SECY-97-087

April 22, 1997

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: OKLAHOMA AGREEMENT STATE NEGOTIATIONS:STATE REQUESTS THAT MAJOR FACILITIES UNDERGOING SITE DECOMMISSIONING NOT BE RELINQUISHED TO STATE

PURPOSE:

To obtain Commission direction on Oklahoma's draft Agreement proposal which would exclude major facilities undergoing decommissioning.

SUMMARY:

The State of Oklahoma's draft application to become an Agreement State requests that NRC retain jurisdiction for the five Site Decommissioning Management Plan (SDMP) sites located in Oklahoma. While the Commission has entered into a variety of "limited" Agreements with States in the past, Oklahoma's proposed approach would be inconsistent with past Commission practice in this area. From a policy perspective, the proposal is likely to create an unwieldy and confusing pattern of regulation in Oklahoma and, possibly, other States in the future. In addition, under these circumstances, implementation of the approach may be inconsistent with the Commission's authority under the Atomic Energy Act (AEA). As such, the staff plans to deny Oklahoma's request. This paper sets out the staff's planned approach to address requests for limited Agreements in the future.

BACKGROUND:

In June 1995, the Office of State Programs received a draft application for an Agreement under 274b of the AEA, as amended, from the Executive Director of the State of Oklahoma's Department of Environmental Quality. The draft application indicated that Oklahoma would like to seek a full Agreement, with authority to regulate AEA 11e(1) byproduct materials, source material, and special nuclear materials in less than critical mass quantities. In addition, the draft application indicated that the State would like to have excluded from its proposed Agreement AEA 11e(2) byproduct materials, and major facilities undergoing decommissioning. These facilities would remain under Federal jurisdiction. The State of Oklahoma identified these facilities as Sequoyah Fuels, Kerr-McGee facilities at Crescent and Cushing, Fansteel, and Kaiser Aluminum. The State noted that these facilities are in various stages of decommissioning and that in order for Oklahoma to assume regulatory responsibility over these facilities the State would have to rapidly develop its expertise, which the State believes would lengthen the decommissioning process. The State of Oklahoma also indicated in a subsequent letter dated November 16, 1995 (Attachment 1) that in addition to a delay in decommissioning, they believe there are potential legal and technical problems involved in acquiring jurisdiction over these facilities. Additional information regarding these problems and Oklahoma's view that there are equity and practicality grounds for granting their request are contained in a recent letter dated March 10, 1997 (Attachment 2).

Staff notes that Oklahoma states in their March 10, 1997 letter that NRC would always have exercised regulatory jurisdiction over the identified SDMP facilities since they are fuel cycle facilities. First, staff notes that fuel cycle facilities that do not qualify as production facilities under the AEA and possess only source materials licenses (e.g., mills, conversion plants) would normally be subject to Agreement State regulation. Second, with the exception of Sequoyah Fuels, the facilities identified by Oklahoma are not fuel cycle facilities. In fact, all of the facilities identified by Oklahoma would fall under the State's jurisdiction if the State were to enter into a 274b Agreement that includes source material in the transfer of jurisdiction.

DISCUSSION:

I. Historical

Section 274b of the AEA states,

> "... the Commission is authorized to enter into Agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under chapters 6, 7, and 8, and section 161 of the Act, with respect to any one or more (Emphasis added) of the following materials within the State --
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> (1) byproduct materials as defined in section 11e(1);
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> (2) byproduct materials as defined in section 11e(2);
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> (3) source materials;
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> (4) special nuclear materials in quantities not sufficient to form a critical mass."

From the first Agreement signed with the State of Kentucky in 1962 to the 25th Agreement signed in 1974 with New Mexico, all the Agreement documents in Article I specified the areas to be assumed by the State as byproduct materials, source materials and special nuclear materials in quantities not sufficient to form a critical mass. In 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act (UMTRCA), which, among other things, added to the category of byproduct material "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore

processed primarily for its source material content." In addition, the Low-Level Radioactive Waste Policy Act of 1980 was enacted which required States to develop low-level radioactive waste disposal facilities.

As a result of these legislative changes, in January 1981 the Commission revised its policy statement regarding criteria for guidance of States and NRC in discontinuance of NRC regulatory authority and assumption of regulatory authority by States through Agreement (46 FR 7540, January 23, 1981; as amended by policy statements published at 46 FR 36969, July 16, 1981; and 48 FR 33376, July 21, 1983). The policy statement allowed States to enter into Agreements for low-level radioactive waste only, and incorporated provisions and requirements of the UMTRCA. The revisions to the policy statement also allowed States that meet the criteria for the regulation of uranium mills and tailings under UMTRCA to obtain regulatory authority over 11e(2) byproduct materials through an Agreement. Thus, subsequent to 1978, all Agreement documents in Article I specified byproduct materials 11e(1) and/or 11e(2) as an area being assumed through Agreement with the Commission. In addition, those States which had entered into an Agreement prior to 1978 and desired to have authority over mill tailings, i.e., AEA 11e(2) byproduct materials, amended their Agreements with NRC to cover this regulatory area (Colorado, Texas, and Washington).

An additional policy change has affected the areas of regulatory authority addressed in Agreements with States. This change is reflected in the Commission's June 30, 1995 decision in response to SECY-95-136, "Options to Improve and Standardize the Evaluation and Approval of Sealed Sources and Devices Manufactured in Agreement States." The Commission decision offers the Agreement States the opportunity to either voluntarily return to the NRC the authority to evaluate sealed sources and devices (SS&D) or to retain it.

Collectively, these changes have allowed States to enter into more specific Agreements tailored to State needs. These Agreements involve the transfer of authority over "subcategories" of material and, as such, constitute limited Agreements. In other words, the transfer of authority has involved portions of the regulated activity covered by the specific categories delineated in Section 274b. For example, a State can elect to obtain authority to regulate byproduct, source, and limited amounts of special nuclear material in all activities, regulate these materials only with respect to disposal of low-level radioactive waste or elect to exclude low-level radioactive waste or uranium mill tailings activities from its Agreement with the NRC. Examples include the return by the New Mexico Agreement State Program of authority for the regulation of uranium mills to the NRC and the recent decisions by some Agreement States to return jurisdiction to evaluate and approve SS&Ds. Despite these examples, the acceptable bounds for entering into tailored or limited Agreements has never been fully defined by NRC. However, absent concerns of national defense, NRC has not entertained requests for Agreements involving the transfer of authority over single licensees absent an identified subcategory of material. Such Agreements have been viewed as inconsistent with the provisions of the AEA.

Thus, the staff believes that the approach taken by NRC in addressing Oklahoma's request could have a significant impact in the development of future Agreements and any amendments to existing ones. For instance, an approach that may be workable in the context of the Oklahoma Agreement may create significant difficulties if applied to another State, such as allowing States to refrain from obtaining Agreement authority over individual licenses perceived as difficult or complex.

II. Requests from States

Recently, some Agreement States and non-Agreement States have expressed an interest in obtaining more specific Agreements tailored to their needs. Some non-Agreement States have indicated their desire to forego assumption of authority over specific licensees when these States enter into an Agreement with the NRC pursuant to Section 274b of the AEA. In addition, similar issues have been raised in the past by existing Agreement States. For example, in 1994, Wyoming inquired about the possibility of entering into a limited 274b Agreement with the NRC for in situ uranium mining only. Under this proposed Agreement, the NRC would not relinquish regulatory authority over conventional mining and associated mill tailings disposal. The State of Wyoming was informed that the NRC needed to further evaluate whether such a limited program would be consistent with the Subsection 274a(3) of the AEA provision which identifies one of the purposes of Section 274 as promoting "... an orderly pattern between the Commission and the State governments with respect to the development and use and regulation of byproduct, source, and special nuclear materials." In addition, the staff informed the State of Wyoming that before the NRC proceeded with further evaluation of a limited Agreement for in situ uranium recovery, the State should provide the NRC additional clarification on whether the State desired to pursue the limited Agreement further. No clarification on this issue has yet been provided.

Utah has expressed interest in obtaining a modification to their Agreement to allow the State to assume authority over disposal of 11e(2) byproduct material at one facility, Envirocare of Utah, Inc. The staff informed the State of Utah that an NRC Agreement for the transfer of regulatory authority for a single licensee would be inconsistent with the provisions of Section 274b of the AEA. The State of New York requested a decision on their ability to return SS&D evaluation authority back to the Commission. Through the Commission's direction in the Staff Requirement Memorandum for SECY-95-136, "Options to Improve and Standardize the Evaluation and Approval of Sealed Sources and Devices Manufactured in Agreement States," the Commission approved voluntary relinquishment of authority over SS&D programs by an Agreement State.

III. Oklahoma's Proposal

As noted under the "Background" section of this paper the Oklahoma draft application for Agreement State status indicated that the State would like to seek a full Agreement, with authority to regulate AEA 11e(1) byproduct materials, source material, and special nuclear materials in less than critical mass quantities. However, the State would like to have exempted from its proposed Agreement major facilities undergoing decommissioning. The State of Oklahoma identified these facilities as Sequoyah Fuels, Kerr-McGee facilities at Crescent and Cushing, Fansteel, and Kaiser Aluminum. The State would like these facilities to remain under Federal jurisdiction.

The staff believes that the Oklahoma proposed Agreement approach would be inappropriate from a policy perspective. In addition, the Office of the General Counsel has indicated that implementation of this approach may be inconsistent with the Commission's authority under the AEA. As such, the

staff plans to deny Oklahoma's request.

The Oklahoma request raises several concerns. First, the limitation of NRC authority to a few, discrete licensees is likely to create future problems if the State otherwise receives authority to regulate the types of activities conducted by those reserved licensees. Under Oklahoma's proposal, NRC retains authority over Fansteel, a source material licensee conducting rare earth extraction. If a similar operation sought a license a month after the Agreement, Oklahoma would have to license and regulate that licensee under the State's newly acquired authority over source material. This would create a form of dual regulation. Both NRC and Oklahoma would be regulating the same type of activities in the same State. Nothing in the Oklahoma proposal would allow the State and NRC to avoid the confusion and duplication created by this approach. If such an approach were employed in Oklahoma and other States, the pattern of NRC and Agreement State regulation could become confusing. This is not the case with limited Agreements created by NRC in the past such as the reservation of SS&D authority.

In addition, the basis for Oklahoma's proposal would raise concerns regarding NRC's confidence in the adequacy of Oklahoma's program. At the time of the Agreement, NRC should have reasonable assurance that the State can adequately regulate any matters involving activities and materials included under the Agreement regardless of the complexity of such activities. Accordingly, the fact that the specific sites identified by Oklahoma involve particularly complex regulatory issues is a poor rationale for retaining NRC authority in the manner proposed by Oklahoma.

IV. Future Approach

In order to aid in addressing such issues in the future, the staff seeks Commission consideration and approval of the staff's planned approach. Since, as discussed earlier, NRC has already entered into a variety of limited Agreements in the past, there is precedent for certain types of arrangements. However, there is little guidance to address new proposals that have not been considered in the past.

Due to the variety of material and licensed activities involved, specific, detailed guidance on this issue is not appropriate. As such, the staff plans to approach future requests for limited Agreements on a case by case basis giving consideration to the following general guidelines stemming from issues raised by the Oklahoma proposal. Overall, the staff would consider whether the proposed Agreement would jeopardize "...an orderly regulatory pattern between the Commission and the State governments..." as indicated by Section 274a(3) of the AEA. In particular, requests for limited Agreements would have to identify discrete categories of material or classes of licensed activity that (1) can be reserved to NRC authority without undue confusion to the regulated community or burden to NRC resources, and (2) can be applied logically, and consistently to existing and future licensees over time. Under this approach, NRC would not reserve authority over a single license unless that licensee clearly constituted a single class of activity or category of material meeting the two criteria described above.

In applying this approach in the future, the staff will inform the Commission concerning any issues that are difficult to resolve or that involve significant disagreement between NRC and a State.

RECOMMENDATION:

That the Commission approve:

1. The denial of the Oklahoma request to enter into an Agreement which would exclude five SDMP sites, Sequoyah Fuels, Kerr-McGee facilities at Crescent and Cushing, Fansteel, and Kaiser Aluminum.

2. The staff's approach for the handling of requests for limited Agreements.

COORDINATION:

The Office of the General Counsel has no legal objections with the staff's recommended approach, noting that there would be legal issues if the Oklahoma proposal were approved.

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Attachments
1. Letter Dated November 16, 1995 from H. A. Caves to R. Bangart
2. Letter Dated March 10, 1997 from H. A. Caves to R. Bangart