), quoted above, requires that the Commission find compliance with section 274o before entering into an agreement for regulation of 11e(2) byproduct material, and the last paragraph of section 274o in turn requires that a state's differing standards be assessed not in the abstract but rather with respect to the "sites concerned", in the words of the statute.

Kerr-McGee argues second that the "public hearing" required by the last paragraph of section 274o must be a formal adjudicatory hearing because assessing Illinois' alternative standards with respect to the one "site concerned" will necessarily involve factual disputes which will require formal adjudication to resolve properly. Kerr-McGee acknowledges in its hearing request that the State's differing standards are "more stringent in some respects than the NRC standards" but asserts that, paradoxically, an

adjudicatory assessment of these standards would show that application of them to disposal of the West Chicago tailings would have a greater adverse impact on health, safety, and the environment than would the authorized program for onsite disposal.

In response, Illinois argues first that the provisions in the last paragraph of section 274o for notice and opportunity for a public hearing apply only after a state acquires regulatory authority of 11e(2) byproduct material. Illinois claims that those provisions are triggered only by a state's act of implementation with regard to an "identifiable area", but that the state regulations the NRC has assessed in considering Illinois' application for mill tailings authority are not tailored to a particular site but rather to all possible sites, present and future. Illinois believes that the hearing provisions of the last paragraph of section 274o were not intended to be yet another hurdle for a state to clear on the way to acquiring regulatory authority over 11e(2) byproduct material.

Illinois argues in the alternative that if the hearing provisions of section 274o have been triggered merely by Illinois' having proposed for the NRC staff's consideration general standards which differ from the NRC's corresponding standards, then the notice and comment procedures which the NRC has employed with respect to the proposed amendment to its agreement with Illinois constitute the "public hearing" required by the last paragraph of section 274o, just as notice and comment procedures are sufficient to satisfy the requirement in section 189a of the AEA that there be a hearing in connection with the issuance or modification of rules and regulations. Illinois claims that if Congress had wanted a formal adjudication on a state's differing standards for 11e(2) byproduct material, it would have said so, as it did when, in another part of section 274o, it explicitly required states

exercising 11e(2) authority to provide their licensees "a public hearing, with a transcript, ... an opportunity for cross-examination, and ... a written determination ... based upon the evidence ... and ... subject to judicial review." See 42 U.S.C. 2021o(3)(A). According to Illinois, its differing standards raise no factual dispute which would require resolution by adjudication: The question of whether Illinois has an adequate program for the regulation of mill tailings is, for Illinois, distinct from the question of the fate of the tailings at the West Chicago site.

4. Discussion

The Commission agrees with Kerr-McGee that the hearing requirements of the last paragraph of section 274o are triggered by Illinois' bringing forward general standards as well as site-specific alternatives. This much seems clear from the plain language of the statute. However, the Commission also agrees with Illinois that notice and comment procedures are sufficient for the purpose of assessing the State's general standards and satisfy the hearing requirement of section 274o with regard to the NRC's approval of the State's general standards and program.[1] See Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968). In reviewing the Illinois program, we believe that we are required only to make a quasi-legislative judgment under 274o on whether the generic standards within the program will, in general and without reference to a particular site or licensee, lead to a level of stabilization and containment and a level of protection for public health and the environment equivalent to, to the extent practicable, or more stringent than the level which would be achieved by the Commission's standards. Consistent with this view of what the

[1] For this reason, we are denying Kerr-McGee's request for oral argument on the proposed amendment to the agreement with Illinois.

statute requires, the Commission is today reaching a final decision on entering into the amended agreement with Illinois and endorsing, as a rationale for that decision, staff's proposed assessment of March 28, 1990, as supplemented by the staff's analysis in SECY-90-253 and SECY-90-253A.

Kerr-McGee believes that we cannot assess a general standard without an adjudicatory application of that standard to the "sites concerned". We disagree. We believe that we are required only to make the quasi-legislative judgment discussed above for purposes of amending our agreement with the State of Illinois to relinquish our authority over 11(e)(2) byproduct material.

To subject every state proposal for a different standard to a formal adjudication would, where a state had a number of potentially affected sites, entail exhaustive licensee and site specific hearings before any transfer of 11e(2) authority. The West Chicago site may be the only 11e(2) site in Illinois now, but we hesitate to presume what the future may yield. Moreover, section 274o applies to other states and we cannot endorse an interpretation of that section that could prove generally unsound and unworkable for future agreements. Before relinquishing some of our authority over 11e(2) byproduct material, we should make programmatic judgments about the general standards that the State has proposed. It would be as much a mistake to approve the program because it could lead to sound results in a single case as it would be to disapprove the whole program because it could lead to unsound results in a single case.

In addition to its obligation to assess a state's general standards, the Commission also has the very important obligation to assure that a state's application of standards that differ from those established by the Commission also achieve a level of stabilization and containment of particular sites, and a level of protection of public health and the environment, equivalent to, to

the extent practicable, or greater than, the level which would be achieved by the Commission's standards. This latter obligation is quite distinct from the former, because it is not infrequent in the law that a body of general standards each of which is sound in the abstract may, when applied singly or together to a particular case, yield unsound results. We believe that this site-specific obligation will arise only later if and when Illinois, having acquired authority over 11e(2) byproduct material, seeks to impose standards which differ from the Commission's own standards.

5. Conclusion

Kerr-McGee's request for oral argument on the proposed amendment to the Commission's agreement with Illinois, and Kerr-McGee's motion that a formal adjudication on Illinois' differing 11e(2) standards be held before the Commission decides whether to amend its agreement with Illinois, are denied. However, if the State seeks to adopt alternatives to any requirements adopted and enforced by the Commission for disposal of the materials at the West Chicago site, the Commission will determine, after notice and opportunity for a hearing, whether the State's alternatives will achieve a level of stabilization and containment of the West Chicago site, and a level of protection for public health, safety and the environment from both radiological and nonradiological hazards associated with the site, which is equivalent to, to the extent practicable, or more stringent than, the level

which would be achieved by any requirements adopted and enforced by the Commission for disposal of the materials at the West Chicago site.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of October, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
KERR-MCGEE CHEMICAL CORPORATION	Docket No.(s) 40-2061-ML PR-MISC. 90-1
(West Chicago Rare Earths Facility)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION M&O (CLI-90-09) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)40-2061-ML PR-MISC. 90-1
COMMISSION M&D (CLI-90-09)

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Dated at Rockville, Md. this
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