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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD '90 NOV 14 P4:08

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

KERR-McGEE OPPOSITION TO STATE
AND CITY MOTION TO TERMINATE AND VACATE

Peter J. Nickles
Richard A. Meserve
Herbert Estreicher
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Kerr-McGee
Chemical Corporation

November 13, 1990

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NUCLEAR REGULATORY COMMISSION

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On October 22, 1990, the State of Illinois and City of West Chicago (the "movants") filed a motion to terminate their appeal and to vacate both Kerr-McGee's license and the Licensing Board's decisions. Kerr-McGee Chemical Corporation ("Kerr-McGee") hereby responds.[1/]

As will be seen, this Board should retain jurisdiction and promptly resolve the pending appeals. But, even if it were to conclude that its jurisdiction has now been terminated, this Board should not vacate either Kerr-McGee's license or the Licensing Board's decisions.

I. THIS BOARD SHOULD RETAIN JURISDICTION.

The movants seek dismissal of this proceeding on the basis of the Commission's October 17, 1990 action approving an

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1/ By an order issued on October 30, 1990, this Board provided Kerr-McGee with the opportunity to respond on or before November 13, 1990.

Amendment to the Section 274 Agreement between Illinois and the NRC. 55 Fed. Reg. 46,591 (Nov. 5, 1990); see State of Illinois (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-09, ___ NRC ___ (Oct. 17, 1990).[2/] The movants assert that, because the Commission has approved the transfer of regulatory authority over section 11e(2) byproduct material, this appeal is now moot. Motion, 3. Indeed, they claim that "[t]he Commission has now spoken," and that this Board is now obliged to dismiss the appeal. Id.

In point of fact, however, the Commission has explicitly stated that it "expresses no opinion as to how [the instant] motion should be decided." State of Illinois (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-11, ____ NRC ____, slip op. at 2 (Nov. 8, 1990). This Board thus has both the authority and the responsibility to determine the extent of its own jurisdiction. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870, 873 (1980); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); Kansas Gas & Electric Co. (Wolf Creek Nuclear

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2/ On October 29, 1990, Kerr-McGee filed a petition with the Commission seeking reconsideration. That petition was denied in a Memorandum and Order issued on November 8, 1990. State of Illinois (Amendment One to the Section 274 Agreement between the NRC and Illinois), CLI-90-11, ___ NRC ___ (Nov. 8, 1990).

Generating Station, Unit No. 1), ALAB-321, 3 NRC 293, 299-300 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977). In the circumstances present here, the retention of jurisdiction is appropriate.

A case is not moot unless the issues presented are no longer "live" or the parties "lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982); see United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980); Powell v. McCormack, 395 U.S. 486, 496 (1969). The controversy here -- the propriety of Kerr-McGee's disposal plan -- obviously remains at issue. Hence, contrary to the movants' assertions, this case can not be deemed moot.

Moreover, the Commission has not given the State the final authority to regulate the subject matter of this proceeding -- the disposition of the West Chicago facility wastes. The Commission has only approved the State regulatory program in general terms and not as applied to any specific site, including, in particular, the West Chicago facility. CLI-90-09, slip op. at 9; CLI-90-11, slip op. at 2. Any proposal by the State to apply its regulatory program to the West Chicago facility is subject to a determination by the Commission, after notice and opportunity for a public hearing, that the State requirements provide at least an equivalent level of protection for public health and the environment to

those provided by the NRC.[3/] Id. In short, the State must obtain further NRC approval before it is allowed to disrupt the stabilization program now under appeal. Because it is highly doubtful that the State will be allowed to apply its approach to stabilization in West Chicago,[4/] this Board should retain jurisdiction.[5/]

3/ The Commission has informed the Governor of Illinois that, in the event the State proposes to apply its alternative standards to the West Chicago facility, the State is to provide the Commission with advance notice, an explanation, and an analysis of whether the standards are sufficiently protective. Letter from Chairman Kenneth M. Carr to Governor James R. Thompson (Oct. 18, 1990) (Exhibit 1). The Commission will authorize the State to take action only if the Commission determines, after notice and opportunity for a public hearing, that the State standards are sufficiently protective. Id.

4/ The NRC staff's analysis shows that the State's preferred alternative -- off-site disposal -- is less protective of the public than the current on-site disposal plan authorized by Kerr-McGee's NRC license. NRC, Supplement to the Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois, 1-19 to 1-20 (Apr. 1989) (NUREG-0904, Supp. No. 1) ("SFES"). There is thus substantial doubt whether the Commission will ever approve the State approach.

5/ The State has prevented Kerr-McGee from obtaining judicial review of the State regulations governing section 11(e)(2) material in the Illinois courts on the grounds that, until the Commission has approved the regulations, any review is premature. Kerr-McGee Chemical Corp. v. IDNS, No. 4-90-0330 (Ill. App. Ct., Oct. 18, 1990) (Exhibit 2). The Appellate Court ruled:

> It is possible that the rules at issue here will never become applicable to Kerr-McGee. The NRC may find, for instance, that the rules themselves are not in harmony with parallel Federal regulations, or the NRC may find other shortcomings in the Department's proposed

(footnote cont'd)

Other considerations support this Board's retention of jurisdiction. Kerr-McGee intends to file a petition with a United States Court of Appeals seeking review of the Commission's action in approving the amendment of the Section 274 agreement. It is thus appropriate to retain jurisdiction, and thereby maintain the status quo, until the courts have had an opportunity to rule on the matter. Indeed, even the State has earlier asserted that any disruption of the Commission's jurisdiction should be avoided during such judicial review. The State specifically declined to accept regulatory control over certain off-site materials at West Chicago pursuant to the 1987 State Agreement, noting that the question of the State's authority over the materials was then pending in the

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(footnote cont'd)

> regulatory scheme which result in the NRC's denying the State's request to assume regulatory control over source-material milling facilities. Disapproval by the NRC of the Department's rules governing such facilities could require the Department to withdraw the rules and substantially rewrite them. This could conceivably occur more than once. Under this scenario, Illinois courts could determine the validity of several sets of rules which, due to action by a Federal regulatory agency, would never become effective.

Slip op. at 9-10. The same considerations that have led the Illinois court to dismiss Kerr-McGee's suit -- the uncertainty as to whether the State regulations will ever pass Commission scrutiny -- now urge the continuation of this proceeding. The existing jurisdiction of this Board should not be disrupted until it is determined that the application of the State program to the West Chicago facility is acceptable.

courts. See Letter from Terry R. Lash, IDNS Director, to Harold R. Denton (Sept. 26, 1989) (Exhibit 3). Exactly the approach urged by the State during the challenge to the original agreement should be followed here.

II. EVEN IF THIS BOARD DECIDES TO DISMISS THE APPEAL, IT SHOULD NOT VACATE EITHER KERR-McGEE'S LICENSE OR THE LICENSING BOARD'S DECISIONS.

The movants assert not only that the appeal must be terminated, but also that "this Panel must vacate the Initial Decision *and any licensing action taken pursuant to that decision*." Motion, 3 (emphasis in original). They claim that such action is required by precedent.

There is no justification for the extraordinary action requested by the movants. Kerr-McGee now has a fully valid license -- a license that this Board refused to stay at the request of the movants. ALAB-928, 31 NRC 263 (1990). The movants should not be allowed to achieve by indirection what this Board refused to authorize in considering the movant's direct attack on the license. The Commission's policies clearly contemplate that existing licenses are not to be disrupted by a transfer of jurisdiction.[6/] And, the State's

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6/ The Agreement State program does not extinguish existing NRC licenses. In fact, the Commission's stated policy provides:

> In effecting the discontinuance of jurisdiction, appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or

(footnote cont'd)

own regulations clearly recognize the continuing force of NRC licenses and provide that they are automatically given the same effect as licenses issued under State law. 32 Ill. Admin. Code § 332.30(c).7/ There thus can be no justification for vacating Kerr-McGee's license. It necessarily follows that, because the Licensing Board's decisions provide the foundation for the license, those decisions must also survive the transfer of jurisdiction.

Contrary to the claims of the movants, a consideration of precedent also confirms that the Licensing Board's decisions should remain intact. The practice of vacating judgments when an appeal has been terminated has its origins

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(footnote cont'd)

> interruption of licensed activities or the processing of license applications, by reason of the transfer. . . .

46 Fed. Reg. 7,540, 7,543 (¶ 25) (1981).

7/ Section 332.30(c) provides in pertinent part:

> Any person who, on the effective date of the Agreement between the State and NRC transferring regulatory authority to the State, possesses a license, issued by the NRC, to operate a . . . byproduct material surface impoundment or disposal area or to receive, possess, dispose of, or transfer source or byproduct material associated with such facilities, shall be deemed to possess a like license issued under this Part.

32 Ill. Admin. Code § 332.30(c), reprinted in 14 Ill. Reg. 1333, 1349 (Jan. 19, 1990) (emphasis added).

in the Supreme Court's decision in United States v. Munsingwear, 340 U.S. 36, 39 (1950). But Munsingwear only applies to cases where vacating a judgment is deemed necessary to protect the appellant from the prejudicial effect of a judgment which has become unreviewable because of circumstances beyond the appellant's control. Id. at 39. The Supreme Court has explained that the Munsingwear doctrine does not apply where the "controversy did not become moot due to circumstances unattributable to any of the parties." Karcher v. May, 484 U.S. 72, 83 (1987).

The normal practice in the courts is not to vacate lower court judgments on appeal where the appellant by his own actions has mooted the appeal. See, e.g., Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982) (vacation of judgment not warranted "when the appellant has by his own act caused the dismissal of the appeal and is in no position to complain that his right of review of an adverse lower court judgment has been lost"); Cover v. Schwartz, 133 F.2d 541, 546-47 (2d Cir. 1942) (lower court judgment will stand as entered where appellant's own actions mooted the appeal), cert. denied, 319 U.S. 748 (1943); see also Blackwelder v. Safnauer, 866 F.2d 548, 551 (2d Cir. 1989) (finding "no basis for allowing a plaintiff who lost in a lower court to vacate the adverse judgment simply by deciding that he no longer wishes to pursue the claim") (emphasis in original); Wisconsin v. Baker, 698 F.2d 1323, 1331 (7th Cir.) ("Just as winning litigants may not bolster

the preclusive effect of final judgments by deliberately mooting questions on appeal, so losing litigants may not destroy their preclusive effect by adopting the same ploy."), cert. denied, 463 U.S. 1207 (1983). To do otherwise would unfairly provide the appellant with a means of depriving the appellee of the full benefit of a judgment in his favor. See United States v. Garde, 848 F.2d 1307, 1310 & n.6 (D.C. Cir. 1988) (finding it "appropriate to depart from practice [of vacating lower court decision] in order to avoid unfairness to parties who prevailed in the lower court"); Allard v. DeLorean, 884 F.2d 464, 467 (9th Cir. 1989) ("a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal"); see also Ringsby, 686 F.2d at 721 (unfairness would result from allowing "any litigant dissatisfied with a trial court's findings [to] be able to have them wiped from the books").8/

Here, any uncertainty as to the status of this proceeding has clearly resulted from the appellants' own

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8/ The rule in the appellate courts has its counterpart at the trial level. It is common practice to dismiss a case with prejudice if the party instituting the action seeks dismissal after the litigation is significantly advanced. Compare Tyco Laboratories, Inc. v. Koppers Co., 627 F.2d 54 (7th Cir. 1980) with Williams v. Ford Motor Credit Co., 627 F.2d 158, 159-60 (8th Cir. 1980); see Shinrone, Inc. v. Insurance Co. of North America, 570 F.2d 715, 719 (8th Cir. 1978); Selas Corp. of America v. Wilshire Oil Co., 57 F.R.D. 3, 7 (E.D.Pa. 1972). A dismissal with prejudice, like the preservation of a decision under appeal, prevents unfairness to a party who has litigated in good faith, but has then been deprived of vindication by the actions of his opponent.

actions. In fact, the State and City have followed a long-standing strategy to use the Agreement State provisions of the Atomic Energy Act as a mechanism for derailing this proceeding.[9/] The only reason that the State sought to obtain an amendment to its 1987 Agreement was to oust the NRC's jurisdiction over this proceeding and thereby to prevent a fair and impartial review of Kerr-McGee's on-site disposal plan.[10/] The State viewed the situation as a "horse race" between this appeal and the amendment of the Section 274 agreement and launched a campaign of delay to prevent the

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9/ Various public pronouncements confirm that the State's purpose in seeking the amendment is solely to oust NRC jurisdiction and thereby to prevent on-site disposal in West Chicago. Perhaps most revealing, Dr. John Cooper, Manager of Environmental Safety for the Illinois Department of Nuclear Safety ("IDNS"), 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, at 4, 5 (Summer 1988) (Exhibit 4). Cooper also stated "[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." West Chicago Press (Winfield Press), Aug. 25, 1988 (Exhibit 5).

10/ Before the entry into the 1987 agreement with the State, the NRC Staff sought to encourage the State to assume jurisdiction over section 11e(2) byproduct material. Memorandum from R.E. Cunningham to G.W. Kerr (Nov. 26, 1985) (Exhibit 6). The State declined this invitation. The State's view changed, however, after the issuance of the Draft SFES ("DSFES"). The DSFES provided the first formal indication that the NRC staff intended to support on-site disposal as the preferred alternative for the disposition of the West Chicago wastes. The DSFES thus provided clear evidence to the State that a neutral and fair observer of the facts was likely to reject the State's arguments in opposition to on-site disposal.

final resolution of these proceedings.[11/] Now, within days of the Commission's action on the amendment to the Section 274 agreement,[12/] the State and City seek to expunge the substantial progress achieved in this proceeding on the eve of its completion.

In this connection, the Board will recall that this proceeding was launched over a decade ago. The staff has incurred the expense of preparing both a final and, at the insistence of the State, a supplemental environmental statement. Kerr-McGee, for its part, prepared a 12-volume West Chicago Project Engineering Report and commissioned numerous reports from experts. The parties' witnesses have devoted long hours to the proceeding and have incurred the inconvenience associated with depositions, the preparation of testimony, and appearance at the Licensing Board hearing.

11/ The Daily Journal, Dec. 18, 1989, at 2 (statement of Douglas Rathe, Assistant Illinois Attorney General) (Exhibit 7). The State and City have requested numerous lengthy extensions of time during the course of this appeal. See e.g. State Motion for an Extension of Time (Mar. 12, 1990); City Motion for an Extension of Time (Mar. 7, 1990); State and City Motion for an Extension of Time (Aug. 31, 1990).

12/ The same day the Commission's October 17, 1990 decision was issued, the Governor of the State held a press conference at the West Chicago site announcing the fulfillment of his promise to the local residents that the facility's wastes would not be buried in West Chicago. Chicago Tribune, Oct. 18, 1990, at 22 (Exhibit 8); West Chicago Press, Oct. 18, 1990, at 1 (Exhibit 9). And Thomas Ortciger, the newly appointed director of the IDNS, has offered predictions as to how long it will take to move the wastes to another site. Exhibit 8, at 1.

Similarly, the Licensing Board has invested its resources, time, and effort in achieving a thoughtful resolution of the issues. Extensive and detailed briefs have been filed in connection with this appeal. This Board has already ruled on numerous motions, including an unsuccessful attempt by the State and City to stay Kerr-McGee's license amendment.

In short, equitable considerations strongly militate in favor of preserving the Licensing Board's decisions. It was at the insistence of the State, an intervenor in this proceeding, that the hearing on Kerr-McGee's license amendment application was convened in the first place. As a result, Kerr-McGee was forced to incur substantial expense in responding to the numerous contentions raised by the State. And, the State and the City were the parties that elected to file this appeal. Having lost below, they now seek to terminate the proceeding before a final resolution has been achieved. It would be blatantly unfair for this Board to allow such a stratagem to succeed.

The State and City claim that the Appeal Board's decision in Kress Creek shows that this Board is required to terminate this proceeding and vacate the Licensing Board's decisions. Motion, 4. In Kress Creek, however, the Appeal Board neither dismissed the appeal nor vacated the Licensing Board decision. Kerr-McGee Chemical Corp. (Kress Creek Decontamination), ALAB-867, 25 NRC 900, 911 and n.15 (1987). In point of fact, the Appeal Board indicated in an earlier Memorandum and Order that even if termination of the

proceeding were eventually deemed necessary, the Board would allow the Licensing Board's decision to stand. Memorandum and Order (Jan. 7, 1987) (unpublished) (Exhibit 10). As the Board stated:

> In this proceeding . . . maintaining the status quo may be more appropriate than vacating the Licensing Board's decision . . . . In the first place, unlike other proceedings involving motions to terminate, this proceeding would not really be moot in the usual sense -- i.e., lacking in controversy. . . . and perhaps most important, equitable considerations here appear to militate against vacating the Licensing Board's decision.

Memorandum and Order, 3-4 (emphasis in original). The Board further noted that "it seems unfair to deprive Kerr-McGee of the successful defense of its activities before the Licensing Board by abrogating that decision. Simply terminating the case as it stands following that Board's decision -- neither affirming nor reversing on appeal -- may present a reasonable solution to this dilemma." Id. at 4. In short, the Appeal Board declined to vacate because of the unfairness to Kerr-McGee that would result. Exactly the same conclusion must be drawn here.[13/]

13/ The Appeal Board's discussion in Kress Creek is fully consonant with the established practice in the federal courts. See pp. 8-9, supra. The Supreme Court has summarized the basic rule as follows: "If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." Walling v. James V. Reuter, Inc., 321 U.S. 671, 677 (1944) (emphasis added); see also Labor Youth League v. Subversive Activities

(footnote cont'd)

The movants also rely on the Appeal Board decision in the Sheffield proceeding to support their assertions. Motion, 2; see US Ecology, Inc. (Sheffield, Illinois Low-level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987). But that decision has no proper bearing here. Sheffield was an enforcement action and not a licensing proceeding.[14] The Appeal Board's decision to vacate was motivated by the Board's recognition that allowing the orders to be used by the State in a subsequent enforcement action would be unfair to the licensee, who no longer had the opportunity to pursue his appeal. Id. at 898 n.4.[15] As the Appeal Board ruled:

(footnote cont'd)

Control Bd., 322 F.2d 364, 373 (D.C. Cir. 1963) (declining to vacate a judgment because to do so would "wipe out" the "whole long record of [the] proceedings").

14/ In Sheffield, the NRC issued a show cause order against its licensee (US Ecology). US Ecology appealed two Licensing Board decisions the first denying summary disposition on certain issues raised by the show cause order, and the second declaring the order denying summary disposition to be final for purposes of appeal. After the NRC transferred regulatory authority over the Sheffield site to the State of Illinois, US Ecology moved to terminate the appeal, vacate the order to show case, and to vacate all decisions relating to the show cause order.

15/ The circumstances in this case are very different from those cases where the Appeal Board, having found that a license proceeding has become moot, vacated the Licensing Board orders then on appeal. Vacation has been found appropriate in two sets of circumstances -- where the licensee has moved to terminate the proceeding, or where the project under review has been cancelled and the licensee has not opposed a motion to vacate. See Rochester Gas and Electric Corp. (Sterling Power Project Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980); Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-656, 14 NRC 965 (1981); Long Island

(footnote cont'd)

> [I]nasmuch as the agreement manifestly has the effect of depriving US Ecology of its pre-existing ability to obtain review within the NRC of the Licensing Board's orders, operative effect must be removed from those orders as an incident of the termination of the proceeding in which they were rendered.

Id. at 898 n.4. Here, the same concerns for fairness require that the Licensing Board's decisions remain intact.

It should be noted that the State of Illinois asserted in the Sheffield case that the decisions should not be vacated because "a real controversy remains" and because "[a]dministrative and judicial economy will not be served by requiring the State or U.S. Ecology to begin anew an enforcement proceeding which has been litigated over several years merely to return to the present posture." State of Illinois Objections to Motion to Vacate Show Cause Order and Board Decisions, 2, 3 (June 12, 1987) (Exhibit 15). Although the State's arguments would have been unfair if applied in Sheffield, they apply with full force here.

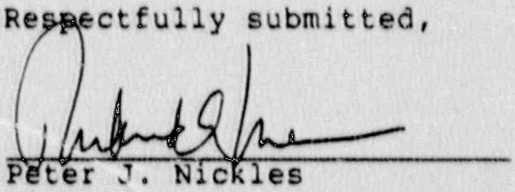
(footnote cont'd)

Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-628, 13 NRC 24 (1981); United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-842, 24 NRC 197 (1986). The circumstances of these other cases do not present the unfairness to the licensee that would follow from the vacation of the Licensing Board's decisions here.

CONCLUSION

For the foregoing reasons, Kerr-McGee urges the denial of the State and City motion. This Board should maintain its jurisdiction and resolve the pending appeals. If this Board concludes otherwise, however, the Kerr-McGee license and the Licensing Board's decisions should not be vacated.

Respectfully submitted,



Peter J. Nickles
Richard A. Meserve
Herbert Estreicher
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044
(202) 662-5575

Attorneys for Kerr-McGee
Chemical Corporation

November 13, 1990

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

CHAIRMAN

October 18, 1990

The Honorable James R. Thompson
Governor of Illinois
Springfield, Illinois 62706

Dear Governor Thompson:

I am pleased to inform you that the Nuclear Regulatory Commission (NRC) has approved your proposed Amendment to the Agreement under which the NRC will discontinue and the State of Illinois will assume regulatory authority over 11e.(2) byproduct material and the facilities that produce 11e.(2) byproduct material in accordance with Section 274 of the Atomic Energy Act, as amended.

The Commission has determined that the Illinois program for regulation of 11e.(2) byproduct material and the facilities that produce 11e.(2) byproduct material generally is compatible with the Commission's program for the regulation of like materials and adequate to protect the public health and safety with respect to the materials covered by the proposed amendment. However, certain standards adopted by Illinois differ from the standards adopted and enforced by the Commission for the same purpose. In accordance with the requirements of Section 274o of the Atomic Energy Act, the Commission evaluated those differing standards in general, without reference to a particular site, and determined that those standards are adequate for purposes of amending the Commission's agreement with Illinois. If, at some time in the future, the State seeks to apply those or other differing standards to a particular site, including the West Chicago Rare Earths Facility site, Section 274o requires the Commission to provide further notice and opportunity for a public hearing and to determine whether the State's differing standards will achieve a level of stabilization and containment of that 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, or more stringent than, the level which would be achieved by any requirements adopted and enforced by the Commission for the same purpose.

In order to enable the Commission to carry out its responsibilities under Section 274o of the Atomic Energy Act to provide notice and opportunity for a public hearing in the event that the State proposes to impose alternative requirements at

sites covered under this agreement, as well as to permit the Commission to determine whether such alternative requirements will achieve a level of protection that is equivalent to or more stringent than that afforded by the Commission's regulations, the State shall notify the Commission in advance of when the State proposes to impose standards that differ from those established by the Commission. This includes all instances where the State's proposed alternative requirements, as contained either in specific State regulations or as proposed for application at a specific site, -- (1) are either more or less stringent than the requirements established by the Commission; (2) address matters where the Commission has affirmatively decided not to impose requirements; (3) involve the exercise by the State of its authority to grant exemptions from requirements established by the State; or (4) add to or remove the flexibility that would otherwise be available to the licensee in complying with NRC's standards. Following notification by the State, and prior to the Commission's publication of a notice, we would ask that the State present the rationale for the application of such alternative requirements, together with an analysis of whether such alternative requirements will achieve a level of protection that is equivalent to or more stringent than that afforded by the Commission's regulations.

I am pleased to enclose three (3) copies of the Agreement for your signature. Following your execution of the Amendment to the Agreement, please return two (2) copies to NRC. The third copy is for retention by the State.

On behalf of the Commission, I congratulate you, your staff, and the State of Illinois for taking this important step in Federal-State relations.

Sincerely,

Kenneth M. Carr

Enclosure:
As Stated

NO. 4-90-0330

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KERR-McGEE CHEMICAL CORPORATION, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF NUCLEAR SAFETY, Defendant-Appellant.	)	Appeal from Circuit Court County of Sangamon No. 90MR49 Honorable Simon L. Friedman, Judge Presiding.

JUSTICE STEIGMANN delivered the opinion of the court:

This case is an outgrowth of a controversy over the disposal of nuclear waste on property owned by plaintiff Kerr-McGee Chemical Corporation (Kerr-McGee) in West Chicago. The principal question presented is whether Kerr-McGee may challenge, by means of a declaratory judgment action, rules promulgated by defendant Illinois Department of Nuclear Safety (Department) pertaining to nuclear waste, which are not currently in effect because the State has not yet received permission from the Nuclear Regulatory Commission (NRC) to regulate the type of nuclear waste covered by the rules. We hold the question of

whether the rules are valid is not yet ripe for decision and reverse the order of the circuit court which denied the Department's motion to dismiss Kerr-McGee's complaint for declaratory judgment.

Although nuclear energy and related matters are generally subject to regulation by the NRC, under certain circumstances the States may assume regulatory authority in this area. (42 U.S.C. §2021 (1988).) In order to assume such regulatory authority, the States must, among other things, promulgate rules that meet NRC requirements. 42 U.S.C. §§2021(d),(o) (1988); 46 Fed. Reg. 7540, 7544 (1981) (criteria 30, 32).

Accepting as true the well-pleaded facts of Kerr-McGee's complaint for declaratory judgment (Martin v. Federal Life Insurance Co. (1982), 109 Ill. App. 3d 596, 601, 440 N.E.2d 998, 1003), Kerr-McGee asserted that it is the owner of a former thorium milling facility in West Chicago and that nuclear waste, consisting of thorium mill tailings and associated materials, is present on this site. Since 1979, Kerr-McGee has sought a license amendment from the NRC to permit stabilization and closure of its West Chicago facility. After two full evaluations of the site, the NRC staff recommended "on-site stabilization" of the nuclear waste at Kerr-McGee's West Chicago facility.

The proposal to indefinitely store nuclear waste at Kerr-McGee's West Chicago facility displeased the Department,

which preferred the nuclear waste to be stored elsewhere. Consequently, the Department, in proceedings before the NRC, opposed the on-site stabilization plan recommended by the NRC staff.

On April 28, 1989, the Department published proposed rules which set forth "Licensing Requirements for Source Material Milling Facilities" (13 Ill. Reg. 5874 (1989)), as part of the procedures requisite to obtain permission from the NRC to exercise regulatory authority over nuclear waste, such as those present at Kerr-McGee's West Chicago facility. According to Kerr-McGee, its West Chicago facility is the only site in Illinois to which these rules could possibly apply. After making only minor modifications in the rules in response to Kerr-McGee's comments, the Department adopted them in final form on January 19, 1990. 14 Ill. Reg. 1333-78 (adopted Jan. 19, 1990).

Kerr-McGee alleged that the Department's effort to obtain jurisdiction over its West Chicago facility was designed to thwart the nearly completed proceedings before the NRC for on-site disposal of nuclear waste at the facility. Also, Kerr-McGee argued that the Department's rules pertaining to its West Chicago facility were tailored to further the Department's ability to obtain in State court an injunction against Kerr-McGee's on-site disposal plan.

Kerr-McGee alleged that the Department's rules relating to source-material milling facilities are invalid because (1)

they violate the Illinois Constitution's proscription of special legislation (Ill. Const. 1970, art. IV, §13); (2) they are contrary to various provisions of the Atomic Energy Act of 1954 (42 U.S.C. §§202.(o), 2114(c) (1988)); (3) they are inconsistent with and different from parallel Federal regulations governing nuclear by-product materials (10 C.F.R. pt. 40, app. A (1989)); (4) they amount to "targeted" rulemaking, which is an impermissible mix of regulatory and litigation functions within the Department and exceeds the Department's statutory authority; and (5) they are arbitrary, unreasonable, and capricious, and impose unreasonable regulatory burdens in that they (a) do not recognize existing NRC licenses for nuclear facilities and permit the Department to revoke such licenses, (b) do not provide for transfer to the Department and action by the Department on nuclear facility license and license amendment applications pending before the NRC, and (c) do not make appropriate distinctions between existing tailings sites and new tailings sites.

On the basis of the above allegations, Kerr-McGee asserted that an actual controversy exists between it and the Department. Kerr-McGee requested that a declaratory judgment be entered against the Department, holding its rules prescribing licensing requirements for source-material milling facilities to be arbitrary, capricious, contrary to law, and, accordingly, null and void. Kerr-McGee also requested such other relief "as is appropriate under the circumstances."

The Department filed a motion to dismiss Kerr-McGee's complaint for declaratory judgment on the bases that the action was premature and no actual controversy existed between it and Kerr-McGee. The Department pointed out that no agreement had yet been executed between Illinois and the NRC allowing the State to regulate nuclear waste of the type present at Kerr-McGee's West Chicago facility and, thus, the State is incapable of exercising regulatory authority over the site. The circuit court denied this motion, but allowed the Department's motion to certify for appeal the question presented by the Department's motion to dismiss. (See 107 Ill. 2d R. 308 (allowing interlocutory appeals by permission).) The court stated the question as follows:

> "'Whether, under the circumstances of this case, an actual controversy exists between plaintiff and defendant which entitles plaintiff to bring an action for declaratory judgment under Section 2-701 of the Code of Civil Procedure.'"

This court allowed the Department's motion for leave to appeal, pursuant to Supreme Court Rule 308 (107 Ill. 2d R. 308).

The positions of the parties to this appeal are quite simple. The Department contends there is no actual controversy between the parties because the rules which Kerr-McGee challenges are not presently effective and will not become effective unless, and until, the NRC permits the State to exercise regulatory authority over nuclear waste of the type present at Kerr-McGee's

West Chicago facility. The Department points out that because there is no certainty that this will ever occur, there is no certainty that the rules Kerr-McGee challenges will ever become applicable to Kerr-McGee. The Department argues that the courts should not be burdened with declaratory judgment actions such as this, which may well prove to be entirely advisory or hypothetical in nature.

Kerr-McGee states that its complaint alleges facts which establish an actual controversy exists between it and the Department and, therefore, properly states an action for a declaratory judgment. Kerr-McGee asserts that the posture of this case, in terms of the record and issues presented for review, is exactly the same as that in a case requesting judicial review of agency rulemaking. Kerr-McGee contends that the question of whether the rules at issue here are invalid under State law is of direct and immediate relevance to the NRC's decision as to whether the State should be allowed to assume regulatory authority over Kerr-McGee's West Chicago facility. Kerr-McGee suggests that holding these rules invalid on State law grounds after the NRC has transferred regulatory authority to the State could create a regulatory vacuum with respect to its West Chicago facility. Kerr-McGee maintains that neither a threat of immediate enforcement of a statute, a threat of personal injury, nor a threat of imminent harm are necessary before a declaratory judgment action to determine the validity of statutes or

regulations may be maintained, and the fact that the occurrence of some future event is a prerequisite to enforcement of administrative rules is of no consequence in determining whether they may be challenged in a declaratory judgment action.

Finally, Kerr-McGee maintains that if it waits until the NRC grants the Department permission to assume regulatory control over nuclear waste sites, such as its West Chicago facility, to contest the Department's rules governing source-material milling facilities, it might never be able to challenge the rules. This argument is grounded on a two-year limitation period on actions to challenge administrative rules for noncompliance with section 5 of the Illinois Administrative Procedure Act (Act) (Ill. Rev. Stat. 1989, ch. 127, par. 1005(b)), and there is no assurance that the NRC will rule on the State's request to assume regulatory authority within two years of the effective date of the rules at issue in the present case. The Department responds to this argument by stating that Kerr-McGee does not assert any challenge to its rules which is subject to the two-year limitation period contained in section 5 of the Act.

Section 2-701 of the Civil Practice Law provides:

> "The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of

> anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation *** and a declaration of the rights of the parties interested. *** The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." (Ill. Rev. Stat. 1989, ch. 110, par. 2-701(a).)

In order to maintain a declaratory judgment action, one need not have suffered an actual injury by virtue of a statutory enactment, and prosecution need not be imminent. However, the underlying facts and issues may not be premature or moot, and the courts should refrain from rendering advisory opinions or providing guidance regarding future events. (Illinois Gamefowl Breeders Association v. Block (1979), 75 Ill. 2d 443, 450, 389 N.E.2d 529, 531.) It is presumed that a validly enacted statute will be enforced (Hoagland v. Bibb (1957), 12 Ill. App. 2d 298, 303, 139 N.E.2d 417, 420), and a declaratory judgment action may be maintained where a statute casts doubt, uncertainty, and insecurity upon a plaintiff's rights or status and thereby damages his pecuniary or material interests. (Oak Park Trust & Savings Bank v. Town of Palatine (1981), 100 Ill. App. 3d 674, 679, 427 N.E.2d 298, 301.) In other words, a declaratory

judgment action may be maintained where statutes or administrative rules, which have cleared all hurdles prerequisite to their becoming fully effective, require one either to take a certain action or to refrain from a certain action, regardless of the actual probability of prosecution for noncompliance.

Measured by the above principles, Kerr-McGee's complaint does not state a cause of action for a declaratory judgment. At present, the rules Kerr-McGee seeks to invalidate impose no duties on Kerr-McGee. They require Kerr-McGee neither to take any action nor to refrain from taking any action in which it is presently engaged or plans to be engaged. These rules will impose duties on Kerr-McGee only if and when the NRC allows the State to assume regulatory control over nuclear waste such as that at Kerr-McGee's West Chicago facility.

It is possible that the rules at issue here will never become applicable to Kerr-McGee. The NRC may find, for instance, that the rules themselves are not in harmony with parallel Federal regulations, or the NRC may find other shortcomings in the Department's proposed regulatory scheme which result in the NRC's denying the State's request to assume regulatory control over source-material milling facilities. Disapproval by the NRC of the Department's rules governing such facilities could require the Department to withdraw the rules and substantially rewrite them. This could conceivably occur more than once. Under this scenario, Illinois courts could determine the validity of several

sets of rules which, due to action by a Federal regulatory agency, would never become effective. In these days of congested court dockets, we cannot countenance the possibility of a proceeding, or a series of proceedings, which would culminate in purely advisory decisions.

Moreover, the most complex issues raised by Kerr-McGee's complaint for declaratory judgment are those which involve questions of whether there is a conflict between the Department's regulations which Kerr-McGee challenges and Federal statutes and regulations pertaining to the same subject. Compared to these questions, the State law issues raised in Kerr-McGee's complaint--whether the Department's regulations violate the Illinois Constitution's prescription of special legislation and whether they amount to impermissible "targeted" rule-making--would be easy to resolve. Under the doctrine of primary jurisdiction, courts should defer decisions on matters which are within the specialized technical expertise of an administrative agency until the appropriate administrative agency has had an opportunity to consider them. (Kellerman v. MCI Telecommunications Corp. (1986), 112 Ill. 2d 428, 444-45, 493 N.E.2d 1045, 1052, cert. denied (1986), 479 U.S. 949, 93 L. Ed. 2d 384, 107 S. Ct. 434.) There are few cases in which application of this doctrine would be more appropriate than the present case. The NRC is unquestionably better qualified than the Illinois courts to consider, in the first instance, the complex questions

concerning the meaning of Federal statutes and regulations pertaining to nuclear safety which are presented by Kerr-McGee's complaint for declaratory judgment.

Contrary to Kerr-McGee's contentions, invalidation of rules promulgated by the Department governing source-material milling facilities after the NRC has given the State authority to regulate such facilities would not result in a regulatory vacuum. If the Department's rules would be invalidated on State law grounds after becoming effective, and the State law deficiencies in them could be cured, the Department could propose new rules which conform to State law. It would be highly unlikely that the changes designed to bring the rules in conformity with State law would create questions as to whether they conformed to Federal statutes and regulations pertaining to nuclear safety and, thus, the validity of the second set of rules could be considered by the Illinois courts on an expedited basis. In the meantime, the Department could exercise its emergency (Ill. Rev. Stat. 1989, ch. 127, par. 1005.02) or peremptory (Ill. Rev. Stat. 1989, ch. 127, par. 1005.03) rulemaking powers to enact temporary rules to regulate source material milling facilities. If for any reason it would prove impossible for the Department to fill a regulatory gap stemming from invalidation of its rules on State law grounds after the NRC had given the State authority to regulate source-material milling facilities, the NRC would have authority to do so. Section 2021(j) of the Atomic Energy Act of 1954 provides:

"(j) Reserve power to terminate or suspend agreements; emergency situations; State nonaction on causes of danger; authority exercisable only during emergency and commensurate with danger[.]

(1) The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, 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. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section.

(2) The Commission, upon its own motion or upon request of the Governor of any State, may, after notifying the Governor, temporarily

suspend all or part of its agreement with the State without notice or hearing if, in the judgment of the Commission:

> (A) an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside the State, and
>
> (B) the State has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.

A temporary suspension under this paragraph shall remain in effect only for such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger." (42 U.S.C. §2021(j), at 449 (1988).)

Given the Department's emergency and peremptory rulemaking powers, as well as the NRC's authority to terminate or suspend State authority to regulate nuclear materials, there is no possibility that source-material milling facilities would be left

unregulated as a result of the Department's rules being invalidated on State law grounds after the State has obtained authority to exercise regulatory jurisdiction over such facilities.

The cases on which Kerr-McGee mainly relies (Lake Carriers' Assn. v. MacMullan (1972), 406 U.S. 498, 32 L. Ed. 2d 257, 92 S. Ct. 1749; Underground Contractors Association v. City of Chicago (1977), 66 Ill. 2d 371, 362 N.E.2d 298; City of Chicago v. Department of Human Rights (1986), 141 Ill. App. 3d 165, 490 N.E.2d 53; Stone v. Omnicom Cable Television (1985), 131 Ill. App. 3d 210, 475 N.E.2d 223) do not support its argument that it is presently entitled to challenge the Department's rules by means of a declaratory judgment action. All these cases involved statutes or procedures which, unlike the rules here at issue, were in full force and effect at the time the declaratory judgment action was filed. The same is true of actions requesting judicial review of agency rulemakings. See A.E. Staley Manufacturing Co. v. Illinois Commerce Comm'n (1988), 166 Ill. App. 3d 202, 206, 519 N.E.2d 1130, 1133.

We also find no merit in Kerr-McGee's argument based on section 5 of the Act. (Ill. Rev. Stat. 1989, ch. 127, pars. 1005 through 1005.04.) As noted by Kerr-McGee, a challenge to an administrative rule based on noncompliance with this section must be commenced within two years of the rule's effective date. (Ill. Rev. Stat. 1989, ch. 127, par. 1005(b).) Subsections 5.02, 5.03, and 5.04 (Ill. Rev. Stat. 1989, ch. 127, pars. 1005.02,

1005.03, 1005.04) concern emergency rulemaking, peremptory rulemaking, and automatic repeal of rules. Clearly, none of these subsections are applicable to the case at bar. Subsection 5.01 (Ill. Rev. Stat. 1989, ch. 127, par. 1005.01) deals with public notice and comment requirements for proposed rules, notice to and action by the joint committee on administrative rules as to proposed rules, and the publication of adopted rules. In its complaint for declaratory judgment, Kerr-McGee does not allege the Department failed to comply with any of the procedural requirements prescribed by section 5 of the Act in promulgating the rules at issue in the present case. Therefore, under the facts of this case, there is no possibility that Kerr-McGee will be barred from asserting any of its objections to the disputed rules by virtue of the section 5(b) limitations period.

The circuit court order which denied the Department's motion to dismiss is reversed, and this cause is remanded to the circuit court with directions to dismiss Kerr-McGee's complaint for declaratory judgment.

Reversed and remanded with directions.

SPITZ and McCULLOUGH, JJ., concur.

STATE OF ILLINOIS
DEPARTMENT OF NUCLEAR SAFETY
1035 OUTER PARK DRIVE
SPRINGFIELD 62704
(217) 785-9900

TERRY R. LASH
DIRECTOR

September 26, 1989

Mr. Harold R. Denton, Director
Office of Governmental and Public Affairs
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 50852

Dear Mr. Denton:

This letter is in response to your letter of September 25, 1989, informing me that the U.S. Nuclear Regulatory Commission (NRC) intends to take no action in response to the recent activities of the Kerr-McGee Chemical Corporation in West Chicago, Illinois. On September 1, 1989, Kerr-McGee sent a letter to Leland Rouse, Chief, Uranium Fuel Licensing Branch, informing him of plans to relocate uranium mill tailings from off-site residential locations to the West Chicago Rare Earth's Facility. Kerr-McGee proposed to perform these activities under authorization granted to it by its 11e.(2) byproduct material license, which was issued by NRC. According to your letter, however, NRC has concluded that because NRC believes the tailings to be source material, Kerr-McGee's proposal does not fall within NRC's jurisdiction and, therefore, NRC is not required to take any regulatory action. The State of Illinois finds this posture undesirable and unacceptable.

The characterization of the material in West Chicago as source material is incorrect. As you know, litigation appealing the Commission's determination of the tailings as source material is currently pending before the United States Court of Appeals for the District of Columbia Circuit. Both the State of Illinois and Kerr-McGee contend that the material is byproduct material as defined in Section 11e.(2) of the Atomic Energy Act. Since Illinois does not acknowledge that the tailings are source material, any regulatory action by the Department of Nuclear Safety with respect to the tailings would fall outside the jurisdiction that was transferred to the State by execution of the Section 274(b) Agreement with NRC. Therefore, for the State to attempt regulation of the tailings before conclusion of the litigation would seriously undermine the State's position that the tailings are 11e.(2) byproduct material and undoubtedly would be challenged by Kerr-McGee in court.

The State of Illinois is doing everything within its authority to assure that the uranium mill tailings located in and near West Chicago are managed properly and in a manner that poses the least threat to public health and

safety. For this reason, the State has consistently objected to Kerr-McGee's proposal for disposal of tailings at the Rare Earth's Facility. While the State is encouraged by Kerr-McGee's initiative to undertake cleanup activities at off-site areas, any material that is collected as a result of these activities should be properly disposed of at a facility that can safely accept such wastes for disposal. The Rare Earth's Facility is not suitable for disposal of this off-site material.

The Department would emphasize that, regardless of whether the off-site materials are characterized as source material or byproduct material, the contamination of the residential properties occurred during a time when NRC was the sole regulatory authority over the West Chicago Rare Earth's Facility. NRC's refusal to address a problem that was created when it had sole regulatory jurisdiction is unacceptable. It is my hope that this most recent controversy involving the Rare Earth's Facility will encourage NRC to cooperate with the State's efforts to assure that all of the tailings are disposed of properly. Furthermore, NRC can resolve the jurisdictional issue by granting Illinois' formal application to amend the Section 274(b) agreement to cover 11e.(2) byproduct material, since execution of such an amendment would render the jurisdiction issue moot.

In the meantime, the State will do everything within its power to protect the health and safety of people of West Chicago. The Illinois Department of Nuclear Safety will continue to monitor Kerr-McGee's off-site cleanup activities to assure that they are performed in accordance with Kerr-McGee's license and the plan that was submitted to NRC on September 1, 1989. The State will also continue its activities to ensure safe disposal of the mill tailings.

Sincerely,

Terry R. Lash
Director

cc: Mr. A. Bert Davis
Administrator, Region III
U.S. Nuclear Regulatory Commission
799 Roosevelt Road
Glen Ellyn, Illinois 60137

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.

(Please see page 12)

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

Thorium removal moves closer to reality

New NRC decision puts waste in hands of Illinois department

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

By Tom Paris

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, 35-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 [illegible]. 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 West Chicago Park District.

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 1933 to 1967 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 6 million cubic feet of waste material in Kress Creek as well as another 4 million to 6 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 [illegible]

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

DAILY JOURNAL 12-18-89 PAGE 2

Kerr-McGee, state conclude waste hearings

The Associated Press

A ruling is expected early next year in a 10-year effort by an Oklahoma energy company to bury tons of radioactive waste in the middle of West Chicago.

Kerr-McGee Chemical Corp. and the state ended the last round of public hearings on the issue on Friday before the U.S. Atomic Safety and Licensing Board, an arm of the Nuclear Regulatory Commission.

Kerr-McGee is trying to get federal approval to bury more than 400,000 cubic feet of the radioactive waste, while at the same time the state of Illinois is trying to gain control over how and where the material is buried. The state would like to force relocation of the material outside its borders.

"It will be a horse race," said Douglas Rathe, an assistant Illinois attorney general who represented the state in the last two days of the hearing.

However, Steve England, chief legal officer of the Illinois Department of Nuclear Safety, said that even if Kerr-McGee wins approval to bury the waste in West Chicago, the state's effort to wrest control will continue.

The NRC is expected to rule in March on a petition by the Illinois agency.

But Kerr-McGee, which stockpiled the waste at its abandoned factory site in West Chicago, hopes to get approval to bury it before then. Unidentified sources told the Chicago Tribune that the board could rule within six weeks.

"All I know," Rathe said, "is that this board is likely to make a decision in early 1990. I'm not sure if that means before March or not."

It would cost the company $150 million to ship its waste elsewhere compared to about $20 million to bury it in West Chicago.

But what also is at stake is whether the burial of the waste will poison the city's drinking water.

Rathe said it's Illinois' position that there are deficiencies in the design that could endanger generations to come.

"They're putting radioactivity over a major supply of drinking water," he said. "There's no actual data. This whole thing depends on models that Kerr-McGee and the NRC staff have come up with."

CHICAGO TRIBUNE 10-18-90 PAGE 1

West Chicago thorium victory

State gains control of waste and vows it must go

By P. Davis Szymczak

It could be years before railroad cars loaded with radioactive thorium waste clog out of West Chicago, even though the U.S. Nuclear Regulatory Commission on Wednesday ceded control over the waste to the Illinois Department of Nuclear Safety, which has vowed that the waste must be shipped to a Utah disposal facility.

The commission's decision to relinquish control to the state capped two years of technical study, hearings and political arm-twisting, and set off waves of delight in the far western suburb as residents celebrated the anticipated removal of the sandy-like waste that has damaged property values.

But Tom Orciger, head of the state agency, warned that a timetable is a little uncertain as to when the first train car will pull up to the abandoned factory site where much of the waste has been taken. "It will be two or three years before anything could be moved," he said.

First, the commission will hold a public hearing this spring. Then, the state agency will assess how Kerr-McGee wants to dispose of the waste.

And considering that Kerr-McGee vice president Tom McDaniel has said in the past that his company will sue if Illinois tries to make good on its threat to move the material out of Illinois, Orciger's "two to three years" scenario might be optimistic, some observers say.

"There are a lot of issues that potentially are affected by what the NRC has decided today, not the least of which is a number of legal proceedings," Kerr-McGee spokesman Myron Cunningham said Wednesday, adding that the company will be taking a "careful and deliberate" approach.

Kerr-McGee will make some move in a matter of days, Cunningham said in a telephone call from Kerr-McGee's Oklahoma City headquarters. But first, company officials plan to meet with representatives from the commission and the state agency, he added.

But even the warnings of delay could not dampen moods in West Chicago.

"This is great. It's what we've

See Waste, pg. 22

From Page 1

Waste

Continued from page 1

been waiting for," said Linda Chasteen, who moved to West Chicago two years ago. "I'm thrilled."

Chasteen was among the 50 or so West Chicagoans who applauded, cheered and waved the banners and signs of the Thorium Action Group as Gov. James R. Thompson opened a news conference on the commission's decision.

"We're ecstatic. This is the day we've been waiting for," said Mike Kasiewicz, another member of TAG, a citizens' group that helped spearhead the fight to rid West Chicago of the thorium.

"It's definitely not over yet," Kasiewicz said. But as Nancy Asian, another TAG member, put it, "There was a group [of concerned citizens] 11 years ago, and I was involved in another four years ago. This is the first time we've gotten any momentum."

"I got goosebumps," said West Chicago Mayor Paul Netzel.

The cheers and applause peaked when Thompson noted TAG's movement in a laundry list of acknowledgements that praised "bipartisan" efforts in Springfield and in Washington to bring about the transfer.

The governor mentioned Illinois Atty. Gen. Neil Hartigan, a Democrat; Du Page County State's Atty. James Ryan, a Republican; state Rep. Don Hensel (R-West Chicago), state Sen. Doris Karpiel (R-Roselle); and Yorkville Republican J. Dennis Hastert, the congressman representing West Chicago.

The state had sought control for two years under a federal law that requires the commission to relinquish its authority over some types of radioactive material to states that prove their competence as regulators. At the same time, Kerr-McGee had sought permission from the commission to bury the material in West Chicago.

The commission last winter gave Kerr-McGee permission to construct a clay-lined cell to inter the waste in West Chicago at an abandoned factory site at Factory and Ann Streets. But a commission official who asked not to be identified said that decision was made moot by Wednesday's vote.

Tribune photo by Terry Ve

Members of the Thorium Action Group express their gratitude Wednesday at a press conference held by Gov. James Thompson.

A. Eugene Rennels, West Chicago's former mayor who during his 12 years in office helped write the legislation with Hensel and Karpiel that launched the state's effort to take over the site, said: "After all these years, the lobbying, the bill writing, I felt like sitting down and crying. We're two-thirds of the way home."

"This is a good day. This is a great day for everyone in West Chicago," Rennels said.

Thompson will sign documents making the transfer official Nov. 1. Then will come the commission's public hearing this spring.

According to Jan Strasma, spokesman for the commission's regional office in Glen Ellyn, the hearing will ensure that Illinois' regulations meet or exceed the commission's standards in strictness. The state, which contends it is stricter, will then assess how Kerr-McGee wants to dispose of the waste.

The Thompson news conference was called within three hours of the commission's 4-0 vote that turned over to the state the 500,000 to 750,000 tons of contaminated debris buried or piled around 40 or more sites in western Du Page County.

"In March 1990, I stood on this spot and assured the people of West Chicago that [this material], 13 million cubic feet of it, would not be disposed of on this site as a health threat to West Chicago," the governor said. "This is a threat that the people of West Chicago should have never been faced with."

Kerr-McGee bought into its West Chicago problem when it merged with American Potash Co. in 1967 to secure mineral rights in the West.

American had until then operated a thorium and rare earth processing plant at Factory and Ann streets in West Chicago, a factory that in the 1930s manufactured gaslights under yet another owner—Lindsay Light and Chemical Co.

During World War II, the factory produced chemicals used in early atomic bomb research and such processes continued after the war as America grappled not only with military applications of atomic energy but nuclear power plant sources as well.

by Gail Wallace

Finally.

In what has been dubbed a "great victory" for West Chicago and Illinois, the federal Nuclea. Regulatory Commission yesterday announced its long-awaited decision to transfer control of radioactive waste found at Kerr-McGee Chemical Corp.'s closed factory site to the state.

And Kerr-McGee foes, from federal officials on down, were celebrating Wednesday.

"This is a great victory and it's really been long overdue," said Scott Palmer, an aide to U.S. Representative Dennis Hastert. "Congressman Hastert is very, very happy about it."

The transfer paves the way for Illinois to take measures to force Kerr-McGee McGee to move half-million tons of thorium waste. Although the company is expected to file some sort of lawsuit to block the move, Palmer said. Kerr-McGe 'esman Myron Cunningham said that company officials have seen a written order of the NRC agreement, they will request a meeting with the NRC and the state before taking any action.

Gov. James Thompson held a press conference outside the factory site Wednesday afternoon, which was attended by a group of about 75, including city and state officials, as well as the city's grass roots group, TAG (Thorium Action Group). Thompson thanked those who have pushed for the waste's removal. Referring to a visit he paid the city in March, he said, "I stood at this spot and told West Chicago I would make sure the 500,000 tons of nuclear waste would not be buried here."

"It's a great relief to have jurisdiction handed to the state," said West Chicago Mayor Paul Netzel. "Upon hearing (the news), I had goose bumps. He added, "I feel that even more satisfaction is felt on the part of the governor, Representative (Donald) Hensel, and other people who have (fought for this) for longer than I have."

Former mayor A. Eugene Rennels, who for years has fought for the waste's removal, said he was "overwhelmed. I'm so used to setbacks.

"After 12 long years of working with Representative Hensel and other people, I felt like sitting down and crying," Rennels said.

Gov. Thompson and chairman of the NRC will sign an amendment to an agreement giving the state control by the end of the week. The transfer will go into effect Nov. 1, said NRC spokesman Jan Strasma.

Once the state, under the Illinois Department of Nuclear Safety, is ready to apply its regulations to the Kerr-McGee site, the NRC will hold a public hearing, probably in the spring, "to ins[illegible] that Illinois standards are at least as st[illegible] federal standards," Palmer said. "Th[illegible] can be stricter."

He added, "We want to regulate this more strictly than Kerr-McGee did."

Kerr-McGee must also ask the West Chicago City Council for official permission to keep the waste in the city, as one of its options, said Illinois Department of Nuclear Safety Director Tom Ortizger, who estimated it could cost the company $120 million to ship the thorium off site.

TAG (Thorium Action Group) member Mike Kasiewicz (right) and other TAG members were all smiles yesterday after hearing that Illinois has been awarded control of the Kerr-McGee radioactive waste at Ann and Factory streets. TAG, city and state officials converged at the plant site Wednesday afternoon for a surprise visit by Gov. James Thompson. Right: Thompson (right) congratulates state Rep. Donald Hensel (R-50, West Chicago) and others who have pushed for the removal of the waste. Press photos by Erik Mahr

The NRC last February issued Kerr-McGee a license allowing it to entomb the material in a clay cell. West Chicago and the state appealed the decision. Illinois will now try to stop the appeals process, since the issue is now moot, Palmer said.

The NRC had been accused of stalling on the long awaited transfer, which officials were expecting last winter. Kerr-McGee tried to delay the decision by requesting an NRC hearing before the transfer took place, but the NRC on Wednesday denied that request.

Jeff Smith and Merle Burleigh contributed to this [illegible]art.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

January 7, 1987

In the Matter of	)	
KERR-McGEE CHEMICAL CORPORATION	)	Docket No. 40-2061-SC
(Kress Creek Decontamination)	)	

MEMORANDUM AND ORDER

Appellee Kerr-McGee Chemical Corporation has moved (on November 21, 1986) for reconsideration, or alternatively referral to the Commission, of our November 13, 1986, Memorandum and Order (unpublished) holding the NRC staff's appeal in this proceeding in abeyance. Kerr-McGee seeks an expeditious decision in that appeal -- i.e., before the NRC transfers its jurisdiction over the subject matter of this show cause proceeding to the State of Illinois pursuant to an agreement authorized by section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021.

Our November 13 Memorandum and Order thoroughly addressed Kerr-McGee's initial Motion for an Expedited Decision (October 16, 1986). In brief, the NRC staff had advised us that in the near future it would move to "terminate" this proceeding, which the staff initiated and

in which it is now the appellant.[1] Kerr-McGee (which prevailed before the Licensing Board), however, seeks a prompt "final" decision (presumably in its favor) that assertedly could be legally binding in any future proceeding involving the same issues that might be brought against Kerr-McGee in Illinois or elsewhere. For our part, we are simply reluctant to devote additional NRC resources to a complicated matter over which the agency is about to yield its jurisdiction. See infra note 3.

Kerr-McGee's motion for reconsideration expands on its previous arguments but adds nothing to compel a change in our decision to hold this proceeding in abeyance. When the staff does move to terminate,[2] however, we would be willing to consider a request to do only that (i.e., terminate) and to decline to vacate either the Licensing Board's initial decision or the show cause order that initiated this proceeding. Ordinarily, when an applicant for a nuclear facility construction permit or operating license seeks to

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[1] The staff has not indicated that it would "withdraw its appeal" -- action that would have consequences different from "termination" of the proceeding.

[2] In response to Kerr-McGee's motion and certain questions we posed in our Order of December 3, 1986 (unpublished), the staff states that the agreement with Illinois is now likely to be executed by early March 1987. We assume that the staff's motion will follow soon thereafter.

terminate an ongoing licensing proceeding and withdraws its application while on appeal, we vacate the underlying licensing board decisions on the ground of mootness. See Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867, 869 (1980). As explained in Sterling, this action is necessary in order to eliminate the authorization for the issuance of a permit (so that the ministerial act of revoking the permit can be performed) and is "dictated by considerations of fundamental fairness" to those who might have challenged that authorization. Id. at 869, 868.

In this proceeding, however, maintaining the status quo may be more appropriate than vacating the Licensing Board's decision and/or the show cause order. In the first place, unlike other proceedings involving motions to terminate, this proceeding would not really be moot in the usual sense -- i.e., lacking in controversy. Lacking instead would be the legal authority for us to act, once the NRC executes the agreement transferring jurisdiction to Illinois.[3] Moreover,

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[3] The staff states unequivocally that the subject matter of this proceeding, which the staff initiated, is "source material" and that regulatory authority over it will be transferred to the State of Illinois. Whether the staff has correctly characterized the material involved here is neither evident from the record below nor relevant to the matter now at hand. If the NRC staff says it is transferring its jurisdiction over this proceeding, we

(Footnote Continued)

because the Licensing Board's decision is so limited to the special facts of this case, there is no need for the concern about its precedential impact on other Commission cases that has prompted vacation of board decisions in other proceedings. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978). Finally, and perhaps most important, equitable considerations here appear to militate against vacating the Licensing Board's decision. To be sure, we see no impediment to a staff motion to terminate this proceeding as a consequence of its transfer agreement, and we have the discretion to defer further consideration of the staff's appeal pending the filing of such motion. But, at the same time, it seems unfair to deprive Kerr-McGee of the successful defense of its activities before the Licensing Board by abrogating that decision. Simply terminating the case as it stands following that Board's decision -- neither affirming nor reversing on appeal -- may present a reasonable solution to this dilemma. Decisionmakers in any possible future proceedings could then determine the legal

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(Footnote Continued)
perceive no basis on which to conclude otherwise and must accept that claim.

effect of the Licensing Board's decision -- a matter on which we have no cause to speculate.[4]

In any event, as we stressed in our November 13 Memorandum and Order (at 4), at this time we are merely deferring consideration of the staff's appeal. When the staff actually moves to terminate this proceeding, we will then consider exactly what action might be appropriate in the circumstances, and we expect the parties to address that in their pleadings.

As for Kerr-McGee's alternative request to refer this matter to the Commission, movant merely recites the criteria of 10 C.F.R. § 2.730(f) required for such action -- i.e., prevention of (a) detriment to the public interest or (b) unusual delay or expense. It wholly fails to explain or to show how either criterion is satisfied here, nor is this self-evident.

Kerr-McGee's motion for reconsideration, or referral, of our November 13, 1980, Memorandum and Order holding this proceeding in abeyance is denied.

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[4] We can see no basis for Kerr-McGee's assumption that, in the event of some future legal proceeding in another forum involving Kress Creek, it would be deprived of its due process rights.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

2776

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

In the Matter of	)	
	)	
US ECOLOGY, INC.	)	Docket No. 27-39 SC
	)	
(Sheffield, Illinois Low-Level Radioactive Waste Disposal Site)	)	
	)	
	)	

'87 JUN 15 P1:22

6/12/87

STATE OF ILLINOIS' OBJECTIONS TO MOTIONS TO VACATE SHOW CAUSE ORDER AND BOARD DECISIONS

NOW COME the People of the State of Illinois, by and through NEIL F. HARTIGAN, Attorney General of the State of Illinois, and present these Objections to the Motions of the NRC Staff and USEC to vacate the orders of the Atomic Safety and Licensing Board and the NRC Staff's Order to Show Cause. In support of these objections, the People state as follows:

1. On May 13, 1987, the Nuclear Regulatory Commission approved the proposed agreement with the State of Illinois whereby the Commission relinquished and the State accepted regulatory authority over, among other things, radioactive waste disposal. The Chairman executed the agreement on behalf of the NRC on May 14, 1987, and Governor James R. Thompson executed it on behalf of the State on May 18, 1987.

2. On May 28, 1987, the NRC staff filed a motion to terminate the proceeding before this Appeal Board on the basis that jurisdiction over the matter had been transferred to the State pursuant to the agreement. On May 20, 1987, US Ecology filed a motion seeking vacature of the Licensing Board's February

DS03

20th and March 10, 1987 decisions which were the subject of the instant appeal. On May 28, 1987, the Staff joined US Ecology in urging vacature of the decisions and further seeks leave to withdraw its show cause order issued March 20, 1979.

3. The People of the State of Illinois respectfully submit that the Appeal Board is without authority to entertain such requests and should enter an order solely terminating the proceeding before it, closing Docket NO. 27-39 SC.

4. Both US Ecology and the Staff rely on a line if cases which suggest that an Appeal Board should vacate decisions of the Licensing Board when the case becomes moot prior to the time the Appeal Board renders its decision [NRC Staff Motion at 6-8; US Ecology's Motion at 5-6]. The principle of law cited by the Staff and US Ecology is inapplicable to the present case and provides no authority for further rulings by the Appeal Board. In the cases relied upon by the movants, proceedings before the Appeal Board were terminated because the case had become moot, that is, circumstances had become such that no real controversy remained between the parties.

Unlike the Sterling case, a real controversy remains here. US Ecology has not relented from its posture that it can and in its view, has terminated its license. The factual circumstances giving rise to this enforcement proceeding have not changed and live controversy remains.

What has changed is the tribunal empowered to decide the controversy. The agreement between the State of Illinois and

the NRC passed jurisdiction -- the power to decide the case -- to the Illinois Department of Nuclear Safety. Unlike Sterling where there was no question of jurisdiction presented, the situation at hand in the present case prevents this Appeal Board from entering any order other than one which closes its docket with respect to this matter.

5. Moreover, any concern of prejudice to US Ecology from the present Board decisions is unwarranted. As the Staff correctly notes, the Licensing Board's decisions are not final decisions and are subject to further review. Only the forums for seeking that review have changed as a result of the passing of jurisdiction. This enforcement proceeding will merely continue in the State forum and judicial review is affordable pursuant to the State's Administrative Review Law. The State which now administers the low-level rad program presumably must do so in a manner consistent with federal requirements. As such, sound administrative policy counsels and supports the notion that the case, as it presently stands, should transfer to the Department's jurisdiction. Administrative and judicial economy will not be served by requiring the State or US Ecology to begin anew an enforcement proceeding which has been litigated over several years merely to return to the present posture.

For the above and foregoing reasons, the People of the State of Illinois respectfully request the Atomic Safety and Licensing Appeal Board to deny the Motions of US Ecology and the NRC Staff to vacate the orders entered below. The present case does not present a situation of a mootness, but rather is one of

loss of jurisdiction -- the very ability to act with respect to the matter at hand. Because the Appeal Board no longer has jurisdiction, and no purpose would be served by the sought-after relief, the State of Illinois respectfully requests the Appeal Board to enter an order solely terminating Docket No. 27-39 SC.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: Henry L. Henderson (GMR)
HENRY L. HENDERSON
Assistant Attorney General
Environmental Control Division
100 West Randolph Street, 13th Flr.
Chicago, IL 60601 (312) 917-3359

DATE: June 12, 1987

Of Counsel:

H. Alfred Ryan
Chief, Environmental Control Division
Gabriel M. Rodriguez
Diane Rosenfeld Lopata
Assistant Attorneys General

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

In the Matter of	)	
	)	
US ECOLOGY, INC.	)	Docket No.
	)	27-39 SC
(Sheffield, Illinois Low-Level Radioactive Waste Disposal Site)	)	
	)	
	)	
	)	

'87 JUN 15 A11:22

CERTIFICATE OF SERVICE

I hereby certify that copies of State of Illinois Objections to Motions to Vacate Show Cause Order And Board Decisions in the above-captioned cause have been served upon the persons on the attached service list by deposit in the United States mail on this 12th day of June, 1987.

* Alan S. Rosenthal
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Thomas S. Moore
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Robert L. Fonner, Esq.
Assistant Chief Hearing
Counsel
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

B. Paul Cotter, Jr.
Administrative Judge
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel

Dr. Terry R. Lash
Director, Department of
Nuclear Safety
1035 Outer Park Drive
Springfield, IL 62704

James R. May, Esq.
State's Attorney
Bureau County Courthouse
Princeton, IL 61356

* R. Lee Armbruster, Esq.
General Counsel
U.S. Ecology, Inc.
P.O. Box 7246
Louisville, KY 40207

John M. Cannon, Esq.
Mid-American Legal
Foundation
20 North Wacker Drive
Suite 1725
Chicago, IL 60606

* Mark J. Wetterhahn
Conner & Wetterhahn, P.C.
Suite 1050
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Docketing and Service
Branch
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Robert Russell, Esq.
Johnson, Martin & Russell
10 Park Avenue West
Princeton, IL 61356

D.J. McRae, Esq.
217 West Second Street
Kewanee, IL 61433

Charles F. Eason, Esq.
Director for Governmental
Affairs
American Ecology, Inc.
1700 North Moore Street
Suite 1925
Arlington, VA 22209

Gabriel M. Rodriguez

GABRIEL M. RODRIGUEZ

* Express Mail

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Kerr-McGee Opposition to Motion to State and City Motion to Termate and Vacate to be served by express mail (or, as indicated by an asterisk, by first-class mail), postage prepaid, on this 13th day of November 1990, as follows:

Administrative Judge
Thomas S. Moore, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
4350 East-West Highway, Room 529
Bethesda, MD 20814

Adminstrative Judge
Howard A. Wilber, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
4350 East-West Highway, Room 529
Bethesda, MD 20814

Administrative Judge
Christine N. Kohl
Atomic Safety and Licensing Appeal Board
4350 East-West Highway, Room 529
Bethesda, MD 20814

John H. Frye, III, Chairman *
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James H. Carpenter *
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline *
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ann P. Hodgdon, Esq.
Patricia Jehle, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Steven J. England, Esq. *
Illinois Department of Nuclear Safety
1035 Outer Park Drive
Springfield, Illinois 62704

Carla D. Davis
Douglas Rathe, Esq.
J. Jerome Sisul
Assistant Attorney General
Environmental Control Division
State of Illinois Building
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

Robert D. Greenwalt, Esq. *
City of West Chicago
100 Main Street
West Chicago, IL 60185

James V. Karaganis, Esq.
James D. Bruslan, Esq.
Karaganis & White Ltd.
414 North Orleans Street, Suite 810
Chicago, Illinois 60610

Jeffrey B. Renton, Esq.
Environmental Protection Agency
Office of General Counsel
Air & Radiation Division (LE-132A)
401 M Street, S.W.
Washington, D.C. 20460

Mark M. Radell
Assistant Regional Counsel
Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Mr. Carl Bausch *
Assistant General Counsel
Executive Office of the President
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Docketing & Service Section (3)
Office of the Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 5th Floor
Bethesda, Maryland 20555

Richard A. Meserve