3793

June 15, 1987

'87 JUN 17 P5:45

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	)	
	)	Source Material License No. STA 583
(Kress Creek Decontamination)	)	
	)	ASLBP No. 84-502-01-SC

NRC STAFF REPLY TO KERR-MCGEE RESPONSE TO STAFF MOTION TO TERMINATE

I. INTRODUCTION

On May 28, 1987, the NRC staff filed in connection with the above matter a "...Motion to Terminate Proceeding and Vacate the Licensing Board's Initial Decision." On June 5, 1987, Kerr-McGee, the respondent in this enforcement action, filed a "...Response to Staff Motion to Terminate." By order dated June 9, 1987, the Atomic Safety and Licensing Appeal Board directed the Staff to reply to Kerr-McGee's response by June 15, 1987. For the reasons set forth in the Staff's motion and this reply, the Appeal Board should grant Staff's motion.

II. DISCUSSION

Kerr-McGee makes three arguments in its response:

that the NRC continues to have jurisdiction over the radiological contamination in and along Kress Creek and the West Branch of the DuPage River (hereafter collectively referred to as the "Creek");

that it is up to the Appeal Board to decide whether it has jurisdiction over the subject matter of this proceeding; and

D507

that if this proceeding is terminated, the Appeal Board should dismiss the Staff's appeal with prejudice.

A. The Commission Has Already Determined That Jurisdiction Over The Radiological Contamination In and Along the Creek Has Been Relinquished to the State of Illinois.

Kerr-McGee devotes much of its response (pp. 2-6, 7-10) to arguments that the radiologically contaminated material along the Creek should be classified as byproduct material under § 11e(2) of the Atomic Energy Act of 1954, as amended (hereafter the "Act", 42 U.S.C. § 2014e(2)), rather than as source material. These arguments are addressed to the wrong tribunal, because the classification of the contaminated material has already been determined by the Commission.

Effective June 1, 1987, the NRC relinquished and the State of Illinois assumed regulatory authority over certain categories of material regulated under the Act. See Notice of Agreement With State of Illinois, Attachment 1 hereto. 1/ One of those categories is source material. In the Staff Assessment of Proposed Agreement Between the NRC and the State of Illinois (52 Fed. Reg. 2309 at 2322, January 21, 1987) the Staff stated that it considered the radiologically contaminated material in and along the Creek to be source material, jurisdiction over which would be relinquished to Illinois under the agreement. As noted in its response (p. 3), Kerr-McGee filed extensive comments disputing this determination by the Staff. Kerr-McGee's comments were addressed by the Staff in Enclosure C to SECY-87-104, which is attached to Kerr-McGee's response.

1/ Attachment 1 does not include an order related to an Allied Chemical Corporation facility in Illinois that will be published in the Federal Register with the notice of the agreement, since that order is not relevant to this proceeding.

These comments have been "...fully considered by the Commission in its deliberations on the Illinois request." See Attachment 1, p. 3 of the notice.

Kerr-McGee has thus had an opportunity, and has availed itself of that opportunity, to raise the same issues before the Commission that it seeks to have this Appeal Board consider. The Appeal Board earlier stated that "...[i]f the NRC staff says it is transferring its jurisdiction over this proceeding, we perceive no basis on which to conclude otherwise and must accept that claim." 2/ This reasoning is even more appropriate for application at this stage, since the Commission has now adopted the Staff's determination that the contamination in and along the Creek should be classified as source material and jurisdiction over that material has been relinquished to the State. Additionally, Kerr-McGee has filed in the U.S. Court of Appeals for the D.C. Circuit a petition for review of the Commission's decision to transfer jurisdiction over offsite radiologically contaminated material resulting from operation of the West Chicago Rare Earths Facility, including material in and along the Creek, to the State. See Attachment 2 hereto. In these circumstances, the Appeal Board should adhere to its view that the question of the proper characterization of the contaminated material in and along the Creek is one that was appropriately determined by the Commission in the context of the State Agreement (or will be determined by the courts, pursuant to Kerr-McGee's petition for review).

2/ Kerr-McGee Chemical Corporation (Kress Creek Decontamination), Memorandum and Order, dated January 7, 1987, at 3-4 n.3.

B. This Proceeding Must Be Terminated Since Jurisdiction Over The Subject Matter Of The Proceeding Has Been Relinquished To Illinois.

The Staff argued in its motion that the Appeal Board is compelled to terminate this proceeding because upon execution of the agreement with Illinois, the Commission, and its adjudicatory boards, would no longer have jurisdiction over the subject matter of this proceeding. Staff motion at 4-5. Kerr-McGee points out that this Appeal Board always has the authority and responsibility to determine the scope of its own jurisdiction. Response at 6. While the Staff does not dispute this point, none of the cases cited by Kerr-McGee relates to circumstances where a superior tribunal had already determined that jurisdiction over the subject matter of the case or administrative proceeding resided elsewhere. 3/ In the

---

3/ In Weinberger v. Hynson, Wescott & Dunning, 412 U.S. 609 (1973) the Supreme Court held that the Food and Drug Administration had jurisdiction to determine whether a product is a "new drug," since that jurisdiction was essential to the FDA's effective exercise of its statutory authority. 412 U.S. at 627. In United States v. Shipp, 203 U.S. 563 (1906) the Supreme Court held that once a Justice of the Court had allowed an appeal, it was for the Court alone to determine whether the case was properly before it. 203 U.S. at 573. United States v. United Mine Workers of America, 330 U.S. 258 (1947), holds that a District Court had authority to issue a temporary restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction. 330 U.S. at 290. In Wolf Creek, the Appeal Board relied upon this general doctrine in holding that a licensing board had the jurisdiction to decide the extent of its own authority. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 NRC 293 at 298 (1976). Wolf Creek differs from the instant case in that the Licensing Board was acting on a matter, the question of whether prior Commission authorization in the form of a limited work

(FOOTNOTE CONTINUED ON NEXT PAGE)

circumtances presented in this case, the Commission has already determined the jurisdictional issue as part of its approval of the agreement with Illinois. Thus, while it is the Appeal Board's responsibility to rule on this motion to terminate, it would be improper for the Appeal Board not to defer to this determination of the Commission.

Kerr-McGee also seeks to characterize the Staff's motion as requesting the Appeal Board to accept the Staff's interpretation of the effect of the agreement. Response at 6. As discussed above, however, the Commission has adopted the Staff's position that jurisdiction over the contaminated material in and along the Creek is relinquished to Illinois under the agreement.

C. There Is No Basis For Dismissal Of The Staff's Appeal With Prejudice

Kerr-McGee argues that if the Appeal Board determines that the proceeding should be terminated, the Staff's appeal should be dismissed with prejudice. Response at 11-16. Since the Commission has relinquished regulatory authority over the contaminated material along the Creek, it is unnecessary for the Appeal Board to dismiss this proceeding with prejudice. Even without prejudice, the Staff would not be able to institute a new enforcement action seeking to require Kerr-McGee to clean

---

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

authorization was required before the applicant could construct an offsite railroad spur and access road associated with the plant, on which the Commission had not spoken.

up the Creek because of the Commission's relinquishing of regulatory authority to the State.

Kerr-McGee submits that the fair action is for the Appeal Board to make the Initial Decision final agency action by dismissing the Staff's appeal with prejudice. Response at 12. Kerr-McGee relies on cases involving voluntary dismissals at the request of plaintiffs after the action has been commenced. See cases cited at response, pp. 12-13. As demonstrated above, this is not a case where the Staff is seeking a voluntary dismissal of an enforcement action. Rather, it is a case where termination of a proceeding is compelled because jurisdiction over the subject matter has been relinquished to another entity. The equities that may apply to situations where a plaintiff seeks voluntary dismissal of an action it has instituted have no applicability here. In this case the Staff will not have the opportunity to have its appeal heard on the merits because of the relinquishing of jurisdiction to the State. The equities in this situation weigh against dismissal with prejudice.

For reasons set forth in the Staff's motion, the appropriate action upon termination of the proceeding would be vacation of the Initial Decision, rather than dismissal of the Staff's appeal with prejudice.

III. CONCLUSION

Based upon the arguments of the Staff in its motion and in this reply, the Appeal Board should terminate this proceeding and vacate the Licensing Board's Initial Decision.

Respectfully submitted,

Stephen H. Lewis

Stephen H. Lewis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of June, 1987

Illinois; Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State

Agency: Nuclear Regulatory Commission.

Action: Notice of Agreement With State of Illinois.

Summary: Notice is hereby given that on May 14, 1987, Lando W. Zech, Jr., Chairman of the Nuclear Regulatory Commission and on May 18, 1987 James R. Thompson, Governor of the State of Illinois signed the Agreement set forth below for discontinuance by the Commission and assumption by the State of certain Commission regulatory authority. The Agreement is published in accordance with the requirements of Pub. L. 86-373 (Section 274 of the Atomic Energy Act of 1954, as amended). The exemptions from the Commission's licensing authority have been published in the Federal Register and codified as Part 150 of the Commission's regulations in title 10 of the Code of Federal Regulations.

On May 13, 1987 the Commission with Chairman Zech and Commissioners Asselstine, Bernthal and Carr agreeing, approved the Agreement between the State of Illinois and the NRC pursuant to Section 274b of the Atomic Energy Act, as amended.

Commissioner Bernthal approved the Agreement between the State of Illinois and the Commission. In his judgment, however, all materials and contaminated areas which have resulted from operations of the West Chicago Rare Earths Facility would more properly be classified as "byproduct material" under §11e.(2) of the Atomic Energy Act. As such, Commissioner Bernthal believes that jurisdiction for these materials and contaminated areas should remain with the Commission until such time as the State of Illinois elects to seek authority for all byproduct material.

In addition, the Commission, with Chairman Zech and Commissioners Bernthal and Carr agreeing, approved an Order to Allied-Chemical, placing its uranium conversion plant under continued NRC regulatory authority based on common defense and security considerations. Commissioner Asselstine disapproved the order.

Commissioner Roberts did not participate in these actions.

For Further Information Contact: Joel O. Lubenau, State, Local and Indian Tribe Programs, Office of Governmental and Public Affairs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Phone (301) 492-9887.

Supplementary Information:

On December 31, 1987, the Nuclear Regulatory Commission initially published for public comment a proposed agreement with the State of Illinois for discontinuance by the Commission and assumption by the State of certain regulatory authority and the staff's assessment of the proposed Illinois program for regulation of radioactive materials covered by the proposed agreement.

As required by Section 274 of the Atomic Energy Act, the proposed Agreement and the staff's assessment of the State's proposed radiation control program were to be published in the Federal Register once a week for four consecutive weeks. Interested persons were invited to submit comments by January 30, 1987. The 2nd publication was made on January 7, 1987. The December 31st and January 7th publications were determined to have been the subject of Federal Register printing errors. As a result, they were incomplete and also contained errors. A corrected notice was published January 21, 1987 at 52 FR 2309. Since the initial notice was incomplete and also contained significant errors, the 4 consecutive week publication cycle required by the Act was restarted beginning with the January 21, 1987 notice. A revision of the date for public comments was also published at that time (52 FR 2309) changing it to February 20, 1987. The 2nd consecutive weekly notice was published January 28, 1987 at 52 FR 2998. The 3rd consecutive weekly notice was published February 4, 1987 at 52 FR 3503 but printing errors again occurred, this time resulting in the omission of text. A correction notice for this omission was published February 12, 1987 at 52 FR 4569. The 4th consecutive weekly notice was published February 11, 1987 at 52 FR 4436.

The proposed agreement would have included the Allied Chemical plant which is one of two plants in the United States licensed to convert uranium "yellowcake" to UF_6. (The other plant is Kerr-McGee's Sequoyah plant in Oklahoma). The Commission, in its Federal Register notices, noted that it was considering whether continued NRC regulation of the Allied Chemical Plant is necessary in the interest of the common defense and security of the United States. The Allied Chemical plant was identified by DOE as having a potential common defense and security significance. Section 274m of the Atomic Energy Act, as amended, provides that:

> "No agreement entered into under subsection b., ... shall affect the authority of the Commission under subsection 161b. or i to issue rules, regulations, or orders to protect the common defense and security..."

The Commission has decided to retain regulatory authority over licensees subject to Section 274b Agreements which have common defense and security significance. An order to effectuate this policy with respect to the Allied Chemical license has been issued and is published below. The order became effective May 14, 1987.

Public comments:

Five written comments on the proposed Agreement and NRC staff assessment were received prior to the end of the comment period on February 20, 1987. Three comment letters were submitted by Conner and Wetterhahn, P.C., counsel for US Ecology which holds the license for the Sheffield low-level waste disposal site. One comment letter was received from A. Eugene Rennels, the Major of the City of West Chicago. One comment letter was received from Covington and Burling, counsel representing

Kerr-McGee which holds a license for the Kerr-McGee West Chicago Rare Earths Facility where thorium processing and recovery operations were conducted under an AEC/NRC license. These comments were fully considered by the Commission in its deliberations on the Illinois request. Summaries of the comments and the staff's responses are available in the Commission's public document room at 1717 H Street, N.W., Washington, D.C. and the Commission's Region III Office, 799 Roosevelt Road, Building No. 4, Glen Ellyn, Illinois.