



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

October 13, 2005

Kelly A. Johnson
Acting Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Ave., N.W.
Room 2143
Washington, D.C. 20530

Re: *Missouri v. Westinghouse Electric, LLC*, No. 4:05-CV-00315 SNL (E.D. Mo.)

Dear Ms. Johnson:

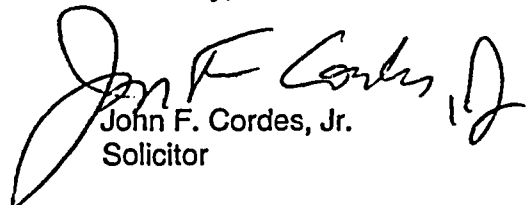
I write to recommend that the government intervene in the above-captioned case to protect the government's regulatory and financial interests in the clean-up of the contaminated "Hematite" site in Missouri. I've attached comments submitted by our agency on a proposed consent decree between Missouri and Westinghouse concerning the Hematite clean-up.

The NRC comments indicate that much, if not all, of the Hematite clean-up falls under the NRC's exclusive Atomic Energy Act jurisdiction. The proposed consent decree arguably would infringe on NRC jurisdiction by asserting an inappropriate regulatory role for Missouri. In addition, the proposed decree seemingly is part of an effort to impose CERCLA liability on the government.

For these reasons, there is ample reason to intervene in the Hematite lawsuit. Charles Mullins of our office and Eric Hostetter of your office already have consulted extensively about the Hematite litigation. Mr. Mullins stands ready to provide whatever litigation support your office requires. He will be out of town at an oral argument between October 17 and 19. He otherwise can be reached at 301-415-1618.

Thank you for your cooperation in this matter.

Sincerely,


John F. Cordes, Jr.
Solicitor

September 26, 2005

NRC Comments on the proposed Hematite Consent Decree

Under the Atomic Energy Act of 1954 ("AEA"), and the Energy Reorganization Act, the Nuclear Regulatory Commission ("NRC") has exclusive authority and/or jurisdiction to direct the investigation and/or cleanup of source, byproduct, and special nuclear material ("AEA materials"). This preemption of the entire field of radiological health and safety extends to AEA materials that are mixed with non-AEA materials. It is the NRC's understanding - in the absence of a definitive site characterization - that essentially all of the materials at issue in the investigation and cleanup of the Hematite Site are either AEA materials or AEA materials mixed with non-AEA materials.

The proposed Consent Decree covers an investigation into the status of AEA materials and AEA materials mixed with non-AEA materials (including sampling and analysis of AEA materials), and two removal actions (including decommissioning, packaging, transport and disposal) addressing AEA materials and AEA materials mixed with non-AEA materials. Because the work that is identified in the Consent Decree addresses actions involving AEA materials and AEA materials mixed with non-AEA materials, the Consent Decree appears to exceed the State's authority and, therefore, appears to be preempted. Accordingly, NRC opposes entry of the Consent Decree on preemption grounds.

Section 274(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2021(b), provides that the NRC can relinquish certain authority over source, byproduct, and limited quantities of special nuclear material to those states that enter into special agreements with the NRC (the "Agreement State" provision). No such agreement exists with Missouri; accordingly, the NRC has exclusive jurisdiction with respect to AEA materials at the Hematite site.

While the Consent Decree appears to be preempted, it is possible that the MDNR may be able to identify specific cleanup actions to be addressed through the Consent Decree that do not involve AEA materials and that do not fall within NRC jurisdiction. Therefore, the NRC offers for MDNR's consideration the following suggested modifications to the Consent Decree terms, which are intended to make clear that the Consent Decree does not impose any requirements whatsoever relating to AEA materials or otherwise intrude in any way into NRC's exclusive jurisdiction over AEA materials.

1. Add a new Paragraph "E" in Background Section between the current "D" and "E." :

The settling parties recognize that, under the Atomic Energy Act and Energy Reorganization Act, as amended, the U.S. Nuclear Regulatory Commission ("NRC") has exclusive responsibility for regulating "source, special nuclear, and byproduct material." 42 U.S.C. §§ 2201(b) and (l)(3). The settling parties further recognize that the NRC has exclusive jurisdiction with regard to those radiological hazards that are present at the Hematite site as a result of activity performed under the various AEC and/or NRC licenses issued to the previous site owners as well as those currently held by WEC. Accordingly, the settling parties recognize that all work undertaken to remediate those radiological hazards that resulted from activity under an AEC and/or NRC license at the Hematite site is subject to exclusive NRC jurisdiction and oversight and to NRC's decommissioning and license termination requirements. The settling parties affirm that nothing in this Consent Decree is intended to impose any requirements related to materials regulated by the Atomic Energy Act or Energy Reorganization Act, or to intrude in any way into the NRC's exclusive authority, including work done pursuant to any decommissioning plan to be approved by the NRC. The settling parties affirm that in the event that any requirement of this Consent Decree so intrudes, that requirement shall be null and void.

2. Revise the current Paragraph “J” in the Background Section.

(A.) In (2) add the following phrase after “Hematite Radioactive Site[;]

“to the extent that the state does not intrude on matters within the jurisdiction of the NRC.”

(B.) Add a new sentence at the end of the paragraph:

“MDNR does not have authority over materials licensed by the Atomic Energy Commission and/or the Nuclear Regulatory Commission, or over activities that fall within the jurisdiction of the Nuclear Regulatory Commission.”

3. Remove all references to Deul’s Mountain in the Consent Decree and acknowledge that the NRC has jurisdiction over the radiological aspects of site building demolition.

The NRC reads the Consent Decree and the EE/CA to assert that the State has final authority over the work at Deul’s Mountain and all aspects of site building demolition, including the radiological aspects of demolition. However, all the work at Deul’s Mountain falls within the exclusive jurisdiction of the NRC. Moreover, the State does not have any jurisdiction over the radiological aspects of site building demolition, at least to the extent that the radiological contamination is the result of activities licensed by the AEC and/or the NRC. The settling parties should revise the Consent Decree accordingly, removing all references to any activities at Deul’s Mountain and stating that the Consent Decree covers the removal of site buildings to the extent that those activities do not conflict with the NRC’s jurisdiction. This paragraph applies, inter alia, to: the definition of “Past Work,” and Paragraphs 10, 11, and 17-21.

In addition, the following changes should be made as well:

4. Revise the Definition of “Past Work.”

Add a new sentence at the end of the paragraph:

“‘Past Work’ does not include any activities that were conducted under the jurisdiction of the Nuclear Regulatory Commission.”

5. Revise the Definition of “Work.”

“‘Work’ shall mean all work and other activities Settling Defendant is required to perform under this Consent Decree, including but not limited to . . . , but does not include any activities that fall under the jurisdiction of the Nuclear Regulatory Commission.”

6. Revise Paragraph 11. . . . Add a new sentence at the end of the paragraph:

“As noted above, Work performed under this Consent Decree does not include those activities to be performed under the jurisdiction of the Nuclear Regulatory Commission.”

7. Revise Paragraph 17. . . . Add a new sentence at the end of the paragraph:

“As noted above, Work performed under this Consent Decree does not include those activities to be performed under the jurisdiction of the Nuclear Regulatory Commission.”

8. Revise Paragraph 20. . . . Add a new sentence at the end of the paragraph:

“Nothing in this paragraph is intended to authorize any activities or work that fall under the NRC’s jurisdiction or any NRC-approved decommissioning plan.

9. Revise Paragraph 21. . . . Add a new sentence at the end of the paragraph:

“Nothing in this paragraph is intended to authorize any activities or work that conflict with NRC requirements or the NRC-approved decommissioning plan; in the event of such a conflict, the NRC’s requirements or the NRC-approved decommissioning plan will take priority.”

10. Revise Paragraph 46. . . . Add a new sentence at the end of the paragraph:

“As noted above, Work performed under this Consent Decree does not include those activities to be performed under the jurisdiction of the Nuclear Regulatory Commission.”

11. Revise Paragraph 50. . . . Add a new sentence at the end of the paragraph:

“MDNR’s Project Coordinators do not have any authority over any activities performed under the jurisdiction of the Nuclear Regulatory Commission.”

12. Revise Paragraph 55. . . . Add a new sentence at the end of the paragraph:

“As noted above, the MDNR does not have authority to approve documents that are related to activities that are within the jurisdiction of the NRC.”

13. Revise Paragraph 69. . . . Add a new sentence at the end of the paragraph:

“As noted above, the State of Missouri and MDNR do not have authority over any activities that fall within the jurisdiction of the NRC.”

14. Revise Paragraph 70. . . . Add a new sentence at the end of the paragraph:

“MDNR does not have authority to take action on any matter within the jurisdiction of the NRC.”

15. Revise Paragraph 72. . . . Add a new sentence at the end of the paragraph:

“The settling parties recognize that the State of Missouri does not have any control over the NRC’s authority to approve amendments to WEC’s license or to approve a decommissioning plan (or plans) for the Hematite facility.”