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September 8, 1989

DOCKETED
USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 SEP -8 P2:51

BEFORE THE ATOMIC SAFETY AND LICENSING BOARDOFFICE OF SECRETARY
DOCKING & SERVICE
BRANCH

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|---------------------------------|---|------------------------|
| In the Matter of | } | |
| KERR-MCGEE CHEMICAL CORPORATION | } | Docket No. 40-2061-ML |
| (West Chicago Rare Earths | } | ASLBP No. 83-495-01-ML |
| Facility) | } | |

NRC STAFF'S RESPONSE TO MEMORANDUM AND
ORDER OF AUGUST 24, 1989I. INTRODUCTION

On August 24, 1989, the Atomic Safety and Licensing Board (Licensing Board) issued a "Memorandum and Order (Concerning EPA's Review of the SFES)" ("Order"). In its Order, the Licensing Board requested the parties to this proceeding to address five questions concerning a letter from EPA's Region 5 to the NRC Staff, dated July 27, 1989, which was furnished to the Licensing Board by the State of Illinois.

II. DISCUSSION

Before answering the specific questions posed by the Licensing Board, the Staff would like to call attention to the background underlying EPA Region 5's letter. The Licensing Board correctly notes in its Order of August 24, 1989, that in BN-89-6 the NRC Staff informed the Licensing Board that EPA's Region 5 had requested a number of extensions of time in which to complete its review of the Supplement to the Final Environmental Statement (SFES), the last of which expired on July 28, 1989.

In this context, it should also be pointed out that the NRC Staff prepared the SFES in accordance with the National Environmental Policy Act

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of 1969 (NEPA) and the Nuclear Regulatory Commission's regulations implementing NEPA, 10 C.F.R. Part 51. In its SFES, the NRC Staff evaluated the proposed action and reasonable alternatives to the proposed action. In the SFES, the NRC staff determined that the proposed action satisfies all applicable Federal regulations and that the environmental impacts of the proposed action are small. Further, the Staff determined that none of the alternatives evaluated was obviously superior to the proposed action.

EPA's Region 5 provided comments on the Draft Supplement to the Final Environmental Statement. The Staff responded to these comments in the SFES. As noted above, the Licensing Board correctly observed that the time extensions granted by the Staff to EPA Region 5 for completion of its review expired on July 28, 1989. The letter of July 27, 1989, does not, however, reflect completion of the EPA Region 5 review but rather reiterates questions that have been answered, most recently in the NRC Staff's meeting with EPA's Region 5 on June 30, 1989. The letter of July 27th is not the determination contemplated by Section 309 of the Clean Air Act.

If the EPA wished to bring this matter to the attention of the Council on Environmental Quality (CEQ), it should have provided the determination contemplated by Section 309 of the Clean Air Act on or before July 28, 1989.^{1/} The determination was not provided by that date

^{1/} 40 C.F.R. § 1504.3 allows 25 days for the referring agency to deliver its referral to the CEQ after the FES has been made available to the EPA, commenting agencies, and the public. 40 C.F.R. § 1504.3 states that the CEQ will not accept referrals after that date except when an extension has been granted by the lead agency.

and, thus, any concern regarding the impact of a differing agency opinion as contemplated in the CEQ guidelines is not an issue.

The Staff's answers to the Licensing Board's specific questions follow.

Questions 1 and 2.

1. To what extent do EPA's concerns detailed in the enclosure to its July 27 letter impact the admitted contentions in this proceeding?

2. To the extent that EPA's concerns impact the admitted contentions, how should those concerns be taken into account in this proceeding?

Response:

Unless the Licensing Board determines that EPA's concerns raise serious environmental issues such as would warrant Licensing Board contentions pursuant to 10 C.F.R. § 2.760a, the EPA's concerns do not impact the admitted contentions.

Question 3.

What is the extent of EPA's regulatory jurisdiction over Kerr-McGee's application?

Response:

The EPA UMTRCA Title II standards issued under 40 C.F.R. Part 192 as implemented by the NRC in its conforming regulations in 10 C.F.R. Part 40

apply to this site. Environmental Defense Fund v. U.S. Nuclear Regulatory Commission, 866 F.2d 1263 (10th Cir. 1989), a decision that construes the EPA's and the NRC's respective statutory duties pursuant to UMTRCA, holds 1) that the NRC has the authority to approve licenses for uranium and thorium mill tailing disposal sites containing site specific alternatives to EPA's general standards when literal compliance with the general standards is not practical and 2) that the NRC is not required to obtain EPA's concurrence in approving such licenses.

The work practice rules established by 40 C.F.R. Part 61 are not applicable to the application pending before the Licensing Board. Those rules apply only to uranium tailings disposal.

Question 4.

Are any EPA approvals required before the Staff's preferred alternative may be implemented? If so, please indicate the specific regulatory provisions involved and the status of any applications pending before EPA.

Response:

The NRC Staff is not aware of any EPA approvals required prior to implementation of the proposed action.

Question 5.


Is NRC subject to the procedures set out in 40 C.F.R. Part 1504?

Response:

In Limerick Ecology Action v. U.S. Nuclear Regulatory Commission, 869 F.2d 719 (3d Cir. 1989), the Third Circuit Court of Appeals noted its decision in Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 740 n.16 (3d Cir. 1982), to the effect that CEQ guidelines are not binding on an agency to the extent that the agency has not expressly adopted them. The holding in Limerick Ecology Action concerns the applicability of CEQ's "worst case" guidelines to NRC's environmental impact statements. The Commission in the Statement of Consideration on the promulgation of revised Part 51 in 1984, 49 Fed. Reg. 9352 (March 12, 1984) specifically rejected those guidelines as "substantive" and therefore inapplicable to the NRC.

EPA has never invoked the procedures in 40 C.F.R. § 1504 in an action in which the NRC was the lead agency. Thus, the precise question has not been raised.

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of September, 1989

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NUCLEAR REGULATORY COMMISSION

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INFO
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In the Matter of

KERR-MCGEE CHEMICAL CORPORATION

(West Chicago Rare Earths
Facility)

Docket No. 40-2061-ML

ASLBP No. 83-495-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MEMORANDUM AND ORDER OF AUGUST 24, 1989" in the above-captioned proceeding have been served by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 8th day of September, 1989:

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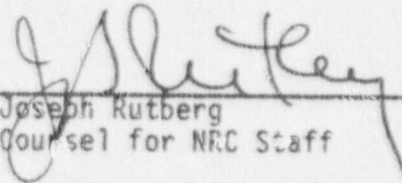
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