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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETING & SERVICE  
BRANCH

In the Matter of )

KERR-McGEE CHEMICAL CORPORATION )

(Kress Creek Decontamination) )

Docket No. 40-2061-SC  
ASLBP No. 84-502-01-SC

MOTION FOR RECONSIDERATION  
OR REFERRAL TO THE COMMISSION

On October 16, 1986, Kerr-McGee Chemical Corporation ("Kerr McGee") filed a motion for an expedited decision of the Staff's appeal in the above-captioned matter. Although the Staff stated that it did not oppose the motion, the Appeal Board nonetheless rejected the Kerr-McGee request. Memorandum and Order (Nov. 13, 1986). Kerr-McGee hereby moves the Appeal Board to reconsider its decision. If this Board determines that reconsideration is unwarranted, Kerr-McGee respectfully requests that it promptly refer the matter to the Commission for its consideration. See 10 C.F.R. 2.730(f).

The Licensing Board in this case determined that the Staff's Order to Show Cause should be dismissed. After the briefing of the Staff's appeal was completed, the Staff informed the Appeal Board that it expected to complete the execution of an Agreement with the State of Illinois that would transfer jurisdiction over the materials in the Creek to

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the State on or about January 1, 1987.<sup>1/</sup> The Staff stated that it then intended to move for an order terminating this proceeding. Although the Staff had not suggested that this proceeding be held in abeyance, the Appeal Board took that action without seeking comment from the parties. Order (October 10, 1986).

Kerr-McGee filed its motion for an expedited decision in order to move the case forward with dispatch. Kerr-McGee seeks a final decision before the transfer of jurisdiction occurs. If a final decision is achieved, Kerr-McGee, the NRC, and the State of Illinois will be bound and this litigation will be at an end.<sup>2/</sup> On the other hand,

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<sup>1/</sup> The Staff had earlier informed the Licensing Board that an Agreement affecting the materials was in the offing. See, e.g., Letter from S. H. Lewis to J. H. Frye, III, et al. (Dec. 6, 1985). The Licensing Board nonetheless proceeded to resolve the case, just as Kerr-McGee urges this Appeal Board to do.

<sup>2/</sup> The Board states that "Kerr-McGee does not argue . . . that our decision would be legally binding so as to preclude subsequent action by Illinois or other federal regulators." Memorandum and Order, 5. In point of fact, Kerr-McGee believes that exactly such binding effect could be achieved if this proceeding were resolved. The State of Illinois is a party (see Initial Decision, 4-5) and it would be bound by any final decision in this action. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 26 (1978); Toledo Edison Co. (Davis Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-778, 5 NRC 557, 563 (1977); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), aff'd, ALAB-575, 11 NRC 14 (1980). Although the NRC may not fully bind another federal agency that is not a party, such an agency would be required to give substantial deference to an NRC decision.

if the case is held in abeyance and then is dismissed pursuant to the threatened Staff motion, the State of Illinois, which Staff asserts would succeed to its authority over the Creek, might take the position that it could start the entire proceeding over again. Kerr-McGee's motion was intended to avoid the unfairness, waste, and turmoil that would surround any transfer of jurisdiction before this matter is finally resolved. Kerr-McGee sought through its motion to prevent specific and concrete injury that would result if this proceeding were allowed to languish.

Kerr-McGee premised its motion on four grounds. The Memorandum and Order issued by the Appeal Board suggests that Kerr-McGee's arguments may not have been fully appreciated:

1. Fairness. Kerr-McGee asserted in its motion that the Staff's proposed action raises profound due process concerns. The Staff's action is fundamentally unfair in two respects.

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(Footnote Continued)

See Public Service Co. of New Hampshire, supra. And, although the U.S. Environmental Protection Agency has proposed the listing of Kress Creek on the National Priorities List authorized by the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), see 51 Fed. Reg. 21109 (June 10, 1986), the agencies have agreed that the lead responsibility for the Creek is the NRC's. Letter from J. G. Davis, NRC, to C. Elkins, EPA (Feb. 25, 1983); Letter from B. Constantelos, EPA, to L. Rainey, Kerr-McGee (Mar. 27, 1984). In short, very real stakes hinge on the Appeal Board's action.

a. The Staff and its ally in this proceeding, the State of Illinois, are in a position to determine the scope of the authority that is transferred to the State. The Staff has indicated that the proponents of the order may use their power to cede the NRC's jurisdiction in certain respects so as to justify termination of this proceeding. Of course, if they had won below, the Staff and the State could choose to preserve NRC jurisdiction over Kress Creek so that a binding decision adverse to Kerr-McGee might be maintained. In short, the Staff seeks a no-risk litigation posture: through adjustment of the Agreement it can preserve a favorable decision or seek to nullify an unfavorable one.

The Appeal Board rejected Kerr-McGee's observations as to the fundamental unfairness of the Staff's approach. The Board has asserted that the Staff could always move to terminate this proceeding at any time for any reason. For example, as the Board indicates, the Staff could have chosen not to appeal and thereby allowed the Licensing Board's thoughtful initial decision to become the NRC's final decision. Memorandum and Order, at 3. The fact is, however, that the Staff has not proposed to acquiesce in the adverse Licensing Board decision. Instead, now that it has lost, it seeks to undercut the very proceeding that it initiated. We are unaware of any circumstance in which one party, after having lost, is provided with the unilateral power to avoid the consequences.

The Appeal Board also indicated that Kerr-McGee's argument is directed to the NRC's Agreement with the State and the Staff's future motion to terminate. Memorandum and Order, at 4. But the Board has misunderstood the relief sought by Kerr-McGee. Kerr-McGee does not request that this Board take any action now with regard to the Agreement or the anticipated Staff motion. Instead, Kerr-McGee seeks expedition in order to bring a final end to this long and costly proceeding and to avoid the serious problems that loom ahead if this proceeding is not resolved by the time that any transfer of authority to the State takes place.

b. Kerr-McGee raised a second fairness concern that the Board chose not to address. Kerr-McGee Motion, 2-3. As noted above, the State (through the Illinois Department of Nuclear Safety) is a party to this proceeding as a proponent of the Order to Show Cause. Indeed, the State has vigorously opposed Kerr-McGee in connection with a whole variety of matters relating to West Chicago. Id. at 2 n.1. Nonetheless, the Staff proposes to allow a party (the IDNS) to assume the mantle of the judge with regard to the ultimate resolution of the matters at issue.<sup>3/</sup> Again this palpable

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<sup>3/</sup> The Board quoted a portion of the text of the Kerr-McGee motion concerning this point, but incorrectly characterized it as directed toward the NRC Staff. Memorandum and Order at 3.

The NRC and the IDNS stand in fundamentally different

(Footnote Continued)

unfairness can be prevented, but only if this Board acts to resolve the pending appeal before the Agreement becomes effective.

2. Waste. Kerr-McGee asserted in its motion that the parties have expended hundreds of hours of effort, costing tens of thousands of dollars, to present the issues for examination. Moreover, the Licensing Board has invested its resources, time and effort in achieving resolution. We urged the Board to hear the appeal forthwith in order to avoid the waste that would result if all this effort were allowed to dissipate short of final agency action.

The Appeal Board responded solely by looking to its own resources, concluding "that no additional resources should be expended unless and until it is clear that such effort would serve a useful purpose." Memorandum and Order, 5. The Board states that it is asked to review a complex record in circumstances where its efforts might prove futile if its decision is subsequently rendered void. Kerr-McGee observes, however, that the issues raised on appeal implicate only a

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positions in this case. Although the Staff has argued for cleanup, the NRC as an agency has remained impartial with regard to the proper resolution of the Order to Show Cause. In contrast, the IDNS is on record as an agency as to its views. Kerr-McGee is thus prejudiced if IDNS is allowed to become the decision-maker because that agency has already decided the case without affording Kerr-McGee any due process safeguards.



slight portion of the total record.<sup>4/</sup> And, in light of the inevitability of delay in consummating the Agreement (see infra at pp. 7-9) and the substantial issues raised by Kerr-McGee's motion, Kerr-McGee urges the Board to expend its resources now in order to avoid the thorny issues that delay will serve to nurture.

3. Jurisdictional Uncertainty. Kerr-McGee observed in its motion that there was substantial doubt as to whether the proposed Agreement with the State will in fact serve to transfer jurisdiction over the materials in the Creek to the State. Motion at 4-5. The Staff's letter asserts that the materials in the Creek are "source material" that are encompassed by the Agreement. The Staff has previously found, however, that the materials at the West Chicago Rare Earths Facility -- the alleged source of the contamination of the Creek -- are by-product materials as defined by section 11e(2) of the Atomic Energy Act.<sup>5/</sup> Because the State has not

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4/ The Staff seeks to raise only two issues on appeal. First, the Staff seeks to establish that the EPA radium-in-soil standard is appropriate to apply to Kress Creek. Only two panels presented any testimony that bears on this question. Tr. 421-500 (Testimony of Drs. Cool and Shum); Tr. 588-686 (Testimony of Drs. Auxier, Chambers, and Still). Second, Staff seeks on appeal to argue for cleanup on the basis of 10 CFR Part 20. There is no testimony in the record on this point as the Staff chose at the hearing not to justify enforcement of the order on the basis of Part 20. See Initial Decision, 18, 19, 24.

5/ See NRC, Final Environmental Statement Related to the  
(Footnote Continued)

requested jurisdiction over such by-product materials, Kerr-McGee asserted that delay may entangle the Board in a jurisdictional morass.

The Appeal Board rejected the argument. It stated that there is confusion as to the classification of the materials and that, in light of this fact, the better course is to await clarification of the matter. Memorandum and Order, 6. If the Board were to act now, however, the classification of the material would be irrelevant. The Licensing Board determined that the NRC had jurisdiction without regard to classification and neither party has raised any issue as to the correctness of that ruling. Initial Decision, 6-12. Thus, this Board's jurisdiction at the moment is clear. But

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Decommissioning of the Rare Earths Facility, West Chicago, Illinois, at H-2 to H-5 (1983) (NUREG-0904). See also Tr. 349 ff. at 14-18 (various Staff theories as to how wastes from the site escaped to the Creek).

The Board implies that Kerr-McGee, like the Staff, has been inconsistent in its characterization of the materials in the Creek. Memorandum and Order, 7. The Board states that Kerr-McGee suggested at the hearing that the material in the Creek might be ore (i.e., source material) that had escaped from trains bringing material to the site. Unlike the Staff, however, Kerr-McGee never presented any testimony as to the origins of the material in the Creek. In the course of cross-examining the Staff's witnesses, Kerr-McGee's counsel explored the possibility of sources of contamination beyond those acknowledged by the Staff. Tr. 407-08; see id. 413-19. Although the Staff conceded the possibility that ore being shipped to the site had escaped, the Board rejected this theory as "pure speculation." Initial Decision, 12. Of course, if the NRC had accepted this possible source of the materials in the Creek, the railroad rather than Kerr-McGee might properly be the respondent in this action.



if the Board waits, confusion will be created. In order to allocate jurisdiction after the Agreement is signed, it will be necessary to determine whether the material in the Creek is by-product material, as the Staff had earlier found with regard to the materials at the West Chicago site, or whether it is source material, as the Staff apparently now asserts. It is precisely in order to avoid this jurisdictional uncertainty that Kerr-McGee urged prompt action.

4. Scheduling Uncertainty. Kerr-McGee observed in its motion that it is unlikely that the transfer of authority will be achieved by January 1, 1987. In light of this fact, we urged the Appeal Board that there was no need to postpone resolution on the expectation that its jurisdiction would promptly disappear. Indeed, there may still be ample time to achieve final agency action in this case if this case is allowed to move forward now.<sup>6/</sup>

Although the Appeal Board did question Kerr-McGee's observation as to the likelihood of delay, it rejected

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<sup>6/</sup> Section 274 of the Atomic Energy Act provides that any agreement with a State must be published in the Federal Register once each week for four consecutive weeks. 42 U.S.C. § 2021(e)(1). The Staff has indicated that it will seek comment on the proposed agreement and will evaluate and respond to any comments before entering the agreement. NRC Staff Response to Kerr-McGee's Motion for an Expedite Decision, 3, 4 (Oct. 31, 1986); see 42 U.S.C. § 2231. Because even the first publication of the proposed agreement has not yet occurred, it is apparent that the entry of the agreement is many months away.

Kerr-McGee's call to action on the basis that Kerr-McGee had not explained "exactly how our decision on the staff's appeal will affect the proposed agreement with Illinois." Memorandum and Order, 8. But Kerr-McGee did not explore this matter because it is not seeking to affect the proposed Agreement. It seeks prompt resolution so as to assure that the fairness, waste, and jurisdictional questions raised by the Agreement need never be addressed.

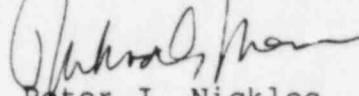
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In sum, Kerr-McGee asserts that concrete harm -- unfairness, waste, and jurisdictional confusion -- will result if this Board does not strive to reach a final decision before the entry of the Agreement between the NRC and the State. Accordingly, we urge this Board to reconsider the Kerr-McGee motion and to provide an expedited decision in this case.

If the Board declines to reconsider its ruling, Kerr-McGee requests that the Board refer the matter to the Commission for its consideration. In light to the profound fairness issues that are raised by delay, prompt resolution will serve to prevent detriment to the public interest. Moreover, prompt resolution in the instant circumstances would enable the avoidance of the unusual delay and expense that

would attend relitigation of this matter yet again before the State.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Peter J. Nickles", written over the typed name.

Peter J. Nickles  
Richard A. Meserve

Counsel for Kerr-McGee  
Chemical Corporation

November 21, 1986