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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING APPEAL BOARD '87 JUN 17 AIO:21

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

OFFICE OF SECRETARY
DOCKETING & SERVICE
June 16, 1987
(ALAB-866)

SERVED JUN 17 1987

In the Matter of)

US ECOLOGY, INC.)

(Sheffield, Illinois Low-Level)
Radioactive Waste Disposal Site))

Docket No. 27-39 SC

Mark J. Wetterhahn, Robert M. Rader, and Nils N.
Nichols, Washington, D.C., for US Ecology, Inc.

Neil F. Hartigan, Henry L. Henderson, H. Alfred Ryan,
Gabriel M. Rodriguez, and Diane Rosenfeld Lopata,
Chicago, Illinois, for the State of Illinois.

Ann P. Hodgdon and Robert M. Weisman for the Nuclear
Regulatory Commission staff.

MEMORANDUM AND ORDER

This show-cause proceeding involving the Sheffield, Illinois Low-Level Radioactive Waste Disposal Site is before us on the appeal of US Ecology, Inc., from two Licensing Board memoranda and orders.¹ Last month, the Nuclear Regulatory Commission and the State of Illinois executed an agreement² whereby, as no party to the proceeding disputes,

¹ See LBP-87-5, 25 NRC ____ (February 20, 1987); March 10, 1987 memorandum and order (unpublished).

² See 52 Fed. Reg. 22,864 (1987).

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regulatory jurisdiction over the Sheffield site was transferred from the Commission to the State effective June 1, 1987.³ On full consideration of the views of US Ecology, Illinois, and the NRC staff respecting the appropriate course in these circumstances, we vacate the two orders subject to the appeal and terminate the proceeding. United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).⁴ In

³ In a February 20, 1987 written submission, US Ecology had requested the Commission to exclude Sheffield from the scope of its then-proposed agreement with Illinois pending the completion of the show-cause proceeding at bar. See Comments of US Ecology, Inc. to the Nuclear Regulatory Commission on the Notice of Proposed Agreement with the State of Illinois for the Assumption of Certain of the Commission's Regulatory Authority Pursuant to Section 274 of the Atomic Energy Act. In recent filings with us, US Ecology explicitly acknowledges that the Commission rejected that request. See US Ecology's Motion to Vacate the Order to Show Cause of March 20, 1979 and All Resulting Adjudicatory Orders (May 20, 1987) at 3 n.6; US Ecology's Answer to NRC Staff Motion to Terminate Proceedings on Appeal and to Vacate Licensing Board's Decisions (June 2, 1987) at 2. Illinois and the NRC staff likewise have affirmatively represented to us that the agreement extends to Sheffield. See State of Illinois' Objections to Motions to Vacate Show Cause Order and Board Decisions (June 12, 1987) at 1-3; NRC Staff Motion to Terminate Proceeding on Appeal and to Vacate Licensing Board's Decisions, etc. (May 28, 1987) (hereafter "NRC Staff Motion") at 5.

⁴ It suffices to observe that there is no merit to Illinois's position that its agreement with the NRC strips us of jurisdiction to take any action other than to terminate the NRC show-cause proceeding. Illinois insists that, although the agreement brought that proceeding to an end, the orders rendered in it by the Licensing Board retain their vitality. This is said to be so because, according to Illinois, the agreement simply transferred the authority to review those orders from us to its Department of Nuclear

(Footnote Continued)

this connection, it is our understanding that, in light of the agreement, the staff has withdrawn, or shortly will withdraw, its March 20, 1979 show-cause order directed to US Ecology.⁵

(Footnote Continued)

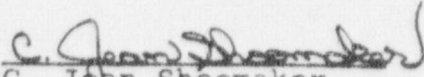
Safety. But Illinois has pointed to no agreement provision or other authority (and we have found none) that might possibly serve to support that proposition. More particularly, the agreement does not suggest that the Commission intended to clothe a state agency with the power to affirm, to reverse, or to modify orders issued by an NRC adjudicatory tribunal in a now-closed proceeding that had been instituted by the NRC and conducted under its Rules of Practice and other regulatory provisions. In the absence of a clear statement of such a seemingly novel purpose, one is not to be inferred. Accordingly, inasmuch as the agreement manifestly has the effect of depriving US Ecology of its pre-existing ability to obtain review within the NRC of the Licensing Board's orders, operative effect must be removed from those orders as an incident of the termination of the proceeding in which they were rendered. As Munsingwear teaches, this objective can be accomplished by simply vacating the orders.

It does not necessarily follow that Illinois is precluded from utilizing for any purposes the fruits of the NRC proceeding or from reaching the same result arrived at by the Licensing Board. Those are questions we neither need nor do consider here. Our action in vacating the challenged orders below means merely that Illinois cannot rely on them as representing the conclusions of this agency on the matters in controversy. Rather, by reason of the NRC-Illinois agreement that brought about the termination of the show-cause proceeding while the orders remained on appeal, the NRC must be taken as having no current (or future) position on those matters.

⁵ See NRC Staff Motion at 10.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board