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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

RESPONSE OF THE CITY OF WEST CHICAGO TO KERR-McGEE'S MOTION TO TERMINATE PROCEEDING AND TO VACATE DECISIONS OF THE LICENSING BOARD AND APPEAL BOARD

INTRODUCTION

Kerr-McGee's most recent pleading in this proceeding raises three distinct matters for action by the Commission:

1. Kerr-McGee has stated that it has withdrawn its application for on-site disposal. (Kerr-McGee motion, page 2).[1] The Commission order of December 10, 1993, notes that Kerr-McGee's withdrawal is subject to the approval of the Commission under 10 CFR §2.107(a). While the City of West Chicago, has no fundamental objection to such withdrawal, the City is exhausted from years of fighting Kerr-McGee in litigation. Allowing Kerr-McGee to withdraw its application for on-site disposal without prejudice would permit Kerr-McGee — should its ephemeral executory contract with Envirocare not go forward — to reinstitute its application

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1 "...Kerr-McGee now withdraws its application for on-site disposal..." (Kerr-McGee motion, page 2).

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for on-site disposal and inflict years more of costly litigation on the taxpayers of West Chicago. Therefore, the City of West Chicago respectfully requests that the Commission allow Kerr-McGee to withdraw its application for on-site disposal *with prejudice — i.e.,* that Kerr-McGee be permanently barred from seeking permission for on-site disposal in West Chicago.

2. Kerr-McGee seeks to terminate the instant appeal proceeding. The City of West Chicago has no objection to this termination, subject to the reservations noted in paragraph 1 above and in paragraph 3 below.

3. Kerr-McGee seeks to vacate the decision of the Atomic Safety and Licensing Appeal Board, ALAB-944, 33 NRC 81 (1991), in this matter. The City of West Chicago strongly opposes Kerr-McGee's request that the Commission vacate the decision of the Atomic Safety and Licensing Appeal Board. Kerr-McGee's abandonment of its appeal only provides a basis for dismissal of the appeal; it does not provide a basis for vacating the underlying decision that is the subject of the appeal. The only event occurring since the commencement of this appeal which — according to Kerr-McGee's argument — triggers mootness of the decision below is Kerr-McGee's abandonment of its appeal. This is a classic attempt to deprive a prevailing party of its victory by commencing an appeal, and then upon abandonment of the appeal, taking the position that the losing party's submission to the adverse determination somehow moots the adverse determination. This circular argument has been repeatedly rejected (see discussion below). The governing case law clearly states that where the appellant has by his own actions mooted the appeal, the

decisions below should *not* be vacated.[2] Should the Commission dismiss the appeal based on Kerr-McGee's abandonment, the decision below should remain in full force as a final determination of the Licensing Appeal Board.

I. ABANDONMENT OF AN APPEAL DOES NOT MOOT AN APPEALED FROM DECISION.

It is well established that a determination by the appealing party not to pursue an appeal, and to take alternative action consistent with an adverse decision, does not create a basis for vacating — based on mootness — the decision appealed from. Where the appellant by its own action has "mooted" the appeal, the accepted practice in the courts is to allow the underlying determination to stand, so as not to deprive the appellee of the hard-earned benefit of a decision in its favor. *Karcher v. May*, 484 U.S. 72, 83, 108 S.Ct. 388, 395 (1987).

The rulings in the U.S. circuit courts are consistent with the dictates of the U.S. Supreme Court on this issue. For example, in *Blackwelder v. Safnauer*, 866 F.2d 548 (2d Cir. 1989), the plaintiffs had brought a constitutional challenge to a New York statute governing minimum education standards for children taught outside public schools. The trial court held that the statute was not unconstitutional. One day after the judge's ruling, the State Board of Regents approved new regulations governing implementation of the statute. The unsuccessful plaintiffs then appealed, solely of the grounds that the new

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[2] In arguments before the Appeal Board Kerr-McGee made this very point: "The normal practice in the courts is <u>not</u> to vacate lower court decisions on appeal where the appellant by his own actions has mooted the appeal." *Kerr-McGee Opposition to State and City Motion To Terminate and Vacate* (November 13, 1990), p. 8 (emphasis by Kerr-McGee).

regulations mooted the determination by the trial court. The court of appeals rejected the plaintiffs' argument, and refused to vacate the trial court decision on constitutionality of the statute, stating:

> The fact that appellants now purport to be "living in peace" with the new regulations does not require us to vacate the District Court opinion. A plaintiff who is *successful* in a lower court can moot a case on appeal by agreeing to withdraw his complaint with prejudice [citation omitted], and, in some circumstances, parties acting together can settle a case after entry of a judgment and agree to its vacatur [citation omitted]. But we find no basis for allowing a plaintiff who lost in a lower court to vacate the adverse judgment simply by deciding that he no longer wishes to pursue the claim.
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> *Blackwelder*, 866 F.2d at 551 (emphasis in original).

In *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982), the court ruled that a post judgment settlement while an appeal was pending was grounds for dismissal of the appeal only, and did not supply a basis for vacating the underlying judgment. The court stated:

> If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books. "It would be quite destructive to the principle of judicial finality to put such a litigant in a position to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal" [quoting 1B Moore's Federal Practice ¶ 0.416[6] (2d ed. 1982)].
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> *Ringsby*, 686 F.2d at 721.

The Court went on to suggest that there is no real reason to distinguish this situation from that in which the non-prevailing party elects not to initiate a timely appeal. *Ringsby*, 686 F.2d at 722.

In *Cover v. Schwartz*, 133 F.2d 541, 546-47 (2d Cir. 1942), cert. denied, 319 U.S. 748, 63 S.Ct. 1158 (1943), the court of appeals, upon taking note of the appellant patentee's acknowledgment that he was not contesting the trial court's finding of no patent infringement, dismissed the appeal only as moot, but declined to vacate the trial court's judgment. The court stated:

> This case has not become moot because of intervening circumstances over which appellant had no control. It resembles one where, after an appeal is taken, the defeated plaintiff settles and compromises the action or executes a release of his right to appeal. For appellant, who asserted and tried to show infringement in the court below, so that there was a controversy before that court, in this court concedes that there is no infringement by defendant, which means that there is *now* no controversy. . . . [D]ismissal of the suit, as distinguished from dismissal of the appeal, might result in unfairness to appellee by subjecting him to other vexatious actions by appellant.
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> *Cover*, 133 F.2d at 546-47 (emphasis added).

The same circumstances militate against vacating the Licensing Appeals Board decision in this case. If in fact Kerr-McGee has abandoned all consideration of West Chicago as a disposal site (a matter which, given the protracted history of this case, and Kerr-McGee's continuing litigation in other forums, is far from certain), that is only a basis for dismissal of the appeal. It is not a basis for disturbing the decision below, which principles of fairness demand be allowed to remain intact.

In *State of Wisconsin v. Baker*, 698 F.2d 1323, 1330 (7th Cir.), cert. denied, 463 U.S. 1207, 103 S.Ct. 3537 (1983), the appellant had asserted and the trial court had ruled against a defense of sovereign immunity. After the trial court had entered judgment, the appellant waived its immunity defense in order to have the controversy decided on the merits, and requested that the court of appeals

vacate the trial court determination on immunity, as moot. The court of appeals refused to disturb the trial court's determination on immunity, stating:

> Had [appellants] decided not to file a notice of appeal, or had they simply abandoned their appeal after filing it, the district court's adverse sovereign immunity decision would not have been deprived of preclusive effect [citations omitted]. We see no reason why it should be otherwise when defendants file a notice of appeal and then purport to waive a defense advanced and thoroughly litigated before the district court [footnote and citation omitted]. . . . Just as winning litigants may not bolster the preclusive effect of final judgments by deliberately mooting questions on appeal, so losing litigants may not destroy their preclusive effect by adopting the same ploy.
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> *State of Wisconsin*, 698 F.2d at 1330-31.

See also *U.S. v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) ("We do not wish to encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books' by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision"); and *Zemansky v. U.S. EPA*, 767 F.2d 569, 573 n. 3 (9th Cir. 1985) ("Where the appellant ceases to press an appeal, the appeal does become moot, but this does not retroactively moot the controversy originally presented to the district court").

II. CASES CITED BY KERR-McGEE DO NOT SUPPORT ITS LEGAL ARGUMENT FOR MOOTNESS IN THIS CASE.

The cases cited by Kerr-McGee to support its argument for mootness of the underlying decision deal with three types of circumstances which are quite distinct from the instant case: (a) circumstances in which total mootness of the issue arose wholly due to happenstance; (b) circumstances in which the *appellee* has taken affirmative steps *after* the commencement of the appeal to render the

issue as a practical matter unreviewable; and (c) circumstances in which the underlying decision is vacated based on a common accord between the parties. All of the cases relied upon by Kerr-McGee fall into one or the other of these three categories. None of the cases is applicable to the present circumstance, where mootness is claimed based on an action taken by the *appellant* after the commencement of the appeal (*i.e.*, the executory contract entered into between Kerr-McGee and the operator of a disposal site in Utah), and where myriad issues regarding the final disposition of the thorium tailings — which are still sitting in West Chicago — remain contested by Kerr-McGee, and aggressively litigated in several forums.

In *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69 (2d Cir. 1991), cited by Kerr-McGee in its footnote argument on page 7 of its motion, the appellee had obtained a declaratory judgment that the publication of a book on the Iran-Contra investigation would not violate rules pertaining to grand jury secrecy, and would not violate any duty of the author as a member of the investigative staff in the Iran-Contra investigation. The independent counsel appealed, but while the appeal was pending the appellee published the book. Upon finding the appeal moot, due to the publication, the court of appeals vacated the trial court decision, because the *prevailing litigant* had taken action *after* commencement of the appeal to effectively deprive the appellant of the right to appellate review. By contrast, the only event cited by Kerr-McGee as supposedly altering the status quo as of the commencement of the appeal is its entry into an executory contract to dispose of low level nuclear waste at another location.

F.T.C. v. Food Town Stores, Inc., 547 F.2d 247 (4th Cir. 1977), also cited by Kerr-McGee in its footnote argument on page 7 of its motion, is equally inapplicable. In that case, the F.T.C. appealed the denial of its application for a temporary restraining order and preliminary injunction against the merger of two food chains. After the trial court decision, and while the appeal was pending, the food chains dropped their merger plans. Treating the case as one in which review was prevented through happenstance, the court of appeals ordered the vacatur of the underlying decision. At no point does Kerr-McGee assert that events beyond control of the parties have mooted the appeal. Therefore, *F.T.C. v. Food Town Stores, Inc.* clearly does not apply.

In its footnote on page 7 of its motion, in an attempt to draw a strained analogy between these cases and the instant case, Kerr-McGee makes a contrived argument that the actions of the Commission and the State of Illinois in entering into an amendment of the Section 274 agreement triggered a chain of events which rendered this proceeding moot. But the Section 274 amendment took place *in advance of* the appeal. It is *not* an action taken by an appellee *after* commencement of appeal to deprive the court of appeals of jurisdiction.

In fact, in its decision the Licensing Appeal Board considered the mootness issue at length, and ruled against mootness. See *In the Matter of Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 100-04 (1991). In so ruling, the Appeal Board noted in particular that the matter was still a live controversy, as evidenced by the active cases pending regarding the disposition of the thorium tailings in and around West Chicago, and regarding the State's jurisdiction over those tailing. 33 NRC at 102.

The Appeal Board's reasoning applies with even greater force at this juncture, where Kerr-McGee's challenge to the State's Section 274 jurisdiction (the supposed ultimate source of mootness) is not merely threatened, but has actually commenced in the D.C. Circuit, and is being actively pursued by Kerr-McGee. In the D.C. Circuit case, and Kerr-McGee's pending action in the Northern District of Illinois, Kerr-McGee repeatedly has attempted to rely on findings of the Atomic Safety Licensing Board, while glossing over the fact that those findings have been reversed by the Appeal Board. Upon Kerr-McGee's abandonment of this appeal, appellees are entitled to retain any preclusive effects which may arise from the Appeal Board decision, as they may impact these pending cases.

The NRC decisions cited by Kerr-McGee are equally inapplicable. *In the Matter of Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993), involved a petition for review and for hearing on the electric company's request for a construction permit extension. Nothing in the review process prevented completion of construction. Completion of construction obviously obviated any need for a further extension of the completion date, rendering all decisions on the appellant's petition for review moot. A comparable situation would only arise in this case upon completion of removal of the West Chicago tailings to a permanent disposal site. But as of this date, no tailings have been removed.

Kerr-McGee's attempt to use the entry into an executory contract to dispose of the tailings in Utah as the equivalent of actual removal can be taken with a grain of salt. The Envirocare contract has been produced in *Kerr-McGee v. Edgar, et al.*, now pending in the Northern District of Illinois, but only subject to

a protective order, negotiated by Kerr-McGee, which precludes West Chicago's disclosure of the contract in any other proceeding. Suffice it to say that in the judgment of West Chicago, the Envirocare contract contains provisions which would allow Kerr-McGee to walk away from the agreement, if it chose to do so. Kerr-McGee is taking unfair advantage of the protective order in *Kerr-McGee v. Edgar;* its arguments based on the supposed contents of that agreement, without producing the agreement for review by the Commission, should be disregarded.

In the Matter of Fewell Geotechnical Engineering, Ltd. (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83 (1992), also has no application to this case. In that case, the NRC Staff's appeal of the reduction of the term of Murray's suspension from employment as a radiographer under the Fewell license from 3 years to 9 months clearly was rendered moot by Fewell's request to terminate its byproducts materials license. There was no ongoing controversy about Murray's suspension, and in fact the decision does not reflect any opposition to the NRC Staff's motion to vacate the Licensing Board's initial decision.

In the Matter of US Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897 (1987), involved a finding of mootness based on a transfer of authority to the State under a Section 274 agreement. However, at the time at which that order was entered, application of the Section 274 agreement to the site in question was acknowledged. By sharp contrast, the validity of the Section 274 agreement in this case is aggressively disputed by Kerr-McGee in pending litigation.

The vacatur of underlying orders *In the Matter of Consumers Power Co.* (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50 (1982) was entered pursuant to a formal settlement agreement, and a "Joint Motion to Terminate

Proceeding." By contrast, in this case Kerr-McGee admits that this attempt to obtain vacatur of underlying decisions is motivated by a failure to reach a settlement — hardly a circumstance warranting vacatur of underlying decisions based on mootness. See Kerr-McGee's motion, page 2.

Lastly, *In the Matter of Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980), was a finding of mootness on the issue of whether to grant a petition to intervene, brought three and one half years after the cutoff. While the matter of intervention was pending, the power company decided to move its site to a distant location, and the proceeding in which intervention was sought was terminated. In sharp contrast to the case at hand, the *Puget Sound* decision does not reflect any opposition by the would-be intervenors, or the power company, to vacatur of the underlying decision.

III. THE ISSUE OF FINAL DISPOSAL OF THE THORIUM TAILINGS NOW SITTING IN AND AROUND WEST CHICAGO IS NOT MOOT.

To date, not a pound of thorium tailings has been removed from West Chicago to the Envirocare facility in Utah. Kerr-McGee's entry into an executory contract with Envirocare — which Kerr-McGee can walk away from at will — does not create certainty that the removal of the tailings from West Chicago will actually occur. In light of the fact that Illinois' jurisdiction over the West Chicago site remains hotly contested by Kerr-McGee in several active cases, there is no basis for a finding by the Commission that the underlying West Chicago licensing decisions are moot, whether based on a transfer of jurisdiction, or upon Kerr-McGee's supposed determination to dispose of the tailings elsewhere. Appellees are entitled to any benefits of preclusion derived from the underlying

Appeal Board decision, as they may apply to the pending cases, and other cases which — based on past experience — are likely to be brought involving these issues.

IV. A POSTSCRIPT ON SETTLEMENT DISCUSSIONS.

Discussion of the substance of settlement talks is normally inappropriate. Here, however, Kerr-McGee has opened the door by suggesting to the Commission that the State and City have refused to settle even though Kerr-McGee has acceded to the principal demand of the State and the City — that Kerr-McGee abandon the on-site disposal of West Chicago wastes (Kerr-McGee motion, page 2). The Commission should be apprised of just what enforceable and binding commitments Kerr-McGee has — and has not — made. Settlement of this controversy has been unsuccessful because Kerr-McGee has refused to enter into any written binding and enforceable agreements (*e.g.*, consent orders or decrees) which would create:

1. A binding and enforceable written commitment by Kerr-McGee to excavate and remove the radioactive waste for permanent disposal outside of West Chicago. Kerr-McGee has refused to enter into such a commitment with the State or West Chicago. All we have are press releases and lawyers' rhetoric — hardly the stuff of judicially enforceable protection. Should Kerr-McGee unilaterally decide to abandon its Envirocare contract -- which neither the State and City can enforce — the State and City would have no basis to seek judicial enforcement of Kerr-McGee's rhetoric.

2. A binding and enforceable written commitment by Kerr-McGee to perform the excavation and disposal by a date certain. Despite the availability of Envirocare, Kerr-McGee has refused to commit to excavation and cleanup of any site — be it the factory facility or the residential off-site contaminated areas — by a time certain.

3. A binding and enforceable commitment by Kerr-McGee to clean up the contaminated residential sites. Despite its informal[3] promise to "address" the residential contaminated sites and other "off-site" contamination in a written agreement, Kerr-McGee still refuses to enter into a binding and enforceable agreement with the State and City to cleanup the off-site contamination.

4. Binding and enforceable financial assurances to make sure the cleanup of the factory facility and the off-site areas is completed. Kerr-McGee has consistently refused to provide such assurances.

In short, the "negotiations" — if they can be called that — have consisted of Kerr-McGee's adamant refusals to enter into clear, unequivocal, and enforceable obligations to clean up — obligations which are enforceable by the State and the City. Given such refusals, it is hardly surprising that the State and the City are relying on the state statutory and regulatory framework which provides for comprehensive and timely cleanup of these contaminated areas.

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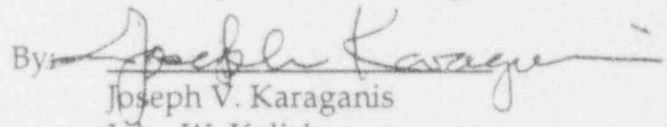
3 In its motion (at page 5) Kerr-McGee alludes to an "agreement in principle" which Kerr-McGee, the State, and the City agreed to in May of 1991. This "agreement in principle" is all that Kerr-McGee has ever "agreed to," and attempts to obtain binding and enforceable commitments from Kerr-McGee have been unsuccessful.

CONCLUSION

For the foregoing reasons, West Chicago requests, should the Commission dismiss this appeal, that the underlying decision remain standing as a decision of the Appeal Board.

Respectfully submitted,

The City of West Chicago,

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 5, 1993, he caused copies of the foregoing Response of the City of West Chicago to Kerr-McGee's Motion to Terminate Proceeding and to Vacate Decisions of the Licensing Board and Appeal Board to be served by U.S. mail, first class postage prepaid, on the following persons:

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