

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before Administrative Judges: *85 SEP 27 P4:08

John H Frye, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

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In the Matter of
KERR-McGEE CHEMICAL CORPORATION
(Kress Creek Decontamination)

Docket No. 40-2061-SC
ASLBP No. 84-502-01-SC
September 26, 1985

MEMORANDUM AND ORDER
(Ruling on Staff's Motion to Hold this Proceeding in Abeyance)

On September 10, Staff moved to hold this Show Cause proceeding in abeyance pending a decision by the Environmental Protection Agency whether it should take action under the Comprehensive Environmental Response, Compensation, and Liability Act, usually referred to as "Superfund." Staff's reasons were, first, EPA action could result in a more expeditious resolution of the problem posed by contamination of Kress Creek than has occurred in this proceeding, and second, deferral of this proceeding would conserve the parties' resources should EPA pursue a Superfund remedy.

Staff's motion recites that its hopes for an early resolution of this matter dimmed after August, 1984, when EPA had deferred to Staff's position that the Kress Creek matter could be expeditiously resolved at NRC. At the prehearing conference in this matter held September 11, Staff counsel candidly stated that our holding in our unpublished

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Memorandum and Order of March 22, 1985, that 40 CFR Part 192, EPA's mill tailings regulation, were not legally applicable and thus not to be accorded the protection of 10 CFR § 2.758 had contributed to the dimming of Staff's expectations. Since that time, Staff has been discussing the possibility of action under Superfund with EPA.

The People support Staff's motion. They believe that our holding referred to above has injected complexities into this case which result in the likelihood that action under Superfund would produce a more expeditious resolution. Further, they believe that Kerr-McGee is using this proceeding to strain the People's resources to their detriment in pursuing related litigation against Kerr-McGee in the Illinois courts.

Kerr-McGee opposes Staff's motion. Kerr-McGee, citing the interrelationship of this proceeding with the West Chicago proceeding, believes deferral to EPA would add needless complexities to an already overly complex situation. The addition of EPA as an actor would, in Kerr-McGee's view, impinge not just this proceeding, but West Chicago as well. Kerr-McGee asserts harm to its interest if it must present its case to yet another agency with the resultant prospect of inconsistency, lack of coordination, and delay.

Kerr-McGee also asserts that Staff's motion is premature because it is problematic whether Kress Creek will be included on the National Priorities List pursuant to Superfund. Kerr-McGee recognizes that Kress Creek has been nominated for inclusion, but asserts that there is no assurance that it will be included, and, if it is included, when that might occur.

We suspect that the parties positions have been influenced to some extent by their assessments of their chances for success in this proceeding. Our own preliminary assessment is that, while the proponents of the Order have a substantial burden to meet in justifying the application of the 40 CFR Part 192 standards (we so indicated in our March 22 unpublished Memorandum and Order), we believe that they have a lesser burden in demonstrating that cleanup to a less stringent standard is necessary. Consequently the proponents may be able to justify a cleanup order, although we must emphasize again that our assessment is preliminary. We do not believe that their efforts to do so would necessarily be wasted.

Further, the issuance of the Order to Show Cause has caused concern among property owners along Kress Creek. One, the Nichiren Shoshu Temple, was sufficiently concerned to intervene.

The parties have invested substantial resources in bringing this proceeding to its present point. When the discovery responses required by our prehearing conference order (LBP-85 ____, 22 NRC ____) are completed in 30 days, the only remaining steps to be taken in advance of hearing are the identification of witnesses and the taking of their depositions.

In these circumstances, the public interest does not favor a halt to this proceeding. To hold matters in abeyance while one Federal agency attempts to pass the problem to another leaves the concerned property owners, whom, after all, are supposed to be protected by the Atomic Energy Act, hanging on tenterhooks. It thwarts expeditious resolution of this proceeding on the hope that another resolution may be

instituted. It further complicates a proceeding already impinged by related proceedings in the NRC, and the state and federal courts. It also deprives the respondent of an expeditious hearing on the charges which the NRC has brought against it.

We believe this matter can be expeditiously resolved and intend to pursue that course. In the event that EPA does take action under Superfund, we will address the problems thus posed. We see nothing to be gained by holding a proceeding which has virtually reached the point of hearing in abeyance because there is some possibility that EPA might act at some time in the future. Consequently, we establish the schedule set forth below.

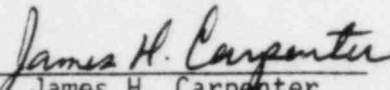
ORDER

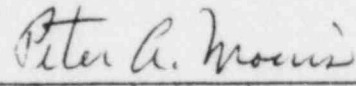
In consideration of the foregoing, it is hereby ORDERED:

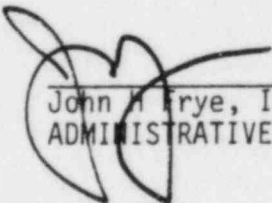
1. Staff's motion to hold this proceeding in abeyance is denied;
2. All parties are to exchange lists of expert and fact witnesses on November 8, 1985;
3. Depositions of witnesses may be scheduled between November 8 and 29, 1985;
4. Written direct testimony is to be filed by the proponents by December 13, and by Kerr-McGee by December 20, 1985; and

5. The hearing will commence on January 6 at a location to be announced in Chicago or its environs and continue until concluded.

ATOMIC SAFETY AND LICENSING BOARD


Dr. James H. Carpenter
ADMINISTRATIVE JUDGE


Dr. Peter A. Morris
ADMINISTRATIVE JUDGE


John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 26, 1985