

LAW OFFICES
CONNER & WETTERHAHN, P.C.
1747 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

TROY B. CONNER, JR.
MARK J. WETTERHAHN
ROBERT M. RADER
NILES N. NICHOLS
BERNHARD G. BECHHOEFER
OF COUNSEL

May 21, 1986

MAY 23 1986

(202) 833-3500

CABLE ADDRESS: ATOMLAW

Robert L. Fonner, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
US Ecology, Inc.
(Sheffield, Illinois Low-Level Waste Burial Site)
Docket No. 27-39 SC

Dear Mr. Fonner:

As a result of a recent FOIA request (No. 86-247), I obtained a memorandum, dated September 18, 1985, from William J. Olmstead, Director and Chief Counsel, Regulations Division, Office of the Executive Legal Director, to G. Wayne Kerr, Director, Office of State Programs. I am enclosing a copy for your information.

At pages two and three of the memorandum, Mr. Olmstead discusses "legal precedent" relating to the NRC's interpretation of licenses authorizing possession of special nuclear material. The memorandum quotes an earlier memorandum, dated July 7, 1964, from Joseph F. Hennessey, then General Counsel, to Harold L. Price, then Director of Regulation, stating that "special nuclear material which has been disposed of by land burial is no longer 'possessed or used' by the burial ground operator within the meaning" of the NRC's regulations.

Because discovery in the Sheffield litigation preceded your representation of the NRC staff in the case, you may not be aware that US Ecology had specifically requested documents of this nature. Our discovery of Staff documents revealed a previously undisclosed memorandum from Michael J. Bell, Chief, Low-level Waste Branch, NMSS, to Edwin J. Reis, Office of the Executive Legal Director, dated February 16, 1979, in which Mr. Bell stated that the legal position proposed by Staff counsel in the case represented a "drastic change in the Commission policy."

Without belaboring the details, US Ecology then moved the Licensing Board to order Staff counsel, inter alia, to

8607020197 860521
PDR ADOCK 02700039
C PDR

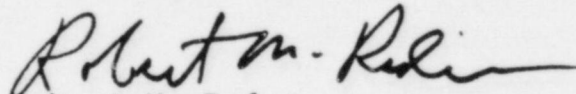
DS03

"review their files and produce to the Board and parties any other statements on the position of the Commission on the 'possession' issue." See Motion By US Ecology, Inc. To Compel NRC Staff To Produce Withheld Documents at 30 (July 29, 1981). In response to the motion to compel, the NRC Staff stated that "Staff has also reviewed legal counsel's files for requested documents and, to the extent not privileged, will make them available as well." Discovery did not proceed, however, because the parties jointly moved to continue the proceedings. Discovery has been held in abeyance since that time.

While the Company recognizes that discovery will continue only if and when the proceeding itself is resumed, the "possession" issue is so basic that those documents should be brought out into the open without delay. This would include the memorandum by Mr. Hennessey quoted above as well as any other documents which the Staff previously pledged to make available. I am therefore requesting that you furnish me with copies and that Mr. Olmstead and any other appropriate Staff be contacted to ensure that the available record is known to all parties.

I will thank you in advance for your prompt attention to this matter.

Sincerely,



Robert M. Rader

RMR/dlf
Enclosure
cc: Service List



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

TR: SN
Lubman

SEP 18 1985

(16)

MEMORANDUM FOR: G. Wayne Kerr, Director
Office of State Programs

FROM: William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive Legal Director

SUBJECT: DRAFT PROPOSAL FROM ILLINOIS FOR AGREEMENT STATE STATUS

We have reviewed the draft proposal from Illinois for a § 274b agreement with NRC. Our detailed comments (Enclosure A) on the Draft Agreement, Draft Letter from the Governor, Illinois Statutes and Illinois Regulations are attached. In view of our prior review of the Illinois Statutes, 1/ our comments on the volume of statutes submitted by Illinois as part of its draft application for Agreement State status are relatively brief. While we believe there are no significant discrepancies between the statutes previously reviewed and those submitted with the Illinois draft application, we have not performed a word-for-word comparison of the respective texts. Also attached (Enclosure C) is a separate analysis which identifies the extent to which the Illinois statutes and regulations meet the criteria in the NRC Statement of Policy for guidance of States and NRC in discontinuance of NRC regulatory authority and assumption of regulatory authority by States through a § 274b agreement.

We have reviewed the State's Program Statement and found the account of the activities of the Office of Nuclear Facility Safety (see pp. 31-37) which relate principally to nuclear power reactors, of particular interest. 2/ It is

1/ See Memorandum of August 9, 1984 from William J. Olmstead to Donald A. Nussbaumer re: Review of Illinois Enabling Legislation Regarding Agreement State Status (Enclosure B).

2/ With respect to this matter, the powers vested in the Department of Nuclear Safety by its Enabling Act, including powers stemming from the Illinois Boiler and Pressure Vessel Safety Act, are also of interest. In addition, see paragraph 218a of the Illinois Radiation Protection Act authorizing the Department of Nuclear Safety "to enter into . . . agreements with the Federal Government . . . whereby this State will perform on a co-operative basis with the Federal Government . . . inspections or other functions relating to control of sources of ionizing radiation."

~~8509300357~~
11-1-1

our understanding that Illinois is performing these activities in accordance with the provisions of a broad Memorandum of Understanding entered into by NRC and Illinois under the authority of § 274i of the Atomic Energy Act of 1954, as amended (49 FR 20586, May 15, 1984). Section 274i authorizes the NRC to enter into agreements under which States may undertake to perform certain NRC functions for the Commission.

Article II of the proposed § 274b Agreement with Illinois states, in part, that:

"This Agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of:

"A. The construction and operation of any production or utilization facility; . . ."

We assume Illinois is fully aware of the fact that its activities with respect to nuclear power reactors (see Program Statement at pp. 31-37) are not among the activities transferred to the State under the provisions of the proposed § 274b Agreement. (Also see comment on this topic in Memorandum of August 9, 1984 on "Review of Illinois Enabling Legislation Regarding Agreement State Status," (Enclosure B at pp. 1-2.) To avoid any misunderstanding on this point, we recommend that in providing comments to Illinois, NRC explicitly state that with respect to regulation of nuclear power reactors, the NRC retains full regulatory authority and that any State activities in connection with the nuclear safety of design or operation of nuclear reactor facilities would be limited to activities carried out under agreements pursuant to § 274i of the Atomic Energy Act.

With respect to the transfer of regulatory control over the Sheffield low-level radioactive waste disposal site, the following procedures are recommended:

1. The Commission paper should state specifically that jurisdiction over the Sheffield site will be relinquished to the State under the Agreement. For this purpose, following legal precedent, 3/ special nuclear

3/ See Memorandum of July 7, 1964 from Joseph F. Hennessey, General Counsel to Harold L. Price, Director of Regulation re: "Land Burial of Special Nuclear Material in Agreement States" which states in part:

"The key issue here is whether or not buried special nuclear material must be deemed, under the Commission's present regulations, to be still 'possessed or used' by the burial ground

material buried in the trenches is not counted in determining if there is more than a critical mass. The Federal Register Notice should also expressly note that jurisdiction over the site will be relinquished to the State, and that upon execution of the Agreement the NRC will request the Atomic Safety and Licensing Board to terminate the present proceeding (Docket No. 27-29 SC).

2. After execution of the Agreement, NRC Staff Counsel will move the Board to terminate the proceeding on the ground that the NRC no longer has jurisdiction over the subject matter of the proceeding, having relinquished jurisdiction to the State of Illinois.

3. Upon issuance of a Board order terminating the proceeding, the NRC staff will transfer the license and associated records, including the docket file, to the State of Illinois in the normal course of business.

It is unclear from a review of the proposed agreement whether Illinois proposes to assume jurisdiction over the radioactive wastes found in Kress Creek and the West Branch of the DuPage River located in and around West Chicago, DuPage County. The Licensing Board in the enforcement proceeding related to Kress Creek has ruled that the proponents of the show cause order (the NRC staff and the State of Illinois, an Intervenor) must demonstrate that the thorium-contaminated wastes are source material under the Atomic Energy Act. Assuming this can be demonstrated, the wastes would then appear to fall within Illinois' proposed jurisdiction since it would assume

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

operator. In my opinion, special nuclear material which has been disposed of by land burial is no longer 'possessed or used' by the burial ground operator within the meaning of those terms as set forth in § 150.11(b). This interpretation is clearly consistent with the Commission's policies . . . [and] I am aware of no reason why § 150.11(b) should not be considered a valid exercise of Commission discretion under section 274 of the Act. Consequently, only those amounts of special nuclear material which are unburied need be taken into account in determining whether or not a burial ground operator is in possession of an amount sufficient to form a critical mass.

"This interpretation is also consistent with the Commission's past and present practice in connection with the regulation of the burial ground operated by Nuclear Engineering Company, Incorporated, in Nevada (a non-agreement State). It is my understanding that the quantity limitation imposed upon the licensee as a license condition with respect to his possession of special nuclear material has been construed and administered as applying only to the unburied material."

jurisdiction over source material in that State. The Licensing Board has, however, also ruled that the proponents may seek to demonstrate that the EPA standards for thorium mill tailings promulgated under the Uranium Mill Tailings Radiation Control Act are appropriate for application in the Kress Creek proceeding. In the proposed agreement, Illinois would not assume jurisdiction over mill tailings. Under the circumstances, you may wish to include in the NRC's comments on the proposed agreement a question as to whether Illinois proposes to assume jurisdiction over the thorium-contaminated wastes in Kress Creek and the West Branch of the DuPage River.

It is our understanding of the Illinois submittal that Illinois would not be accepting jurisdiction under the agreement over the Kerr-McGee West Chicago Rare Earths Facility. All the parties in that proceeding (Docket No. 40-2061-ML) agree that the wastes result from the extraction of source material from source material ore, and are therefore byproduct material within the meaning of § 11e(2) of the Atomic Energy Act of 1954, as amended. Illinois has specifically excluded § 11e(2) byproduct material from the provisions of the proposed § 274b Agreement. However, as a party in the West Chicago proceeding, Illinois has evidenced deep interest in the disposal of the West Chicago wastes. We suggest that the Commission be informed of Illinois' interest in the West Chicago matter. In view of this interest, the Commission may wish to consider, as a matter of policy, whether the position of Illinois with respect to the exclusion of § 11e(2) byproduct material from the proposed agreement is acceptable. So far as we are aware, there is no evidence that other uranium or source material milling activities are likely to be conducted in Illinois in the future. Thus the question of policy relates solely to jurisdiction over the West Chicago Rare Earths Facility.

As a matter of policy the Commission has already stated to me no defined on 11/2/82 my ltr & checked

William J. Olmstead

William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive Legal Director

Enclosures:

- A. Detailed OELD Comments on Draft Proposal from Illinois for Agreement State Status
- B. Memorandum of August 9, 1984 from William J. Olmstead to Donald A. Nussbaumer re: Review of Illinois Enabling Legislation Regarding Agreement State Status
- C. OELD Analysis of Illinois Statutes and Regulations from Standpoint of NRC Criteria