

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W. DOCKETED  
P. O. BOX 7566 USNRC

WASHINGTON, D. C. 20044

RICHARD A. MESERVE

DIRECT DIAL NUMBER  
(202) 662-5304

(202) 662-6000 '87 MAY 27 AIO:27

VIRGINIA OFFICE  
2000 CORPORATE RIDGE  
McLEAN, VIRGINIA 22102  
(703) 749-3860

TELEX: 89-593 (COVLING WSH)

TELECOPIER: (202) 662-6288

CABLE: COVLING

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

May 22, 1987

BY HAND

Lando W. Zeck, Jr., Chairman  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, D.C. 20555

Re: Proposed Agreement with State of Illinois,  
52 Fed. Reg. 2309 (Jan. 21, 1987).

Dear Mr. Chairman:

I am writing on behalf of Kerr-McGee Chemical Corporation ("Kerr-McGee") concerning the entry of the proposed Agreement with the State of Illinois. I have learned from a letter recently submitted by the staff to the Appeal Board in Kerr-McGee Chemical Corporation (Kress Creek Decontamination), Dkt. No. 40-2061-SC, ASLBP No. 84-502-01-SC, that the Commission has recently authorized you to enter the Agreement. I am writing to urge that you (and the Commission) withhold any transfer of jurisdiction over materials that allegedly originated at Kerr-McGee's West Chicago Rare Earths Facility until the matters discussed in this letter are resolved.

In the notice of the proposed Agreement the staff stated that it viewed the materials in the offsite areas in West Chicago as source material, whereas the material on the site was seen to be byproduct material under section 11(e)(2). 52 Fed. Reg. at 2322. Because the State does not seek jurisdiction over 11(e)(2) material, the effect of the staff's allocation is to transfer part of the regulatory authority for the West Chicago materials to the State, while retaining NRC jurisdiction over the remainder. Kerr-McGee submitted extensive comments concerning this interpretation of the Agreement on February 20, 1987, and I have previously written about the matter to Mr. Chilk on February 24, and April 15, and to each of the Commissioners individually on April 30. The Kerr-McGee comments and my letters observed that the staff had provided no explanation for this seemingly arbitrary allocation and

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that the proposal threatened to frustrate the final disposition of the West Chicago wastes.

The letters and comments also emphasized that the proposed transfer of jurisdiction would raise serious due process concerns. Any transfer of jurisdiction over the Kress Creek proceeding is unfair because it might allow the losing parties to evade an adverse decision by the ASLBP. Moreover, the transfer would place the decision-making authority in the hands of a state official who has vigorously opposed Kerr-McGee's plan for the stabilization of the materials in West Chicago.

I have now received a copy of a memorandum concerning the Agreement from H.R. Denton to the Commissioners (Apr. 21, 1987) (SECY-87-104). The memorandum sets out the staff's responses to the public comments and describes for the first time the staff's justification for the proposed division of responsibility for the West Chicago materials. The memorandum states:

"The NRC staff has characterized the contaminated landfill returned to the West Chicago site from West Chicago residential areas and the sewage treatment plant as source material. The NRC staff has also characterized other offsite materials . . . as source material. . . . The staff based these characterizations on the fact that most of the process wastes created prior to 1953, particularly prior to the early 1940's, are properly attributable to the production of rare earths. It is these materials that were removed from the West Chicago site and used as landfill. The process wastes created during the period after 1953, particularly during the period the West Chicago Rare Earths Facility was licensed by the Atomic Energy Commission, are properly attributable primarily to the production of thorium. Accordingly, the staff has characterized the onsite process wastes which now remain at and have at no time been removed from the West Chicago site as §11e.(2) byproduct material."

SECY-87-104, Enc. C, at 7 (footnote omitted). The memorandum also mentions Kerr-McGee's due process concerns in passing, but dismisses them as "speculative." Id.



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There are several difficulties with the Staff's analysis that demand correction before final agency action on the Agreement:

1. Throughout the comment period and thereafter Kerr-McGee sought unsuccessfully through both formal and informal channels to obtain an explanation for the staff's proposed allocation of jurisdiction over the West Chicago materials. Despite all these efforts, Kerr-McGee learned of the staff's reasoning only upon receipt of the Denton memorandum. As a result, Kerr-McGee has been denied the opportunity to comment on the staff's jurisdictional theories. This has resulted in serious prejudice to Kerr-McGee, because it is hardly apparent that the factual determinations by the staff are valid. There has been no proper fact finding on the crucial issues that underlie the jurisdictional allocation -- namely, whether the production at the site prior to 1953 is properly attributable to rare earths production, and whether the materials that are found in the offsite areas in fact escaped the site prior to 1953. These are important determinations that should be allowed a full and careful airing.

2. To the best of Kerr-McGee's knowledge, ores were processed for thorium content from the outset of operations at the site in 1932 through the termination of production in 1973. (The original operator, the Lindsay Light & Chemical Company, produced thorium nitrate for use in the production of mantles for gas lamps.) Moreover, ores that were processed for rare earths were customarily also processed for thorium throughout the period of operations. Thus, even if the offsite wastes did escape the site prior to 1953, they necessarily must contain section 11(e)(2) byproduct material. The retention of NRC jurisdiction over the materials is thus mandatory, since the Agreement does not transfer authority over section 11(e)(2) material. The retention of NRC jurisdiction also has a practical advantage in light of the fact that a complete regulatory regime has been established for section 11(e)(2) wastes, but not for wastes from rare-earths processing. In this connection it must be recalled that even though the staff in the Kress Creek proceeding asserted that the materials in the creek were source material, the staff nonetheless sought to apply standards developed solely for section 11(e)(2) material.

Moreover, even if the offsite wastes were assumed to be derived solely from rare earths processing (which they clearly were not), the NRC is nonetheless legally required to retain jurisdiction. The relevant statutory provision governing the stabilization of rare earths sites provides:

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"If the low-level radioactive waste involved is the result of a licensed activity to recover . . . rare earths from source material, the Secretary, upon request of the owner of the site involved, shall assume title and custody of such waste and the land on which it is disposed when such site has been decontaminated and stabilized in accordance with the requirements established by the Commission . . . ."

42 U.S.C. § 10171(c) (emphasis added). The section provides no authorization for the transfer of NRC responsibility to an Agreement State, particularly for those offsite materials that have been returned to the site pursuant to the NRC license for stabilization. Accordingly, even on the staff's theory, NRC jurisdiction must be retained.

3. The staff's rationale for the transfer of jurisdiction cannot, as a factual matter, justify the transfer of jurisdiction over Kress Creek to the State. The staff testified in the Kress Creek proceeding that "[a]bout 77 percent of the total ore used over the operating life of the facility was processed after the facility was licensed by the AEC " and, based on this fact among others, the staff asserted that at least part of the contamination of the Creek "occurred during the period the facility operated under AEC license." NRC Staff Testimony of Merri Horn, et al., Tr. 349 ff. Guided by the staff's testimony, the ASLBP explicitly found that "the material in Kress Creek came from the West Chicago facility while it was licensed under the Atomic Energy Act." Kerr-McGee Chemical Corporation (Kress Creek Decontamination), 23 NRC 799, 804 (LBP-86-18) (1986), appeal pending on other grounds. Because the facility was first licensed in 1956, the NRC has already found that Kress Creek involves material from post-1953 processing. The staff's recently revealed jurisdictional theory thus cannot justify a transfer of jurisdiction over the Creek to the State.

4. The due process issues that are associated with the proposed transfer have not yet been addressed. The staff has not responded in any fashion to Kerr-McGee's comments as to the unfairness of the withdrawal of jurisdiction in circumstances in which the staff's proposed action might serve to enable it to evade its loss before the ASLBP in the Kress Creek proceeding. Moreover, the staff's assertion that Kerr-McGee's due process concerns are "speculative" is singularly disingenuous in light of the aggressive litigation by the State against

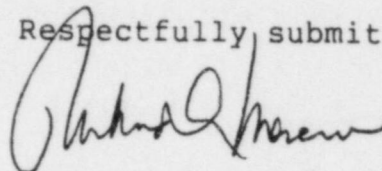
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Kerr-McGee and the testimony under oath by the Director of the Illinois Department of Nuclear Safety, submitted with the Kerr-McGee comments, that he has unequivocally prejudged the appropriate disposition of the West Chicago materials.

\* \* \* \*

I recognize the Commission's interest in an orderly transfer of jurisdiction to the State. Nonetheless, the NRC should retain jurisdiction over the West Chicago materials until the important factual and legal issues that are discussed above have been fully and fairly aired. Kerr-McGee has expended over \$30 million in an effort to seek the final stabilization of all the West Chicago wastes. Precipitous action by the Commission will serve only to frustrate this effort, with resulting severe economic injury to Kerr-McGee as well as harm to the public interest.

Respectfully submitted,



Richard A. Meserve

Counsel for Kerr-McGee  
Chemical Corporation

cc: Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine  
✓ Commissioner Frederick M. Bernthal  
Commissioner Kenneth Carr  
Service List, Dkt. No. 40-2061-SC;  
ASLBP No. 84-502-01-SC  
Mr. Richard E. Cunningham  
Mr. Leland C. Rouse