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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION '90 OCT 29 P2:37

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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

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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,

Peter J. Nickles
Richard A. Meserve
Herbert Estreicher

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044
(202) 662-5576

Attorneys for Kerr-McGee Chemical Corporation

October 29, 1990

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

In the Matter of

KERR-MCGEE CHEMICAL CORPORATION,	)	Docket No. 40-2061-ML
	)	
(West Chicago Rare Earths Facility)	)	ASLB No. 89-495-01-ML

MOTION TO TERMINATE PROCEEDING AND TO VACATE INITIAL DECISION FOR LACK OF JURISDICTION

In light of the Commission's October 17, 1990 approval of the amendment of its agreement with the State of Illinois ("Illinois") which transfers jurisdiction from the Commission to Illinois to regulate section 11e(2) byproduct material, Illinois and the City of West Chicago ("West Chicago") move this Board to terminate this proceeding and to vacate the Initial Decision by the Licensing Board for lack of jurisdiction. In support of this motion, Illinois and West Chicago state as follows:

1. On February 13, 1990, the Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision. *See Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), No LBP-90-9, 31 NRC 150 (1990). On February 20, 1990, Illinois filed its Notice of Appeal of the Initial Decision. On February 22, 1990, West Chicago filed its Notice of Appeal of the Initial Decision.

2. This Panel has not yet ruled on the appeals of Illinois and West Chicago. As a result, under NRC regulations, 40 C.F.R. section

2.770, the Commission has not rendered a "final decision" on Kerr-McGee's application to permanently dispose of wastes at West Chicago. *See State of Illinois* (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), No. CLI-90-09 (October 17, 1990).

3. On October 17, 1990, the full Commission approved the application of Illinois to assume regulatory authority over section 11e(2) byproduct material. The radioactive waste at West Chicago that is the subject of this proceeding is classified as section 11e(2) byproduct material. See February 23, 1990 Materials License to Kerr-McGee, authorizing "onsite disposal of section 11e(2) byproduct material;" *Kerr-McGee Chemical Corp v. U.S. Nuclear Regulatory Commission*, Nos. 87-1254, 88-1698 (D.C. Cir. April 27, 1990).

4. Because the NRC has transferred its regulatory authority over section 11e(2) byproduct material to Illinois, the Commission no longer has jurisdiction over the byproduct material at West Chicago. Under clear Appeal Board precedent, this proceeding, and all other Commission proceedings regarding West Chicago must come to a close. In addition, all previous Board decisions must be vacated. In *U.S. Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987), after Illinois acquired jurisdiction from the NRC over materials at Sheffield, the Appeal Board vacated all orders subject to appeal and terminated the proceeding. The Appeal Board added that the "operative effect" of all Licensing Board orders on appeal at the time of the transfer, "must be removed...as an incident of the termination of the proceeding in which they were rendered." *Id.* at 898 n.4. The Board explained that once jurisdiction is transferred to the

State, there is no longer a forum for appealing Licensing Board decisions. This case is no different from *U.S. Ecology*. This proceeding, which relates solely to *federal* regulatory control over section 11e(2) byproduct material is now moot. Moreover, the Initial Decision, which is not final NRC action, is of no force and effect. As a result, this Panel must vacate the Initial Decision *and any licensing action taken pursuant to that decision*, and terminate the appeal for lack of jurisdiction.

5. The Commission, with full knowledge of this proceeding and Kerr McGee's position, has ruled that Illinois now has jurisdiction over the materials at West Chicago. In its November 22, 1989 Memorandum and Order (Ruling on Motions for Summary Disp. [illegible] No. LBP-89-35, 30 NRC 677 (1989) (November 22 Order), the Licensing Board addressed the possibility that the Commission would transfer regulatory authority over section 11e(2) byproduct material to Illinois. The Licensing Board specifically rejected Kerr-McGee's "Motion for a Order Protecting [the Licensing] Board's Jurisdiction" in the event of transfer to Illinois. The Board ruled that "the Commission has authority to decide whether it wishes to resolve Kerr-McGee's application or delegate authority for its resolution to Illinois." *Id.* at 680. The Commission has now spoken. It has delegated authority to Illinois and relinquished the NRC's jurisdiction over this proceeding.

6. Moreover, in its November 22 Order, the Licensing Board specifically stated that NRC staff would seek to terminate the NRC licensing proceeding if the Commission transferred its regulatory authority to Illinois. The Licensing Board stated, "[i]f the Commission delegates such authority to Illinois, Staff will seek to terminate this proceeding on the ground that authority to rule on Kerr-McGee's

application to dispose of the tailings no longer resides in the Commission." *Id.* at 880. Illinois and West Chicago concur in NRC staff's position that this proceeding must terminate, as articulated by the Licensing Board.

7. NRC staff also voices [illegible]ition that the Commission, and thus this Appeal Panel, is without jurisdiction to proceed with this case after regulatory authority has passed to Illinois, in *Kerr-McGee Chemical Corporation, (Kress Creek Decontamination)*, No. ALAB-867, 25 NRC 900 (1987). There, as soon as the Commission had delegated authority over source material to Illinois, NRC staff "moved quickly to terminate this [Appeal Board] proceeding and to vacate the initial decision."[1] In its opinion, this Panel quoted staff's position that the Appeal Board must dismiss, vacate and "terminate" all federal proceedings as soon as the Commission passes its authority to Illinois:

> Because the Order to Show Cause [the subject of the proceeding before the NRC] pertained to these source materials, the agreement will terminate the Commission's jurisdiction with respect to the radiological materials that are the subject of the proceeding...*Once jurisdiction has passed to Illinois, the Commission, including its adjudicatory boards, may not take further regulatory action with respect to the source material in and around Kress Creek. In these circumstances, the Appeal Board is compelled to terminate this proceeding.* *Id.* at 904. (emphasis added).

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[1] In the Kress Creek Decontamination case, the NRC issued a show cause order why Kerr-McGee should not be required to take remedial actions regarding radiological contamination near Kress Creek. The Licensing Board found in Kerr-McGee's favor and NRC staff appealed. After the parties submitted all of their briefs to the Appeal Panel, staff notified the Panel that Illinois was on the verge of acquiring jurisdiction from the Commission over source materials, which staff asserted were the material at issue in the proceeding. As soon as the NRC transferred jurisdiction over source materials to Illinois, staff moved to terminate the proceeding and vacate the initial decision.

8. In addition to its decision in *U.S. Ecology* (discussed above), in *Kress Creek* the Appeal Board also indicated that once the NRC transfers regulatory authority to Illinois, as it has done here, all proceedings before the Commission must cease. The Board ruled that the material at Kress Creek was not source, but rather byproduct material, which, until now, was still subject to the Commission's jurisdiction. Nevertheless, this body made it clear that *if* Illinois had acquired jurisdiction over materials that were the subject of the action, as here, Illinois, and not the NRC, would have authority over disposition of the materials:

> Equally clear is that, *if* the contamination in Kress Creek is source material, regulatory authority over it is now vested in Illinois, pursuant to the terms of the agreement. *Id.* at 208.

Under both the staff's unequivocal position and the Appeal Board's Panel's rulings in *U.S. Ecology* and its pronouncement in *Kress Creek*, this Panel should dismiss this proceeding and vacate the Initial Decision for lack of jurisdiction.

WHEREFORE, Illinois and West Chicago respectfully move this Panel to terminate this appeal for lack of jurisdiction and to vacate the Initial Decision of the Licensing Board.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General
State of Illinois

By: Michelle Jordan /ael
Michelle D. Jordan, Chief
Environmental Control Division
Assistant Attorney General

OF COUNSEL:

Matthew J. Dunn, Deputy Chief
Douglas J. Ratha
J. Jerome Stoul
William D. Saith
Assistant Attorneys General
Environmental Control Division
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2550

WEST CHICAGO, ILLINOIS

By: Joseph V. Karaganis

OF COUNSEL:

Joseph V. Karaganis
James D. Brussalan
Karaganis & White Ltd.
414 North Orleans Street
Suite 810
Chicago, Illinois 60610
(312) 836-1177

Robert D. Greenwalt
100 Main Street
West Chicago, Illinois 60185
(708) 231-8638

wcls

CERTIFICATE OF SERVICE

I, James D. Brussian, an attorney in this case do certify that on the 22nd day of October, 1990, I caused to be served the foregoing MOTION TO TERMINATE PROCEEDING AND TO VACATE INITIAL DECISION FOR LACK OF JURISDICTION upon the parties listed below by Facsimile:

Peter J. Nickles, Esq.
Richard A. Meserve
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
Fax: (202)662-6291

Anne Hodgdon
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
Fax: (301)479-0260

Marc M. Radell
Office of Regional Counsel
U.S.EPA, Region V
230 S. Dearborn Street
Chicago, Illinois 60604
Fax: 886-0747

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Appeal Panel
EWW - 529
Washington, DC 20555
Fax:(301)492-5461

U.S. Nuclear Regulatory Commission
Office of the Secretary
16th Floor
1 White Flint North
11555 Rockville Pike
Rockville, MD 20852
Attn: Docketing & Service Branch
Fax: (301)492-0279

Douglas J. Rethe
Assistant Attorney General
Environmental Control Division
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
Fax: (312)814-2806

and by first class mail, in envelopes bearing sufficient postage to the following parties:

Stephen England, Esq.
Illinois Dept. of Nuclear Safety
1035 Outer Drive
Springfield, IL 62704

Joseph A. Young
Kerr-McGee Chemical Corp.
123 Robert S. Kerr Ave.
Oklahoma City, OK 73125

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

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20003

Mr. Carl Bausch
Assistant General Counsel
Executive Office of the President
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

by depositing same in the United States Mail.

James D. Bruxelas

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

STATE OF ILLINOIS: STAFF ASSESSMENT OF PROPOSED AMENDMENT NUMBER ONE TO THE AGREEMENT BETWEEN THE NRC AND THE STATE OF ILLINOIS, 55 FED. REG. 11,459 (MAR. 28, 1990)	NOTICE OF PROPOSED AMENDED AGREEMENT WITH STATE OF ILLINOIS

KERR-McGEE REPLY TO STATE OPPOSITION TO THE MOTION REQUESTING COMPLIANCE WITH SECTION 274o

The State of Illinois ("State") has submitted an opposition to the motion of Kerr-McGee Chemical Corporation ("Kerr-McGee") that the Commission provide the notice and opportunity for public hearing required by section 274o of the Atomic Energy Act. 42 U.S.C. § 2021(o) (1982). Kerr-McGee hereby replies.

The State has made two principal arguments in its opposition to Kerr-McGee's motion: (1) that the requirements of the last paragraph of section 274o come into play only after a state has acquired agreement state status; and (2) that the obligation to provide notice and the opportunity for a public hearing is satisfied by informal notice-and-comment rulemaking procedures. Neither of the State's arguments can withstand scrutiny.

I. THE COMMISSION IS REQUIRED TO MAKE THE SECTION 274o DETERMINATION BEFORE ENTERING THE PROPOSED AGREEMENT

Section 274o provides in pertinent part:

> In adopting requirements pursuant to paragraph (2) of this subsection with respect to sites . . . which are used for the disposal

> of byproduct material . . . the State may adopt alternatives (including, where appropriate, site-specific alternatives) to the requirements adopted and enforced by the Commission for the same purpose if, after notice and opportunity for public hearing, the Commission determines that such alternatives will achieve a level of stabilization and containment of the sites concerned, and 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 . . . .

42 U.S.C. § 2021(o); see 10 C.F.R. § 150.31(d) (1989). The State has adopted regulations that depart significantly from those promulgated by the NRC and, hence, by the terms of the section, the NRC is obliged to provide "notice and opportunity for public hearing" with regard to the State's alternatives to the NRC requirements. The State seems to acknowledge that such detailed NRC scrutiny is required, but argues that the Commission need not concern itself with the matter until after the State has acquired agreement state status over section 11e(2) byproduct material. State Response, 4-7.

The State seems to suggest that Congress intended the examination of the State alternative regulations only in the context of site-specific licensing actions and that the notice and opportunity for public hearing required by section 274o can thus be postponed. State Response, 4. But, such a construction is flatly inconsistent with the statutory language. By the terms of section 274o, Congress made clear that the examination of State alternatives was to take place

in the context "of the sites concerned," thereby explicitly requiring the examination of the State's regulatory program outside individual licensing actions. Indeed, if the State's approach were adopted, it appears that the State's regulations themselves would never be directly subject to NRC scrutiny, only their application in individual circumstances. There is nothing in the statute or legislative history to suggest that the NRC's examination of State alternatives was to be so narrowly confined.

Moreover, the above-quoted passage from section 274o explicitly provides for notice and the opportunity for public hearing in the context of the State adoption of requirements "pursuant to paragraph (2)" of the subsection. That paragraph provides in pertinent part:

> In the licensing and regulation of [section 11e(2)] byproduct material . . . a State shall require -- . . .
>
> (2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than standards adopted and enforced by the Commission for the same purpose . . . .

42 U.S.C. § 2021(o)(2)(1982) (emphasis added). The statutory cross-reference makes clear that the notice and opportunity for public hearing relate specifically to the "standards" promulgated by the State for the regulation of section 11e(2) byproduct material. Suffice it to say, it is those precise "standards" which the NRC staff, in the notice of the proposed amendment of the agreement, has shown to depart in significant

respects from those promulgated by the Commission. 55 Fed. Reg. 11,459, 11,462-63 (Mar. 28, 1990). Given the fact that the State's standards are now in place, there is no reason why the NRC examination of their adequacy should be postponed.

In fact, although the State does not acknowledge the fact, the statutory language shows that the notice and public hearing required by section 274o must take place before any transfer of NRC jurisdiction to the State. Under section 274d(2), the Commission is required to make a determination whether the State's regulatory program "is in accordance" with the requirements of section 274o before entering into an agreement. 42 U.S.C. § 2021(d)(2). The NRC scrutiny of the State regulations required by section 274o must thus be completed before the Commission can make the related determination under section 274d(2).[1/] There is simply no justification for distinguishing the determinations required by the final sentences of section 274o from the other determinations that must be made before the Commission is authorized to enter an agreement with a state.

1/ There may well be situations where a State is allowed to propose regulatory alternatives to a particular site after the State has entered into a section 274(b) agreement. The NRC has already suggested that the "additional flexibility to adopt generic or site specific standards [under section 274o] is available to the State regardless of the status of the State's regulations." 50 Fed. Reg. 41,852, 41,856 (1985). There is no basis, however, for concluding that Commission scrutiny of state alternatives may only take place once the state has reached agreement state status.

The State cites various portions of the legislative history of the 1983 UMTRCA amendments to support its position that the findings required by section 274o can be made after the State has acquired jurisdiction over section 11e(2) byproduct material. State Response, 4 n.1, 5-6 & n.2. But, on close reading, the passages quoted by the State show only that the assessment of alternatives must be made in light of the specific sites that will be affected. They do not support the State's argument that the assessment can be deferred until after jurisdiction has transferred.

Indeed, the passages of the legislative history cited by the State were in connection with Senate consideration of a bill that unambiguously contemplated notice and the opportunity for public hearing concerning state alternatives before NRC entry into an agreement. The Senate bill specifically provided that the Commission would consider the state alternatives for the purpose of making the findings required by section 274d(2) -- the findings that must be made by the NRC before agreement state status is conferred.[2/] In short,

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2/ The Senate bill provided in pertinent part:

> Subsection 274d . . . is amended by adding the following at the end of paragraph (2):
>
> "If the State determines, pursuant to subsection o of this section, that any Federal requirement . . . is not practicable for

(footnote cont'd)

the State cannot construe the legislative history in the Senate to authorize the postponement of notice and the opportunity for public hearing for the simple reason that the bill enacted by the Senate clearly provides exactly the opposite.3/

The State also seems to argue that a site-specific assessment of its alternative regulations cannot now be performed because the State regulations are "general in nature"

(footnote cont'd)

> application by the State, the Commission shall accept such State determination, and the alternate requirement developed by the State, for the purpose of making the findings required by this paragraph [subsection 274d(2)] . . . .

S. 1207, 98th Cong., 2d Sess. § 204(g), as amended, 128 Cong. Rec. S2967 (daily ed. Mar. 30, 1982) (emphasis added). The legislation that was ultimately enacted removed the requirement that the NRC defer to the state selection of alternatives. See note 3, infra. As discussed above, however, the demand that the NRC confirm that the state program is in compliance with the requirements of section 274o before entry into an agreement was preserved in the enacted legislation.

3/ The amendment to section 274o that was enacted also did not provide, as the State contends, that Agreement States had "the right to deviate from the [NRC] requirements" in regulating a particular site. State Response, 6. Again, the State has gleaned its interpretation from statements that were made in the Senate debate on the Senate bill. Although the Senate bill did contemplate that a state's impracticability determination would ordinarily be accepted by the Commission, the amendment that was finally enacted by the Congress took a different approach. Under section 274o, as enacted, Congress provided a state with "an opportunity to propose" alternatives, rather than a right to adopt alternatives. See H.R. Conf. Rep. No. 884, 97th Cong., 2d Sess. 48, reprinted in 1983 U.S. Code Cong. & Admin. News 3603, 3618; Letter from Senators Simpson and Domenici to Rep. Hatfield (Nov. 18, 1982), reprinted in 128 Cong. Rec. H8814-15 (daily ed. Dec. 2, 1982); see also 128 Cong. Rec. S13052 (daily ed. Oct. 1, 1982) (statement of Sen. Simpson).

and "intended to apply to all present and future sites in the State." State Response, 7. But, as shown above, Congress in fact intended that the State standards would be assessed by examining their effects at "the sites concerned." And, in any event, as Kerr-McGee has demonstrated in its comments on the proposed amendment, the State has not proposed a generic regulatory program; the State regulations are largely tailored to ensure that Kerr-McGee, if forced to comply, would not be able to carry out its plan for on-site disposal. Kerr-McGee Comments, 41-43 (Apr. 27, 1990). Moreover, the State has always recognized that the West Chicago facility is the only facility that is likely to be subject to the State's regulatory program.[4/] Because uranium and thorium ore is not mined in Illinois, there is in fact no prospect that any mill will be opened in Illinois in the future. The State's regulatory alternatives must thus be examined in the context of the one site to which those regulations will apply -- the Kerr-McGee site.

In sum, section 274o requires that the Commission provide notice and opportunity for public hearing concerning the State's alternatives to the NRC's regulations before the

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4/ The State originally declined to include section 11e(2) material in its 1987 agreement specifically because the State would then have 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) (Kerr-McGee Comments, App. A, Exh. 17).

Commission considers the entry into the proposed amendment of its agreement with the State.

II. THE COMMISSION IS REQUIRED TO PROVIDE NOTICE AND CONVENE A PUBLIC HEARING ON THE STATE'S PROPOSED ALTERNATIVE REGULATORY PROGRAM

The State argues in the alternative that the NRC can satisfy the "public hearing" requirement of section 274o by following informal procedures -- namely, the notice-and-comment procedures allowed in rulemakings. As will be seen, the procedures advocated by the State are inadequate.[5/]

The specific determination required by section 274o -- whether the State alternative, as applied to the "site[] concerned," will afford an equivalent level of protection to that provided by the NRC regulations -- is not a determination that can be made through a generic rulemaking proceeding. The statutory provision requires the Commission to make findings that are site-specific. Indeed, section 274o specifically envisions that consideration will be given to "local or regional conditions, including the geology, topography,

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5/ It is important to note that the State has failed to address the specific obligation in section 274o that the Commission provide "notice." See also 10 C.F.R. § 150.31(d); 50 Fed. Reg. 41,852, 41,856 (1985) ("the Commission must notice the alternatives and provide an opportunity to request public hearing"). The staff has provided notice of the proposed amendment of the agreement, 55 Fed. Reg. 11,459 (Apr. 27, 1990), but it has failed to provide any notice either of the site-specific findings required by section 274o or of the opportunity for public hearing. A new notice is thus required because the notice of the proposed amendment was inadequate. See North Alabama Express, Inc. v. United States, 585 F.2d 783, 790 (5th Cir. 1978).

hydrology and meteorology." 42 U.S.C. § 2021(o). Such site-specific factual matters are exactly the type of matters that are best illuminated by formal adjudicative procedures. As the United States Supreme Court has stated, the "recognized distinction in administrative law" between rulemaking and adjudication is "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245 (1973); see id. at 239 ("The term 'hearing' . . . has a host of meanings . . . [which] will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts."); see also United States v. Independent Bulk Transp., Inc., 480 F. Supp. 474, 478 (S.D.N.Y. 1979) ("Adjudicatory proceedings, unlike rulemaking proceedings, involve determinations of contested facts in applying rules to specific circumstances."). The examination of the site-specific application of the State alternatives clearly falls on the adjudicatory side of the line.

Moreover, in enacting section 274o, Congress understood that a "hearing" would entail the application of formal trial-type procedures.[6/] At that time, the NRC interpreted

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6/ The State urges the Commission to apply the balancing (footnote cont'd)

the hearing provision in section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), to require a formal hearing in adjudications. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444-45 n.12 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985); see also Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1203 (D.C. Cir. 1984) ("[NRC] apparent[ly] interpret[s] . . . Section 189(a) as requiring formal hearings in licensing proceedings"); Siegel v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968) (The Commission has invariably "provided formal hearings in licensing cases, as contrasted with informal hearings in rule-making proceedings. . . ."). In short, Congress was aware of the NRC practice when it required a "public hearing" in section 274o. It must be assumed that Congress used the words in that section advisedly.7/ Thus, a

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(footnote cont'd)

test of Matthews v. Eldridge, 424 U.S. 319 (1976), to determine what procedural requirements are mandated by due process. In light of the fact-specific nature of the inquiry, it is certainly arguable that due process considerations require a formal hearing. See Alaska Airlines, Inc. v. CAB, 545 F.2d 194, 200 (D.C. Cir. 1976). In any event, however, the requirements of a public hearing under section 274o are not guided solely by due process considerations, but rather, as discussed in the text, by the Congressional intent in enacting the provision.

7/ The State cites the Seventh Circuit's decision in West Chicago, Ill. v. NRC, 701 F.2d 632 (1983), as an example of a context for which the Commission has declined to provide a formal hearing. State Response, 9. But West Chicago was decided after Congress had enacted the obligation to provide notice and the opportunity for a public hearing in section 274o. As such, knowledge of the sole exception to the consistent Commission policy of interpreting the term "hearing" to require a formal evidentiary proceeding can not be imputed to Congress at the time it enacted section 274o.

full consideration of the legislative history in fact reinforces the need to apply formal adjudicatory procedures in resolving issues under section 274o.

The State argues that the inclusion of certain specified procedures in section 274o(3)(A) -- the provision setting forth the procedural requirements for state licensing regulations -- indicates that formal procedures are not required under the last paragraph of section 274o. State Response, 11. But, as the legislative history of the provision shows, section 274o(3)(A) was intended to clarify that agreement states need not provide the procedural formality required under the NRC hearing provisions. As Senator Wallop explained:

> "[F]ormal adjudicatory hearings involving the full panoply of procedures required by Federal law would not be imposed upon the Agreement States. Rather, State law would govern and the State would have discretion to determine how cross-examination opportunities would be incorporated into their hearings.

124 Cong. Rec. 37,545 (1978) (statement of Sen. Wallop); see id. at 38,229 (statement of Rep. Dingell) ("[We] do not intend any trappings of adjudicatory proceedings in adding this provision."). The legislative history of the section cited by the State thus shows that Congress assumed that formal procedures apply to NRC hearings. The section supports Kerr-McGee, not the State.

The State has also seized upon the "on the record" language of section 554 of the Administrative Procedure Act ("APA"), which the State evidently views as necessary "magic

wording" to signal when a formal hearing is required.[8/] State Response, 8. However, the precise words "on the record" need not be used to trigger the formal hearing requirements of the APA. The courts have clearly rejected such an extreme reading in the context of adjudications. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978); Marathon Oil v. EPA, 564 F.2d 1253, 1261-64 (9th Cir. 1977); United States Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1977); Independent Bank Ass'n v. Board of Governors, 516 F.2d 1206, 1217-18 (D.C. Cir. 1975); see also United States v. Healy Tibbitts Const. Co., 713 F.2d 1469, 1475-76 n.6 (9th Cir. 1983); United States v. Hardage, 663 F. Supp. 1280, 1288 (W.D. Okl. 1987). The failure of Congress to use the words "on the record" in section 274o is thus of no significance.

The State also contends that the examination of the adequacy of the State's regulations will not benefit from the full and thorough public airing of the issues that an adjudicatory hearing will provide. State Response, 10. The State asserts that there is no "disagree[ment] with the factual material presented." Id. In fact, however, the litigation concerning Kerr-McGee's request for a license amendment to

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8/ Section 554 of the APA governs adjudications "required by statute to be determined on the record after opportunity for an agency hearing," and specifies the circumstances under which the procedures of § 556 and §557 of the APA are to apply. 5 U.S.C. § 554 (1982).

authorize on-site disposal reveals that the State has a profound disagreement with Kerr-McGee and the staff with regard to the risks presented by the various disposal alternatives for the West Chicago wastes. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-90-9, 31 NRC 150 (1990), appeal pending; LBP-89-35, 30 NRC 677 (1989). The Licensing Board found that Kerr-McGee's plan satisfied the NRC requirements by "wide margins," 31 NRC at 194, and the staff's analysis shows that off-site disposal would serve to increase the threats to public health, safety, and the environment from both radiological and non-radiological hazards over those that would arise from on-site disposal.[9/] Nonetheless, the alternatives to the NRC regulations adopted by the State are clearly designed in large part to require the off-site stabilization of the West Chicago wastes. See Kerr-McGee Comments, 41-43 (Apr. 27, 1990). Hence, the exploration of the adequacy of the State's alternatives necessarily presents detailed and site-specific factual matters about the comparative risk of on-site and off-site disposal-- a matter on which Kerr-McGee and the State have substantial disagreement.

Finally, the State suggests that the conclusions drawn by the staff in its assessment of the State's proposed regulatory program provide a sufficient basis upon which the

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9/ NRC, Supplement to the Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois, 1-18 to 1-20, 5-1 to 5-86, 8-1 to 8-24 (Apr. 1989) (NUREG-0904, Supp. No. 1) ("SFES").

Commission can make the required section 274o determination. State Response, 10. But, in point of fact, the staff has declined to offer an opinion as to whether, as applied to any particular site, the findings required by the last paragraph of section 274o could be satisfied. 55 Fed. Reg. at 11,462. The Commission thus can not rely on the staff's assessment of the State's application because that assessment did not reach the particular issue that Kerr-McGee has presented.[10/]

CONCLUSION

In light of the foregoing, Kerr-McGee urges the Commission to comply with the requirements of section 274o. The Commission is obligated to provide notice and the opportunity for public hearing with regard to the adequacy of the State's alternatives to the Commission's regulations. The

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10/ Even if the Commission should view the language of section 274o as not triggering the formal hearing requirements of the APA, the Commission still "must conduct whatever proceedings are necessary to ensure that it has sufficient information so that its final decision reflects a consideration of the relevant factors. An evidentiary hearing must be conducted when there are disputed issues of material fact." Sea-Land Serv., Inc. v. United States, 683 F.2d 491, 496 (D.C. Cir. 1982) (citations omitted); see also New Mexico Env'l Improvement Div. v. Thomas, 789 F.2d 825, 829 (10th Cir. 1986) ("Conflicting factual evidence often necessitates a trial-type agency hearing with the opportunity to confront witnesses and present evidence"); Patagonia v. Board of Governors, 517 F.2d 803, 816 (9th Cir. 1975); American Bancorp. v. Board of Governors, 509 F.2d 29, 38 (8th Cir. 1974). In light of the nature of the issues to be resolved, the notice-and-comment procedures advocated by the State are clearly inadequate.

public hearing should be a formal adjudicatory hearing, not the notice-and-comment process suggested by the State. Moreover, the Commission should not amend its agreement with the State without first discharging its obligations under section 274o.

Respectfully submitted,

Richard Meserve IIHE

Peter J. Nickles
Richard A. Meserve
Herbert Estreicher

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for
Kerr-McGee Chemical Corporation

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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 clang out of West Chicago, even though the U.S. Nuclear Regulatory Commission on Wednesday ended 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 Ortciger, 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, Ortciger'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. 12

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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.

Photo shown by Kenny Yu

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 Nuclear 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-McGee spokesman Myron Cunningham said that once 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 insure that Illinois standards are at least as strict as federal standards," Palmer said. "They 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 report.

State wins control of Kerr site

By Alex Rodriguez
Daily Herald Staff Writer

It took 11 years of court battles, politicking and weekend rallies, but it looks like Kerr-McGee will have to truck more than 500,000 tons of radioactive dirt out of West Chicago, and probably out of Illinois.

The Nuclear Regulatory Commission on Wednesday gave Illinois jurisdiction over the thorium-contaminated soil being stored near the downtown of the far Western suburb, on the grounds of the old Kerr-McGee plant. Kerr-McGee had wanted to bury the 587,000 tons of waste there.

The ruling allows officials from the Illinois Department of Nuclear Safety, and local heads of government, to decide how and where the waste will be buried. West Chicago doesn't want it, and Illinois officials have long supported West Chicago's desire to get it out of the city. The most probable final resting place is a radioactive dump in Utah, say nuclear safety representatives.

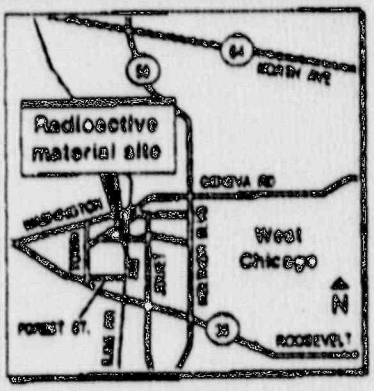
The decision could be a costly one for Kerr-McGee. The Oklahoma City-based company's plan to bury the dirt in a clay-lined mound at Factory and Brown streets would have cost an estimated $25 million to $40 million. Moving it out of state by truck or by train probably will cost up to $100 million.

But on Wednesday the NRC ruling was being hailed as a god-

See BATTLE on Page 4

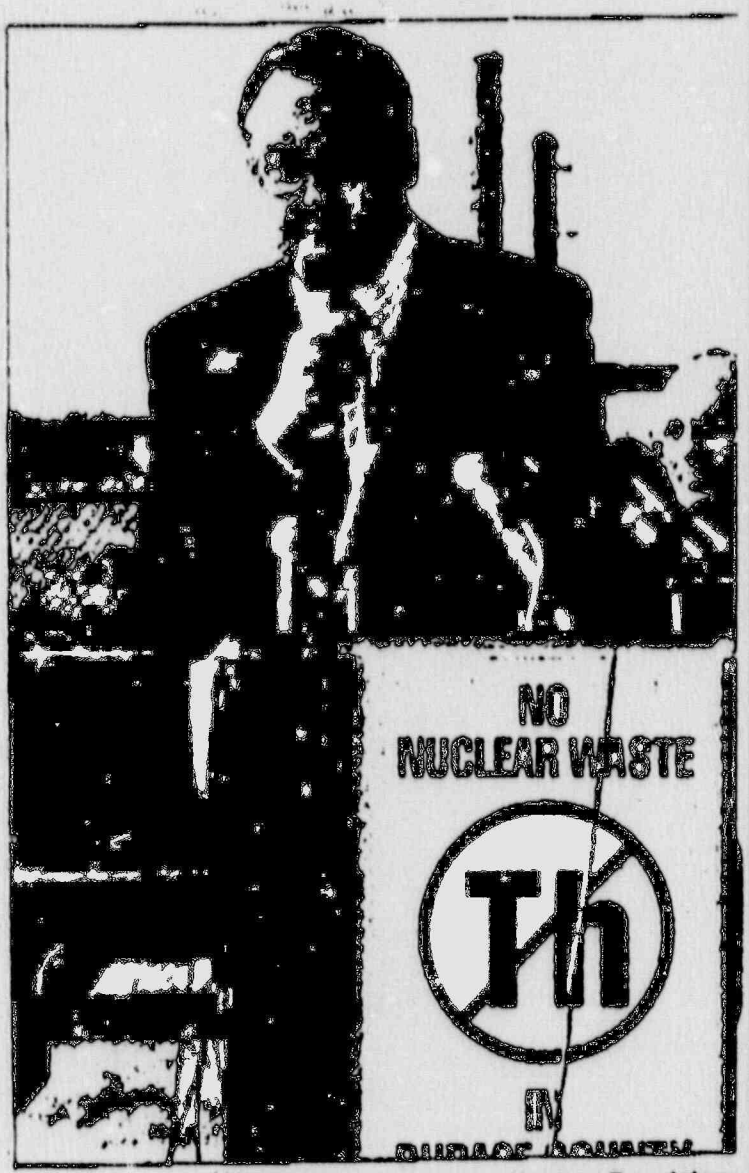
End of the line for Kerr-McGee?

- What the NRC ruling means: Paves the way for Illinois to force Kerr-McGee to ship out 587,000 tons of radioactive waste out of a West Chicago neighborhood.
- Estimated cost of moving the dirt: $100 million.
- When it most likely will be moved: Two or three years from now.
- Where to: A radioactive dump site in Utah.
- How it may be moved: By truck or by train. If by train, it could take 50 trainloads to cart the waste out of West Chicago.



Source: Nuclear Regulatory Commission, Illinois Department of Nuclear Safety

Daily Herald Graphic



Gov. Thompson on Wednesday hailed the Nuclear Regulatory Commission's ruling that will permit the radioactive dirt to be taken out of West Chicago.

Daily Herald Photo/Michael Mortimer

BATTLE: NRC gives state jursdiction over waste site

Continued from Page 1

send by the people of West Chicago, who for years have maintained that the radioactive waste will contaminate their drinking water and raise cancer rates in their neighborhood.

Richard Kassanits let out a whoop.

"Illinois has control now," exulted the homeowner who helped amass citizen opposition. "Illinois doesn't have the loopholes that the federal government licensing process has that allows something as ridiculous as letting Kerr-McGee keep this dump in the middle of a town."

The state is expected to take control of the site Nov. 1, Gov. James Thompson said Wednesday to a small gathering outside the fenced dump site. After that, state and local officials would hold a public hearing on the company's plans. That hearing probably will be held in the spring.

Thompson lauded the ruling as a "significant victory" for the people of West Chicago.

"This is a threat that the people of West Chicago should never have been faced with," Thompson said. "Now the time has come for this administration, and the next administration, to keep up the fight to ensure that these wastes are disposed of in a safe manner."

The dump would have been built on the site of a demolished factory that Kerr-McGee operated until 1973. Thorium, a radioactive material, was used in the manufacturing of gaslight mantles. The contaminated dirt is buried under ground, and Kerr-McGee's disposal plan was to continue housing it there inside a 46-foot high clay-lined cell.

Under Illinois regulations governing radioactive waste, any disposal plan drafted by Kerr-McGee now would have to withstand scrutiny from the city of West Chicago, said Thomas Ortciger, director of the Illinois Department of Nuclear Safety. West Chicago is not likely to approve any plan that doesn't involve eventual removal of the waste.

"Realistically, it probably would go out of state," Ortciger said.

However, Kerr-McGee spokesman Myron Cunningham said it was too early to tell whether the ruling would force the company to move the waste out of town.

Cunningham said Kerr-McGee executives plan to "seek a prompt meeting" with officials from the NRC and the state's Department of Nuclear Safety to discuss the impact of the ruling.

The most likely home for the waste may be a radioactive dump site in Utah that has applied for permission to begin taking thorium-tainted waste.

Joseph Karaganis, an attorney who has represented West Chicago in the dump controversy, said perhaps the most feasible way to get rid of the waste would be to have it carted out by rail.

An old rail line runs by the dump, and could be used to transport the waste out of the city. It would take about 80 train loads to get rid of all of the contaminated dirt, Karaganis said.

To get jurisdiction, Illinois had to prove that it had the staff, the facilities and the laws in place to regulate the dump site, Ortciger said. In addition, the state had to show that its standards for regulating thorium waste were as stringent, or more stringent, than the NRC's standards.

It probably would be at least two or three years before the first loads of waste started to leave the site, Ortciger said.

CHICAGO SUN-TIMES, THURSDAY, OCTOBER 19 1989

State taking over A-dump

West Chicagoans cheer victory over Kerr-McGee

By Philip Franchine
Suburban Reporter

West Chicago residents cheered Wednesday when they heard from Gov. Thompson that the state will take over regulation of the Kerr-McGee Chemical Corp. radioactive waste site in their community.

The federal Nuclear Regulatory Commission earlier Wednesday had approved transferring its authority over the wastes in West Chicago to the Illinois Nuclear Safety Department as of Nov. 1.

About 50 neighbors and officials applauded as Thompson and other officials vowed to use the state's power to oppose the company's plan to bury 13 million cubic feet of low-level radioactive waste, including thorium and uranium mill tailings, in a residential area of West Chicago.

That plan was approved in February by the NRC but has since been tied up in court challenges.

"Today's action by the NRC marks a big step toward resolving the serious environmental problem hanging over West Chicago," Thompson said. "For years, tons of radioactive materials have been present on the site, literally a stone's throw from homes and schools."

The sandlike tailings, a manufacturing by-product, are about 1 percent thorium, a Kerr-McGee spokesman said. Neighbors have long claimed that they are a hazard to groundwater and that they have caused abnormally high rates of cancer in the area, while the company says the NRC does not consider them a threat.

"The key thing is the state has promised us, at every level, that they will not let it remain here," said an elated Nancy Assian of the Thorium Action Group.

"I got goose bumps when I first heard the [NRC decision]," Mayor Paul Netzel said. "I think it [the waste] will be moved but I still think there will be litigation by Kerr-McGee."

The NRC ruling means the tailings may be moved within two to three years, said Tom Ortciger, director of the state's Nuclear Safety Department.

Ortciger said Kerr-McGee's current proposal to bury the wastes will not meet state regulations.

Even if the company did meet those standards, the burial plan would have to win approval of the West Chicago City Council, which has opposed it.

The state nuclear agency plans a hearing on what should be done at the site, possibly by spring, 1991, or later if Kerr-McGee appeals the decision, said Ortciger.

Kerr-McGee spokesman Myron Cunningham said the company intends to pursue its plan to bury the wastes in West Chicago. He said Kerr-McGee officials are either little additional comment until they read the NRC order.

Burying the wastes at West Chicago would cost $25 million, Cunningham said, whereas relocating them within Illinois would cost $60 million to $70 million. Ortciger said it is unlikely the state will approve another in-state site, and estimated out-of-state disposal would cost at least $120 million.

Neighbors have been fighting the tailings since 1974, the year after Kerr-McGee closed a factory that for some 40 years had processed thorium ore to make thorium gas mantles.