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

In the Matter of	
KERR-McGEE CHEMICAL CORPORATION	Docket No. 40-2061-ML
(West Chicago Rare Earths Facility)	ASLB No. 83-495-01-ML

MOTION FOR AN EXTENSION OF TIME

Kerr-McGee Chemical Corporation ("Kerr-McGee") hereby requests, pursuant to 10 CFR § 2.711, an extension of time for ten days, or until November 12, 1990, to respond to the State of Illinois ("State") and City of West Chicago ("City") October 22, 1990 Motion to terminate this proceeding and to vacate the initial decision for lack of jurisdiction.

The State and City filed their Motion within days of the Commission's October 17, 1990 Decision approving the amendment to the 1987 State agreement with the NRC. In the Matter of State of Illinois (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-09, 31 NRC __ (Oct. 19, 1990) (Exhibit 1). The approval is subject to a determination by the Commission, after notice and opportunity for a public hearing, that any State requirements for the disposal of the mill tailings at the Kerr-McGee West Chicago facility that differ from the NRC-license requirements provide at least an equivalent level of protection for public health and the environment. Id. at

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9-10. Moreover, before the State can seek to impose any alternative standards to the West Chicago facility the State must first provide the Commission with notice, an explanation and an analysis of whether the standards are sufficiently protective. Letter by Chairman Carr to Governor Thompson (Oct. 18, 1990) (Exhibit 2). The Amendment is not scheduled to become effective until November 1, 1990.[1/] In light of the conditions that have been imposed on the approval of the Amendment, the relevance of the October 17, 1990 Decision to this proceeding is far from clear.

On October 29, 1990, Kerr-McGee filed a petition for reconsideration of the Commission's Decision. (Exhibit 3). Kerr-McGee requested that the Commission convene a public hearing at this time to assess the State alternative regulatory program for the West Chicago facility and to stay any further action on the Amendment until that hearing has been held. In addition, Kerr-McGee informed the Commission of the State and City's efforts to dismiss this proceeding and

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1/ The State and City's precipitous action in filing their Motion before the Amendment has become effective and before the Amendment has been made available for review has prejudiced Kerr-McGee's ability to respond. In fact, the Federal Register notice concerning the Amendment will not be published until after the Amendment has become effective. Moreover, Kerr-McGee's principal attorney in this proceeding, Mr. Richard A. Meserve, is currently involved in trial in Mississippi. The trial which was originally scheduled to end last week has been extended until November 1, 1990. Kerr-McGee urges this Board to grant the requested extension in order to allow Mr. Meserve an opportunity to provide this Board with the benefit of his views on the events that have recently occurred.

urged that the Commission provide guidance on the implications of its Decision on this Board's jurisdiction. Kerr-McGee asks this panel to defer further action until the Commission has had an opportunity to consider Kerr-McGee's Petition.

In light of the foregoing, Kerr-McGee respectfully requests an extension of time for ten days in which to file a response to the State and City Motion.

Respectfully submitted,

Herbert Estreicher

Peter J. Nickles
Richard A. Meserve
Herbert Estreicher

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Attorneys for Kerr-McGee Chemical Corporation

October 29, 1990

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Kerr-McGee Motion for an Extension of Time to be served as indicated by the parenthetical, postage prepaid, on this 29th day of October, 1990, as follows:

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Administrative Judge (By Hand)
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Adjudicatory File (2) (By First-Class Mail)
Atomic Safety and Licensing Board Docket
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing (By First-Class Mail)
Appeal Board Panel
U.S. Nuclear Regulatory Commission
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Herbert Estreicher
Herbert Estreicher

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

SERVED OCT 17 1990

In the Matter of

STATE OF ILLINOIS

(Amendment Number One to the Section 274 Agreement between the NRC and Illinois)

Docket No.
PR MISC 90-1

MEMORANDUM AND ORDER

CLI-90-09

1. Introduction

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

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

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

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

2. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The positions of Kerr-McGee and Illinois

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

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

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

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

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

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

4. Discussion

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

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

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

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

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

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

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

5. Conclusion

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

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

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

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

DOCKET NUMBER
BYPRODUCTS 40-2061-ML

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

CHAIRMAN

October 18, 1990

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DOCKETING & SERVICE BRANCH

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

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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

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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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

PETITION FOR RECONSIDERATION OF THE COMMISSION'S OCTOBER 17, 1990 MEMORANDUM AND ORDER

On October 17, 1990, the Nuclear Regulatory Commission ("Commission") issued a Memorandum And Order (CLI-90-09) denying Kerr-McGee's request that the Commission provide the notice and opportunity for a public hearing required by section 274o of the Atomic Energy Act before the Commission approves an Amendment to the NRC Agreement with the State of Illinois that would allegedly empower Illinois to regulate the thorium mill tailings at Kerr-McGee's West Chicago Rare Earth Facility ("facility" or "site"). The Commission decided to proceed with the Amendment based on a "quasi-legislative" judgment under section 274o and to defer the site-specific determination required by section 274o until the State seeks to apply its alternative regulatory program to the West Chicago site.

Kerr-McGee Chemical Corporation ("Kerr-McGee") hereby requests that the Commission reconsider its Decision

and stay any further action on the proposed amendment, currently scheduled to become effective on November 1, 1990, until a public hearing has been held and the Commission has made the determination required by section 274o.

A. Recent Events Further Demonstrate That The Commission May Not Defer Its Obligation To Assess The State's Alternative Regulatory Program For The West Chicago Site

Recent actions taken by the State and the City of West Chicago ("City") make it imperative that the Commission convene a public hearing at this time to assess the level of safety offered by the State's alternative approach to the on-site disposal plan authorized by Kerr-McGee's NRC-license amendment. On October 22 -- within days of the NRC's Decision, the State and City filed a motion with the NRC Appeal Board to have the West Chicago proceeding dismissed and the initial decision of the NRC Licensing Board vacated. See Exhibit A. The State and the City have informed the Appeal Board that the Commission's Decision has now rendered that entire proceeding moot. In so doing, the State intends to use the Commission's Decision as a vehicle for scuttling the substantial progress that has been made by the NRC staff and the NRC Licensing Board in defining the final disposition of the West Chicago wastes. Years of effort by the NRC staff, the Licensing Board, and Kerr-McGee (the NRC-licensee) will be wasted if the State succeeds in its scheme. In short, the Commission's Decision threatens to wipe out more than ten years of effort expended by the NRC, Kerr-McGee and intervening parties (including the State and City) to develop

a suitable disposal plan. The Commission could not have intended this result when it issued the October 17, 1990 Decision.

Moreover, the Commission has approved the State's request for a transfer of regulatory authority without providing the NRC Appeal Board with guidance as to the implications of the transfer to the on-going NRC-license proceeding. A transfer of jurisdiction to the State under these circumstances is fundamentally unfair. Kerr-McGee has labored for more than ten years to obtain approval for on-site stabilization of the West Chicago wastes. The State and City have participated vigorously in these NRC proceedings. The propriety of on-site disposal has been vindicated by both the staff and the NRC Licensing Board after intense analysis, extensive hearing and massive litigation. The staff has concluded that on-site disposal is the "preferred course of action" for the disposition of the West Chicago wastes. SFES 1-20. And the Licensing Board has found after thorough consideration, that Kerr-McGee's on-site disposal plan satisfies the NRC regulatory requirements by "wide margins." LBP-90-9, 31 NRC 150, 194 (1990). Yet the State now seeks to use the statute's Agreement State provisions as a mechanism to accomplish precisely what the State has been unable to achieve through the NRC review process -- the prevention of on-site stabilization. The Appeal Board proceeding is now nearing completion and must be allowed to continue. The ultimate decision on the propriety of on-site disposal must be made

through the NRC review process and not through the artifice of a jurisdictional transfer to the State.

B. The Commission's Application Of Section 274o To The State's Request For A Transfer Of Jurisdiction Is Unlawful and Contrary to Sound Public Policy.

The language and legislative history of section 274o demonstrate that the specific determination required by the last paragraph of section 274o is an assessment of the State alternatives as applied to the "site[] concerned." Kerr-McGee Reply To State Opposition To The Motion Requesting Compliance With Section 274o (June 15, 1990), 2-6 (Exhibit B). That determination cannot be made by a review of the State regulations in the abstract, or "generically." Rather, the determination must be made with specific reference to the only site subject to the State regulations, the Kerr-McGee West Chicago site. Id. at 6-8. That site-specific determination can only be made after a hearing has been held to determine whether the State's alternative regulatory standards will afford an equivalent level of protection to that provided by the Federal Standards. Id. at 8-14.

The Commission's own findings demonstrate that the site specific determination called for by section 274o must be made at this time. The Commission recognized that the requirements of the last paragraph of section 274o were "triggered" when the State submitted a regulatory program that departs in significant respects from the NRC's own regulations for section 11e(2) byproduct material. Memorandum and Order, 7. The Commission also recognized its statutory obligation to

assure that any alternative State regulation of the West Chicago site provide a level of protection of public health and the environment that is at least equivalent to that which would be provided by the NRC's own regulation of the site.[1/] Id. And the Commission has further recognized that the Kerr-McGee plan for on-site disposal has been recognized by the NRC staff to "have the smallest overall health effects" of any disposal alternative considered by the staff, including the State-preferred alternatives of off-site disposal. Id. at 4. In light of these findings, Kerr-McGee submits that all of the statutory prerequisites for the site-specific determination required by section 274o have been triggered.

It must be emphasized that the State has not submitted a "generic" regulatory program to the Commission for approval. The State and the NRC have always recognized that the West Chicago facility is the only facility that is likely to be subject to the State's regulatory program.[2/] See 55 Fed. Reg. 11,459, 11,460 (Mar. 28, 1990). In fact, the State

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1/ The Commission has informed the Governor of the State by letter that in the event the State seeks to impose its alternative standards to the West Chicago site the State must provide the Commission with advance notice, an explanation, and an analysis of whether the standards are sufficiently protective. Letter by Chairman Carr to Governor Thompson (Oct. 18, 1990).

2/ The Commission also has recognized that the West Chicago site is the only existing mill tailings site in Illinois. Memorandum and Order, 8. Moreover, in light of the economic status of the domestic uranium industry, there is in fact no reasonable prospect that any other mill will ever be subject to the State regulations.

originally declined to include section 11e(2) material in its 1987 agreement specifically because that would have required the State to develop a regulatory program for just one site, the West Chicago facility. See Memorandum by G.W. Kerr to G.H. Cunningham (Nov. 21, 1985) (Exh. 17 to Appendix A to Kerr-McGee Comments). Moreover, as Kerr-McGee has demonstrated in its comments on the proposed amendment, the State regulations are largely tailored to ensure that Kerr-McGee, if forced to comply, would not be able to carry out its NRC-license, authorizing on-site disposal. Kerr-McGee Comments (April 27, 1990), 41-43. There is thus no dispute that the State's regulatory standards were designed with one site in mind. Therefore, those standards must be examined in the context of the one site to which they apply -- the Kerr-McGee site.

Finally, there is no sound policy reason for the Commission to defer its statutory obligation to make a site-specific determination. The State has already revealed that it intends to apply its alternative standards to the West Chicago site in order to force Kerr-McGee to ship the thorium materials off-site. Actions taken by the State shortly after the Commission announced its approval of the Amendment on October 17 pointedly demonstrate the State's plans for the West Chicago site. The same day the Commission 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 C); West Chicago Press, Oct. 18, 1990, at 1 (Exhibit D). And Thomas Ortciger, the newly-appointed director of the Illinois Department of Nuclear Safety ("IDNS"), has offered predictions as to how long it will take to move the facility's wastes off-site. Exh. C, 1; Daily Herald, Oct. 18, 1990, at 4 (Exhibit E).[3/] In short, the State has made it patently clear that the State's regulatory program is directed at one site only, the West Chicago site, and that the State's application of its alternative regulations will lead to one result only -- the movement of the site's materials to some other location. There is thus no reason why the Commission should await any further action by the State before making the site-specific determination required by section 274o. Moreover, because the staff's analysis shows that off-site disposal is less protective of the public health, safety, and the environment than the current on-site disposal plan, the Commission cannot delay its

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3/ Mr. Ortciger has also candidly acknowledged that since State regulations give the City of West Chicago the right to veto the siting of any disposal facility within its borders, "[r]ealistically, the [West Chicago wastes] would go out of state." Exh. E, 4. Mr. Ortciger has also been reported as saying that "Kerr-McGee's current proposal will not meet state regulations." Chicago Sun-Times, October 18, 1990, at 1 (Exhibit F). In sum, the IDNS, the state agency that will regulate section 11e(2) byproduct material has already concluded what the ultimate disposition of the West Chicago wastes will be under the State's regulations.

statutory obligation to assure that the State alternative is sufficiently protective.

CONCLUSION

The events that have occurred since the Commission issued its decision have served to clarify the serious consequences that threaten to flow from the Commission's refusal to make the site-specific determination required by section 274o at this time. The interpretation of section 274o adopted by the Commission is unlawful and contrary to sound public policy. It will unnecessarily prolong the long-delayed resolution of issues implicated by disposal of the West Chicago thorium tailings. The assessment of the State's alternative regulatory program must be made now. A public hearing must be convened immediately to examine the matter.

Respectfully submitted,

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