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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
U.S. NUCLEAR REGULATORY COMMISSION

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

'856005'

PEOPLE'S COMMENTS ON STAFF
REPORT ON SUPPLEMENT TO FES

The People offer the following comments on the Staff's March 22 report on the forthcoming supplement to the FES.

1. In its order of January 23, 1985 the Board stated:

> [I]t would appear useful, as a practical matter, for Staff to undertake its supplementation of this FES only after Staff has determined whether it will approve Kerr-McGee's proposal under UMTRCA. Should Staff make an adverse determination, its NEPA review, to the extent it is not duplicative of the UMTRCA review, would be meaningless . . . . [A] NEPA review is meaningless if Kerr-McGee's proposal does not meet UMTRCA standards.

LBP-85-3, p. 18; see also p. 28. At p. 4 of its Report the Staff notes that the Supplemental Environmental Statement will, among other things, evaluate Kerr-McGee's proposal against the criteria of 10 CFR Part 40 Appendix A, the NRC's UMTRCA regulations.

The People would like to reiterate the Board's caution that no Supplemental Environmental Statement need be prepared at all if Kerr-McGee's proposal cannot pass muster under UMTRCA and implementing regulations (40 CFR Part 192 and Appendix A). While the standards under 40 CFR Part 192 and some of the criteria and requirements of Appendix A raise factual matters like those raised by NEPA, the question whether Kerr-McGee's proposal is consistent with the statute and the siting criteria of Appendix A

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raises few or no factual matters. The question under UMTRCA is one of congressional intent--i.e., did Congress contemplate with approval the disposal of mill tailings at a residential site which is hydraulically connected to a major aquifer? The answer to this question will be found in the language of the statute and its legislative history. The question under the siting criteria of Appendix A is whether they would permit disposal at this site and if they would not, is there any legal basis for disregarding them or creating an exception to them. The answer to this question will be found in the language of Appendix A, its supporting NEPA documents, and the Supplementary Information accompanying the proposed and final rule.

Before committing the effort and resources necessary to evaluate the factual matters raised by NEPA and 40 CFR Part 192, the Staff should address the purely legal questions posed by UMTRCA and Appendix A. Such a course of action may not only save the taxpayers the expense of another EIS but may help move this proceeding to a (relatively) expeditious resolution.

2. At footnote 3, p. 3 of its Report, the Staff states:

> Contention AG 1(c) raises the issue of whether the Licensee's alternative site analyses were tainted by self-interest and should not, therefore, have been relied upon by the Staff in NUREG-0904. 20 NRC at 1321-22. If, during the course of its review of documents produced under discovery, the Staff should conclude that there was such a taint, it would take appropriate steps to assure the adequacy of the alternative site analyses undertaken in the Supplement.

To begin with, the Staff has misstated our contention. Contention 1(c) alleges that the FES failed adequately to

evaluate alternative disposal sites because the NRC entirely delegated its responsibilities in that regard to Kerr-McGee and Kerr-McGee's search was unjustifiably limited. (In prior comments on the DES the People and the Illinois State Geological Survey demonstrated that the company excluded from its search extensive areas of the State potentially suitable for waste disposal purposes.)

The question of Kerr-McGee's self-interest came up in discussion about NRC's failure to independently assess the availability of alternative disposal locations. As the People argued at length in briefs filed last Summer, whether or not the applicant submits information on alternatives, it is the agency's primary and nondelegable duty under NEPA to assess alternatives to the proposed action. The CEQ regulations and case law requiring independent agency assessment are based on the recognition that no applicant for a particular project is likely to be motivated to find a less convenient alternative. Whether or not the Staff finds a document in which Kerr-McGee says "let's deliberately mislead the NRC about the existence of alternative sites" is irrelevant; the law presumes--and rationally so--that one in Kerr-McGee's position cannot be trusted to fairly evaluate alternatives. The statutory responsibility to do so therefore rests upon the agency.

The People have not merely complained about Kerr-McGee's site search. They have offered to make available the resources of the relevant Illinois agencies to help the Staff assess the entire State, in terms of hydrogeology and demography, for potentially suitable disposal locations. The information these

agencies can provide was compiled generically and without regard to this particular litigation. It is hard to understand why the Staff would not jump at the opportunity to review this information. Yet the Staff does strongly imply that unless it finds documentary evidence of deliberate withholding or falsification of data on Kerr-McGee's part it will not avail itself of the relevant state materials before issuing the Supplemental Environmental Statement.

3. At pp. 4-5 the Staff states:

> Since the standard in NRC case law for rejecting a proposal site for a licensed activity is whether there is an "obviously superior" alternative site, the Staff will request the People to focus on data relevant to alternative sites in the context of this standard.

We are unclear as to the meaning of this statement and suggest that it be clarified insofar as the Staff expects the People to provide particular information or engage in particular actions in connection with the Supplemental Environmental Statement.

4. The People wish to emphasize that their offer of technical assistance with respect to alternative sites in Illinois should not be construed as an assertion that the wastes must be disposed of in Illinois. Removal of the wastes, with Department of Energy's concurrence, to a site already being utilized for Title I purposes is an acceptable option from the People's point of view and highly desirable in terms of federal radioactive waste policy. Disposal at an appropriate site now owned or to be purchased by Kerr-McGee in some other State is also, of course, acceptable. Indeed, it should be noted that the

southern border of Illinois is 400 miles from West Chicago, while licensable sites might be located in sister States nearer or no further than that. Moreover, as documents produced in discovery indicate, Kerr-McGee itself during the 1970s considered removing the wastes to one of its own sites in Oklahoma (Cimmaron) or New Mexico (Grants) at an estimated cost considerably less than that now projected for onsite disposal (see attachment). The FES apparently rejected the possibility of out-of-State disposal but did not explain the basis for the rejection. We emphasize that the People have not arbitrarily insisted that the wastes be buried outside Illinois; there is no reason for the Staff to arbitrarily assume that the wastes should be buried only in Illinois.

Respectfully submitted,

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