

OCT 17 1980

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

Ardelle M. Kissler, Clerk
Environmental Quality Council

IN THE MATTER OF THE NOTICE OF VIOLATION)
ISSUED TO MR. W. J. SHELLEY, DIRECTOR,)
REGULATION AND CONTROL, KERR-McGEE)
NUCLEAR CORP., P. O. BOX 25861, OKLAHOMA)
CITY, OK 73125)
PERMIT NO. 304C)

Docket No. 789-80

PETITION FOR HEARING

COMES NOW Kerr-McGee Nuclear Corporation, and petitions for a hearing before the Wyoming Environmental Quality Council.

This Petition is based on and challenges the legal bases for the Notice of Violation Order, dated October 7, 1980 by the Administrator of the Land Quality Division as well as the orders contained in his transmittal letter dated October 7, 1980, both attached.

STATUTES AND REGULATIONS

I. W.S. 35-11-411(b). Upon receipt of the annual report the administrator shall make such further inquiry as shall be deemed necessary after consultation with the advisory board. If the administrator objects to any part of the report or requires further information he shall notify the permittee as soon as possible and shall allow a reasonable opportunity to provide the required information, or take such action as shall be necessary to remove the objection.

II. W.S. 35-11-701(c)(i) and (ii). For other than surface coal mining operations, if, as a result of the investigation, it appears that a violation exists, the administrator of the proper division may, by conference, affiliation and persuasion, endeavor promptly to eliminate the source or cause of the violation: (i) In case of failure to correct or remedy an alleged violation, the director shall cause to be issued and served upon the person alleged to be responsible for any such violation a written notice which shall specify the provision of this act, rule, regulation, standard, permit, license, or variance alleged to be violated and the facts alleged to constitute a violation thereof, and may require the person so complained against to cease and desist from the violation within the time the director may determine; (ii) Any order is final unless, not later than ten days after the date the notice is served, the person or persons named therein request, in writing, a hearing before the council. Upon the filing of a request the order complained of shall be stayed pending the council's final determination thereon;

III. Land Quality Division Rules and Regulations, Chapter I
Section 2 (103). "Underground mining activities" means a combination of:
(a) underground operations necessary for the extraction of solid minerals by
man-made excavations underneath the surface of the earth; and (b) for the
extraction of coal, surface operations incident to the underground operation
such as construction, use, maintenance, and reclamation of roads, surface
repair shops, storage areas, etc., and areas on which materials incident to
underground operations are placed.

IV. Land Quality Division Rules and Regulations, Chapter IV
Section 2(1). (1) Time schedule. (1) Reclamation must begin as soon as
possible after mining commences and must continue concurrently until such time
that the mining operation is terminated and all of the effected land is
reclaimed. If conditions are such that final reclamation procedures cannot
begin until the mining operation is completed, this must be explained in the
reclamation plan. Regardless of the type of operation, reclamation must begin
within 180 days after termination of mineral production and must be completed
within the time frame of the approved reclamation schedules. A detailed
time schedule for the mining and reclamation progression must be included
in the reclamation plan. . . . (2) If reclamation cannot be completed within
two years after mining has ceased in a particular area, the operator must
justify the reasons for the delay. If any operator desires to leave an
operation partially unreclaimed for a period of time on the basis that
economic conditions may make it profitable to continue mining in the near
future, this must be explained in a written request to the Land Quality
Division. This request must be accompanied by an economic report describing
the extent of remaining reserves along with a description of all interim
procedures and precautions that will be taken to stabilize all effected
land, prevent any surface and subsurface pollution, avoid public nuisance
and provide safety measures to protect human and animal life. All requests
must be accompanied by written consent from the surface land owners to the
proposed plan. All bonding and monitoring requirements shall be maintained
during such an interim period.

FACTS

On August 16, 1978, Petitioner notified the Division that the
Bill Smith Mine had been placed in a standby status on July 1, 1978. Petitioner
did not notify that operations at the mine had ceased. No reply was received

by Kerr-McGee from the Administrator.

Subsequently Petitioner filed annual reports with the Division on the mine. On March 20, 1980, Petitioner filed with its Division an annual report with regard to the Bill Smith Mine. Thereafter, the Division filed its inspection report. In its filing the Division made no comment indicating any dissatisfaction with the condition of the Bill Smith Mine, or that Petitioner was in default of its reclamation obligations or any other obligations under Wyoming statutes or regulations.

Quoting from the transmittal letter dated June 30, 1980, it states: "Thank you for the continued excellent annual reports." The inspection report states: "No violations were found."

In fact, since being placed in a standby status, Petitioner has continued to pump water from the mine, employ a crew for maintenance, (hoistman, mechanics, etc.), conduct regular environmental surveillance required by regulatory agencies, operate the water treatment system, maintain all surface facilities in good order, prepare and submit all reports and other documents to regulatory agencies pursuant to existing permits, regulations, and laws.

During this period of standby status meetings were held with the Administrator on various dates on matters relating to Petitioner's mining permit. At none of these meetings did the Administrator request that reclamation be commenced on the Bill Smith Mine or state that Petitioner was in violation of the statutes or regulations in this regard.

In August of 1979, Kerr-McGee Nuclear filed with the Division its application for an in situ mining permit for the Bill Smith Mine. This permit was granted by the Division on August 28, 1980.

In a letter dated August 26, 1980, the Administrator for the first time referred to Chapter IV Section 2 of the Regulations and requested the information detailed in that section by October 1, 1980. Petitioner requested a meeting with the Administrator and the date of October 6 was agreed upon for the meeting. (The Administrator did not request this meeting).

At the meeting the Administrator "promised" to issue a notice of violation to Petitioner because it had not completed reclamation at the Bill Smith Mine within two years after cessation of operations at the mine. At the meeting, Petitioner explained why it did not feel that it had ceased its mining operations so as to trigger its obligation to complete reclamation

at Bill Smith Mine within the two years after cessation of operations.

PETITIONER'S POSITION

I. Petitioner did not in August, 1978 cease mining operations so as to trigger the reclamation obligations required by the regulations when a company ceases mining operations in Wyoming.

II. The Administrator throughout the two year standby period agreed that Petitioner did not cease mining operations on July 1, 1978 so as to trigger those reclamation obligations.

III. It was arbitrary and capricious for the Administrator to demand that Petitioner furnish information specified in Chapter IV, Section 2, including landowner consent within a period of less than 45 days after his notice, since this involved a change in the Administrator's interpretation of his own regulation.

IV. It was arbitrary and capricious for the Administrator to fail to exercise his discretion during the two year period of the standby status so as to encourage the cessation of a violation of the statute by Petitioner if he in fact believed that reclamation activities had been illegally delayed, or that Petitioner was in danger of default in its obligation under Chapter IV, Section 2.

V. The Administrator did not believe that Petitioner was in violation of the statute for failing to commence reclamation activities within 180 days of commencement of Bill Smith's standby status since at no time did he raise this contention with Petitioner even though the annual reports by Petitioner and inspections and reports by the Division were made in the meantime.

VI. The Administrator's own continuing interpretation of his regulations during the two year period of standby status, as demonstrated by his conduct, is entitled to great weight.

VII. The statutes and regulations do not define the term "cessation of operations".

VIII. The granting of Petitioner's application for in situ mining at the Bill Smith Mine, filed in 1979 without raising any question of a default in Kerr-McGee Nuclear's reclamation responsibilities, was recognition by the Administrator that in his judgment mining had not theretofore ceased at the Bill Smith Mine.

IX. It would be arbitrary and capricious as well as uneconomical to now cause Petitioner to fill in the Bill Smith Mine shaft, and dismantle the surface buildings thereon in light of in situ mining thereon.

X. Petitioner in fact substantially complied with the requirements of Chapter IV, Section 2, when it submitted its reports of annual operations, approved by the Division, all the time keeping a standby force at the mine to prevent pollution, nuisances, and risks to safety of persons and animals.

XI. The orders of the Administrator dated October 7, 1980, relating to a revision of its permit to mine and the reduced mining area for Kerr-McGee Nuclear's mining permit are contrary to law as Kerr-McGee Nuclear has a valid permit from the Division for the area comprehended by the permit. Likewise the order to submit Chapter IV, Section 2, information includes surface land owner consent for its entire mining permit area is unsanctioned by law and is a deprivation of Petitioner's property without due process of law.

XII. Petitioner's Bill Smith Mine has been held to be "grandfathered" under orders by the Industrial Siting Council of the State of Wyoming.

XIII. It is a deprivation of Petitioner's property without due process to require land owner consent of Petitioner's reclamation plan for the Bill Smith Mine and there is no basis in law for this requirement.

XIV. Petitioner is willing to submit (except for land owner consent) the information required by Chapter IV, Section 2, for the Bill Smith Mine, now that it has learned of the Administrator's "new interpretation" of the requirements of the regulations. Petitioner should have been afforded a reasonable time in which to submit this information, for example not earlier than June 1, 1981.

PRAYER

WHEREFORE, Petitioner prays that the orders of the Administrator in his letter of October 7, 1980 and in his notice of violation dated October 7, 1980 be reversed and that Petitioner be allowed a reasonable time to furnish (except for land owner consent) the Chapter IV, Section 2, information for the Bill Smith Mine by June 1, 1981. Petitioner does not believe that the Administrator's present interpretation of his regulation is consistent with his conduct during the two year standby period. Petitioner does not believe that the Administrator would wait until the end of the two year reclamation period to inform Petitioner of the claimed default. This, when the regulations invite, and fairly by implication, require that the Administrator hold

conferences with the mining operator to avoid and eliminate defaults. Instead the Petitioner believes that the Administrator has changed his interpretation of its own regulations and under the circumstances it is illegal and inappropriate to Notice Petitioner as in violation of the regulations.

DATED this 17th day of October, 1980.

Petitioner
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