

Mount file
P137

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
	)	Docket No. 030-30870-OM
FEWELL GEOTECHNICAL)	
ENGINEERING, LTD.	)	(Byproduct Material
	)	License)
)	
(Thomas E. Murray,)	
Radiographer))	

NRC STAFF'S MOTION TO VACATE THE LICENSING
BOARD'S INITIAL DECISION, LBP-91-29

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
on this 15th day of October, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
	)	Docket No. 030-30870-OM
FEWELL GEOTECHNICAL)	
ENGINEERING, LTD.	)	(Byproduct Material
	)	License)
)	
(Thomas E. Murray,)	
Radiographer))	

NRC STAFF'S MOTION TO VACATE THE LICENSING
BOARD'S INITIAL DECISION, LBP-91-29

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
on this 15th day of October, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
FEWELL GEOTECHNICAL	)	Docket No. 030-30870-OM
ENGINEERING, LTD.)	
)	
(Thomas E. Murray,	)	(Byproduct Material
Radiographer)	)	License)
)	

NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S
INITIAL DECISION, LBP-91-29

INTRODUCTION

By Commission Order dated September 12, 1991, the Staff was directed to inform the Commission of its final action on the licensee's request to terminate its license and, at that time, advise the Commission whether the Staff wishes to proceed with its appeal of LBP-91-29¹. By letter dated September 27, 1991 (copy attached), the Staff forwarded Amendment 3 to the license to Fewell Geotechnical Engineering, terminating its license.

Since the license has been terminated, the proceeding has become moot. Accordingly, the NRC Staff requests the Commission to terminate this proceeding and vacate the Atomic Safety and Licensing Board's Initial Decision, LBP-91-29.

¹ *Fewell Geotechnical Engineering, Ltd.* (Thomas E. Murray Radiographer), LBP-91-29, 33 NRC 561 (1991)

DISCUSSION

The Staff's enforcement action in this matter became moot when the Fewell Geotechnical Engineering license was terminated. The Staff took no direct enforcement action against Mr. Murray, but acted by issuing an Order² modifying the Fewell Geotechnical Engineering license to preclude Mr. Murray from performing any radiographic work *under that license*. Therefore, when that license was terminated, the Order affecting Mr. Murray ceased to have any operative effect, and this proceeding became moot.

Generally, when a case becomes moot while an appeal is pending through no fault of the appellant, it is appropriate to vacate the decision of the lower court. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990); *Consumers Power Co. (Palisades Nuclear Power Facility)*, CLI-82-18, 16 NRC 50, 51 (1982). Thus, since the circumstances by which this matter became moot, *i.e.*, the termination of the Fewell license at the request of the licensee, were essentially beyond the control of the appellant (the Staff), it is appropriate to vacate the Licensing Board's decision.

As noted above, the enforcement action on which LBP-91-29 is based has become moot and should be vacated. A decision to vacate LBP-91-29 will eliminate the decision as precedent and thus alleviate the Staff's concern's about the Licensing Board's interpretations of the Commission's Enforcement Policy. See NRC Staff's Brief on Appeal of the Licensing Board's Initial Decision, LBP-91-29, dated August 20, 1991.

² *Fewell Geotechnical Engineering, Ltd.*, Pearl City, HI; Order Modifying License (Effective Immediately), 55 Fed. Reg. 47409 (November 13, 1990) ("Order").

The Commission may, nevertheless, wish to render an advisory opinion concerning the proper interpretation of the Commission's Enforcement Policy for guidance in dealing with similar issues in future cases.³ However, the Staff recognizes the burden that this may impose on Mr. Murray in terms of submitting a brief in response to the Staff's appeal. Such advisory opinion would be of little practical moment from Mr. Murray's perspective in light of the termination of the Fewell license. For this reason, the Staff is not requesting the Commission to provide specific guidance regarding this proceeding. A decision to vacate LBP-91-29 will address the Staff's concern as to the Licensing Board's interpretation of the enforcement policy and will eliminate the decision as a precedent.

³ In situations in which a licensing board decision might have wide-spread implications but the proceeding was otherwise moot before completion of the appellate process, advisory opinions have been rendered. For example, when deciding to vacate as moot a decision by the Licensing Board concerning the "as low as reasonably achievable" (ALARA) standard, the Appeal Board noted that "[t]he correctness of the application of the ALARA standard by the Licensing Board in this case . . . might very well be of importance in the disposition of a number of present and future licensing proceedings," and proceeded to render an advisory opinion. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978). As the Appeal Board noted, "[t]here is no jurisdictional limitation or other 'insuperable barrier to our rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to licensing board decision.'" *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988) quoting *Prairie Island*, *supra*, 7 NRC at 54. The Appeal Board noted that "[w]here an issue is of 'demonstrable recurring importance,' an opinion that is essentially advisory in nature is warranted." ALAB 900, 28 NRC at 284. As in *Shoreham*, the Licensing Board's decision here, LBP-91-29, involves issues of first impression which are likely to recur and have significant implications relative to the Staff's implementation of the Enforcement Policy. These matters are addressed more fully in the Staff's appeal brief. See NRC Staff's Brief on Appeal of the Licensing Board's Initial Decision, LBP-91-29, dated August 20, 1991.

CONCLUSION

For the reasons set forth above, the Staff requests the Commission to terminate this proceeding, and to vacate the Licensing Board decision, LBP-91-29.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', with a long horizontal flourish extending to the right.

Richard G. Bachmann
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 15th day of October, 1991

SEP 27 1991

docket file

Docket No.: 030-30870
License No.: 53-23288-01
Control No.: 521241

Fewell Geotechnical Engineering, LTD
96-1416 Waihona Place
Pearl City, Hawaii 96782

Attention: Richard B. Fewell, P.E.
President

Gentlemen:

Enclosed is the termination amendment which you requested in your letter dated August 23, 1991.

Should you make application in the future for a new license for radiography, we will expect your application to address the corrective action arising out of the violations set forth in NRC Notice of Violation and Proposed Imposition of Civil Penalties dated February 7, 1991.

Sincerely,

Beth A. Prange
Sr. Health Physicist (Licensing)
Nuclear Materials and
Fuel Fabrication Branch

Enclosure: As Stated

MATERIALS LICENSE
SUPPLEMENTARY SHEET

License number

53-23288-01

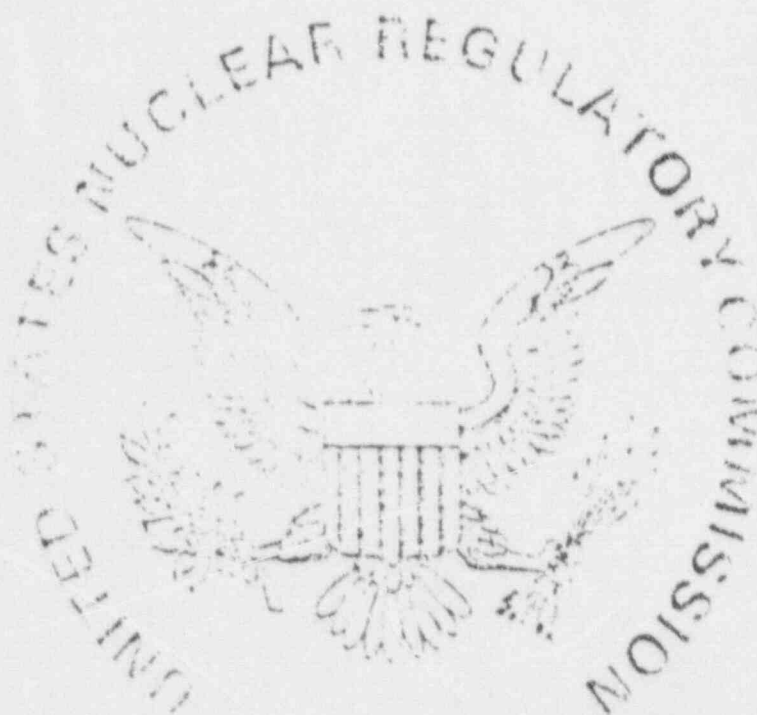
Docket or Reference number

030-30870

Amendment No. 3

Fewell Geotechnical Engineering, LTD
96-1416 Waihona Place
Pearl City, Hawaii 96782

In accordance with letters dated August 23, 1991 and September 23, 1991 License No. 53-23288-01 is hereby terminated.



FOR THE U.S. NUCLEAR REGULATORY COMMISSION

Date SEP 27 1991

By

Beth A. Prange

Beth A. Prange
Sr. Health Physicist (Licensing)
Nuclear Materials and
Fuel Fabrication Branch
Region V

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
	) Docket No. 030-030870-OM
FEWELL GEOTECHNICAL)
ENGINEERING, LTD., <u>ET. AL.</u>)
)
(Thomas E. Murray,	) (Byproduct Material License)
Radiographer))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S INITIAL DECISION, LBP-91-29" in the above-captioned proceeding 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 15th day of October 1991:

B. Paul Cotter, Jr., Chairman*
Administrative Judge
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Dr. Richard F. Foster
Administrative Judge
P.O. Box 4263
Sunriver, OR 97707

Dr. Peter S. Lam*
Administrative Judge
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel (1)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
Attn.: Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Thomas E. Murray
802 Prospect Street, Apt. 601
Honolulu, HI 96813

Fewell Geotechnical Engineering, Ltd.
96-1416 Waihona Place
Pearl City, HI 6783-1973

Office of the Commission Appellate
Adjudication*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', is written over a horizontal line.

Richard G. Bachmann
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
	)	Docket No. 030-30870-OM
FEWELL GEOTECHNICAL)	
ENGINEERING, LTD.	)	(Byproduct Material
	)	License)
)	
(Thomas E. Murray,)	
Radiographer))	

NRC STAFF'S MOTION TO VACATE THE LICENSING
BOARD'S INITIAL DECISION, LBP-91-29

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
on this 15th day of October, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
	)	Docket No. 030-30870-OM
FEWELL GEOTECHNICAL)	
ENGINEERING, LTD.	)	(Byproduct Material
	)	License)
)	
(Thomas E. Murray,)	
Radiographer))	

NRC STAFF'S MOTION TO VAC. THE LICENSING
BOARD'S INITIAL DECISION, LBP-91-29

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
on this 15th day of October, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

FEWELL GEOTECHNICAL)
ENGINEERING, LTD.)

(Thomas E. Murray,)
Radiographer))

Docket No. 030-30870-OM

(Byproduct Material
License)

NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S
INITIAL DECISION, LBP-91-29

INTRODUCTION

By Commission Order dated September 12, 1991, the Staff was directed to inform the Commission of its final action on the licensee's request to terminate its license and, at that time, advise the Commission whether the Staff wishes to proceed with its appeal of LBP-91-29¹. By letter dated September 27, 1991 (copy attached), the Staff forwarded Amendment 3 to the license to Fewell Geotechnical Engineering, terminating its license.

Since the license has been terminated, the proceeding has become moot. Accordingly, the NRC Staff requests the Commission to terminate this proceeding and vacate the Atomic Safety and Licensing Board's Initial Decision, LBP-91-29.

¹ *Fewell Geotechnical Engineering, Ltd. (Thomas E. Murray Radiographer), LBP-91-29, 33 NRC 561 (1991)*

DISCUSSION

The Staff's enforcement action in this matter became moot when the Fewell Geotechnical Engineering license was terminated. The Staff took no direct enforcement action against Mr. Murray, but acted by issuing an Order² modifying the Fewell Geotechnical Engineering license to preclude Mr. Murray from performing any radiographic work *under that license*. Therefore, when that license was terminated, the Order affecting Mr. Murray ceased to have any operative effect, and this proceeding became moot.

Generally, when a case becomes moot while an appeal is pending through no fault of the appellant, it is appropriate to vacate the decision of the lower court. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990); *Consumers Power Co. (Palisades Nuclear Power Facility)*, CLI-82-18, 16 NRC 50, 51 (1982). Thus, since the circumstances by which this matter became moot, *i.e.*, the termination of the Fewell license at the request of the licensee, were essentially beyond the control of the appellant (the Staff), it is appropriate to vacate the Licensing Board's decision.

As noted above, the enforcement action on which LEP-91-29 is based has become moot and should be vacated. A decision to vacate LBP-91-29 will eliminate the decision as precedent and thus alleviate the Staff's concern's about the Licensing Board's interpretations of the Commission's Enforcement Policy. See NRC Staff's Brief on Appeal of the Licensing Board's Initial Decision, LBP-91-29, dated August 20, 1991.

² *Fewell Geotechnical Engineering, Ltd.*, Pearl City, HI; Order Modifying License (Effective Immediately), 55 Fed. Reg. 47409 (November 13, 1990) ("Order").

The Commission may, nevertheless, wish to render an advisory opinion concerning the proper interpretation of the Commission's Enforcement Policy for guidance in dealing with similar issues in future cases.³ However, the Staff recognizes the burden that this may impose on Mr. Murray in terms of submitting a brief in response to the Staff's appeal. Such advisory opinion would be of little practical moment from Mr. Murray's perspective in light of the termination of the Fewell license. For this reason, the Staff is not requesting the Commission to provide specific guidance regarding this proceeding. A decision to vacate LBP-91-29 will address the Staff's concern as to the Licensing Board's interpretation of the enforcement policy and will eliminate the decision as a precedent.

³ In situations in which a licensing board decision might have wide-spread implications but the proceeding was otherwise moot before completion of the appellate process, advisory opinions have been rendered. For example, when deciding to vacate as moot a decision by the Licensing Board concerning the "as low as reasonably achievable" (ALARA) standard, the Appeal Board noted that "[t]he correctness of the application of the ALARA standard by the Licensing Board in this case . . . might very well be of importance in the disposition of a number of present and future licensing proceedings," and proceeded to render an advisory opinion. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978). As the Appeal Board noted, "[t]here is no jurisdictional limitation or other insuperable barrier to our rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to licensing board decision." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988) quoting *Prairie Island, supra*, 7 NRC at 54. The Appeal Board noted that "[w]here an issue is of 'demonstrable recurring importance,' an opinion that is essentially advisory in nature is warranted." ALAB 900, 28 NRC at 284. As in *Shoreham*, the Licensing Board's decision here, LBP-91-29, involves issues of first impression which are likely to recur and have significant implications relative to the Staff's implementation of the Enforcement Policy. These matters are addressed more fully in the Staff's appeal brief. See NRC Staff's Brief on Appeal of the Licensing Board's Initial Decision, LBP-91-29, dated August 20, 1991.

CONCLUSION

For the reasons set forth above, the Staff requests the Commission to terminate this proceeding, and to vacate the Licensing Board decision, LBP-91-29.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', with a long horizontal flourish extending to the right.

Richard G. Bachmann
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 15th day of October, 1991

SEP 27 1991

closed file

Docket No.: 030-30870
License No.: 53-23288-01
Control No.: 521241

Fewell Geotechnical Engineering, LTD
96-1416 Waihona Place
Pearl City, Hawaii 96782

Attention: Richard B. Fewell, P.E.
President

Gentlemen:

Enclosed is the termination amendment which you requested in your letter dated August 23, 1991.

Should you make application in the future for a new license for radiography, we will expect your application to address the corrective action arising out of the violations set forth in NRC Notice of Violation and Proposed Imposition of Civil Penalties dated February 7, 1991.

Sincerely,

Beth A. Prange
Sr. Health Physicist (Licensing)
Nuclear Materials and
Fuel Fabrication Branch

Enclosure: As Stated

MATERIALS LICENSE
SUPPLEMENTARY SHEET

License number

53-23288-01

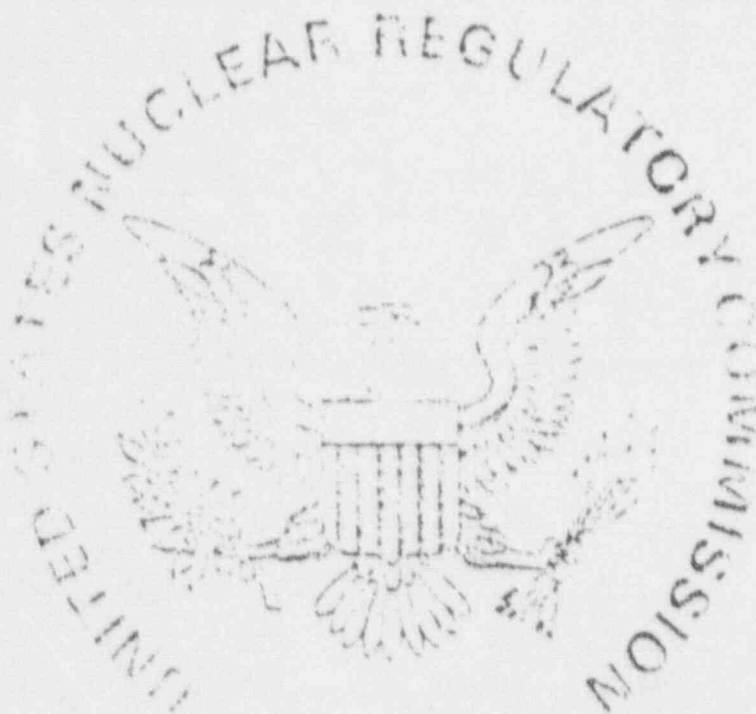
Docket or Reference number

030-30870

Amendment No. 3

Fewell Geotechnical Engineering, LTD
96-1416 Waihona Place
Pearl City, Hawaii 96782

In accordance with letters dated August 23, 1991 and September 23, 1991 License No. 53-23288-01 is hereby terminated.



FOR THE U.S. NUCLEAR REGULATORY COMMISSION

Date SEP 27 1991

By Beth A. Prange
Beth A. Prange
Sr. Health Physicist (Licensing)
Nuclear Materials and
Fuel Fabrication Branch
Region V

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
	)	Docket No. 030-030870-OM
FEWELL GEOTECHNICAL)	
ENGINEERING, LTD., ET AL.)	
)	
(Thomas E. Murray,	)	(Byproduct Material License)
Radiographer))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO VACATE THE LICENSING BOARD'S INITIAL DECISION, LBP-91-29" in the above-captioned proceeding 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 15th day of October 1991:

B. Paul Cotter, Jr., Chairman*
Administrative Judge
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Dr. Richard F. Foster
Administrative Judge
P.O. Box 4263
Sunriver, OR 97707

Dr. Peter S. Lam*
Administrative Judge
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

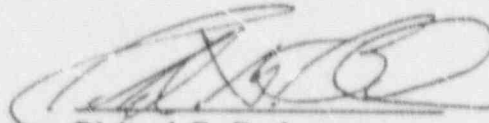
Atomic Safety and Licensing Board
Panel (1)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
Attn.: Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Thomas E. Murray
802 Prospect Street, Apt. 601
Honolulu, HI 96813

Fewell Geotechnical Engineering, Ltd.
96-1416 Waihona Place
Pearl City, HI 6783-1973

Office of the Commission Appellate
Adjudication*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', is written over a horizontal line.

Richard G. Bachmann
Counsel for NRC Staff