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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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KERR-MCGEE CHEMICAL CORPORATION	)	Docket No. 40-2061 -ML
	)	
	)	
(West Chicago Rare Earths Facility)	)	
	)	
	)	
55 Fed. Reg. 41619 (October 12, 1990)	)	

NRC STAFF RESPONSE TO COMMISSION ORDER
OF DECEMBER 7, 1990

Richard G. Bachmann
Counsel for NRC Staff

December 24, 1990

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NUCLEAR REGULATORY COMMISSION

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NRC STAFF RESPONSE TO COMMISSION ORDER OF DECEMBER 7, 1990

I. INTRODUCTION

The NRC Staff herewith responds to the Commission's Order of December 7, 1990, which requested the views of the parties on possible Commission action concerning the motion filed on November 9, 1990 by the City of West Chicago.[1] The Commission asked for the views of the parties "as to whether Commission action on the instant hearing request might prejudge pending jurisdictional questions before the Appeal Board." The Commission also asked whether there were any objections to the Commission's withholding action until after the Appeal Board has issued a decision in the existing license amendment proceeding.

II. DISCUSSION

It is the Staff's position that Commission action on the City's request could indeed influence the Appeal Board's determination of the jurisdictional questions. As discussed in the Staff's motion, filed today with the Appeal Board (attached), if the Commission

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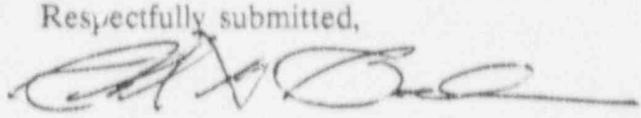
[1]West Chicago's Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment.

were to decide that execution of the amendment to the Agreement with the State of Illinois, 55 Fed. Reg. 46,591 (November 5, 1990), has the effect of passing jurisdiction over the Kerr-McGee license to the State of Illinois on November 1, 1990, thus eliminating the NRC's regulatory authority over the license, any further consideration of the pending matters within the agency would be precluded. For that very reason, the Staff filed its motion with the Appeal Board which asks the Appeal Board to certify the overall jurisdictional question to the Commission. Therefore, the Staff urges the Commission to accept and decide the jurisdictional question if so certified by the Appeal Board.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of December, 1990.

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)	)	
	)	

NRC STAFF MOTION FOR CERTIFICATION TO THE COMMISSION OF THE QUESTION OF JURISDICTION

I. INTRODUCTION

The NRC Staff hereby moves the Appeal Board to certify to the Commission, pursuant to 10 C.F.R. § 2.785(d), the question of whether the Commission retained jurisdiction over the Kerr-McGee license after the November 1, 1990 amendment to the agreement between the NRC and the State of Illinois, which transferred regulatory responsibility for section 11e.(2) material to the State in accordance with Sec. 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201.

II. DISCUSSION

On October 17, 1990, the Commission approved an amendment to the agreement with the State of Illinois which approved the State's generic program for the regulation of "byproduct material" as defined in section 11e.(2) of the Atomic Energy Act of 1954, as amended. CLI-90-09, 32 NRC ____ (1990). Pending before the Appeal Board at that time were the appeals of the State of Illinois and the City of West Chicago ("intervenors") from the Licensing Board's initial decision, LBP-90-9, 31 NRC 150 (1990), and related rulings, and the intervenors' August 31, 1990 motion to vacate the Kerr-McGee license amendment issued as a result of that decision. As a result of the

amendment to the agreement, intervenors filed a motion before the Appeal Board to terminate the proceeding for lack of jurisdiction.

At the same time these matters are pending before the Appeal Board, there is pending before the Commission a request from the City of West Chicago for a hearing on another amendment to the Kerr-McGee license, or alternatively, to vacate that amendment on jurisdictional grounds. West Chicago's Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment, dated November 9, 1990.

Thus, the Commission and the Appeal Board are each faced with the issue of the jurisdictional implications of the transfer of regulatory responsibility for the section 11e.(2) material from the NRC to the State of Illinois. This issue is fundamental to the resolution of the other issues pending before the Commission and the Appeal Board, since a determination that jurisdiction over the Kerr-McGee license passed from the NRC to the State of Illinois when the amendment to the agreement became effective would preclude further consideration of pending matters within the NRC.

In view of this fact, the NRC Staff moves the Appeal Board to certify to the Commission, pursuant to 10 C.F.R. § 2.785(d), the following question:

> To what extent has the U.S. Nuclear Regulatory Commission retained jurisdiction over the above-captioned license subsequent to the effective date of the amendment to the agreement with the State of Illinois, November 1, 1990?

Pursuant to 10 C.F.R. § 2.785(d), the Appeal Board may, in its discretion, certify to the Commission "major or novel questions of policy, law or procedure." Since a determination that the November 1, 1990 amendment transferred all the Commission's regulatory authority over Section 11e.(2) material in Illinois to the State would deprive this Appeal Board, and indeed the Commission itself, of jurisdiction over the pending

litigation as of that date, this deprivation of jurisdiction, with adjudicatory matters still pending, creates a major and novel question of procedure and law.

In *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-681, 16 NRC 146 (1982), the Appeal Board faced a similar situation. The Commission had suspended the Diablo Canyon low power license pending the results of an independent design verification program because of doubts about the adequacy of the licensee's quality assurance program. 16 NRC at 147. The Appeal Board had pending before it an appeal from the Licensing Board decision authorizing the low power license, and a motion to reopen the record based on "new evidence" in the quality assurance and quality control (QA/QC) area. *Id.* The question before the Appeal Board was whether the Commission intended its suspension order to deprive the adjudicatory boards of jurisdiction over QA/QC matters. 26 NRC at 148. Although in certifying the jurisdictional question to the Commission, the Appeal Board based its rationale largely on avoiding licensing delays, it also stated that "deciding jurisdictional questions now may ultimately save considerable Commission resources." 26 NRC at 149. Finally, the Appeal Board determined to hold the motion to reopen "in abeyance pending the Commission's determination of the certified questions or until we receive further instructions from the Commission (such as directions to forward the motion to it for decision)." *Id.*

In the instant proceeding, unlike *Diablo Canyon*, the issue is not only where, within the NRC, jurisdiction lies but rather more fundamentally, whether the NRC has continuing jurisdiction at all. On November 8, 1990, the Commission acknowledged the motion to vacate the decision on appeal, based on the November 1, 1990 amendment, filed before this Appeal Board by the State of Illinois and the City of West Chicago. *In*

the Matter of State of Illinois (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-11, 32 NRC __ (Slip Op. at 2). Although the Commission noted that it "fully expected" such a motion, the Commission "expresse[d] no opinion as to how that motion should be decided." *Id.* Subsequently, on November 9, 1990, the City of West Chicago filed before the Commission its "Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment." The request sought to vacate the amendment authorizing receipt and storage of contaminated soils from outside the City's limits based on lack of jurisdiction by the Commission. By Order dated December 7, 1990, the Commission requested, *inter alia*, the views of the parties on the impact Commission action on the City's request might have on the jurisdictional questions pending before the Appeal Board. Thereafter, on December 12, 1990, Kerr-McGee filed its "Motion for a Protective Order" with this Appeal Board in order to "preserve" the Appeal Board's jurisdiction and the status of Kerr-McGee's NRC-issued license.

Thus, at the present moment, this Appeal Board has before it a motion to vacate the decision on appeal based on lack of NRC jurisdiction, and a conflicting motion that the Appeal Board issue an order protecting that jurisdiction. At the same time the Commission has before it a motion to vacate a license amendment based on that same lack of jurisdiction. The Staff submits that the questions of jurisdiction and the Commission's intent in executing Amendment No. 1 to the Illinois Agreement, here pending before both the Appeal Board and Commission in essentially identical form, is precisely the type of question that ought to be certified to the Commission. Since the City's motion to vacate is now before the Commission the overall question of jurisdiction should be decided by the Commission prior to further consideration of any other matter

pending before the Appeal Board.

As noted above, in CLI-90-11, the Commission acknowledged the pending motions before the Appeal Board concerning, among other things, the question of jurisdiction and expressed no opinion as to how that issue should be decided. CLI-90-11 at 2. But that was before the City of West Chicago's petition presented the jurisdictional issue directly to the Commission. The Staff believes that it is now appropriate for the Commission to consider this issue. A determination at this time may obviate further consideration of the other issues that are now pending. If the Commission determines that resolution of the jurisdictional issue does not eliminate the need to address the other issues, then the matter can be pursued after the jurisdictional issue is resolved.

III. CONCLUSION

The Appeal Board should certify the jurisdictional question to the Commission for resolution and hold matters pending before it in abeyance until the Commission resolves the question.

Respectfully submitted,

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of December, 1990.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO COMMISSION ORDER OF DECEMBER 7, 1990" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of December, 1990:

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

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

J. Jerome Sisul
Carla D. Davis
Assistant Attorney General
Environmental Control Division
100 W. Randolph, 12th Floor
Chicago, IL 60601

Christine N. Kohl, Esq.*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Dr. Jerry R. Kline*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 200555

Peter Nickles, Esq.
Richard Meserve, Esq.
Covington and Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Docketing and Service Section

Stephen J. England, Esq.
Legal Chief Counsel
Illinois Department of
Nuclear Safety
Springfield, IL 62704

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

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

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

Robert A. Clifford
and Associates
Two North LaSalle Street
Chicago, IL 60602

Atomic Safety and Licensing
Board Panel (1)*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal
Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph A. Young, Jr.
Kerr-McGee Chemical Corporation
123 Robert S. Kerr Avenue
Oklahoma City, OK 73125

Joseph V. Karaganis, Esq.
Karaganis & White Ltd.
414 North Orleans Street, Suite 810
Chicago, IL 60610

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

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

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

Richard G. Bachmann
Counsel for NRC Staff