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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY  
LICENSING DIVISION

In the Matter of )

KERR-MCGEE CHEMICAL )  
CORPORATION )

(West Chicago Rare Earths )  
Facility) )

Docket No. 40-2061-ML

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NRC STAFF RESPONSE OPPOSING KERR-MCGEE'S  
MOTION FOR A PROTECTIVE ORDER

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Ann P. Hodgdon  
Counsel for NRC Staff

December 24, 1990

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I. INTRODUCTION

On December 12, 1990, Kerr-McGee Chemical Corporation ("Kerr-McGee") filed a Motion in which it requested this Appeal Board to issue an order to protect its jurisdiction. For the reasons discussed below, the NRC Staff opposes the Motion.

II. BACKGROUND

The background of this proceeding was recited in the NRC Staff's brief on appeal filed on August 10, 1990, and will not be repeated here. After the Staff filed its brief on appeal, the State of Illinois and the City of West Chicago filed a joint "Motion to Vacate as Moot the License Amendment and to Remand the License Amendment Application to Director of Nuclear Safety and Safeguards or to Reopen Record and Remand to Licensing Board," August 31, 1990.

In an Order of October 9, 1990, the Appeal Board indefinitely postponed oral argument on the motion to vacate or reopen. Before another date could be set,

the Commission on October 7, 1990 issued CLI-90-09, denying Kerr McGee's request for a hearing pursuant to Section 274c of the Atomic Energy Act and approving Illinois' request for Amendment Number One to its Section 274 agreement to include jurisdiction over 11e.(2) byproduct material, which includes the licensed material involved in the subject proceeding.

On October 22, 1990, the State of Illinois filed a joint motion to terminate the proceeding and to vacate the Licensing Board's initial decision based on the Commission's action of October 17, 1990. Kerr-McGee filed a response on November 13, 1990 and the Staff responded on November 19, 1990.

On November 21, 1990, the Appeal Board issued an order setting oral argument on (1) appeals of the State of Illinois and the City of West Chicago; (2) the intervenors' August 31, 1990, motion to vacate; and (3) intervenors' October 22, 1990 motion to terminate.<sup>1</sup>

On November 9, 1990, the City of West Chicago filed before the Commission its "Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment." The request seeks to vacate another amendment to the Kerr-McGee license issued by the Staff on October 15, 1990, authorizing receipt and storage of contaminated soils from outside the city limits, based on lack of jurisdiction by the Commission. By order dated December 7, 1990, the Commission requested, among other things, the views of the parties on the impact Commission action on the

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<sup>1</sup> An order of November 28, 1990 granted the City's unopposed motion to extend the date for oral argument until January 16, 1990, a date that was confirmed in a notice of December 17, 1990.

City's request might have on the jurisdictional questions pending before the Appeal Board.

By letter dated December 5, 1990, the State of Illinois' Department of Nuclear Safety informed Kerr-McGee that its NRC-issued license would expire ninety days from Kerr-McGee's receipt of the letter. On December 12, 1990, Kerr-McGee filed its "Motion for a Protective Order" before this Appeal Board in order to "preserve" the Appeal Board's jurisdiction and the status of Kerr-McGee's NRC-issued license.

### III. DISCUSSION

Kerr-McGee requests, in its motion, that the Appeal Board issue an order (1) directing the State to vacate its notice to Kerr-McGee dated December 5, 1990, terminating Kerr-McGee's NRC-issued license effective in ninety days and (2) prohibiting the State from interfering with Kerr-McGee's NRC-issued license.

The Appeal Board is not charged with any responsibility concerning Illinois' Section 274 agreement and must respect the unequivocal determinations of the Commission regarding that matter. In *Kerr-McGee Chemical Corporation* (Kress Creek Decontamination), ALAB-867, 25 NRC 900 (1987), the Appeal Board denied the Staff's motion to terminate the proceeding on the Staff's appeal from a Licensing Board decision dismissing a Staff show cause order, holding that the Commission's transfer of jurisdiction over "source material" to Illinois did not involve an unequivocal determination by the Commission that the material of concern in the show cause proceeding was source material. Here, the Commission has made an unequivocal determination transferring Section 11e.(2) byproduct

material to Illinois. In CLI-90-09, the Commission unequivocally "permits the State to regulate 11e.(2) by-product material and the facilities that produce 11e.(2) by-product material."


Kerr-McGee relies on two Supreme Court decisions for the proposition that this Appeal Board has the authority to take the action requested (Motion at 2, n.4). However, these cases are inapposite. *FTC v. Dean Foods Co.*, 384 U. S. 597 (1966), concerned a federal court of appeals' power under the All Writs Act (28 USC § 1651(a)), to enjoin the prospective merger of two companies at the instance of the FTC, pending the agency's conclusion of Clayton Act proceedings. In contrast, here the transfer of jurisdiction has already occurred, and the Atomic Safety and Licensing Appeal Board no longer possesses the authority to grant the relief requested in Kerr-McGee's motion. *Arrow Transport Co. v. Southern R.R.*, 372 U.S. 658, 671 n.22 (1963) is inapplicable for the same reason. Nor do the NRC cases cited by Kerr-McGee (Motion at 2, n.4) offer support for Kerr-McGee's position. These cases concern protection of information alleged to be privileged or otherwise protected from disclosure, where relief is sought prior to the release; here, the "release", or transfer of jurisdiction, has already occurred. Thus, all the cases cited by Kerr-McGee involve preservation of the status quo pending resolution of a controversy in order to preserve the tribunal's ability to decide the issue in controversy, and are not applicable to the instant motion where Kerr-McGee seeks an Order to the State to desist from an action it has been authorized by the Commission to take. In light of the Commission's divestment of jurisdiction

by virtue of Amendment No. 1 to the Illinois Agreement, the Appeal Board may not now grant the requested relief.

IV. CONCLUSION

The Appeal Board lacks the authority to grant the relief Kerr-McGee seeks in its motion. Therefore, the Appeal Board should dismiss the motion for lack of jurisdiction to decide it.

Respectfully submitted,

  
for Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 24th day of December, 1990.