

Harold J. Spelman and Associates

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July 28, 1982

Executive Director for Operations
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

APPEAL OF INITIAL FOIA DECISION

82-A-16E (82-255)

82-A-17E (82-256)

82-A-18E (82-257)

Rec'd 8-2-82

APPEAL FROM INITIAL FOIA DECISION

RE: Withholding Under FOIA-82-255, 82-256, 82-257

Dear Sir:

This is an appeal under Subsection (a)(6) of the Freedom of Information Act (FOIA) as amended, 5 U.S.C. Section 552 and NRC Regulation, 10 C.F.R. 9.11.

I am in receipt of letters from J. M. Felton, NRC Director of Division of Rules and Records. Those letters refer to the above captioned FOIA Requests. The letters denied production of many documents in their entirety which I had requested on May 25, 1982 and May 26, 1982. Enclosed please find copies of those three requests and a copy of Mr. Felton's response. Because of the similarity of the documents and because Exemption 5 is claimed by the agency as to all of the documents, I am combining the three requests for purposes of this appeal.

I request reconsideration of the agency's withholding of the documents under Exemption (5) of FOIA. The exemptions from disclosure are to be interpreted narrowly, Vaughn v. Rosen 484 F. 2d 820, 823 (D.C. Cir, 1973), and withholding under an exemption is discretionary with the agency.

The agency's claim of exemption for the documents in this case ignores their very purpose and content. Our requests were for preliminary draft environmental impact statements (EIS). According to your letters, documents withheld contain information "leading

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Executive Director for Operations

RE: Withholding Under FOIA-82-255, 82-256, 82-257

July 28, 1982

Page Two

toward development of the published draft EIS" for decommissioning and stabilization of the Kerr-McGee rare earth facility in West Chicago, Illinois.

According to the National Environmental Policy Act (NEPA), the development of an EIS is a public process. 42 U.S.C. § 4332(2). The withholding of documents relating to the development of an EIS violates the spirit, if not the letter, of the NEPA. The public is to receive environmental statements and comments prior to the agency action for which an EIS is prepared (42 U.S.C. § 4332(2)); however, the withholding of background and draft documents undermines the contemplated public input under the NEPA.

Furthermore, the withholding of these documents appears to violate the regulations promulgated under the NEPA by the Council on Environmental Quality (CEQ). 10 C.F.R. § 1506.6(f) mandates agency disclosure of underlying documents relating to environmental impact statement, "without regard to the (FOIA) exclusion for inter-agency memoranda where such memoranda transmit comments of federal agencies on the environmental impact of the proposed action." This regulation is binding on your agency under 40 C.F.R. § 1500.3.

Because of the obvious and substantial interest of the citizens of West Chicago in actions regarding the former thorium processing facility in their city, it is in the public interest to disclose the documents as requested. In this manner, the citizens may more meaningfully understand and participate in actions involving the site.

Mr. Felton's letters to me indicated that there were no segregable portions of the documents that could be released. In light of the heavily factual nature of environmental impact studies, I respectfully request your review of this decision as well as the decision to withhold in toto.

Executive Director for Operations

RE: Withholding Under FOIA-82-255, 82-256, 82-257

July 28, 1982

Page Three

I expect to receive a reply to this appeal letter within 20 working days. If you have any questions or comments on this matter, please contact me at (312) 731-1580. Thank you.

Yours very truly,

Harold J. Spelman

Harold J. Spelman
Attorney for City of West Chicago,
Illinois

HJS:PLF:bao
Enclosures



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

June 25, 1982

RECEIVED JUL 1 1982

Harold J. Spelman, Esquire
Harold J. Spelman and Associates
200 High Street
P.O. Box 190
West Chicago, IL 60185

IN RESPONSE REFER
TO FOIA-82-256

Dear Mr. Spelman:

This is in response to your letter dated May 26, 1982 in which you requested, pursuant to the Freedom of Information Act, copies of all records relating to any preliminary draft environmental impact statement (EIS) subsequent to December 1981 for the Rare Earths Facility in West Chicago, Illinois. (In addition to the preliminary drafts dated December 1980, May 1981, and December 1981, addressed in responses to FOIA-82-257 FOIA-82-255, and FOIA-81-464, respectively, a preliminary draft EIS was prepared in February 1982 and is being addressed in this response to FOIA-82-256.)

As you know, with the technical assistance of a contractor, Department of Energy's Argonne National Laboratory, NRC developed and distributed a draft EIS, NRC Report No. NUREG-0904 "Draft Environmental Statement related to the decommissioning of the Rare Earths Facility, West Chicago, Illinois" dated May 1982, a copy of which was provided to you. By notice published May 20, 1982 (47 FR 21943), NRC informed the public that this draft EIS is available for public inspection and comment and that comments are due by July 6, 1982. Upon consideration of comments submitted on this draft EIS, NRC will prepare a final EIS.

A draft EIS and a final EIS, and records relating to an EIS, are routinely made available to the public in accordance with provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq., 4332) and NRC's regulations found at 10 CFR Part 51. Thus, with the exception of records discussed below, pertinent NRC records which to date have been generated and retained have already been made available for public inspection and copying at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555; the Local Public Document Room for the Kerr-McGee site which is located in the West Chicago Public Library, 332 E. Washington Street, West Chicago, Illinois 60185; and distributed to persons, such as the Mayor of West Chicago and yourself, on the Service list. Such records include the Kerr-McGee decommissioning plan and amendments, which are referenced in the preface of the draft EIS.

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Upon search of pertinent files for any records subject to your request which have not already been made available to the public as noted above, NRC staff located five records. I have been informed by staff of NRC's Office of Nuclear Material Safety and Safeguards that most of NRC's communications to Argonne were not committed to writing, or retained, but were, instead, transmitted to Argonne by means of telephone conversations and meetings.

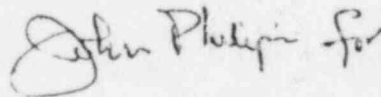
The record identified on enclosed Appendix A is being provided to you at this time.

Four additional records, identified on enclosed Appendix B, generated by the NRC staff and contractor, are working documents in which recommendations, opinions and advice are expressed, leading toward development of the published draft EIS (NUREG-0904). There are no releasable segregable portions of these documents. We believe that release of these records would impair NRC's ability to freely formulate proposed policies in such matters. Therefore, these records are being withheld from public disclosure pursuant to exemption (5) of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The persons responsible for this denial are the undersigned and Mr. John G. Davis.

This denial may be appealed to the Commission's Executive Director for Operations within 30 days from the receipt of this letter. As provided in 10 CFR 9.11, any such appeal must be in writing, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision".

Sincerely,



J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosures: As stated

Appendix A

Record enclosed:

1. 3/19/82 Memo to Cunningham, et. al., from Nixon, "Revised Draft of EIS for West Chicago", w/o stated enclosure, "Summary and Conclusions" mentioned in Appendix B to this letter.

Appendix B

Records withheld:

1. 2/82 Preliminary draft EIS.
2. Undated Draft "Summary and Conclusions" section of the EIS (stated enclosure to 3/19/82 memo identified in Appendix A).
3. Undated Comments by R. G. Page noted in text of the draft "Summary and Conclusions" section identified in No. 2 above.
4. Undated Comments by R. E. Cunningham noted in text of the draft "Summary and Conclusions" section identified in No. 2 above.

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WEST CHICAGO, IL 60185

May 26, 1982

FREEDOM OF INFORMATION ACT REQUEST

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-82-256

Rec'd 6-1-82

Freedom of Information Act
Director, Office of Administration
United States Nuclear Regulatory Commission
Washington, D. C. 20555

RE: Any Preliminary Draft
Environmental Impact Statement
for West Chicago, Illinois
Rare Earth Facility prepared
by Argonne National Laboratory
submitted subsequent to
December, 1981.

Dear Sir:

Pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. §552), and Regulations promulgated by your Agency thereunder (10 C.F.R. §9.1) (the "Act" and "Regulations"), we hereby request disclosure of copies of all documents and other materials available from your Agency relating to the above-referred matter.

Your Agency is believed to have custody of these documents, but if it does not, we hereby request prompt notice of their current location. Under the Act, Regulations and pertinent case law, these documents are available to us and to other members of the public. Current interpretation of the Act and Regulations does not exempt these documents from required disclosure.

In the event that this request is denied, in whole or in part, we hereby request a detailed statement of the reason or reasons for withholding such documents from the public and an index or similar statement of the nature of the documents withheld. In the event of deletions, we request that a reason be stated for each partial denial of access. To expedite this request, we would be willing to discuss specific instances of denial, whether whole or partial, deletion, or other exemption claims in advance of a final decision by the Agency.

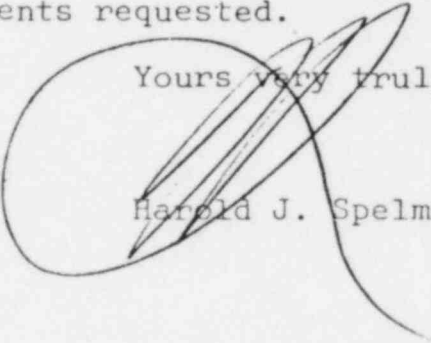
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Nuclear Regulatory Commission
May 26, 1982
RE: Freedom of Information Act
Page Two

In accordance with the Act and Regulations, we expect that your usual fees for searching and reproduction of records will be waived because of our client's status as a local government entity. 10 C.F.R. §914a (a)(2). Your furnishing the requested information will be of primary benefit to the public since our concern is the health and safety of the citizens of West Chicago, Illinois, the site of the Kerr-McGee facility in the above referenced matter. In order to expedite this request in the event your Agency does not waive search and copying fees for the requested documents, we are willing to incur reasonable charges for those expenses, in accordance with the Act and Regulations, upon presentation by your Agency of the documents and an invoice.

Please direct written inquiries and notice to the above given West Chicago, Illinois address. Our telephone number is 312/231-1580. We look forward to hearing from you within ten (10) business days with the documents requested.

Yours very truly,



Harold J. Spelman

HJS:PLF:bao

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July 28, 1982

Executive Director for Operations
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

APPEAL OF INITIAL FOIA DECISION

82-A-16E (82-255)

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I request reconsideration of the agency's withholding of the documents under Exemption (5) of FOIA. The exemptions from disclosure are to be interpreted narrowly, Vaughn v. Rosen 484 F. 2d 820, 823 (D.C. Cir, 1973), and withholding under an exemption is discretionary with the agency.

The agency's claim of exemption for the documents in this case ignores their very purpose and content. Our requests were for preliminary draft environmental impact statements (EIS). According to your letters, documents withheld contain information "leading

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Executive Director for Operations
RE: Withholding Under FOIA-82-255, 82-256, 82-257
July 28, 1982
Page Two

toward development of the published draft EIS" for decommissioning and stabilization of the Kerr-McGee rare earth facility in West Chicago, Illinois.

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Furthermore, the withholding of these documents appears to violate the regulations promulgated under the NEPA by the Council on Environmental Quality (CEQ). 10 C.F.R. § 1506.6(f) mandates agency disclosure of underlying documents relating to environmental impact statements "without regard to the (FOIA) exclusion for inter-agency memoranda where such memoranda transmit comments of federal agencies on the environmental impact of the proposed action." This regulation is binding on your agency under 40 C.F.R. § 1500.3.

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Executive Director for Operations

RE: Withholding Under FOIA-82-255, 82-256, 82-257

July 28, 1982

Page Three

I expect to receive a reply to this appeal letter within 20 working days. If you have any questions or comments on this matter, please contact me at (312) 231-1580. Thank you.

Yours very truly,

Harold J. Spelman

Harold J. Spelman
Attorney for City of West Chicago,
Illinois

HJS:PLF:bao
Enclosures



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

June 25, 1982

Harold J. Spelman, Esquire
Harold J. Spelman and Associates
200 High Street
P.O. Box 190
West Chicago, IL 60185

IN RESPONSE REFER
TO FOIA-82-257

Dear Mr. Spelman:

This is in response to your letter dated May 25, 1982 in which you requested, pursuant to the Freedom of Information Act, copies of all records relating to the December 1980 preliminary draft environmental impact statement (EIS) for the Rare Earths Facility in West Chicago, Illinois.

As you know, with the technical assistance of a contractor, Department of Energy's Argonne National Laboratory, NRC developed and distributed a draft EIS, NRC Report No. NUREG-0904 "Draft Environmental Statement related to the decommissioning of the Rare Earths Facility, West Chicago, Illinois" dated May 1982, a copy of which was provided to you. By notice published May 20, 1982 (47 FR 21943), NRC informed the public that this draft EIS is available for public inspection and comment and that comments are due by July 6, 1982. Upon consideration of comments submitted on this draft EIS, NRC will prepare a final EIS.

A draft EIS and a final EIS, and records relating to an EIS, are routinely made available to the public in accordance with provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq., 4332) and NRC's regulations found at 10 CFR Part 51. Thus, with the exception of records discussed below, pertinent NRC records which to date have been generated and retained have already been made available for public inspection and copying at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555; the Local Public Document Room for the Kerr-McGee site which is located in the West Chicago Public Library, 332 E. Washington Street, West Chicago, Illinois 60185; and distributed to persons, such as the Mayor of West Chicago and yourself, on the Service list. Such records include the Kerr-McGee decommissioning plan and amendments, which are referenced in the preface of the draft EIS.

Upon search of pertinent files for any records subject to your request which have not already been made available to the public as noted above, NRC staff located three records. I have been informed by staff of NRC's Office of Nuclear Material Safety and Safeguards that most of NRC's communications to Argonne were not committed to writing, or retained, but were, instead, transmitted to Argonne by means of telephone conversations and meetings.

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Harold J. Spelman, Esquire

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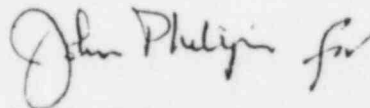
The two records identified on enclosed Appendix A is being provided to you at this time.

However, the requested December 1980 preliminary draft EIS is a working document in which recommendations, opinions and advice are expressed, leading toward development of the published draft EIS (NUREG-0904). There are no releasable segregable portions of this document. We believe that release of this record would impair NRC's ability to freely formulate proposed policies in such matters. Therefore, this record is being withheld from public disclosure pursuant to exemption (5) of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5).

Pursuant to 10 CFR 9.9 of the Commission's regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The persons responsible for this denial are the undersigned and Mr. John G. Davis.

This denial may be appealed to the Commission's Executive Director for Operations within 30 days from the receipt of this letter. As provided in 10 CFR 9.11, any such appeal must be in writing, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision".

Sincerely,



J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosures: As stated

Appendix

1. 8/13/80 Letter from Saguinsin, Argonne, to Nixon, NRC,
transmitting attachments:
 - (a) "Environmental Impact Statement for the
Decommissioning of the Kerr-McGee West
Chicago Facility Proposed Outline".
 - (b) "Timetable for the Kerr-McGee EIS Project".
2. 12/3/80 Argonne intra-lab memo from Kretz to Roberts and Chee,
"Progress Report on West Chicago Radiological Study".

LAW OFFICES OF

(312) 231-1580

Harold J. Spelman and Associates

200 HIGH STREET
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May 25, 1982

FREEDOM OF INFORMATION ACT REQUEST
**FREEDOM OF INFORMATION
ACT REQUEST**

FOIA-82-257
Rec'd 6-1-82

Freedom of Information Act
Director, Office of Administration
United States Nuclear Regulatory Commission
Washington, D. C. 20555

RE: First Preliminary Draft
Environmental Impact Statement
for West Chicago, Illinois
Rare Earth Facility prepared
by Argonne National Laboratory
submitted in December, 1980.

Dear Sir:

Pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. §552), and Regulations promulgated by your Agency thereunder (10 C.F.R. §9.1) (the "Act" and "Regulations"), we hereby request disclosure of copies of all documents and other materials available from your Agency relating to the above-referred matter.

Your Agency is believed to have custody of these documents, but if it does not, we hereby request prompt notice of their current location. Under the Act, Regulations and pertinent case law, these documents are available to us and to other members of the public. Current interpretation of the Act and Regulations does not exempt these documents from required disclosure.

In the event that this request is denied, in whole or in part, we hereby request a detailed statement of the reason or reasons for withholding such documents from the public and an index or similar statement of the nature of the documents withheld. In the event of deletions, we request that a reason be stated for each partial denial of access. To expedite this request, we would be willing to discuss specific instances of denial, whether whole or partial, deletion, or other exemption claims in advance of a final decision by the Agency.

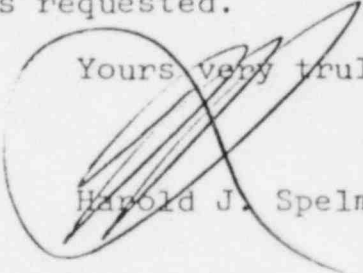
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Nuclear Regulatory Commission
May 25, 1982
RE: Freedom of Information Act
Page Two

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