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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY LICENSING AND APPEAL BOARD

'90 DEC 26 P3:17

OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the matter of
KERR-McGEE CHEMICAL CORPORATION
(West Chicago Rare Earths
Facility)

) Docket No. 40-2061-ML
) ASLB No. 83-495-01-ML
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)

RESPONSE OF ILLINOIS TO
KERR-McGEE'S MOTION FOR A PROTECTIVE ORDER

NOW COMES the PEOPLE OF THE STATE OF ILLINOIS and the ILLINOIS DEPARTMENT OF NUCLEAR SAFETY, (collectively referred to as "Illinois") by and through their Attorney, Neil F. Hartigan, Attorney General of the State of Illinois, and in response to the Motion of Kerr-McGee for a Protective Order state as follows:

Kerr-McGee is asking the Appeal Board to issue an injunction against Illinois and require Illinois to vacate the notice of December 5, 1990 which informed the company its license for the West Chicago site will expire 90 days after its receipt, and prohibiting Illinois from "interfering" with Kerr-McGee's NRC issued license.

The action of Illinois was taken pursuant to "Amendment Number One to the Agreement Between the United States Nuclear Regulatory Commission and the State of Illinois for Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic

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Energy Act of 1954, as Amended," 55 Fed. Reg. 46591 (November 5, 1990). The Appeal Board does not have the power to force Illinois to rescind an action which was taken pursuant to its authority under Section 274. In the hierarchical structure of the NRC, the Appeal Board's power is not superior to that of the Commission itself. The effect of the Appeal Board issuing such an injunction would be tantamount to overruling the unanimous decision of the Commission as to the transfer of certain of its regulatory authority to Illinois. Under these circumstances, the issuance of an injunction by the Board would be improper.

Furthermore, in its Agreement with Illinois and in 10 CFR 150.15 the Commission has reserved some continuing authority over 11e(2) byproduct material in Illinois; however, that authority is very narrow in scope and is vested in the Commission itself, not in the Appeal Board. The Commission has retained the authority to determine, prior to the termination of a state license for byproduct material, that all applicable standards and requirements pertaining to such material have been met; to establish minimum standards governing reclamation, long-term surveillance or maintenance, and ownership of byproduct material and the land used as a disposal site for such material; to establish terms and conditions as the Commission determines necessary to assure that, prior to the state terminating an 11e(2) byproduct material license, the licensee has complied with decontamination, decommissioning and reclamation standards and with ownership requirements; and to require that, prior to the state terminating any license for 11e(2) byproduct material, title to such material

and sites where such material is disposed of be transferred to the United States or the state. The Commission has not reserved for itself, or for the Appeal Board, the authority to enjoin licensing actions taken by the state or to hear appeals of such licensing actions.

Additionally, in approving the Amendment to the Section 274 Agreement, the NRC retained the right, pursuant to provisions of Section 274(o) of the Atomic Energy Act of 1954, as amended, to review alternative regulations adopted and applied by Illinois. See October 18, 1990, letter from NRC Chairman Kenneth M. Carr to Governor James R. Thompson, attached as Exhibit A. At the same time that Illinois notified Kerr-McGee that its license will expire in 90 days, Illinois also provided NRC with the requested notice under Section 274(o). See December 5, 1990, letter from IDNS Director Thomas Ortciyer to Carlton Kammerer, attached as Exhibit B. Because the NRC has the authority to review such regulations that Illinois proposes to impose, there is no reason for the Appeal Board to involve itself in the Section 274 Agreement proceeding. Furthermore, the mechanism for review under Section 274(o) does not involve the Appeal Board.

There is an additional problem with Kerr-McGee's motion. Essentially, this motion is asking for the entry of an injunction against Illinois which seeks to prevent the State from ordering off-site disposal of the waste materials currently located at the West Chicago site. Even if the Appeal Board were to conclude that it had the power to issue such an injunction, action by the Board, at this time, would certainly be premature.

IDNS' letter to Kerr-McGee has simply notified the latter that its license will expire in 90 days. Kerr-McGee is invited to apply for a new license. There is nothing in the letter that explicitly or implicitly suggests that IDNS has determined that it will require off-site disposal of the waste.

Moreover, even if IDNS were to determine at some future time that off-site disposal is required, this is not a basis to preclude the State from acting. The Nuclear Regulatory Commission has previously stated that differences in approach to the handling of wastes at West Chicago, is not justification in preventing the State from acting:

It is no argument to the contrary that the staff's preferred plan for the stabilization of the West Chicago wastes might be scotched by Illinois. No doubt there are many instances in which the staff's preferences are upset by a § 274 Agreement, but Agreement states are not mere ministers of the Commission's will. Indeed, no state may become an Agreement state unless it can demonstrate the capacity for judgment which though in compliance with minimum federal standards, displays independence.

In the Matter of STATE OF ILLINOIS (Section 274 Agreement) Docket No. MISC-87-1.

The argument Kerr-McGee is raising before the Appeal Board has previously been raised in its Motion for Reconsideration with regard to the Amendment to the Section 274 Agreement, filed with the Nuclear Regulatory Commission on October 29, 1990. In a Memorandum and Order the Commission rejected Kerr-McGee's petition for reconsideration of its decision to transfer authority to Illinois. 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-90-11. Kerr-McGee's motion is clearly a collateral attack upon the Commission's decision regarding the Amendment to the Section 274 Agreement. This is improper and is simply one more reason the Appeal Board should deny Kerr-McGee's Motion.

There is a final reason that the Appeal Board should not consider Kerr-McGee's request for injunctive relief with regard to the Section 274 Agreement. The Nuclear Regulatory Commission has recently abolished the Atomic Safety Licensing and Appeal Panel. 55 Fed.Reg. 42944 (October 24, 1990). This Appeal Board no longer has the power to entertain Kerr-McGee's motion.

The only exception granted by the NRC, as to the consideration of a new matter by an Appeal Board, is for a new filing which is so "closely related to a matter currently pending before an appeal board, it should be decided by the appeal board even if it is filed after the date of publication of this final rule." 55 Fed. Reg. 42944 (October 24, 1990). The transfer of regulatory responsibility for all covered radioactive wastes to Illinois by the NRC is a totally different matter than the site-specific issues which the Appeal Board will address in Illinois' appeal of the Atomic Safety and Licensing Board decision which allows for the permanent disposal of radioactive wastes at the West Chicago site. Since the two matters are not "closely related" as required by regulation, the Appeal Board does not have the necessary jurisdictional authority to act on Kerr-McGee's

request for injunctive relief with regard to the transfer of authority to Illinois by the NRC.

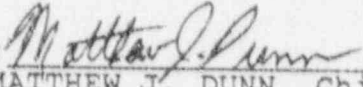
WHEREFORE, for the reasons set forth in Illinois' Response to Kerr-McGee's Motion for a Protective Order, the People of the State of Illinois and the Illinois Department of Nuclear Safety respectfully request that the Atomic Safety Licensing and Appeal Board deny Kerr-McGee's motion for a Protective Order.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

ILLINOIS DEPARTMENT OF NUCLEAR
SAFETY

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: 
MATTHEW J. DUNN, Chief
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 18, 1990

CHAIRMAN

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

Dear Governor Thompson:

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

The Commission has determined that the Illinois program for regulation of 11e.(2) byproduct material and the facilities that produce 11e.(2) byproduct material generally is compatible with the Commission's program for the regulation of like materials and adequate to protect the public health and safety with respect to the materials covered by the proposed amendment. However, certain standards adopted by Illinois differ from the standards adopted and enforced by the Commission for the same purpose. In accordance with the requirements of Section 274c 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 274c 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 274c 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

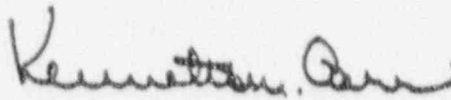
EXHIBIT A

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



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

THOMAS W. ORTCIGER
DIRECTOR

JAMES H. THOMPSON
GOVERNOR

December 5, 1990

CERTIFIED MAIL

Mr. Carlton Kammerer, Director
State Programs
Office of Governmental and
Public Affairs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Kammerer:

On October 18, 1990, Chairman Carr sent a letter to Governor Thompson notifying him that the Nuclear Regulatory Commission had approved amendment of the Section 274 Agreement with Illinois to cover byproduct material as defined in Section 11e.(2) of the Atomic Energy Act, as amended. The purpose of this notification is to enable the Commission to carry out its responsibilities under Section 274a, as discussed in Chairman Carr's letter to Governor Thompson.

In compliance with Chairman Carr's request, I am hereby notifying you that the Department of Nuclear Safety intends to implement 32 Ill. Adm. Code 332.30(c) with regard to License Number STA-583, issued to Kerr-McGee Chemical Corporation. That regulation provides as follows:

Any person who, on the effective date of an Agreement between the State and NRC transferring regulatory authority to the State, possesses a license issued by the NRC, to operate a source material milling facility or byproduct material surface impoundment or disposal area or to receive, possess, dispose of, or transfer source or byproduct material associated with such facilities, shall be deemed to possess a like license issued under this Part. Such license shall expire 90 days after receipt from the Department of a notice of expiration of such license or on the date of expiration specified in the NRC license, whichever is earlier.

On December 5, 1990, the Department sent a letter to Dr. John C. Stauter, Kerr-McGee Chemical Corporation, to notify Kerr-McGee that pursuant to Section 332.30(c), Kerr-McGee's license would expire 90 days from receipt of the notice. A copy of this letter is enclosed.

NRC's rules do not contain a provision equivalent to Section 332.30(c). The Department does note, however, that the regulation is identical in

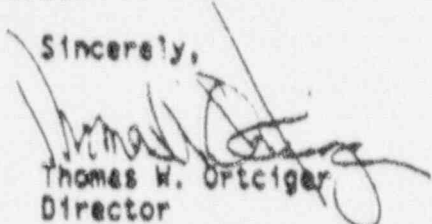
EXHIBIT B

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substance to 32 Ill. Adm. Code 330.360, which the Commission previously found to be compatible. We also note that Section 332.30(c) is substantively similar to Section C.36 of the Suggested State Regulations for Control of Radiation. Unless advised otherwise, we will assume that NRC will provide an opportunity for a public hearing on the Department's implementation of 32 Ill. Adm. Code 332.30(c) and that we should proceed to prepare and submit to the Commission a document describing the Department's rationale for the requirement and an analysis of the level of protection that will be afforded by the regulation.

Should you have any questions regarding this matter, please feel free to contact Joseph G. Klinger at 217/785-9830.

Sincerely,



Thomas W. Ortziger
Director

TWO/vbh

CERTIFICATE OF SERVICE

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USNRC

'90 DEC 26 P3:17

I, WILLIAM D. SEITH, an attorney in this case do certify that on the 24th day of December, 1990, I caused to be served the foregoing Response To Kerr-McGee's Motion For A Protective Order upon the parties listed below by U.S. Postal Service Express Mail.

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- * Administrative Judge
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- * Joseph Karaganis
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414 N. Orleans
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and by first class mail, in envelopes bearing sufficient postage to all of the parties listed on said Notice, by depositing same with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois, 60601

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

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Atomic Safety and Licensing Appeal Panel (5)
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* - denotes Service by U.S. Postal Service Express Mail

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