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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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IN THE MATTER OF	)	
KERR-McGEE CHEMICAL CORPORATION	)	Docket No. 40-2061-ML
(West Chicago Rare Earths Facility	)	

RESPONSE TO KERR-McGEE TO TERMINATE PROCEEDING AND TO VACATE DECISIONS OF THE LICENSING BOARD AND APPEAL BOARD

The People of the State of Illinois and Illinois Department of Nuclear Safety (hereinafter "People"), by Roland W. Burris, Attorney General of the State of Illinois, in response to Kerr-McGee's Motion to terminate this proceeding and to vacate previous decisions of the Licensing Board and Appeal Board state as follows:

The People do not oppose Kerr-McGee's motion to terminate the proceeding, but they strenuously oppose the vacation of these decisions.

The People make three arguments in support of their position. First, the case law does not support Kerr-McGee's contention that the previous decisions should be vacated because Kerr-McGee has failed to satisfy the rationale set forth in the *Munsingwear* line of cases (*United States v. Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

Second, Kerr-McGee has stated that it is pursuing an appeal before the Court of Appeals for the District of Columbia Circuit

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Circuit regarding the transfer of 11(e)(2) by-product authority from the NRC to the State of Illinois. Should the petitioner be successful on this appeal, then the jurisdiction over the radiological aspects of the West Chicago site may revert to the NRC. Under such circumstances, previous decisions by administrative bodies of the Commission would be relevant to the NRC.

Third, the Commission should hesitate to vacate these decisions in light of the significant resources expended by the NRC as well as the parties in undertaking these proceedings. Further, in that the Appeal Board has ruled in favor of the People, as well as the City of West Chicago, there is a question of fundamental fairness in preserving that decision.

Background

This matter arose from an application by Kerr-McGee Chemical Corporation to the Nuclear Regulatory Commission to amend its license to allow permanent disposal of 11(e)(2) by-product material at its West Chicago Rare Earths Facility.

In a proceeding before the Licensing Board LBP-90-9, 31 NRC 150 (1990); LBP-89-35, 30 NRC 677 (1989) the request for the license amendment was granted. The State of Illinois and the City of West Chicago appealed that decision to the Atomic Safety and Licensing Appeal Board. On February 28, 1991, the Board reversed the decision of the Licensing Board. ALAB-944, 33 NRC 81 (1991). Subsequently, the petitioner filed an appeal of the Appeal Board's decision to the Commission. As Kerr-McGee has

indicated in its motion, this proceeding has been stayed since July 3, 1991 to allow for negotiations among the parties with the hope that the matter could be resolved without the necessity of a decision by the Commission.

Discussion

The petitioner believes that the matter should be considered moot for the reason that it no longer intends to seek permanent disposal of these wastes at the West Chicago Rare Earths Facility. Instead, Kerr-McGee has entered into a contract with Envirocare of Utah to dispose of the 11(e)(2) by-product wastes at this facility. The petitioner takes the position that since the matter has become moot, it is appropriate to terminate the proceeding and vacate the two decisions previously described.

However, this "commitment" to off-site disposal is dependent upon both Kerr-McGee and Envirocare fulfilling all conditions of the contract as well as satisfying all licensing requirements. Clearly, Kerr-McGee has no such written commitment to the State of Illinois. Any agreement between Kerr-McGee and the State must include, at a minimum, a commitment to move the wastes off-site, a commitment to pay for the entire costs of the cleanup and financial surety which is sufficient to guarantee the completion of the work. Absent this type of commitment to the State, if there were a breach of the contract, or if it otherwise falls through, the 11(e)(2) materials would remain at the West Chicago site for a period of time that may well span several more decades. Finally, the Kerr-McGee-Envirocare contract remains

executory since there has been no actual transfer of wastes from West Chicago to Envirocare.

At this time, there are too many uncertainties to say that there is such finality to this matter that it should be considered moot. Even if the NRC would find the matter moot, there is no basis for vacating the decisions of the Licensing Board and Appeal Board.

I. THE CASE LAW

The petitioner refers to two cases decided by the Commission and by the Appeal Board as supporting its position that vacation of the Licensing Board or Appeal Board decision is appropriate. *In the Matter of Fewell Geotechnical Engineering Ltd.*, (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83 (1992) and *U.S. Ecology, Inc.*, (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987).

In *Fewell, supra,* the Commission only agreed to vacate the proceedings because the company had requested the termination of its materials license. When the license was terminated, the original order barring an individual from performing radiography ceased to have any operative effect or purpose. In reaching its decision the Commission relied upon the case of *United States v. Munsingwear,* 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

In contrast, Kerr-McGee still has a legal obligation to address the 11(e)(2) by-product wastes at West Chicago. See *In the Matter of: U.S. Ecology, Inc.*, (Sheffield, Illinois Low-Level

Radioactive Waste Disposal Site, ASLBP no. 78-374-01 OT, 25 NRC 98 (1987). Because of this obligation, Kerr-McGee's claim that the proceeding is moot, justifying vacation of the two decisions, is unsupported.

In *U.S. Ecology, supra,* the Appeal Board vacated two Licensing Board memoranda and orders based on the fact that regulatory jurisdiction over the site has been transferred from the Commission to the State of Illinois. The transfer of authority deprived U.S. Ecology of its ability to obtain review of the Licensing Board orders. Based on the rationale of *Munsingwear, supra,* the Appeal Board found it appropriate to vacate the previously entered orders. Even though there now has been a transfer of authority regarding the 11(e)(2) by-product material, Kerr-McGee has not been deprived of a review of the decision of the Appeal Board by the Commission, except for the fact it has now moved to terminate this proceeding.

As the Commission and the Appeal Board both indicated, the law regarding vacating of decisions is set forth in *Munsingwear, supra,* and its progeny *Burke v. Barnes,* 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987) and *Karcher v. May,* 484 U.S. 79, 108 S.Ct. 388, 98 L.Ed. 2d 327 (1987).

In *Munsingwear, supra,* the Court made it clear that cases will be vacated only in those circumstances where a judgment has become unreviewable because of circumstances beyond the control of the party seeking review.

A case which adopts the *Munsingwear* rationale and one that was cited in petitioner's motion appears to be particularly analogous to the situation presently before the Commission. In *Karcher v. May, supra,* former officers of the New Jersey Legislature argued that lower court judgments had become unreviewable as a result of the fact the leaders had left office. They urged the Court to apply the *Munsingwear* rationale to vacate these judgments.

The Court rejected this argument. The justices concluded that the case had become unreviewable, not because of an action outside of the control of the parties, but as a result of a decision by the New Jersey Legislature to forego an appeal of an adverse decision. As a result, the *Munsingwear* rationale - which requires circumstances to occur which are unattributable to any of the parties before a controversy will be considered moot - was not applicable.

Despite Kerr-McGee's claim that this proceeding has become moot due to circumstances outside of its control, this is not true. Like the New Jersey Legislature in *Karcher, supra,* Kerr-McGee has now chosen to forego its appeal of the Appeal Board's decision to the Commission. For that reason the *Munsingwear* rationale is not applicable and vacation of the Appeal Board's decision is inappropriate.

II. D.C. CIRCUIT APPEAL

In footnote 2 of Kerr-McGee's Motion, the petitioner refers to its challenge to the transfer of authority between the NRC and

the State of Illinois - *Kerr-McGee Chemical v. NRC*, No. 90-1534. Like the present case, the appeal before the Circuit Court of Appeals had been stayed at the request of the parties. On November 24, 1993, Kerr-McGee requested that the Court restore the case to its active docket.

While at the time of submission of this response to the Commission, the Court of Appeals had not responded to Kerr-McGee's request, it would appear at some future date the appellate court will allow the petitioner's motion to restore the appeal to the court's active docket.

In the appeal to the Court of Appeals, Kerr-McGee has argued that the NRC transfer of authority to the State of Illinois should be declared to be invalid and jurisdiction over 11(e)(2) by-product material returned to the Commission. If Kerr-McGee prevails on its appeal and jurisdiction is restored to the Commission, Kerr-McGee would be asking the NRC to make decisions with regard to the West Chicago Rare Earths Site. Should this situation arise previous decisions by the Atomic Safety and Licensing Appeal Board would be relevant to the Commission. By preserving these decisions there would be no necessity of starting the licensing process from the beginning which would involve the investment of additional substantial resources. For these reasons, the decisions of the two boards should not be vacated.

III. Fundamental Fairness

In light of the substantial resources that have been invested in these proceedings by the NRC, Kerr-McGee, the People and the City of West Chicago, the Commission should not vacate the decisions of the Licensing Board and the Appeal Board, especially if there is any possibility the NRC may someday be required to revisit the issues pertaining to West Chicago Rare Earths Facility. To allow the vacation of these decisions after the expenditure of such resources would essentially mean that the time and energy invested by the members of the two boards served no purpose.

Further, in that the Appeal Board has ruled in favor of the People, as well as the City of West Chicago, fundamental fairness should prohibit Kerr-McGee from destroying an adverse decision by merely moving to vacate that decision. *Wisconsin v. Baker,* 698 F.2d 1323, 1331, (7th Cir. 1983), *cert. denied* 463 U.S. 1207 (1983); *Allard v. DeLorean,* 884 F.2d 464, 467 (9th Cir. 1989).

Conclusion

The People of the State of Illinois do not oppose the motion of Kerr-McGee to terminate this proceeding, but they do oppose its request to vacate the decisions of the Licensing Board and Appeal Board.

Respectfully submitted

PEOPLE OF THE STATE OF ILLINOIS

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 1994 I caused copies of the foregoing "*Response of the People of the State of Illinois to Kerr-McGee's Motion to Terminate Proceeding and to Vacate Decisions of the Licensing Board and Appeal Board*" to be served by first-class mail, postage prepaid, as follows:

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