UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

REPLY OF KERR-McGEE CHEMICAL CORPORATION TO THE NRC STAFF, THE STATE OF ILLINOIS, AND THE CITY OF WEST CHICAGO

On December 9, 1993, Kerr-McGee Chemical Corporation ("Kerr-McGee") filed a motion to terminate the above-captioned proceeding and to vacate certain decisions of the Licensing and Appeal Boards. Responses were filed by the State of Illinois ("State") and the City of West Chicago ("City") on January 5, 1994, and by the NRC Staff on January 10, 1994. Kerr-McGee replies here to certain of the matters raised in these responses.

1. Although the State and the City argue that the proceeding should be terminated, they claim that the proceeding is not in fact moot. State Response, 4, 6-8; City Response, 9-11. They thus reject the sole ground advanced by Kerr-McGee to justify termination of the proceeding. Although the NRC Staff does not explicitly take a position on the issue of mootness (Staff Response, 5), the peculiar conditions that

Staff offers for vacatur -- namely, a final decision upholding the Section 274b transfer of jurisdiction to Illinois, and certification by the parties that a final binding determination to remove the materials from the West Chicago Facility is in place -- suggest that the Staff also believes that the proceeding before the NRC could come to life again in the future. Staff Response, 6. Under these circumstances, Kerr-McGee offers its perspective on the mootness issue.

Kerr-McGee has filed a closure plan with the Illinois Department of Nuclear Safety ("IDNS") that is premised on the disposal of the West Chicago wastes at Envirocare. Although Kerr-McGee has not succeeded in obtaining the necessary licenses, permits, and other authorizations from the State and City that would allow it to implement its plan, Kerr-McGee believes that the necessary authorizations will eventually be received. Kerr-McGee is aware of no other roadblock to the resolution of the disposal of the West Chicago wastes. Unless an unforeseen obstacle appears, this proceeding is assuredly at an end.

Past experience has demonstrated, however, that even the best plans for disposal can be thwarted by political forces. As the West Chicago experience shows, the Not-In-My-Backyard ("NIMBY") phenomenon is powerful, particularly in connection with radioactive wastes, and forces of which Kerr-McGee is now unaware might view with hostility the plan to ship radioactive waste from Illinois for disposal elsewhere.

There can thus be no guarantees as to what the future might bring, which is why the decision on vacatur is important.

If the Commission accepts the views advanced by the State and City (and implicitly by the Staff) with regard to mootness, then it has also rejected the only ground advanced by Kerr-McGee for termination of the proceeding. In such a case, the proper course of action is not to terminate this action, but rather to hold the proceeding in abeyance until future events demonstrate whether Kerr-McGee is able to dispose of the West Chicago wastes at Envirocare. If the Commission decides to hold the proceeding in abeyance, Kerr-McGee will file periodic status reports to inform the Commission of its progress.

2. As noted above, the Staff has suggested that the Commission condition vacatur of the decisions on certain conditions. Staff Response, 6. The Staff suggests that the Commission has the power to condition vacatur under the provisions of 10 C.F.R. § 2.107(a).[1/] By its terms, however,

---

[1/] Section 2.107(a) provides:

> The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

10 C.F.R. § 2.107(a) (1993).

the section applies to the disposition of requests for the withdrawal of applications. The Staff does not suggest that the Commission impose conditions on the withdrawal of Kerr-McGee's application for on-site disposal, but rather proposes conditions on Kerr-McGee's request for vacatur.[2/] Section 2.107(a) is inapplicable to the Staff's proposal.

Moreover, the conditioned vacatur proposed by the Staff would lead to a situation in which the decisions of the Licensing and Appeal Boards could be vacated at some distant time in the future, even though those decisions are no longer the subject of an ongoing proceeding. We are unaware of any case in which either the Commission or a federal court has terminated a proceeding on grounds of mootness, but has

---

[2/] The City has requested that the Commission grant withdrawal of Kerr-McGee's application with prejudice because of the possibility that Kerr-McGee might reinstate its application and renew litigation concerning on-site disposal. City Response, 1-2. The Appeal Board has observed:

> [t]hat kind of harm -- the possibility of future litigation with its expenses and uncertainties -- is precisely the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice.

Puerto Rico Electric Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981). See also Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2) ALAB-657, 14 NRC 967, 979 (1981) (noting "that it is well settled that the prospect of a second lawsuit -- or, in this case, another application to construct a nuclear reactor at Fulton -- does not provide the quantum of legal harm to warrant dismissal with prejudice"). The City's suggestion is contrary to established and long-standing Commission precedent.

deferred decision on whether to vacate the lower tribunal's opinion. Indeed, such an action by the Commission would place the underlying decisions in a strange limbo in which their strength as precedent would remain indeterminate. If the Commission decides to terminate this proceeding, it should not condition the vacatur of the underlying decisions on the occurrence of future events.

3. The NRC Staff correctly states that the dispute with regard to the vacatur of the Licensing and Appeal Boards decisions does not turn on a dispute as to the law that should govern the Commission's decision. Staff Response, 5 n.1. Although the NRC's normal practice is to vacate a decision that has become moot during the pendency of an appeal,[3/] the State, City, and Kerr-McGee agree that a decision should not be vacated when the losing party has rendered the case moot. Compare State Response, 5-6; City Response, 3-6 with Kerr-McGee Motion, 7 n.9. As the Staff correctly observes, the decision on vacatur turns on a factual dispute -- namely, are the circumstances leading to mootness attributable to the State and City (and perhaps the Commission), as argued by

---

[3/] See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 205 (1993); Fewell Geotechnical Eng'g, Ltd. (Thomas E. Murray, Radiographer), CLI-92-5, 35 NRC 83, 84 (1992); Consumers Power Co. (Palisades Nuclear Power Facility), CLI-82-18, 16 NRC 50, 51 (1982); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407, 408 (1980). See also U.S. Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897, 899 n.4 (1987).

Kerr-McGee, or are they instead attributable to Kerr-McGee, as argued by the State and City. Staff Response, 5 & n.1.

The State and City seem to argue that Kerr-McGee's decision to dispose of the West Chicago wastes at Envirocare -- the circumstance leading to the mootness of Kerr-McGee's petition for review -- should be seen as Kerr-McGee's free act. State Response, 6; City Response, 2, 3-6, 9. That claim is like asserting that a store clerk with a gun to his temple has voluntarily handed over the money in his cash register. The campaign of coercion by the State and City to force off-site disposal is summarized in the Kerr-McGee motion. Kerr-McGee Motion, 3 & n.2, 5 & nn.5-6.

The basic fact is that the NRC Staff has estimated that on-site disposal would cost roughly $25 million, whereas the off-site disposal demanded by the State and City will impose future costs in excess of $140 million.[4/] Kerr-McGee does not propose to spend this money because there is any health or safety justification for off-site disposal; the Staff's analysis shows that off-site disposal in fact serves to <u>increase</u> the risks to the public.[5/] Kerr-McGee is

---

[4/] Kerr-McGee recently established a surety for the completion of the closure of the West Chicago Facility in the amount of $148.4 million.

[5/] In its 1989 supplemental environmental statement, the Staff compared the Kerr-McGee proposal with a range of off-site disposal alternatives. NRC, <u>Supplement to the Final Environmental Statement Related to the Decommissioning of the Rare Earths Facility, West Chicago, Illinois</u>, 1-18 to 1-20, 5-1 to 5-86, 6-1 to 6-2, 8-1 to 8-24 (Apr. 1989) (NUREG-0904,

(continued...)

pursuing off-site disposal because it has been compelled by the State and City to do so. Because the mootness of this proceeding is the direct result of the State's and City's acts, the NRC's normal practice should govern and the underlying decisions should be vacated.

4. The NRC Staff states that Kerr-McGee has asserted that the Appeal Board decision should be vacated because that decision is wrongly decided. Staff Response, 5. The Staff has misunderstood Kerr-McGee's argument: it is the existence of doubt about the validity of the Appeal Board's decision that justifies vacatur.

There should be no question that the Appeal Board decision may be wrongly decided: the decision is at odds with the decisions of a skillful Licensing Board, and even the Staff has expressed its disagreement with the Appeal Board's action. Letter from R. M. Bernero, NMSS Director, to John C. Stauter (Mar. 22, 1991) (Exhibit 1 to Kerr-McGee Motion). But, if the Appeal Board's decision is not vacated, it will remain as precedent. Indeed, because the Commission has never had an opportunity in an adjudicatory context to examine issues arising from its regulatory requirements governing

---

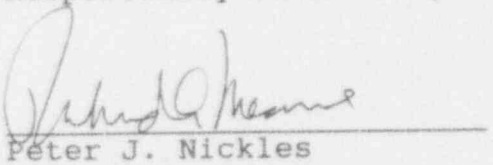
5/(...continued)
Supp. No. 1) (hereinafter "SFES"). Based on a detailed examination of radiological impacts (SFES, 5-42 to 5-70), the Staff concluded that the Kerr-McGee plan "would have the smallest overall health effects." Id. at 1-19; see id. at 1-13 to 1-14. Because of the ordinary safety hazards associated with any transport of the material (id. at 6-2), a consideration of the full range of risks only enhances the safety advantage of on-site disposal.

uranium and thorium mill tailings, the decision would be the leading decision interpreting those requirements. As the Staff has itself acknowledged elsewhere, vacatur is justified in order to avoid the needless preservation of a possibly erroneous precedent. For example, when the proceeding in Sheffield was rendered moot, the Staff urged vacatur of the Licensing Board's decision "to avoid prejudice to the Staff and other parties who will participate in future proceedings before NRC tribunals." NRC Staff Motion to Terminate Proceeding on Appeal and to Vacate Licensing Board's Decisions: NRC Staff Response To US Ecology's Motion to Vacate, 9-10 in U.S. Ecology, Inc. (Sheffield, Illinois Low-Level Radioactive Disposal Site), Dkt. No. 27-29 SC (May 28, 1987) (Exhibit 1). The Appeal Board subsequently vacated the Licensing Board decision. U.S. Ecology (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-866, 25 NRC 897, 898 (1987).

* * *

In light of the foregoing, we respectfully urge the Commission to terminate this proceeding and to vacate the decisions of the Licensing and Appeal Boards. However, if the Commission accepts the views of the State and City (and implicitly the Staff) with regard to mootness, it should deny Kerr-McGee's motion to terminate and instead hold this proceeding in abeyance.

Respectfully submitted,



Peter J. Nickles
Richard A. Meserve
Herbert Estreicher
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for
Kerr-McGee Chemical Corp.

Dated: January 18, 1994

May 28, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
US ECOLOGY, INC.	)	Docket No. 27-39 SC
	)	
(Sheffield, Illinois Low-Level Radioactive Waste Disposal Site)	)	

NRC STAFF MOTION TO TERMINATE PROCEEDING ON APPEAL AND TO VACATE LICENSING BOARD'S DECISIONS; NRC STAFF RESPONSE TO US ECOLOGY'S MOTION TO VACATE

I. INTRODUCTION

On May 13, 1987, the Commission approved a proposed agreement with the State of Illinois whereby the Commission would relinquish and Illinois would assume certain regulatory authority pursuant to Section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021. 1/ The regulatory authority to be assumed by Illinois includes jurisdiction over low level radioactive waste disposal. US Ecology's low level radioactive waste disposal site, located near Sheffield, Illinois, is the subject of an NRC enforcement proceeding, initiated by a show cause order issued March 20, 1979. The Atomic Safety and Licensing Board

---

1/ Memorandum dated May 13, 1987 from Samuel J. Chilk to Harold R. Denton and Victor Stello, Jr., Subject: SECY-87-104-Proposed Agreement Between The State Of Illinois And U.S. Nuclear Regulatory Commission Pursuant To Section 274 Of The Atomic Energy Act Of 1954, As Amended (hereafter, "Chilk Memorandum", copy attached).

decisions of February 20 and March 10, 1987, [2] are before the Atomic Safety and Licensing Appeal Board pursuant to US Ecology's appeal, filed March 16, 1987.

On May 14, 1987, the NRC Staff filed a motion to hold further briefing on US Ecology's appeal in abeyance in light of the Commission's action on May 13, 1987, and the proposed June 1, 1987 effective date of the Agreement. [3] In an Order of May 18, 1987, the Appeal Board granted the Staff's request and indicated that a Staff motion to terminate should be filed within ten days of the execution of the Agreement. On May 14, 1987, the Chairman executed the Agreement on behalf of the NRC and on May 18, 1987, the Governor executed it on behalf of the State. On May 20, 1987, US Ecology filed a "Motion to Vacate the Order to Show Cause of March 20, 1979 and Resulting Adjudicatory Orders."

This constitutes the Staff's response to the Appeal Board's Order of May 18, 1987 and to US Ecology's Motion of May 20, 1987. For the reasons discussed, the NRC Staff urges the Appeal Board to terminate the proceeding and to vacate the Licensing Board's decisions of February 20, 1987 and March 10, 1987. However, the Staff opposes US Ecology's request to vacate decisions other than those that are the subject of the instant appeal. As discussed below, the Staff will

---

2/ Memorandum and Order (Ruling on Motions for Summary Disposition), February 20, 1987; Memorandum and Order (Clarifying Finality of Decision), March 10, 1987.

3/ NRC Staff Motion to Hold in Abeyance Further Briefing of the Appeal in This Proceeding (May 14, 1987).

withdraw its show cause order of March 20, 1979 and, therefore, vacation of that order is unnecessary.

II. BACKGROUND

The facts, insofar as they are relevant to this motion and to the Staff's response to US Ecology's motion, are as follows:

This proceeding grew out of an earlier proceeding conducted on the application of US Ecology, then known as Nuclear Engineering Company (NECO), to expand its low-level radioactive waste disposal site near Sheffield, Illinois. 4/ On March 8, 1979, NECO informed the NRC that it was withdrawing its application for license renewal and site expansion and that it had terminated its license. 5/

On March 20, 1979, the NRC staff issued an immediately effective order to show cause. The order required NECO to resume its responsibilities and obligations under License No. 13-10042-01 at its Sheffield site. Upon NECO's request for a hearing on the order, the Commission issued a memorandum and order sustaining the immediate effectiveness of the Staff's show cause order and referring the issue raised, whether NECO could unilaterally terminate its license, to the Licensing Board presiding over the proceeding on the license renewal and site expansion. Nuclear Engineering Company (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-8, 9 NRC 673 (1979).

4/ See 42 Fed. Reg. 61522 (December 5, 1977).

5/ "Notice to Atomic Safety and Licensing Board of Withdrawal of Application and Termination of License for Activities at Sheffield" (March 8, 1979).

Following a number of continuances granted by the Licensing Board at the behest of the parties to accommodate their attempt to reach a settlement agreement, the Board conducted a prehearing conference on August 19, 1986 during which it set a schedule for filing and responding to summary disposition motions on the two legal issues identified by the Board: (1) whether US Ecology possessed the material buried at Sheffield; and (2) whether it had the right to terminate its license unilaterally without affirmative action by the NRC. 6/ US Ecology filed its motion on October 14, 1986, pursuant to the amended schedule ordered by the Board. 7/ The State of Illinois, an intervenor in the proceeding, and the NRC Staff filed responses in opposition to US Ecology's motion on November 10, 1986. 8/

On February 20, 1987, the Licensing Board denied US Ecology's motion for summary disposition and on March 10, 1987, it held, in response to a motion made by US Ecology in a telephone conference call of March 9, 1987, that its memorandum and order deciding the summary disposition issue was final for purposes of appeal.

On March 16, 1987, US Ecology filed its notice of appeal and its brief.

6/ "Memorandum and Order" at 6-7 (August 22, 1986).

7/ "Order" (September 24, 1986).

8/ "NRC Staff's Response in Opposition to US Ecology's Motion for Summary Disposition," November 10, 1986; "Motion by the People of the State of Illinois for Summary Disposition," November 10, 1986.

II. DISCUSSION

A. Jurisdiction

Section § 274b of the Atomic Energy Act of 1954, as amended, [9] authorizes the Commission to enter into an agreement with the Governor of any State providing for discontinuance of the regulatory authority of the Commission with respect to any one or more of the following categories of materials within the State, namely § 11e(1) byproduct material, § 11e(2) byproduct material (uranium and thorium mills and mill tailings), source material, and special nuclear material in quantities not sufficient to form a critical mass. Under the provisions of the Low-Level Radioactive Waste Policy Act, as amended, 42 U.S.C. § 2021b et seq., and the Commission's Policy Statement on "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption thereof by States through Agreement," as amended (46 Fed. Reg. 7540, January 23, 1981, 46 Fed. Reg. 36969, July 16, 1981; and Fed. Reg. 33376, July 21, 1983), States may also enter into an agreement to regulate the disposal of low-level radioactive waste. The Commission has executed an agreement with the Governor of Illinois to relinquish, among other categories, regulatory authority over low-level radioactive waste disposal in Illinois. [10] When the agreement takes effect on June 1, 1987, it will terminate the Commission's regulatory authority over the Sheffield site and the Commission's jurisdiction to enforce the show cause order of

---

9/ 42 U.S.C. § 2021b (1982).

10/ See Chilk Memorandum, supra, n.1; 52 Fed. Reg. 2,309 et seq. (1987).

March 20, 1979. 11/ In these circumstances, the Appeal Board should terminate this proceeding.

B. Vacation of the Licensing Board's Decisions

With the Commission's discontinuance of regulatory authority, the Appeal Board will lose the jurisdiction to review the two decisions that US Ecology has appealed. Thus, the Licensing Board's decisions will not have appellate review. Accordingly, consistent with Commission policy calling for vacation of unreviewed Licensing Board decisions that have become moot while on appeal, the vacation of the Licensing Board's memoranda and orders of February 20 and March 10, 1987 is appropriate.

Two lines of cases support the Staff's motion to vacate the decisions that are before the Appeal Board. The Appeal Board has consistently vacated Licensing Board decisions mooted before the Appeal Board rendered a decision on appeal. See, e.g., Rochester Gas and Electric Corp. (Sterling Power Project Nuclear Unit No. 1), ALAB-596, 11 N.R.C. 867 (1980); United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant) ALAB-755, 18 N.R.C. 1337 (1983). In Sterling, Rochester Gas and Electric Corporation (the Applicant) asked the Appeal Board to

---

11/ The agreement with Illinois contemplates the assumption by Illinois not only of regulatory authority but also of NRC licenses themselves. US Ecology's license is currently in force because US Ecology's predecessor, NECO, filed a timely application to renew. Subsequently, NECO sought to withdraw the renewal application. However, the Licensing Board denied NECO's motion to withdraw its application to renew its license. Memorandum and Order (Ruling on Motions to Withdraw Application and Dismiss Proceeding), May 3, 1979. Therefore, US Ecology's license for Sheffield continues in effect and may be assumed by Illinois as contemplated by the agreement.

"terminate all proceedings in this docket." [12] The Appeal Board granted the applicant's request, and, in order to prevent the Applicant from retaining a construction permit based on an unreviewed initial decision, also vacated the initial decision, which authorized the issuance of a construction permit for the Sterling facility. [13]

In vacating the initial decision, the Appeal Board followed a line of cases in the Federal courts concerning vacation of unreviewed lower courts decisions. The Munsingwear [14] case established the rule that an appeals court should vacate a trial court decision when a controversy has become moot while on appeal. According to the Supreme Court:

> That procedure [vacation] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. [15]

12/ Sterling, 11 N.R.C. at 868.

13/ Id.

14/ United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

15/ Id. at 40. In Munsingwear, the United States failed to request vacation of a District Court decision that had become moot while on appeal. In later litigation arising out of the same facts, Munsingwear asked the courts to hold the earlier decision res judicata. The Supreme Court held the earlier decision res judicata but stated that the Department of Justice should have moved to vacate the earlier decision when it became moot and that the Court of Appeals should have granted such a motion to vacate in order to avoid the problem that occurred.

The instant case presents a similar situation: US Ecology has appealed two Licensing Board decisions, the first denying summary disposition on two legal issues raised by the show cause order of March 20, 1979, and the second declaring the order denying summary disposition to be final for purposes of appeal. US Ecology argues in its motion that the decisions if allowed to stand might have some precedential, res judicata, or collateral estoppel effect in proceedings that might be brought against it in Illinois state courts. US Ecology Motion at 7. US Ecology argues that it would thus be prejudiced by unreviewed decisions. Id., at 8.

The Staff does not believe that Illinois will be able to apply the Licensing Board's decisions as res judicata or collateral estoppel against US Ecology in the State courts. In order to use an NRC adjudication as res judicata or collateral estoppel, Illinois would have to prove, at least, that the NRC had rendered a final judgment on the merits. 16/ Because the Appeal Board (and the Commission, should the losing party seek Commission review) will not complete a review on the merits of the issues raised by US Ecology's appeal before the NRC loses jurisdiction, 17/ Illinois will not obtain a final judgment on the merits. US Ecology, therefore, will not be prejudiced in the Illinois state courts by

---

16/ See e.g., Ballweg v. City of Springfield, 114 Ill.2d 107, 499 N.E.2d. 1373 (111. 1986); See generally, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (describing the policy underlying offensive collateral estoppel); Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (analyzing collateral estoppel within the historic context of patent law).

17/ The Commission would review the Appeal Board's decision to terminate this proceeding and either vacate or not vacate the Initial Decisions to determine if the Appeal Board erred in its decision.

unreviewed Licensing Board decisions. The Appeal Board should vacate the Licensing Board's decisions in this case not to avoid prejudice to US Ecology in the Illinois courts, but to avoid prejudice to the Staff and other parties who will participate in future proceedings before NRC tribunals.

If the decisions are left standing, litigants may rely on them in future NRC proceedings. While there are cases that suggest that unreviewed, uncontested Licensing Board decisions do not have precedential value, [18] other cases suggest future litigants may nevertheless rely on this Licensing Board's decisions. In the Prairie Island case, the Appeal Board vacated a Licensing Board decision because of its "potential precedential significance[.]" [19] The Appeal Board in Shearon Harris [20] recognized that "[t]here is a reasonable probability that, if permitted to stand, the remedy chosen by this Licensing Board will be invoked by future construction permit boards entertaining similar [questions]. In order to avoid the potential for reliance in future proceedings upon unreviewed Licensing Board

---

18/ See Arizona Public Service Co. (Palo Verde Nuclear Generating Station Units 1, 2, and 3), ALAB-718, 17 N.R.C. 83 (1983); Duke Power Co. (Cherokee Nuclear Station Units 1, 2, and 3), ALAB-482, 7 N.R.C. 979 (1979).

19/ In that proceeding, the Licensing Board imposed a condition on Northern States Power, (NSP), but NSP had already complied with the condition before the Appeal Board made its decision. Because NSP's compliance with the condition had rendered any appeal moot, the Appeal Board vacated the initial decision to preclude the unreviewed Licensing Board decision from having any precedential effect.

20/ Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4) ALAB-577, 11 N.R.C. 18 (1980).

decisions, the Appeal Board should vacate the Licensing Board's decisions in this case. Therefore, while the Staff disagrees with US Ecology's reasoning in support of vacation of unreviewed decisions, the Staff agrees that they should be vacated.

However, US Ecology has gone too far in asking that all adjudicatory orders and decisions in this proceeding that are related to the show cause order be vacated. US Ecology Motion at 3, 6. Although US Ecology asserts that unreviewed rulings of the Licensing Board could unfairly prejudice the disposition of the same matters in any proceedings regarding Sheffield that may be brought by the State (Id. at 3 n.5) as shown above such unreviewed rulings would not be entitled to res judicata or collateral estoppel effect. The Staff, therefore, opposes, as unnecessary, the vacation of such rulings or decisions.

The Commission's decision upholding the immediate effectiveness of the show cause order, CLI-79-8, 9 NRC 873 (1979), supra, is final agency action that has been effective for some eight years. Final agency actions are not reached by Munsingwear, which applies to unreviewed decisions of trial courts (or, in this case, licensing boards). Additionally, it would be inappropriate to consider vacation of CLI-79-8 because the decision addresses generic issues having significance beyond this proceeding. 21/

Since the NRC will relinquish regulatory authority over US Ecology with respect to the Sheffield license on June 1, 1987, the Staff will withdraw the March 20, 1979 show cause order. As noted above, n.12.

21/ Public Service Company of Oklahoma, (Black Fox Station, Units 1 and 2), ALAB-723, 17 N.R.C. 555 (1983).

the Sheffield license continues in effect and will be assumed by the State. The license requires US Ecology to maintain the site in such a manner as to continue to protect the public health and safety. In view of the Staff's withdrawal of the show cause order, vacation is unnecessary.

III. CONCLUSION

Because the NRC will lose jurisdiction over US Ecology with respect to the Sheffield license on June 1, 1987, the Appeal Board should terminate all proceedings in this docket. Consistent with the Commission's policy regarding vacation of unreviewed Licensing Board decisions in moot cases, the Appeal Board should also vacate the Licensing Board decisions on appeal in this case and, to that extent, grant US Ecology's Motion. The Appeal Board should deny US Ecology's motion in all other respects.

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Robert M. Weisman

Robert M. Weisman
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of May, 1987

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE SECRETARY

May 13, 1987

MEMORANDUM FOR: Harold R. Denton, Director
Office of Governmental and
Public Affairs

Victor Stello, Jr., Executive Director
for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-87-104 - PROPOSED AGREEMENT BETWEEN THE STATE OF ILLINOIS AND U.S. NUCLEAR REGULATORY COMMISSION PURSUANT TO SECTION 274 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

The Commission, with Chairman Zech and Commissioners Asselstine, Bernthal and Carr agreeing, has approved the staff's proposed Agreement between the State of Illinois and the NRC pursuant to Section 274b of the Atomic Energy Act, as amended.

Commissioner Bernthal approves the Agreement between the State of Illinois and the Commission. In his judgment, however, all materials and contaminated areas which have resulted from operations of the West Chicago Rare Earths Facility would more properly be classified as "byproduct material" under §11e(2) of the Atomic Energy Act. As such, Commissioner Bernthal believes that jurisdiction for these materials and contaminated areas should remain with the Commission until such time as the State of Illinois elects to seek authority for all byproduct material.

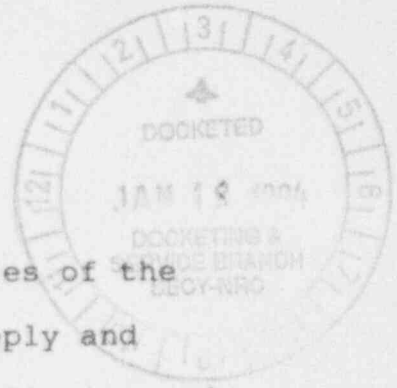
In Addition, the Commission, with Chairman Zech and Commissioners Bernthal and Carr agreeing, has approved the staff's proposed Order to Allied-Chemical, as modified by Commissioner Carr, placing its conversion plant under continued NRC regulatory authority.

9004200321

The staff is requested to transmit the Agreement document to the Chairman and the Order to the Secretary for their signatures, respectively.
(GPA) (SECY SUSPENSE: 5/15/87)

Copies:
Chairman Zech
Commissioner Asselstine
Commissioner Bernthal
Commissioner Carr
OGC H Street
OPA

* Commissioner Roberts did not participate.
** Commissioner Asselstine disapproved the Order.



CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Kerr-McGee Motion for Leave to File a Reply and Kerr-McGee Reply to the NRC Staff, the State of Illinois, and the City of West Chicago to be served as indicated by the parenthetical, postage prepaid, on this 18th day of January, 1994, as follows:

Douglas J. Rathe, Esq.
Assistant Attorney General
Office of the Attorney General
100 W. Randolph, 12th Floor
Chicago, IL 60601 (By Express Mail)

Atomic Safety and Licensing Board
Panel (5)
U.S. Nuclear Regulatory Commission
Washington, DC 20555 (By First Class Mail)

Ann P. Hodgdon, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852 (By Hand)

Office of the Secretary (3)
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Docketing and Service Section (By Hand)

Stephen J. England, Esq.
Legal Chief Counsel
Illinois Department of Nuclear Safety
Springfield, IL 62704 (By First Class Mail)

Joseph V. Karaganis, Esq.
Karaganis & White Ltd.
414 North Orleans Street, Suite 810
Chicago, IL 60610 (By Express Mail)

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

(By Hand)

Jeffrey B. Renton, Esq.
Environmental Protection Agency
Office of General Counsel
Air & Radiation Division (LE-132A)
401 M. Street, S.W.
Washington, DC 20460

(By First Class Mail)

Mark M. Radell, Esq.
Assistant Regional Counsel
Environmental Protection Agency
Region V (C-3T)
77 West Jackson Blvd.
Chicago, IL 60604-3590

(By First Class Mail)

Carl Bausch, Esq.
Assistant General Counsel
Executive Office of the President
Counsel on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

(By First Class Mail)

Robert D. Greenwalt, Esq.
City of West Chicago
100 Main Street
West Chicago, IL 60185

(By First Class Mail)

Office of the Commission (5)
Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

(By Hand)

/Herbert Estreicher

Herbert Estreicher