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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

'94 JAN 11 P4 56

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

NRC STAFF RESPONSE TO KERR-MCGEE'S
MOTION TO TERMINATE PROCEEDING

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January 10, 1993

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INTRODUCTION

On December 9, 1993, Kerr-McGee Chemical Corporation (Kerr-McGee) filed a "Motion to Terminate Proceeding and to Vacate Decisions of the Licensing Board and Appeal Board." In its motion, Kerr-McGee requests the Commission to vacate the Appeal Board's decision in *Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility)*, ALAB-944, 33 NRC 81 (1991), a decision in which the Appeal Board reversed in part and vacated in part the Licensing Board's decisions (LBP-90-9, 31 NRC 150 (1990); LBP-89-35, 30 NRC 677 (1989)) authorizing onsite disposal of thorium tailings (classified as byproduct material pursuant to Section 11 e.(2) of the Atomic Energy Act of 1954) at Kerr-McGee's facility in West Chicago, Illinois. Kerr-McGee filed a petition seeking review by the Commission of the Appeal Board's decision, but requested, in July 1991, that the appeal be held in abeyance pending settlement negotiations among the State of Illinois (State), the City of West Chicago (City), and Kerr-McGee. In its motion, Kerr-McGee states that, notwithstanding the fact that settlement negotiations have not been successful, it is now committed to moving the

materials from the City of West Chicago to the Envirocare facility in Utah for disposal (Motion at 2), thus abandoning its plan to dispose of the material on its West Chicago site. It thus seeks to withdraw its application for onsite disposal and requests the Commission to terminate the proceeding and to vacate the underlying decisions. On January 5, 1994, the State of Illinois and the City of West Chicago filed responses according to the schedule set by the Commission in its Order of December 10, 1993.

For the reasons set forth below, the Staff believes that the Commission should terminate the proceeding and should condition its vacatur of the decisions on the performance of conditions imposed pursuant to 10 C.F.R. § 2.107.

BACKGROUND

In 1989, the NRC Staff issued a Supplement to its Final Environmental Statement in which the Staff found Kerr-McGee's proposal to encapsulate the wastes at the West Chicago site in an engineered cell onsite to be acceptable. NUREG-0904, Supp. No. 1, April 1989. The State and the City opposed the proposal. After a hearing, the Licensing Board found that Kerr-McGee's proposal satisfied all applicable requirements and authorized the Director of Nuclear Materials Safety and Safeguards (NMSS) to issue the revised license. LBP-90-9, 31 NRC at 194.

While the Licensing Board's decision authorizing onsite disposal of the thorium tailings at Kerr-McGee's West Chicago facility was on appeal, the Commission and the State of Illinois amended their Agreement under section 274b of the Atomic Energy Act of 1954, as amended, to permit the State to regulate 11e.(2) byproduct material. 55 Fed.

Reg. 46, 591(1990). Subsequently, in ALAB-944, the Appeal Board found, among other things, that even though jurisdiction over the 11e.(2) byproduct material involved had passed to Illinois, it had the jurisdiction to review the Licensing Board's decision on the merits. 33 NRC at 100-04. The Appeal Board reversed LBP-90-9 in part, vacated in part and terminated the proceeding. The Appeal Board also directed the Director of Nuclear Materials Safety and Safeguards (NMSS) to revoke the license that had been authorized by the Licensing Board.

In addition to petitioning for review of ALAB-944, Kerr McGee also challenged the Commission's transfer of jurisdiction over 11.e (2) byproduct material to Illinois. *Kerr-McGee Chemical Corp. v. NRC*, No. 90-1534 (DC Cir, filed Nov. 14, 1990). That case, like the petition for review pending before the Commission, had been stayed at the request of the parties. Kerr-McGee has now asked the D.C. Circuit to restore the case to its active docket.

DISCUSSION

While the State and the City are in agreement with Kerr-McGee that the Commission should terminate its review of ALAB 944, the parties disagree regarding whether the Appeal Board and Licensing Board decisions are moot and whether they should be vacated.

A. Whether the Appeal Board and Licensing Board Decisions Sought to be Vacated are Moot

Kerr-McGee states that the proceeding before the Commission is moot, as Kerr-McGee has abandoned the disposal plan that was at issue in ALAB-944, *i.e.*, the disposal of the 11 e.(2) byproduct material onsite. Motion at 2, 6. However, both the State and the City, although not opposed to the termination of the proceeding, dispute that the decisions of the Appeal Board and Licensing Board are moot. The State expresses the view that the decisions are not moot because Kerr-McGee's alternative plans to remove the material from the West Chicago site are not final. State Response at 4. Further, the State argues that if Kerr-McGee prevails in the Court of Appeals and jurisdiction is restored to the Commission, Kerr-McGee would be asking the NRC to again make decisions with regard to the West Chicago site. State Response at 6-8. The City argues that Kerr-McGee's contract with Environcare is still executory. City Response at 9-10. Thus, the State and City raise questions of fact regarding the mootness of the decisions.

If the decision to remove the material from the West Chicago site is, in fact, final and the material is removed, then the proceeding is, indeed, moot. The Staff, which was not a party to the settlement negotiations or to the petition for Commission review, is not privy to the discussions that the City invokes in its argument and, therefore, cannot evaluate the merits of the parties' representations concerning the finality of Kerr-McGee's decision to remove the material from its current site. *See* City Response at 9-10. The Staff suggests, however, that, with appropriate conditions imposed in connection with the termination of this proceeding, the dispute can be resolved.

B. Whether the Decisions Should be Vacated

Kerr-McGee argues that because the proceeding is moot, the Commission should terminate its review and vacate the decisions below. Motion at 6-8. Kerr-McGee relies on the line of cases following *Munsingwear*, which reason that it is appropriate to vacate the decision of the lower court when, through no fault of the appellant, a case becomes moot while an appeal is pending. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). The State and City argue that, to the extent that the decisions are moot, that mootness is attributable to Kerr-McGee. Thus, according to the State and the City, the *Munsingwear* line of decisions does not favor vacatur in this instance.¹

Kerr-McGee also argues that the Commission should vacate ALAB-944 because it is wrongly decided. Motion at 7-8. The Staff does not agree with this argument, because a determination that the decision is in error would necessitate a merits determination. If Kerr-McGee's motion to terminate Commission review of ALAB-944 is granted, there will be no merits review of that decision and no basis for determining whether any errors were committed.²

¹ Kerr-McGee acknowledges a line of cases following *Munsingwear* that recognized that a decision should not be vacated where the losing party had rendered the case moot and thereby deprived the winning party of its victory. See Motion at 7, n.9 and cases cited there. The State and the City argue that these cases support their position that the decisions should not be vacated. However, the dispute concerns the facts rather than the law. Kerr-McGee attributes to the prevailing parties and the Commission the circumstances leading to the mootness of the decisions (Motion at 7). The State and the City attribute these circumstances to Kerr-McGee.

² In *Fewell Geotechnical Engineering Ltd.* (Thomas E. Murray, Radiographer), CLI-92-05, 35 NRC 83 (1992), the Commission vacated a Licensing Board decision modifying an NRC Staff enforcement order where the case became moot while on appeal

C. The Staff's View

The Commission's regulation in 10 C.F.R. § 2.107 provides that withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.³ In view of the parties' disagreement regarding the propriety of vacatur at this time, the Staff believes that the Commission should vacate the decisions when the issue concerning the disposition of the material at the West Chicago site is, in fact, resolved. This would include resolution of Kerr-McGee's appeal of the transfer of regulatory responsibility to the State and a final binding determination to remove the material from the West Chicago site. Accordingly, the Staff proposes that the Commission terminate this proceeding and condition vacatur of the decisions on the following conditions: a) a final determination upholding the 274b transfer of jurisdiction to Illinois, and 2) certification by the parties that a final binding determination to remove the materials from the site is in place. When these conditions are met, there will be no doubt that the decisions are moot and that it would not be unfair to either the State or the City to vacate them.

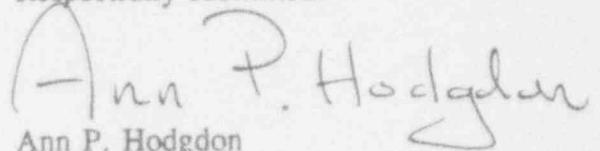
before the Commission when Fewell Geotechnical requested termination of its byproduct materials license. The Commission declined to adopt the Staff's suggestion that it render an advisory opinion on matters raised in the Staff's appeal, reasoning that vacating the Licensing Board decision obviated the need to review the Board's interpretation of the governing law and policy or to consider its potential impact on future cases.

³ In *Sequoyah Fuels Corporation* (Source Material License No. SUB 1010), CLI-93-07, 37 NRC 175 (1993), the Commission allowed Sequoyah Fuels Corporation to withdraw its application for a materials license amendment without prejudice and without terms and conditions, reasoning that petitioners for intervention would not be prejudiced by the dismissal.

CONCLUSION

For the reasons discussed above, the Commission should terminate the proceeding and vacate the underlying decisions under the conditions set forth above.

Respectfully submitted.

A handwritten signature in cursive script that reads "Ann P. Hodgdon". The signature is written in dark ink and is positioned above the typed name and title.

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of January, 1994.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO KERR-MCGEE'S MOTION TO TERMINATE PROCEEDING" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 10th day of January, 1994:

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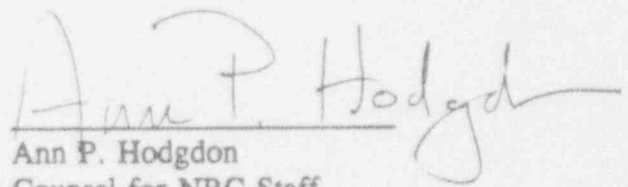
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