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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD APPEAL PANEL**

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

MOTION TO TERMINATE PROCEEDING AND TO VACATE INITIAL DECISION FOR LACK OF JURISDICTION

In light of the Commission's October 17, 1990 approval of the amendment of its agreement with the State of Illinois ("Illinois") which transfers jurisdiction from the Commission to Illinois to regulate section 11e(2) byproduct material, Illinois and the City of West Chicago ("West Chicago") move this Board to terminate this proceeding and to vacate the Initial Decision by the Licensing Board for lack of jurisdiction. In support of this motion, Illinois and West Chicago state as follows:

1. On February 13, 1990, the Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision. *See Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), No LBP-90-9, 31 NRC 150 (1990).* On February 20, 1990, Illinois filed its Notice of Appeal of the Initial Decision. On February 22, 1990, West Chicago filed its Notice of Appeal of the Initial Decision.

2. This Panel has not yet ruled on the appeals of Illinois and West Chicago. As a result, under NRC regulations, 40 C.F.R. section

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2.770, the Commission has not rendered a "final decision" on Kerr-McGee's application to permanently dispose of wastes at West Chicago. See *State of Illinois* (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), No. CLI-90-09 (October 17, 1990).

3. On October 17, 1990, the full Commission approved the application of Illinois to assume regulatory authority over section 11e(2) byproduct material. The radioactive waste at West Chicago that is the subject of this proceeding is classified as section 11e(2) byproduct material. See February 23, 1990 Materials License to Kerr-McGee, authorizing "onsite disposal of section 11e(2) byproduct material;" *Kerr-McGee Chemical Corp v. U.S. Nuclear Regulatory Commission*, Nos. 87-1254, 88-1636 (D.C. Cir. April 27, 1990).

4. Because the NRC has transferred its regulatory authority over section 11e(2) byproduct material to Illinois, the Commission no longer has jurisdiction over the byproduct material at West Chicago. Under clear Appeal Board precedent, this proceeding, and all other Commission proceedings regarding West Chicago must come to a close. In addition, all previous Board decisions must be vacated. In *U.S. Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987), after Illinois acquired jurisdiction from the NRC over materials at Sheffield, the Appeal Board vacated all orders subject to appeal and terminated the proceeding. The Appeal Board added that the "operative effect" of all Licensing Board orders on appeal at the time of the transfer, "must be removed...as an incident of the termination of the proceeding in which they were rendered." *Id.* at 898 n.4. The Board explained that once jurisdiction is transferred to the

State, there is no longer a forum for appealing Licensing Board decisions. This case is no different from *U.S. Ecology*. This proceeding, which relates solely to *federal* regulatory control over section 11e(2) byproduct material is now moot. Moreover, the Initial Decision, which is not final NRC action, is of no force and effect. As a result, this Panel must vacate the Initial Decision and any licensing action taken pursuant to that decision, and terminate the appeal for lack of jurisdiction.

5. The Commission, with full knowledge of this proceeding and Kerr-McGee's position, has ruled that Illinois now has jurisdiction over the materials at West Chicago. In its November 22, 1989 Memorandum and Order (Ruling on Motions for Summary Disposition), No. LBP-89-35, 30 NRC 677 (1989) (November 22 Order), the Licensing Board addressed the possibility that the Commission would transfer regulatory authority over section 11e(2) byproduct material to Illinois. The Licensing Board specifically rejected Kerr-McGee's "Motion for a Order Protecting [the Licensing] Board's Jurisdiction" in the event of transfer to Illinois. The Board ruled that "the Commission has authority to decide whether it wishes to resolve Kerr-McGee's application or delegate authority for its resolution to Illinois." *Id.* at 680. The Commission has now spoken. It has delegated authority to Illinois and relinquished the NRC's jurisdiction over this proceeding.

6. Moreover, in its November 22 Order, the Licensing Board specifically stated that NRC staff would seek to terminate the NRC licensing proceeding if the Commission transferred its regulatory authority to Illinois. The Licensing Board stated, "[I]f the Commission delegates such authority to Illinois, Staff will seek to terminate this proceeding on the ground that authority to rule on Kerr-McGee's

application to dispose of the tailings no longer resides in the Commission." *Id.* at 680. Illinois and West Chicago concur in NRC staff's position that this proceeding must terminate, as articulated by the Licensing Board.

7. NRC staff also voiced its position that the Commission, and thus this Appeal Panel, is without jurisdiction to proceed with this case after regulatory authority has passed to Illinois, in *Kerr-McGee Chemical Corporation*, (Kress Creek Decontamination), No. ALAB-867, 25 NRC 900 (1987). There, as soon as the Commission had delegated authority over source material to Illinois, NRC staff "moved quickly to terminate this [Appeal Board] proceeding and to vacate the initial decision."² In its opinion, this Panel quoted staff's position that the Appeal Board must dismiss, vacate and "terminate" all federal proceedings as soon as the Commission passes its authority to Illinois:

Because the Order to Show Cause [the subject of the proceeding before the NRC] pertained to these source materials, the agreement will terminate the Commission's jurisdiction with respect to the radiological materials that are the subject of the proceeding... *Once jurisdiction has passed to Illinois, the Commission, including its adjudicatory boards, may not take further regulatory action with respect to the source material in and around Kress Creek. In these circumstances, the Appeal Board is compelled to terminate this proceeding.* *Id.* at 904. (emphasis added).

² In the Kress Creek Decontamination case, the NRC issued a show cause order why Kerr-McGee should not be required to take remedial actions regarding radiological contamination near Kress Creek. The Licensing Board found in Kerr-McGee's favor and NRC staff appealed. After the parties submitted all of their briefs to the Appeal Panel, staff notified the Panel that Illinois was on the verge of acquiring jurisdiction from the Commission over source materials, which staff asserted were the material at issue in the proceeding. As soon as the NRC transferred jurisdiction over source materials to Illinois, staff moved to terminate the proceeding and vacate the initial decision.

8. In addition to its decision in *U.S. Ecology* (discussed above), in *Kress Creek* the Appeal Board also indicated that once the NRC transfers regulatory authority to Illinois, as it has done here, all proceedings before the Commission must cease. The Board ruled that the material at Kress Creek was not source, but rather byproduct material, which, until now, was still subject to the Commission's jurisdiction. Nevertheless, this body made it clear that if Illinois had acquired jurisdiction over materials that were the subject of the action, as here, Illinois, and not the NRC, would have authority over disposition of the materials:

Equally clear is that, if the contamination in Kress Creek is source material, regulatory authority over it is now vested in Illinois, pursuant to the terms of the agreement. *Id.* at 906.

Under both the staff's unequivocal position and the Appeal Board's Panel's rulings in *U.S. Ecology* and its pronouncement in *Kress Creek*, this Panel should dismiss this proceeding and vacate the Initial Decision for lack of jurisdiction.

WHEREFORE, Illinois and West Chicago respectfully move this Panel to terminate this appeal for lack of jurisdiction and to vacate the Initial Decision of the Licensing Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James D. Brusslan, an attorney in this case do certify that on the 22nd day of October, 1990, I caused to be served the foregoing **MOTION TO TERMINATE PROCEEDING AND TO VACATE INITIAL DECISION FOR LACK OF JURISDICTION** upon the parties listed below by Facsimile:

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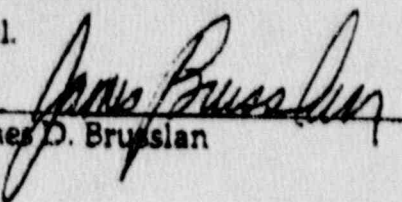
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