

February 21, 1996

MEMORANDUM FOR: John F. Cordes, Acting Director
Office of Commission Appellate Adjudication

FROM: John C. Hoyle, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION,
3:30 P.M., THURSDAY, FEBRUARY 21, 1996,
COMMISSIONERS' CONFERENCE ROOM, ONE WHITE
FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO
PUBLIC ATTENDANCE)

I. SECY-96-021 - Kerr-McGee Chemical Corporation -- Motion to
Dismiss Proceeding and Vacate Underlying Decisions

The Commission, by a vote of 3-0, approved an order terminating this proceeding as moot and vacating the underlying decisions.

The proceedings involved Kerr-McGee's application for a license amendment authorizing disposal of mill tailings by on-site burial at its West Chicago Rare Earths facility. All parties agreed that this proceeding is moot because Kerr-McGee no longer intends to pursue on-site disposal.

(Subsequently, on February 21, 1996, the Secretary signed the Order.)

cc: Chairman Jackson
Commissioner Rogers
Commissioner Dicus
EDO
OGC
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-24

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus

In the Matter of)
)
KERR-McGEE CHEMICAL CORPORATION)
) Docket No. 40-2061-ML
(West Chicago Rare Earths)
Facility))
)
)

CLI-96-2

ORDER

This proceeding came before the Commission in March 1991, when Kerr-McGee filed a petition for review of Atomic Safety and Licensing Appeal Board decision ALAB-944, 33 NRC 81 (1991). The proceeding concerns Kerr-McGee's application for NRC authorization to dispose of mill tailings by on-site burial at its West Chicago Rare Earths facility. In ALAB-944, the Appeal Board reversed in part and vacated in part an Atomic Safety and Licensing Board decision that had approved on-site disposal. See LBP-89-35, 30 NRC 677 (1989). The period within which the Commission may act on Kerr McGee's petition for review has been held in abeyance since July 3, 1991, at the joint request of Kerr-McGee, the State of Illinois (the State), and the City of West Chicago (the City), to allow for a negotiated settlement.

On December 9, 1993, Kerr-McGee moved to terminate this proceeding as moot, and to vacate the proceeding's underlying

decisions: ALAB-944, and the earlier decisions of the Atomic Safety and Licensing Board, LBP-90-9, 31 NRC 150 (1990), and LBP-89-35, 30 NRC 677 (1989). Kerr-McGee indicated that it had abandoned its original plan to dispose of mill tailings on-site in West Chicago and, to that effect, had contracted with Envirocare of Utah, Inc., to transfer the wastes to Utah. Kerr-McGee claimed that its commitment to pursue off-site disposal of the wastes rendered this proceeding moot.

The State and the City responded that although they did not oppose termination of the proceeding, vacatur of the underlying decisions was inappropriate. In particular, the State and the City questioned whether the proceeding indeed had become moot. Both parties expressed various doubts about Kerr-McGee's commitment to removing the wastes from the West Chicago site, citing such factors as the executory and conditional nature of Kerr-McGee's contract with Envirocare, and Kerr-McGee's continued related litigation in other forums.

The Commission recently requested and received updated status reports on this proceeding. All parties are now in agreement that this proceeding has become moot. Kerr-McGee states that it has begun shipping wastes from West Chicago to Utah. The State and the City are satisfied that Kerr-McGee "has clearly agreed to remove" the wastes from West Chicago. The Nuclear Regulatory Commission staff, although not a formal party to the pending appeal, finds it "no longer realistic" to believe that the Commission will need to address a proposal for on-site

disposal at the West Chicago site. Although the parties present differing theories on what factors or events rendered the proceeding moot, at bottom all agree that Kerr-McGee no longer intends to pursue on-site disposal, the subject of this proceeding. The Commission therefore agrees that the proceeding is moot.

Kerr-McGee also requests the Commission to vacate the underlying decisions in this proceeding. The NRC staff concurs, urging the Commission to vacate "three unreviewed decisions involving highly controversial issues in the waste disposal area." The State and the City, however, oppose vacatur, claiming that this proceeding became moot only after Kerr-McGee in 1994 entered into a settlement agreeing to remove the mill tailings from the West Chicago site. Voluntary settlement, according to the State and City, deprives litigants of any claim to the equitable remedy of vacatur. Cf. United States Bancorp Corp. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994). Kerr-McGee and the NRC staff do not agree that the 1994 settlement is what rendered the Commission proceeding moot, and instead argue that the proceeding became moot in 1990, when the Commission -- over Kerr-McGee's objection -- transferred regulatory jurisdiction over section 11(e)(2) byproduct material to the State of Illinois.¹

¹ Kerr-McGee challenged the transfer of jurisdiction in a D.C. Circuit lawsuit against the NRC. Kerr-McGee later withdrew the suit, apparently because of provisions in the 1994 settlement agreement with the State and City. Kerr-McGee, though, claims

In short, the parties do not agree on precisely why this long-pending case is moot, but do agree that there no longer is any point to Commission review because of Kerr-McGee's commitment to move the mill tailings offsite. The Commission, in any case, is not bound by judicial practice and need not follow the Bancorp ruling. In these circumstances, and because these unreviewed Board decisions involve complex questions and vigorously disputed interpretations of agency provisions for disposal of byproduct material, the Commission as a policy matter chooses to vacate and thereby eliminate as precedent all three underlying decisions in this proceeding. This will permit any similar questions that may come up to be considered anew, without the binding influence of an apparently controversial Appeal Board decision that the Commission has not had the occasion to review.

By vacating the decisions, the Commission does not intimate any opinion on their soundness. Without engaging in a full inquiry into the merits -- which no party any longer requests, and the Commission sees no compelling reason to undertake on its own -- the Commission cannot properly evaluate the analyses of the Licensing and Appeal Boards.

This proceeding is terminated as moot, Kerr-McGee's application for on-site disposal is deemed withdrawn, and the following decisions are vacated: ALAB-944, 33 NRC 81 (1991); LBP-

that the settlement agreement neither encompasses this Commission proceeding nor resolves numerous outstanding disputes with the State and City over the removal of the material.

90-9, 31 NRC 150 (1990); LBP-89-35, 30 NRC 677 (1989).

It is so ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland
this ___ day of February, 1996.