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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	Docket No. 40-2061-SC
KERR-MCGEE CHEMICAL CORPORATION	ASLBP No. 84-502-01-SC
(Kress Creek Decontamination)	

KERR-McGEE RESPONSE TO STAFF MOTION TO TERMINATE

On May 28, 1987, the NRC staff filed a motion to terminate this proceeding on the basis that the Agreement with the State of Illinois has served to withdraw NRC jurisdiction over the subject matter of the case. The staff offers no justification for its jurisdictional assertions. The focus of the motion is a request that the Appeal Board vacate the underlying decision of the Licensing Board.1/

Kerr-McGee Chemical Corporation ("Kerr-McGee") hereby opposes the staff's motion. We establish in Part I that the NRC retains jurisdiction over Kress Creek and the West Branch of the DuPage River (hereinafter "the Creek") and

1/ In light of the unfairness to Kerr-McGee that would result from abrogating the Licensing Board's decision, the Appeal Board has stated that it would consider terminating the proceeding, but not vacating the Licensing Board's decision. Memorandum and Order, 4-5 (Jan. 7, 1987). The staff's motion opposes the Appeal Board's suggestion.

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that, accordingly, there is no foundation for the staff's motion. We show in Part II that, if the Appeal Board were to decide that it should not proceed in light of the jurisdictional dispute, the Board should now dismiss the staff's appeal with prejudice.

I. THE NRC CONTINUES TO HAVE JURISDICTION OVER THE SUBJECT MATTER OF THIS PROCEEDING.

The Agreement that the NRC has entered with the State of Illinois does not specifically mention the Creek and does not provide any guidance as to the implications of the Agreement for NRC jurisdiction over the Creek. The Appeal Board is thus confronted with the traditional judicial task of construing the Agreement in the factual context of this case.

By its terms the Agreement transfers jurisdiction previously exercised by the NRC only with respect to certain classes of material. Of specific relevance here, the Agreement serves to transfer jurisdiction over source material, but not to transfer jurisdiction over section 11(e)(2) byproduct material.[2/] 52 Fed. Reg. 2309, 2310, 2323 (1987). Kerr-McGee contends that the Agreement does not encompass the materials that are found in the Creek.

2/ Section 11(e)(2) of the Atomic Energy Act defines byproduct material to include "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2).

The staff explained in a notice concerning the proposed Agreement that it intended to construe the Agreement as transferring to the State jurisdiction over offsite materials that allegedly had derived from Kerr-McGee's West Chicago Rare Earths Facility, thus terminating NRC jurisdiction over the materials in the Creek. Id. at 2322. The staff chose to define the offsite materials as "source material." Jurisdiction over the materials that are on the site would remain with the NRC, however, because the onsite materials were defined as section 11(e)(2) byproduct material. Id. The notice did not explain why the offsite materials -- which are chemically, physically, and radiologically similar to those on the site -- should be treated differently from the onsite materials.

Kerr-McGee filed extensive comments on the proposed Agreement.[3/] Kerr-McGee observed that the staff had previously determined that the wastes produced from operations at the West Chicago site are byproduct material[4/] and thus any wastes that are alleged to have escaped from the site must therefore also be seen as byproduct material. Kerr-McGee also observed that the only explanation that had been provided by the staff

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3/ The Kerr-McGee comments were served on the parties in this proceeding. Letter from R.A. Meserve to C.N. Kohl, et al. (Feb. 20, 1987).

4/ See NRC, Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois, at H-2 to H-5 (1983) (NUREG-0904) (hereinafter "FES") (attached to the Kerr-McGee Comments on the Proposed Agreement, App. 1 (Feb. 20, 1987)).

in any context to justify the categorization of the West Chicago wastes as source material was certain staff testimony in this proceeding. The staff had asserted before the Licensing Board that any material containing uranium and thorium should be considered to be source material.[5/] But that theory could not explain why some of the West Chicago materials were viewed as source material and others as byproduct material, and thus the theory did not illuminate the staff's interpretation of the Agreement.

During the comment period and thereafter Kerr-McGee sought vigorously to learn the basis for the staff's proposed jurisdictional allocation, but without success. Kerr-McGee first learned the basis only after the Commission had voted on the proposed Agreement. A staff analysis that purports to respond to comments on the Agreement explains the jurisdictional allocation as follows:

> The NRC staff has characterized the contaminated landfill returned to the West Chicago site . . . as source material. The NRC staff has also characterized other offsite materials determined to be contaminated as a result of the operations of the West Chicago Rare Earths Facility as source material. These materials include . . . contaminated areas in Kress Creek

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5/ Staff Testimony of D.A. Cool, et al., Tr. 425 ff., at 5. Because uranium or thorium tailings necessarily must contain uranium or thorium that is not removed by processing, the staff's theory requires that all uranium or thorium tailings be defined as source material. The theory is inconsistent with NRC precedent, Petition of Sunflower Coalition, CLI-81-13, 13 N.R.C. 847, 850 (1981), and with the statutory definition of byproduct material, supra note 2.

> and the West Branch of the DuPage River. 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.

Memorandum from H.R. Denton for The Commissioners, Enc. C. at 7 (footnote omitted) (Apr. 21, 1987) (SECY-87-104) (attached).

In short, the staff's justification for the transfer of jurisdiction over the Creek evidently rests on two factual allegations: (1) that materials produced at the site before 1953 stem from production of rare earths rather than thorium (and hence the resulting wastes are source material rather than byproduct material); and (2) that the materials in the Creek are wastes that were produced before 1953.[6/] Neither of

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6/ In fact, the staff's analysis of comments does not explain the transfer of jurisdiction over the Creek. The staff's analysis justifies transfer to the State on the basis that pre-1953 wastes were removed from the site and used as landfill. Because no one has ever asserted that the materials in the Creek derive from a landfill, the staff has still not explained why jurisdiction over the Creek is affected by the Agreement. Indeed, as will be seen, the staff's testimony in this proceeding undercuts any assertion that the contamination of the Creek arises from pre-1953 activities at the site.

these allegations is supportable on the record in this case; to the contrary, the staff's own evidence demonstrates that jurisdiction over the Creek must remain with the NRC.

A. This Tribunal Must Determine Whether It Has Subject Matter Jurisdiction.

An administrative tribunal, like a court, has the authority and responsibility to determine the scope of its own jurisdiction. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 627 (1973). That fundamental prerogative may not be removed by the unilateral action of one party. Cf. United States v. Shipp, 203 U.S. 563 (1906) (Holmes, J.); United States v. United Mine Workers of America, 330 U.S. 258 (1947). Accordingly, this Appeal Board cannot merely accept the staff's representations, but rather must determine for itself whether the Board's jurisdiction has been compromised by the Agreement.

The obligation of an NRC tribunal to determine its own jurisdiction was faced squarely by the Appeal Board in Kansas Gas & Electric Co., et al. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 N.R.C. 293 (1976). In that case, an applicant sought a ruling from a Licensing Board that certain matters ancillary to the construction of the reactor were within the scope of a licensing proceeding. The Licensing Board granted the applicant's motion, and the staff appealed. The Appeal Board found that the applicant's motion in essence constituted a request for a ruling as to subject matter

jurisdiction. The Appeal Board noted that federal courts routinely pass upon the scope of their subject matter jurisdiction, and that administrative agencies necessarily had the authority to do the same. The board concluded:

> We hold . . . that a Licensing Board has the authority to rule on whether, to what extent, and for what purposes particular matters are subject to the Commission's regulatory jurisdiction and thus may be brought before it. Indeed, we suggest that the Board must do so in order to carry out the responsibilities delegated to it.

3 N.R.C. at 300; see id. at 298 ("A tribunal always has jurisdiction to decide the extent of its own authority.")

Just as in Kansas Gas & Electric Co., this Appeal Board can not abdicate its responsibility to determine whether the Agreement removes NRC jurisdiction over the materials in the Creek, particularly since such a conclusion is not apparent from the face of the Agreement itself. This Board can not simply accept the staff's interpretation of the Agreement.

B. The NRC Continues To Retain Jurisdiction Over The Creek.

As noted above, the transfer of jurisdiction to the State is premised on the notion that the State has now obtained jurisdiction over wastes stemming from pre-1953 activities at the West Chicago site. Even if we were to accept arguendo the staff's theory for allocation of jurisdiction based on the time of processing, the materials in the Creek remain within the NRC's exclusive jurisdiction.

The staff submitted written testimony to the Licensing Board that set out the staff's theories as to how the Creek was contaminated. The staff testified that at least part of the contamination of the Creek "occurred during the period the Rare Earth facility operated under AEC license." Testimony of Merri Horn, et al., Tr. 349 ff., at 15; see also NRC Staff's Proposed Findings of Fact and Conclusions of Law, 36 (May 21, 1986). Guided by the staff's testimony, the Licensing Board explicitly held:

> [W]e find 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), LBP-86-18, 23 NRC 799, 806 (1986) (emphasis added). Because the Facility was first licensed in 1956, id. at 814, the Licensing Board has thus already found that this case involves post-1953 wastes[7/] -- wastes that remain the responsibility of

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7/ The staff speculated in its testimony as to various ways by which wastes from the site might have escaped to a storm sewer that leads to the Creek. 23 NRC at 815. All of these theories -- which involve escape from various drains, processing lines, or disposal locations -- necessarily entail the loss of contemporaneously produced wastes. Thus, if the release from the site to the Creek occurred after 1956, it involved post-1953 wastes.

The Licensing Board summarized the history of operations at the site as follows:

> The quantity of solid waste (tailings plus pond sediments) produced in the West Chicago plant was approximately

(Footnote Continued)

the NRC even on the staff's recently revealed theory. Neither Kerr-McGee nor the staff has challenged the Board's determination. Thus, on the record that has already been established in this case, NRC jurisdiction over the Creek must be maintained.

Moreover, even if the staff were now to attempt to evade its prior testimony and the Licensing Board's findings, any transfer of jurisdiction over the Creek (or over the offsite materials more generally) would still be improper. The staff's assertion that pre-1953 processing at the site should be attributed to rare earths processing, rather than thorium processing, is incorrect.[8/] To the best of Kerr-

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(Footnote Continued)
proportional to the ore fed to the process. Losses to residues were 20 to 25% of total oxide input. The plant processed 10,000 tons per year (tons/yr) of monazite sands during peak production years between 1954 and 1958, about 5000 to 6000 tons/yr between 1958 and 1963, and about 2000 to 2500 tons/yr before 1954 and after 1963. The ore fed to the process from 1954 to 1973 was about 77% of the total ore used from 1936 to 1973.

23 NRC at 816. Thus, even if the wastes in the Creek were allocated in some fashion between pre-1953 and post-1953 processing, the wastes must relate predominantly to the post-1953 period. The materials in the Creek thus remain subject solely to NRC jurisdiction, just as the onsite wastes remain subject to exclusive NRC jurisdiction. See FES, supra note 4, at H-2 to H-5.

8/ Staff cited two Kerr-McGee internal memoranda in its analysis of comments to explain its characterization of pre-1953 operations as relating to production of rare earths. SECY-87-104, Enc. C. at 7, note 2 (Appendix). (Neither of
(Footnote Continued)

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. Indeed, the West Chicago facility was established by the Lindsay Light & Chemical Company in order to produce thorium for use in the mantles of gas lamps. Moreover, ores that were processed for the production of rare earths were customarily also processed for thorium. The retention of NRC jurisdiction over the wastes arising from West Chicago operations is thus mandatory, regardless of when the wastes were produced, because the Agreement does not encompass wastes derived from thorium production.

In sum, this Board cannot rely on the self-serving assertion of the losing party that this Board has lost jurisdiction over the case. As NRC precedent confirms, this Board must determine its subject matter jurisdiction for itself. And the record in this proceeding -- the record that the staff established -- shows that the Commission retains jurisdiction over Kress Creek.

(Footnote Continued)
these memoranda are in the file assembled in the public document room concerning the Agreement and the staff has never indicated to Kerr-McGee that it was relying on the memoranda for any purpose.) These memoranda were created by H.E. Kremers (a Kerr-McGee consultant, now deceased) and reflect efforts in 1982 and 1983 to allocate tailings produced at the site between Government and commercial contracts. The memoranda suggest that Mr. Kremers had, at best, an imperfect knowledge of pre-1953 operations. Moreover, although the memoranda do state that processing through 1953 was "driven by rare earth demand," the analysis set out in the memoranda shows that thorium was recovered from all the ore that was processed at the site through 1953.

II. IF THE BOARD CONCLUDES THAT IT MUST HALT THESE PROCEEDINGS, IT SHOULD DISMISS THE STAFF'S APPEAL WITH PREJUDICE.

In responding to one of Kerr-McGee's requests that this Board expedite the appeal, the Board stated:

> [I]t seems unfair to deprive Kerr-McGee of the successful defense of its activities before the Licensing Board by abrogating that decision. Simply terminating the case as it stands following that Board's decision -- neither affirming nor reversing on appeal -- may present a reasonable solution to this dilemma. Decisionmakers in any possible future proceedings could then determine the legal effect of the Licensing Board's decision -- a matter on which we have no cause to speculate.

Memorandum and Order, 4-5 (Jan. 7, 1987) (footnote omitted).

The staff opposes the Board's suggestion, urging instead that the proceeding should now be obliterated by both terminating the appeal and vacating the Licensing Board's decision. The staff claims that Kerr-McGee will not be prejudiced by the vacation of the Licensing Board's decision because the decision will provide no protection for Kerr-McGee in any event. The staff explains:

> Before Kerr-McGee could assert the Licensing Board's decision as res judicata or collateral estoppel in another forum, Kerr-McGee would have to prove, at least, that there had been a final judgment on the merits in the earlier case. Because the Appeal Board (and the Commission, should the losing party seek Commission review) will not complete a review on the merits of the issues raised in the Staff's appeal before the NRC loses jurisdiction, Kerr-McGee will not obtain a final judgment on the merits. Kerr-McGee would not be prejudiced by vacation of the Initial

> Decision because it could not have been given res judicata or collateral estoppel effect. Should the Appeal Board vacate the decision in this case, that action will not harm Kerr-McGee.

Staff Motion to Terminate, at 10 (footnote omitted). In short, the staff asserts that the Board's suggested action will not serve to protect Kerr-McGee. And, on that basis, the staff asserts that Kerr-McGee will not be harmed by vacating the Licensing Board's decision.

Even if the staff's analysis of the Board's suggestion were correct,[9/] that fact cannot justify the outcome that staff now seeks. Vacating the Licensing Board's decision would serve only to guarantee the unfairness that this Board properly seeks to avoid. Accordingly, the Board should fashion a disposition that will assuredly achieve a fair result. Kerr-McGee submits that, if this Board were to conclude that it can not resolve the appeal on the merits, it it should now dismiss the staff's appeal with prejudice so that the Licensing Board's decision is unambiguously a final judgment on the merits.

It is a common practice to dismiss a case with prejudice if a plaintiff seeks dismissal after the litigation is significantly advanced. Compare Tyco Laboratories, Inc. v. Koppers Co., 627 F.2d 54 (7th Cir. 1980) with Williams v. Ford

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9/ Kerr-McGee does not agree with the staff's assertion that the preservation of the Licensing Board decision will provide no benefits to Kerr-McGee.

Motor Credit Co., 627 F.2d 158, 159-60 (8th Cir. 1980); Shinrone, Inc. v. Insurance Co. of North America, 570 F.2d 715, 719 (8th Cir. 1978); Selas Corp. of America v. Wilshire Oil Co., 57 F.R.D. 3 (E.D.Pa. 1972). Exactly this practice should be followed here. Indeed, several additional considerations show that a final resolution in favor of Kerr-McGee is now appropriate:

1. Kerr-McGee was brought into this dispute unwillingly as a result of the staff's issuance of an order to show cause. It is fundamentally unfair to allow one party to exercise the unilateral power to evade an adverse result, particularly in the very proceeding that it initiated. See International Shoe Co. v. Cool, 154 F.2d 778, 780 (8th Cir.), cert. denied, 329 U.S. 726 (1946).

2. A final decision on the staff's appeal could have been achieved if this Board had received an accurate appraisal from the staff of the date on which the Agreement would become effective. The Board was initially informed that the Agreement would become effective in January; and subsequently, it was informed that the agreement would be executed in early March.10/ Guided by these representations, the Board

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10/ Letter of S.H. Lewis to S.N. Kohl, et al. (Oct. 9, 1987); NRC Staff Response to Kerr-McGee's Motion for Reconsideration, 10 (Dec. 11, 1986). The latter estimate by the staff was in response to a Board request that the staff provide "a realistic expected date for execution of the agreement." Order (Dec. 3, 1986) (emphasis in original).

denied Kerr-McGee's request for expedited action, explaining that it was reluctant to devote resources to matters "over which the agency is about to yield its jurisdiction." Memorandum and Order, 2 (Jan. 7, 1987).

3. It is unfair to transfer jurisdiction to the State in circumstances in which the State might not be bound by the Licensing Board's decision. (The State is a party to this proceeding and clearly would be bound by a final decision.) This is particularly the case since the Illinois regulatory authority, the Illinois Department of Nuclear Safety, has been a litigant that has vigorously opposed Kerr-McGee at every opportunity.[11/] Indeed, Mr. Lash, the Director of the IDNS and the agency's final decisional officer, has already testified under oath that he has determined the appropriate disposition of the West Chicago wastes.[12/] It is a violation of Kerr-McGee's due process rights to transfer jurisdiction to the State under circumstances in which the new administrative decision-maker has already prejudged the matters to be presented to him. See Marshall v. Jerrico,

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11/ The State is the plaintiff in a state-court action seeking an injunction against the onsite disposal of the West Chicago wastes. It has intervened in an NRC licensing proceeding to oppose Kerr-McGee's plan for final closure of the site. And it participated in this proceeding in support of cleanup and in opposition to any disposal of offsite wastes on the site.

12/ See Comments by Kerr-McGee Chemical Corporation on the Proposed Agreement, 23-28, App. 2, 5A (Feb. 20, 1987).

Inc., 446 U.S. 238, 242-43 (1980); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

4. The issues raised by the staff in its appeal are frivolous. One issue -- the applicability of Part 20 to the Creek -- cannot properly provide a foundation for reversal because the staff explicitly waived reliance on Part 20 before the Licensing Board. 23 NRC at 810. And the Licensing Board's determination of the inapplicability of the radium-in-soil standard to thorium stands on scientific foundations that the staff has not, and cannot, rebut.[13/]

5. The staff will not be harmed by dismissal with prejudice. Although the staff claims injury from the precedential effect of the Licensing Board's decision (Motion to Terminate, at 8-9), this argument is totally without merit. The holding of the Licensing Board relates to the applicability of the radium-in-soil standard to thorium and the staff has elsewhere conceded that the Kerr-McGee West Chicago site is the only thorium site in the country to which the standard applies.[14/] Moreover, this Board's decision could remedy any

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13/ The staff sought to apply to thorium wastes a standard that was developed for uranium wastes. It is an elementary and inescapable fact that this is improper -- just as the Licensing Board found -- because uranium wastes and thorium wastes have very different properties.

14/ The staff stated in its analysis of certain NRC regulations that would incorporate the radium-in-soil standard, inter alia, into NRC criteria that "Kerr-McGee correctly observed that its West Chicago facility is the only

(Footnote Continued)

undue reliance on the Licensing Board's opinion in other contexts through its explanation for its action.

In sum, there is ample foundation for this Board to correct the injustice that would attend the grant of the staff's request.

CONCLUSION

This Board has jurisdiction over the staff's appeal and thus the staff's motion should be denied. Nonetheless, if the Board should conclude that it can not proceed with this case, the Board should dismiss the staff's appeal with prejudice so that the Licensing Board's decision unambiguously becomes the final agency action.

Respectfully submitted,

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(Footnote Continued)
current thorium facility subject to the thorium standards . . . ." Memorandum from W.J. Dircks to The Commissioners, App. D at 48 (Jul. 8, 1985) (SECY-85-178).

APPENDIX

POLICY ISSUE
(Notation Vote)

April 21, 1987 SECY-87-104

FOR: The Commissioners

FROM: Harold R. Denton, Director
Office of Governmental and
Public Affairs

SUBJECT: PROPOSED AGREEMENT BETWEEN THE STATE OF ILLINOIS AND U.S. NUCLEAR REGULATORY COMMISSION PURSUANT TO SECTION 274 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

PURPOSE: To request Commission approval of the proposed Agreement with Illinois.

SUMMARY: By letter dated October 2, 1986, Governor Thompson of Illinois requested that the Commission enter into a Section 274b Agreement with the State. Federal Register notices of the NRC staff's assessment of the proposed Illinois radiation control program and the proposed agreement were published as required by Section 274e of the Atomic Energy Act of 1954, as amended. The comment period ended February 20, 1987.

The State's request includes transfer of regulatory authority for health and safety over the Allied-Chemical UF_6 conversion plant (source material), which has been identified by the Department of Energy as having common defense and security significance. Policy options for dealing with such situations were furnished to the Commission in SECY-87-59. The Commission's decision to retain jurisdiction over the plant has been factored into this paper.

Contact:
Joel O. Lubenau, X27767
Donald A. Nussbaumer, X27767

Enclosure C

Summaries of Public Comments and
NRC Staff Responses[1]

Comments 1 and 2

Letters dated January 7, 1987, and January 15, 1987 from Robert M. Rader, Counsel for US Ecology, noting unavailability in the NRC H Street public document room of documents referenced in the Federal Register notice and requesting that the comment period be extended from 30 to 60 days. Mr. Rader stated that US Ecology, Inc. is currently a party to a proceeding before an NRC Atomic Safety and Licensing Board regarding the low-level radioactive waste disposal site near Sheffield, Illinois.

NRC Staff Response:

On January 27, 1987, G. Wayne Kerr, Director, OSP informed Mr. Rader that documents referenced in the FR notice were made available for public inspection in the PDR on January 9, 1987, that the comment period was extended to February 20, 1987 to accommodate public review of the corrected FR notice, and that the staff had decided, after careful consideration of the request, not to extend the 30 day comment period.

Comment 3

Letter dated January 29, 1987 from A. Eugene Rennels, Mayor, City of West Chicago, commenting on the classification of waste at the Kerr-McGee West Chicago Rare Earths Facility as section 11e.(2) byproduct material and on the request of Illinois to exclude this material from the provisions of the agreement, noting that under the proposed agreement Illinois would assume regulatory responsibility for off-site source material resulting from operation of the Kerr-McGee West Chicago Rare Earths Facility (including off-site material which has been or may be returned to the Kerr-McGee site), expressing the view that regulatory responsibility for the materials located at the West Chicago Rare Earths Facility site should not be divided between the State of Illinois and the NRC and requesting, in the alternative, either that the Commission disapprove the Agreement because it does not include section 11e.(2) byproduct material, or that the classification of the materials in the City of West Chicago, both those located at the Kerr-McGee West Chicago Rare Earths Facility site and those located off-site, be reassessed and determined to be source material. The Mayor also requested that NRC adopt as policy certain resolutions of the City of West Chicago concerning the radioactive materials at the Kerr-McGee Rare Earths Facility.

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[1]Copies of the public comments are available for public inspection in the Commission's public document room at 1717 H Street N.W., Washington, DC and the Commission's Region III Office, 799 Roosevelt Road, Building No. 4, Glen Ellyn, Illinois.

NRC Staff Response:

Under the implementing Commission Policy (46 FR 7540, 46 FR 36969, 48 FR 33376) the Commission may enter into agreements with States to discontinue its authority over "one or more of the following materials: byproduct material as defined in Section 11e.(1) of the Act (radioisotopes), byproduct material as defined in Section 11e.(2) of the Act (mill tailings or wastes), source material (uranium and thorium), special nuclear material (uranium 233, uranium 235 and plutonium) in quantities not sufficient to form a critical mass and permanent disposal of low-level waste containing one or more of the materials stated above but not including mill tailings" (emphasis added). The Policy does not contemplate mandating the transfer of categories of licenses to applicant Agreement States. There is no statutory basis in the Act to do so. The staff believes that it is the State's option to decide which categories of material it desires to request under a Section 274b agreement. Illinois chose not to seek regulation of byproduct material as defined in Section 11e.(2) of the Act.

NRC staff explored the possibility of Illinois requesting authority to regulate Section 11e.(2) byproduct material in a meeting with Dr. Terry Lash, Director, Illinois Department of Nuclear Safety held in Bethesda, Maryland on November 15, 1985. Dr. Lash indicated he might consider requesting such authority but not as part of the current request for an Agreement. It should also be noted that even if Illinois were to assume regulatory authority over the Section 11e.(2) byproduct material, the Commission's regulatory responsibility does not cease. Under UMTRCA, the Commission must make a determination that all applicable requirements have been met before an Agreement State license covering mill tailings may be terminated. The Commission must also require a license for long term monitoring and maintenance as may be necessary.

The NRC staff appreciates the commenter's concern respecting the division of regulatory responsibility over the radioactive materials located at the West Chicago Rare Earths Facility site which will occur on the effective date of the Illinois Agreement. In the opinion of the staff, this situation should not cause serious difficulty. The onsite materials over which Illinois and NRC will exercise regulatory authority are not commingled. In addition, NRC and Illinois will work together to make sure that their respective regulatory responsibilities for §11e.(2) byproduct material and source material at the facility site are carried out in a consistent and compatible manner which will assure that the health and safety of the public is adequately protected.

Comment 4

Comments by Kerr-McGee Chemical Corporation filed February 20, 1987 by Covington and Burling, Counsel for Kerr-McGee Chemical Corporation and letter dated February 24, 1987 from Richard A. Meserve, Covington and Burling, objecting to the NRC staff's characterization of certain thorium residuals, both on and off the site of the West Chicago Rare Earths Facility, as source material and requesting an opportunity for a representative of Kerr-McGee to make an oral presentation to the Commission.

NRC Staff Response

For the reasons set out below, the NRC staff disagrees with the commenters' views that the off-site process wastes from the West Chicago Rare Earths Facility, including those off-site wastes which have been subsequently returned to the West Chicago site, should be considered §11e.(2) byproduct material. In the opinion of the staff, these wastes are properly characterized as source material.

Under the regulatory scheme established by §274 of the Atomic Energy Act of 1954, as amended, the transfer of jurisdiction over particular licensees depends on whether the licensed activities fall within the categories of materials over which a state has agreed to assume regulatory authority under the provisions of a §274b agreement. In the case of the proposed Illinois agreement, Illinois would assume regulatory responsibility for activities in the following categories: §11e.(1) byproduct material, source material, special nuclear material in quantities not sufficient to form a critical mass, and land disposal of low-level radioactive waste received from other persons. NRC would retain jurisdiction over §11e.(2) byproduct material. While there is no argument over this division of authority, a dispute has arisen as to whether certain materials attributed to one licensee (Kerr-McGee Chemical Corporation) have been properly characterized. The dispute relates to the characterization of offsite materials located in the vicinity of Kerr-McGee's West Chicago site. (Some of these materials have been returned to the Kerr-McGee West Chicago site for storage.)

One commenter, the City of West Chicago, urges that all the radiological materials on and in the vicinity of the West Chicago site be classified as source material, thereby placing all regulatory authority over these materials in the State of Illinois. Another commenter, Covington & Burling on behalf of Kerr-McGee Chemical Corporation, urges that the offsite materials in the vicinity of the West Chicago site be classified as §11e.(2) byproduct material, thereby assuring that regulatory responsibility for these materials will remain with NRC. The waste materials that have remained on the site are already classified as §11e.(2) byproduct material. Both commenters object to the NRC staff's determination characterizing part of the materials at the West Chicago site as §11e.(2) byproduct material and part as source material (see Federal Register notice containing Staff Assessment of Proposed Agreement between the NRC and the State of Illinois, 52 FR 2309 at 2322, January 21, 1987.) In the opinion of these commenters, regulatory authority over these materials should either be exercised by NRC or by Illinois but not by both.

As defined in the Atomic Energy Act of 1954, as amended and the Commission's regulations, the terms source material and §11e.(2) byproduct material have the following meanings:

> Source material means (1) uranium or thorium, or any combination thereof, in any physical or chemical form or (2) ores which contain by weight one-twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium or (iii) any combination thereof. Source material does not include special nuclear material.

> Section 11e.(2) byproduct material means the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute byproduct material within the meaning of this definition.

Section 62 of the Atomic Energy Act of 1954, as amended, which authorizes the Commission to issue source material licenses, contains an important exception, namely "that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant." This statutory requirement is implemented in §40.13(a) of the Commission's regulations which provides:

> "Any person is exempt from the regulations in this part and from the requirements for a license set forth in section 62 of the Act to the extent that such person receives, possesses, uses, transfers or delivers source material in any chemical mixture, compound, solution, or alloy in which the source material is by weight less than one-twentieth of 1 percent (0.05 percent) of the mixture, compound, solution or alloy. The exemption contained in this paragraph does not include byproduct material as defined in this part." (Section 40.4(a-1) contains a definition of §11e.(2) byproduct material.)

Mill tailings or wastes produced by the extraction or concentration of uranium or thorium from ore are a mixture of components, including residual quantities of uranium or thorium, usually below the level established in 10 CFR 40.13(a) for unimportant quantities of source material, radium, a naturally occurring radioactive material (NARM) and the principal radioactive material of concern, radon and its daughters (also NARM), some hazardous heavy metals, acid radicals and a large quantity of inert substances. Generally, for example, in the uranium extraction process, over 90% of the uranium is removed.

Prior to the enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) the Commission had no direct statutory jurisdiction over NARM. Under the law, the Commission was also precluded from asserting regulatory authority over residual quantities of source material below the unimportant quantity level established in 10 CFR 40.13(a).

From a factual standpoint, accurate characterization of the materials at the Kerr-McGee West Chicago site is not an easy task. The task is further complicated by the fact that some of the materials once located at the site have been dispersed to other locations. The following historical background is of interest.

In 1932, the Lindsay Light & Chemical Company opened a chemical refinery for the production of industrial thorium and rare earth chemical products from various naturally occurring low-level radioactive ores, including monazite, on a site in West Chicago. Initially, the facility primarily produced thorium nitrate for use in incandescent light mantles. The facility also produced rare earth materials for a variety

of industrial uses including polishes, chemical manufacture, catalysts, and television phosphors. Beginning in the 1940's, the refinery, under Government contracts, became a principal source of thorium for national defense needs. Following World War II, much of the factory output was sold to U.S. government agencies. With the passage of the Atomic Energy Act of 1954, production of thorium at the facility became subject to federal regulation. At all times since May 1, 1956, the facility has been licensed by the Atomic Energy Commission or its successor, the Nuclear Regulatory Commission. In 1958, the facility was acquired by American Potash & Chemical Corporation which continued thorium production at the site. In 1967, Kerr-McGee acquired the West Chicago Rare Earths Facility as a small part of its larger acquisition of American Potash. In December 1973, Kerr-McGee discontinued operations at the facility.

Kerr-McGee, which now holds a license authorizing possession of unlimited amounts of thorium at the West Chicago Rare Earths Facility, has applied to the Commission for a license amendment authorizing it to decommission the facility and restore the West Chicago site to its approximate original state. Under the restoration plan proposed by Kerr-McGee, all the factory structures would be torn down (demolition of these structures is now essentially complete), five settling ponds would be eliminated and the contaminated building rubble and process wastes would be placed in a disposal cell on a landscaped and fenced portion of the site. The remainder of the property would be prepared for unrestricted, beneficial use. The NRC has not yet acted on Kerr-McGee's application for a license amendment. The matter is pending before an Atomic Safety and Licensing Board. The State of Illinois has intervened in this proceeding. Both Illinois and the City of West Chicago have indicated that they want all the contaminated material removed from the site.

According to the plant operating history, as presented in the Kerr-McGee Decommissioning Plan submitted August 15, 1979, the West Chicago facility processed 10,000 tons per year of monazite sands during peak production years between 1954 and 1958, about 5000 to 6000 tons per year between 1958 and 1963, and about 2000 to 2500 tons per year before 1954 and after 1963. The ore fed to the process from 1954-1973 was about 77 percent of the total ore used from 1936-1973. The liquid and solid waste volumes which resulted from the production process and contain significant quantities of thorium and thorium daughter products would be essentially proportional to ore use. It follows, therefore, that the majority of the liquid and solid wastes produced during the life of the facility, including those now on the West Chicago site, were produced during the period the facility was licensed by the Atomic Energy Commission.

The process used for thorium and rare earths production at the West Chicago facility produced two types of waste materials. These wastes were initially deposited on site. One waste material resulted from the ore digestion process and was a solid sandlike residue. The other waste material was composed of liquid wastes from a number of processes and contained dissolved salts and suspended solids. The solids settled out on the bottoms of the facility's sumps and percolation ponds. These sediments were periodically dredged from the ponds and sumps and placed

on a sludge pile near the ponds. Although both of these waste materials contain quantities of thorium and thorium daughter products, the wastes cannot be differentiated on the basis of the quantities of thorium and thorium daughter products which they contain.

At some time prior to the early 1940's, certain of the onsite wastes were removed from the West Chicago site and used as landfill at a nearby sewage treatment plant, at Reed-Keppler Park, and in residential areas in the City of West Chicago and in DuPage County. Recently, contaminated landfill from residential areas in the City of West Chicago and from the sewage treatment plant has been brought back to the West Chicago site for storage.

The contaminated material now present at the West Chicago site consists of process wastes from the facility, contaminated building rubble resulting from the demolition of the facility structures and contaminated landfill from residential areas in the City of West Chicago and the sewage treatment plant that has been brought back to the West Chicago site. The thorium content of the process wastes, both those that have never been moved from the site and those that have been taken offsite and used for landfill, is above the unimportant quantity level specified in 10 CFR 40.13(a). The contaminated landfill which has been returned to the site contains amounts of source material above the levels specified for unimportant quantities and has been kept segregated from the contaminated materials which have always remained on the site.

Contamination attributed to the activities at the West Chicago site has also been found in Kress Creek and the West Branch of the DuPage River. In the Kress Creek Decontamination proceeding initiated by NRC, Kerr-McGee contested the proposition that the material in the Creek came from its West Chicago facility and thus was its responsibility.

Concluding that "the thing speaks for itself," the Licensing Board in the Kress Creek proceeding found "that the material in Kress Creek came from the West Chicago facility while it was licensed under the Atomic Energy Act. . ." The Licensing Board also stated that its jurisdiction "does not depend on whether the material in Kress Creek may properly be classified as source or byproduct material." Citing applicable portions of 10 CFR Part 20, the Board concluded that "this regulatory scheme illustrates that jurisdiction exists to regulate radiation hazards caused by a licensee whether or not the hazard results from [source, byproduct or special nuclear] materials." Notwithstanding its assertion of jurisdiction and its conclusion that 10 CFR Part 20 contains numerical radiological dose limitations appropriate to protect health in the situation posed by the radiological contamination at Kress Creek, the Board, on June 19, 1986, dismissed the proceeding because the record in the proceeding "does not demonstrate that the Part 20 numerical radiological dose limitations are exceeded as a result of this contamination." An appeal is currently pending before an Atomic Safety and Licensing Appeal Board.

Under the law, the only wastes that may be characterized as §11e.(2) byproduct material are those "produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." Because some of the wastes yielded from

the operations at the West Chicago Rare Earths Facility can be attributed to the production of rare earths, it would be inaccurate to characterize all the wastes determined to have originated from the West Chicago Rare Earths Facility as §11e.(2) byproduct material.

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 determined to be contaminated as a result of the operations of the West Chicago Rare Earths Facility as source material. These materials include landfill at Reed-Keppler Park and in certain residential areas of DuPage County, and contaminated areas in Kress Creek and the West Branch of the DuPage River. 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.[2] 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. During the period the facility was producing thorium under its AEC license, some of the facility structures became increasingly contaminated. Since the most extensive use of the buildings has been in connection with the thorium production process, the staff has also characterized the contaminated building rubble left on the West Chicago site following demolition of the facility structures as §11e.(2) byproduct material. In view of the facts, the staff is of the opinion that these characterizations are reasonable.

Both Kerr McGee Chemical Corporation and US Ecology (see Comment 5) object to the termination of the proceedings before the Commission on the grounds that termination would deny them due process and be wasteful of the efforts that the Commission and the parties have devoted to those proceedings to date.

The commenters' due process concerns are speculative and without foundation. Once the NRC proceedings are terminated, it will be up to Illinois to initiate its own enforcement proceedings. We see no basis to speculate that Illinois would deny either of the licensees due process of law in the conduct of those proceedings.

The NRC staff has examined Illinois procedures for the formulation of general rules, for approving or denying applications for licenses or authorizations to possess and use radioactive materials and for taking disciplinary actions against licensees in the light of Criterion 23

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[2] See, Kerr-McGee Chemical Corporation, Internal Correspondence, Memos dated February 4, 1982 and January 21, 1983 re: "West Chicago Comingled Tailings."

which relates to administration. On their face, the Illinois procedures provide for minimum due process, appear adequate to assure the fair and impartial administration of regulatory law and satisfy Criterion 23. With respect to the need for certain specific procedures, including those relating to such matters as discovery, separation of functions or authority to issue subpoenas, it should be noted that the Commission has never construed §274 of the Atomic Energy Act of 1954, as amended, to require States to have administrative procedures which are identical to those of the NRC.

As to the argument that all the effort which the Commission and the parties have put into the pending proceedings has been wasted, we assume that Illinois would use the record compiled to date in both NRC proceedings in determining whether to initiate its own enforcement proceedings.

Comment 5

Letter dated February 20, 1987 and enclosure, and supplementary letters dated March 2, 6, 16, 20 and April 2, 1987 from Mark J. Wetterhahn, Conner & Wetterhahn, Counsel for US Ecology, Inc., requesting that the Sheffield disposal site be temporarily excluded from the general grant of authority in the proposed §274b Agreement with Illinois and requesting an opportunity to make an oral presentation to the Commission. Some of the late-filed comments submitted by Conner & Wetterhahn, Counsel for US Ecology, Inc., addressed matters at issue in the recently concluded NRC adjudicatory proceeding, now on appeal before an ASLAB (see letter dated March 2, 1987 from Mark J. Wetterhahn). Other late-filed comments submitted by Conner & Wetterhahn are based on dated documents which addressed matters previously considered and addressed by the NRC staff during the course of its review of the Illinois program[3] (see letters dated March 16, 1987 and March 20, 1987

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[3]The NRC staff's finding of compatibility was questioned in the commenter's March 16, 1987 letter in which reference is made to an October 3, 1986 internal NMSS memorandum documenting the results of the review by Division of Waste Management staff of the proposed Illinois regulatory program for regulation of low-level radioactive waste. In that memo, which was dated October 3, 1986 and represented formal documentation of WM comments conveyed earlier to SP, WM noted: "Overall, as in our 8/21/85 review of an earlier draft, we find the proposed Illinois program to be compatible with the NRC program for management of low-level waste and could find nothing in the application that would preclude the granting of Agreement State status based on inadequacies in the low-level waste management program." The memo then offered specific comments on the proposed program. NRC staff has concluded that the commenter's view on compatibility required passing over the informed judgment of the WM staff on compatibility quoted above and, instead, selectively used specific WM comments (originally designed to further enhance the State program) to press their client's case. Additionally, the commenter's March 16, 1987 letter ignores a memo dated

(Footnote Continued)

from Mark J. Wetterhahn). The NRC staff's views on these matters, summarized briefly in footnote 3 are contained in documents on file in the Commission's public document room and have, in addition, already been made available to the commenter under an FOIA request (FOIA-87-47) which was both filed and answered before the relevant comments were submitted. Conner & Wetterhahn's late-filed comment of April 2, 1987 addresses US Ecology's concerns respecting two inactive chemical waste disposal sites located to the north and west of the Sheffield low-level radioactive waste disposal site. These chemical waste disposal sites are not regulated by the NRC and are not included in the categories of materials transferred by the agreement. The following NRC response to the commenter's letter dated February 20, 1987 also addresses the matters raised by Mark J. Wetterhahn in his late-filed comment letter dated March 6, 1987.

NRC Staff Response

The concerns expressed by Conner & Wetterhahn on behalf of their client, US Ecology, relate primarily to the anticipated impact of the Agreement upon the ongoing NRC adjudicatory proceeding involving the Sheffield site and to the detrimental effect that the State's assumption of regulatory authority is expected to have on US Ecology's procedural rights. (The commenter's due process concerns are addressed in the NRC response to Comment 4, supra.) The comments do not substantively address the NRC staff's assessment of the Illinois program. The comments did not question the NRC staff's conclusion that Illinois' proposed program is adequate to protect public health and safety within the State nor do they substantively challenge the NRC staff's conclusio that the Illinois program is compatible with the Commission's regulator program for like materials. The principal purpose of the comments is t request relief, specifically temporary exclusion of the Sheffield site, from the provisions of the proposed agreement.

On March 10, 1987, the Atomic Safety and Licensing Board issued an Orde holding that all issues in the Sheffield proceeding had been resolved b the Board's Memorandum and Order of February 20, 1987[4] and concluding the proceeding. On March 16, 1987, US Ecology appealed the Licensing Board's order and asked for expedited Appeal Board consideration. On

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(Footnote Continued)
October 1, 1986 from G. Wayne Kerr, SP to J. Davis, NMSS which summarized the staff's disposition of NMSS' comments on the Illinois proposal, including addressing each and every one of those of WM. Thi document was placed in the NRC public document room in Washington, DC along with other materials relating to the negotiations for an Agreeme with Illinois on February 26, 1987 and was in the same package that contained the October 3, 1986 WM memo. In the aggregate, staff found the March 16, 1987 comment on the compatibility of the proposed Illinc proposal to be totally without merit.

[4]The Board's Memorandum and Order of February 20, 1987 addressed two legal issues. The first dealt with the possession of the buried materials and the second with the termination of the license.

March 19, 1987 the Appeal Board denied US Ecology's request for expedited consideration.

Section 274 of the Atomic Energy Act of 1954, as amended, also known as the Federal-State amendment, permits States to enter into an agreement with NRC for any one or more of the categories of materials listed in §274, namely byproduct materials as defined in §11e.(1) of the Act, byproduct materials as defined in §11e.(2) i.e., uranium and thorium mill tailings, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. Under the provisions of the Low-Level Radioactive Waste Policy Act and the Commission's Policy Statement on "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption thereof by States Through Agreement," as amended (46 FR 7540, January 23, 1981, 46 FR 36969, July 16, 1981 and 48 FR 33376, July 21, 1983) States may also enter into an agreement to regulate the disposal of low-level radioactive waste. This statutory scheme, as originally enacted in 1959 and subsequently amended, does not provide for dual or concurrent Federal-State jurisdiction.[5] Its avowed purpose is to encourage States to take over and assume full responsibility for the regulation of one or more specific categories of radioactive materials after first demonstrating to the Commission that they are capable of doing so in a manner determined by the Commission to be compatible with the Commission's regulatory program and adequate to protect the public health and safety. In addition to promoting the full development of State regulatory authority over radiation hazards associated with materials covered by a §274b agreement, the provisions of §274 also promote an orderly regulatory pattern between the Commission and State governments. Thus, under the law, once a State has agreed to assume regulatory authority over a particular category of materials, the State must accept full responsibility for all health and safety activities within that category as of the effective date of the agreement. The State may not choose to regulate some of these activities within a category and decline to regulate others. Similarly, upon the effective date of the agreement, NRC must also relinquish all regulatory authority over those same activities.[6] NRC may not retain control over particular

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[5] See, Senate Report No. 870, to accompany S. 2568, September 1, 1959, Joint Committee on Atomic Energy, 86th Cong., 1st Sess. at p. 9.

[6] The statutory authority which permits NRC to relinquish its regulatory responsibilities and thereby implement the agreement is set out in §274f which states "The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in chapters 6, 7, and 8, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection b. of this section." This authority, which is also referenced in §274e and has been implemented in the Commission's regulations (see, 10 CFR 150.10, Persons exempt) does not authorize the Commission to exclude individual licensees from categories of materials covered by a §274b (Footnote Continued)

segments of a nuclear materials category or over individual licensees.[7] Contrary to the views of the commenter, the NRC does not retain jurisdiction over pending enforcement matters after an Agreement has been executed nor do such matters constitute a special category of radioactive materials within the meaning of §274. Read correctly, the memorandum on which the commenter relies only stands for the proposition that the staff is to finish what can be finished in the time available so that the turnover can be completed in an orderly manner.

Section 274j authorizes the Commission, under certain circumstances, to terminate or suspend a §274b agreement and to reassert its licensing and regulatory authority. In 1978, this section was amended to enable the Commission to terminate or suspend "all or part of" its agreement. This change made it possible for the Commission to reassert regulatory authority over a single category of materials, such as uranium mills and mill tailings, while at the same time permitting States to retain regulatory authority over other categories of materials subject to the agreement. However, this amendment did not authorize NRC to terminate or suspend an agreement with respect to a particular licensee. In 1980, §274j was again amended to authorize NRC to reassert its regulatory authority over an individual licensee. Under this authority, the Commission may temporarily suspend all or part of its agreement with a State without notice or hearing if, in the judgment of the Commission: ". . . an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside of the State, and ... the State has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose." Section 274j further provides that this temporary suspension is to remain in effect "only for

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(Footnote Continued)
agreement.

Section 274f tracks the text of §274e of the draft bill which the Atomic Energy Commission, NRC's predecessor agency, transmitted to the Joint Committee on Atomic Energy in March 1959. In its section-by-section analysis of §274e of the draft bill, the Commission concluded "Subsection e. gives the Commission necessary authority to implement those agreements." JCAE, Joint Committee Print, "Selected Materials on Federal-State Cooperation in the Atomic Energy Field," March 1959, 86th Cong., 1st Sess. at p. 33. See also, analysis of S. 1987, as introduced, 105 Cong. Rec. 7524, May 19, 1959.

[7] This point is specifically addressed in the section-by-section analysis prepared by the AEC to accompany its draft bill which was introduced in the Senate as S. 1987 on May 19, 1959. "Three categories of activities are specified. Under the bill the Commission may enter into an agreement providing for discontinuance of its regulatory authority with respect to any one or more of those categories. Such an agreement may not provide for discontinuance of the Commission's authority with respect to part of a category ..." 105 Cong. Rec. 7523, May 19, 1959.

such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger." In our opinion, the circumstances in which US Ecology now finds itself do not constitute an emergency within the meaning of §274j.

Although NRC now has limited authority to reassert its regulatory authority in response to an emergency situation involving a single agreement State licensee, §274 contains no mechanism which the NRC can use at the time of entering into a §274b agreement to exclude, for reasons of public health and safety, specific activities from the categories of materials for which the State will assume regulatory responsibility under the provisions of the agreement. For the foregoing reasons, the relief requested by the commenter is denied.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	Docket No. 40-2061-SC
KERR-MCGEE CHEMICAL CORPORATION	ASLBP No. 84-502-01-SC
(Kress Creek Decontamination)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Kerr-McGee Response to Staff Motion to Terminate have been served by first-class mail, postage prepaid, on this 5th day of June, 1987, as follows:

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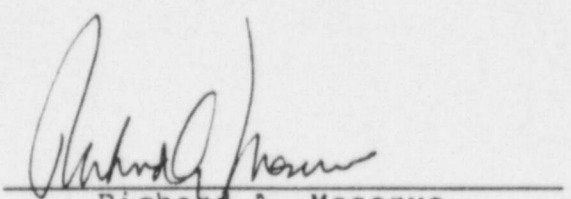

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