

831

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

In the Matter of

KERR-McGEE CHEMICAL CORPORATION
(West Chicago Rare Earths Facility)

OCT 18 1985
DOCKET No. 40-2061-ML
SECY-NEC

PEOPLE OF THE STATE OF
ILLINOIS' MOTION TO STAY PROCEEDING

The People of the State of Illinois, by their attorney, Neil F. Hartigan, Attorney General of the State of Illinois, move this Board to stay further proceedings in this matter until trial is completed in the related action in Illinois Circuit Court for DuPage County. By order of Court entered February 11, 1985, the trial, which is scheduled to last eight weeks, begins on February 4, 1986.

The state court action commenced 5-1/2 years ago, in April 1980. As the Board knows, the complaint alleges that Kerr-McGee's waste disposal practices--i.e., the pouring of liquid waste into the sand and gravel aquifer and the maintenance of solid waste piles--have polluted the groundwater with chemicals and the ambient air with radon and its daughter products, all in violation of Illinois law, and that unless the wastes are removed from the West Chicago site Illinois law will continue to be violated. Statutory civil penalties and an injunction are sought. In this action the Attorney General represents not only the People but two Illinois agencies as well, the Illinois Department of Nuclear Safety ("IDNS") and the Illinois Environmental Protection Agency ("IEPA").

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C PDR

In its Memorandum and Order of September 26, 1985, the Board disposed of Kerr-McGee's motions to compel in both this and the Kress Creek proceedings by ordering the People to make further or different answers to a total of 61 interrogatories (this count does not include the numerous subparts many of these interrogatories entail).¹ These answers are to be provided by October 30. In addition, the Board has ordered the People to provide yet further information about their document production by October 10, and has ordered the Directors of IDNS and IEPA to file affidavits, also by October 10, concerning the propriety of certain of Kerr-McGee's interrogatories.² Further, the Board has ordered that requests for admissions be filed by October 30 and that motions for summary disposition be filed by November 29. Because many of the facts appropriate for admission and the issues appropriate for summary disposition cannot be identified until after depositions, we presume that the Board also expects depositions

¹If and when the necessity arises, the People will move the Board to reconsider its decision with respect to a majority of the interrogatories it has ordered them to answer. We note for the present that in large part the Board's Order on interrogatory answers does not address the People's arguments and in some instances allows Kerr-McGee to avoid answering the sorts of questions the People are ordered to answer.

²For the record the People state that the case relied upon by the Board for ordering such affidavits is inapposite, since it dealt with the issue whether certain documents contained privileged information. Here, the Board has ruled that the interrogatories themselves seek information which is privileged. Whether or not IEPA Director Carlson and IDNS Director Lash also assert that the interrogatories seek privileged information cannot add anything. In any event, if and when the necessity arises, the People will provide the requested affidavits from Directors Carlson and Lash.

to be conducted within the next few weeks.

For the People to participate in a schedule like this one and simultaneously prepare for trial in DuPage County is physically impossible. The parties to the Circuit Court action are presently engaged in taking depositions, as they have been since mid-August. By Court order depositions were scheduled to end on November 1; however, since that would be impossible in light of the tremendous number of individuals to be deposed, the parties have agreed to extend depositions until November 15.³ As of October 4, 23 depositions have already been taken, and by November 15 an additional 35 depositions will be taken.⁴ Depositions are now taking place at the rate of almost one and sometimes two a day. In addition to preparing for and taking depositions through November 15, the People will be in and out of court dealing with the customary obstreperous behavior of a defendant. For example, the People have already had to obtain judicial relief to force Kerr-McGee to comply with state practice rules requiring disclosure of the testimony of expert witnesses and the release of relevant documents in the possession of such witnesses; further relief will be necessary to make Kerr-McGee comply with document demands in notices of deposition to its current employees. Furthermore, Kerr-McGee itself has been filing motions right and left, all to be heard before November 15.

³The parties have stipulated that, because of the extreme tightness of scheduling, these depositions shall cover only issues material to the state action.

⁴These depositions will include the 7 expert witnesses designated by Plaintiff and the 19 expert witnesses designated by Defendant.

After depositions are completed the parties will have to file their requests to admit facts and the genuineness of documents, update document production, make partial summary judgment motions in order to narrow the scope of the trial, prepare exhibits and testimony, and engage in at least one lengthy pre-trial conference with the judge.

It should be clear that, given the People's responsibilities in the state court action, the Board's schedule cannot be met. Even if the Attorney General's Office could add extra staff to the present team, those additional staff could not quickly enough read the thousands of pages of pleadings in this case and familiarize themselves with the myriad technical issues involved so as to accomplish (much less effectively accomplish) what the Board wants, which is the virtual completion of all pre-trial activities by November 29.

The more important point, however, is that additional staff are not available for the West Chicago matter. On two occasions in its September 26 Memorandum and Order the Board expresses disbelief that the People are constrained by resource limitations. At p. 25 the Board "admonish[es] the People not to clutter their pleadings with inappropriate 'disparate resources' arguments." At p. 42 the Board speculates "that the resources of the [Attorney General's] office are probably substantial." These remarks indicate that the Board underestimates the effort that complex multi-forum litigation involves and has a misconception about the manpower resources of a government office like this

one. The Illinois Attorney General's northern regional Environmental Control Division--the enforcement section where Assistant Attorney General Anne Rapkin is located and which is responsible for the Kerr-McGee matter--employs eleven staff attorneys who carry a combined case load of 210 cases. In this matter alone Kerr-McGee is represented by eleven attorneys of record (five at Covington & Burling, four at Chadwell & Kayser, and two in-house), not to mention the staffs of law clerks and paralegals available for research and other litigation support. Our Division employs only two technical assistants who are responsible for all cases on our docket. Kerr-McGee, by contrast, employs numerous technical staff, at least a couple dozen of whom appear to have worked on this case; indeed, five of them have been designated as expert witnesses in the state court action.

Since the Environmental Control Division could not spare other attorneys for the Kerr-McGee matter (indeed, other Environmental Control Division attorneys have already had to assume many of Ms. Rapkin's responsibilities in other cases because of the time commitment required by this one), the Office assigned attorneys from other divisions to help out with depositions and trial in the state court.⁵ These attorneys are employed in the divisions which defend the State and its officers against actions in the courts of Illinois and the United States. All these attorneys carry large case loads; one of them is responsible for over 100 cases.

⁵Mr. Eggert, who has been involved in this matter for some time, serves the Office primarily as an Administrative Assistant with special advisory responsibilities to the Attorney General.

The Attorney General's functions are to represent all state agencies, departments, boards, and commissions in all litigation; to enforce or administer the provisions of numerous statutes such as the Illinois Environmental Protection Act, Consumer Fraud and Deceptive Practices Act, Crime Victims Assistance Act, and Charitable Solicitation Act; to institute actions for the benefit of the State; to prepare written legal opinions upon request for all state officers and members or committees of the state legislature; and to perform any other duty which is required of him, from time to time, by law. It should thus be apparent that the resources of the Attorney General's Office, whether deemed "substantial" or not, are spread thinly over numerous and diverse statutory responsibilities. Insofar as the Board believes that this Office is free to assign yet additional attorneys to this one matter, we respectfully inform the Board that it is mistaken.

As this Board has acknowledged, its function, like that of a court's, is to supervise and manage litigation in the public interest--by preventing abuses of legal process,⁶ controlling

⁶An example of Kerr-McGee's abuse of this forum is the fact that, in opposing the document subpoena to James Grant, Kerr-McGee persisted in the claim that it had not decided whether to call Grant as an expert witness even after it had so designated him in the state court and had filed a pleading there asserting that the expert witnesses in both the state court and NRC hearing would be identical. See Exhibits A and B. Having thus lied by omission to the Board and avoided an order to turn over documents it apparently wants dearly to suppress, Kerr-McGee refused to produce Grant's documents prior to his deposition in the state action and went so far as to threaten to quash a document subpoena issued in that forum to obtain the documents. See Exhibit C. Even an order of court entered October 3 has failed to pry loose from Kerr-McGee the documents in Grant's possession, though Plaintiff expects a further order to have the desired effect.

costs, limiting issues, and so forth. The integrity of the legal system, and its accessibility to others besides large corporations, depends on the sensitivity of adjudicators to these needs. This intervenor--the representative of all Illinois' citizens as well as of Illinois' two interested agencies--submits that the public interest will best be served if this proceeding is stayed until the completion of trial in DuPage County.⁷

Certainly it would be preferable if the parties' resources were equal and the People, like Kerr-McGee, could simultaneously prepare for multiple hearings in a complex matter. Such, unfortunately, is not the case; unequal resources are a fact of life. Through granting a stay, the Board can address that fact in a way which does not prejudice Kerr-McGee and benefits Illinois' citizens by facilitating the ability of their legal representative to competently participate in this proceeding.

Finally, the People respectfully submit that the Board's rationale for the September 26 schedule is incorrect. The Board states: "[B]ecause both the People and Kerr-McGee have raised arguments concerning the possible preemption of State regulation, early resolution of this proceeding could be beneficial in determining to what extent an actual conflict exists between State and Federal regulation." (p. 42) Precisely the opposite proposition is the correct one. That is to say, even if this Board approved Kerr-McGee's decommissioning application, that would constitute

⁷The Board itself has acknowledged that the People will be unable to properly litigate this proceeding under the September 26 scheduling order: "[W]e appreciate that counsel's time to devote to this proceeding may be affected by the state court litigation".

no more than a permission to the company to decommission the site in the manner most congenial to itself. It would not constitute an order forbidding the company to acquire another property (or make use of one it already owns) and bury the wastes there. Only such an order would produce the "actual conflict" between state and federal regulation which results in the displacement of state law. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). On the other hand, if the state court issues the injunction the People have asked for, the West Chicago site as an option for disposal will be lost to the company, and its pending decommissioning application mooted. Thus, resolution of the state court action prior to further proceedings here would be beneficial in determining whether additional energy ought to be expended by any of the parties or the Board in connection with Kerr-McGee's present proposal.


In sum, the People cannot physically comply with the Board's September 26 order while simultaneously preparing for trial in DuPage County--a trial which was scheduled months ago in an action which was commenced more than three years before this one. For this reason the public interest will most efficaciously


be served by a stay of the proceeding until trial is completed in the state court action.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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State of Illinois

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Assistant Attorney General

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EXHIBIT A

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September 16, 1985

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TERRY D. WILHELM
PAUL BERMAN
WILLIAM F. SKINNER
WILLIAM J. WILSON, JR.
RICHARD A. HENSLER

Anne Rapkin, Esq.
Assistant Attorney General
State of Illinois
Environmental Control Division
100 West Randolph Street - 13th Floor
Chicago, Illinois 60601

Dear Anne:

Because Kerr-McGee is a defendant, the testimony of its witnesses will be primarily directed at responding to the State's case. Although your letter to me of September 4 does provide some indication of the matters that will be covered by your experts, the precise scope of the testimony is impossible to discern. Thus, we have made an effort to anticipate the areas that your experts will cover and to define the thrust of our expected testimony in response. However, as the precise contours of the State's case become more clear, the matters covered by our witnesses may change. You should assume that Kerr-McGee will present testimony to rebut the entirety of the State's case.

Your letter has enabled us to determine that it may now be unnecessary to designate as experts some of the individuals listed in my letter of August 30. Thus, Messrs. Still, Schornick, Shelley, Stauter, and Smith are not presently listed as experts. Because of their extensive background on matters relating to this

Anne Rapkin, Esq.
September 16, 1985
Page 2

proceeding, however, they may well be important witnesses for Kerr-McGee. In addition, upon learning from your letter of September 4 that Mr. Minning will offer evidence as to the effects of "drought, disease and burrowing animals" on the cap, I have added one additional name (Dr. George Ware) to our list of experts.

Kerr-McGee's list of expert witnesses and the substance of their testimony can be summarized as follows:

Eugene Andrews. Mr. Andrews will describe the civil engineering analyses that have been undertaken to predict and assure the performance of the disposal cell. He will discuss the long-term integrity of the cell, including such matters as its ability to withstand erosional forces.

Douglas B. Chambers. Dr. Chambers will testify as to the basic physical principles governing radioactive decay. He will also discuss the transport to the environment of the radionuclides of the type and in the circumstances present at the West Chicago site.

C. W. Fetter. Dr. Fetter will testify on the basic principles governing the movement and chemistry of groundwater, on the hydrogeology of the site and surrounding area, and the characteristics and uses of groundwater in the aquifers in the region. He may also testify as to the adequacy of Kerr-McGee's groundwater monitoring program.

William Ganus. Dr. Ganus will offer testimony as to the past and present chemical condition of ground and surface water at the site.

James L. Grant. Dr. Grant will testify as to the post-closure groundwater regime that will exist at the site. Dr. Grant will offer testimony that discusses the concept, function, and predicted performance of the containment cell and that establishes the consistency of on-site stabilization with the proper management of the West Chicago materials.

Porter C. Knowles. Dr. Knowles will testify that the sampling program that was designed by Kerr-McGee is adequate to characterize the materials at the site.

Jorj Osterberg. Dr. Osterberg will offer testimony as to the long-term stability of the cell. He will discuss the foundation under the cell and the absence of any significant settlement of the wastes.

Anne Rapkin, Esq.
September 16, 1985
Page 3

Oktay I. Oztunali. Dr. Oztunali will testify concerning the post-closure radiological impacts. His testimony will focus on the radon flux from the cell, and the calculation of the transport of any emissions from the cell in the environment.

Frank Parker -- Dr. Parker will offer testimony as to the consistency of the Kerr-McGee proposal with proper radioactive waste management.

Garet E. Van de Steeg. -- Dr. Van de Steeg will offer testimony concerning the analyses of the waste and groundwater samples and as to the various chemical considerations that assure cell performance (e.g., solubility of the wastes, neutralization).

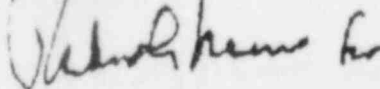
Dr. George Ware -- Dr. Ware will testify that a self-sustaining vegetative cover can be established on the cell.

I told you that I would also indicate if any of our experts are now seen as having a low probability of appearing as witnesses. In light of your letter, we do not feel we will need testimony from Dr. John Auxier, but in an abundance of caution, you should be aware that he is available to us. Dr. Auxier could offer testimony, if necessary, on radiation dosimetry, as well as radiation source terms and pathways at the West Chicago site after stabilization.

As I indicated previously, Kerr-McGee will identify an expert who will testify as to the de minimis radiological health risks resulting from the site. In addition, Kerr-McGee will present testimony as to the risks and costs associated with disposal of the tailings other than in West Chicago. Some of the above-listed experts (and/or perhaps others) may testify on this subject; I will notify you promptly of the results of our deliberations on this matter. Finally, Kerr-McGee will identify a toxicologist to respond to the testimony of the State's toxicologist, if the State should decide to identify such a witness.

Let me note that if the State decides not to challenge the adequacy and accuracy of the waste sampling results, it may not prove necessary for Kerr-McGee to call Dr. Knowles as a witness. Moreover, a portion of Dr. Van de Steeg's testimony may prove unnecessary.

Sincerely,



Peter J. Nickles

cc: Thomas J. McDaniel, Esq.
John C. Berghoff

EXHIBIT B

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff,)

v.)

KERR-McGEE CHEMICAL CORPORATION,)
a Delaware corporation,)

Defendant.)

No. 80 CH 298

RESPONSE OF KERR-McGEE CHEMICAL CORPORATION
TO PLAINTIFF'S EMERGENCY MOTION
FOR RELIEF REGARDING EXPERT WITNESSES

As noted in plaintiff's brief, this is a complex case involving the federal decommissioning and cleanup of a former thorium and rare earths processing plant in West Chicago, Illinois. The United States Nuclear Regulatory Commission ("NRC") has a proceeding currently underway before the NRC's Atomic Safety and Licensing Board ("ASLB") to determine the best procedure for decommissioning this facility and permanently disposing of low-level radioactive waste materials located at the site.

This instant proceeding has been pending for more than five years, and discovery is now at its most active phase, with depositions going forward daily in locations around the country. The plaintiff has filed a motion seeking rulings on three procedural questions that will arise during the next phase of discovery, involving experts. Plaintiff has styled its request an "emergency motion," and brought it on for hearing during a temporary absence of the presiding

The same issues that are to be addressed in this case, including issues that are to be the subject of expert testimony, are concurrently the subject of two pending proceedings before the NRC. In the first--referred to as the License Amendment proceeding--Kerr-McGee is seeking federal licensing approval for permanent isolation of the low-level radioactive waste materials at West Chicago in an engineered containment cell at the facility site. The second NRC proceeding--referred to as the Kress Creek proceeding--involves the disposition of certain thorium-bearing materials located in deposits along or beside the bed of a stream that flows by the West Chicago facility site. The State of Illinois is a party in both the License Amendment and the Kress Creek proceedings. The same scientists and engineers who have been named as potential expert witnesses in this case have been working on testimonial presentations to be made in one or the other of the two NRC proceedings. The License Amendment proceeding is moving forward in stages and although depositions have not yet begun, the parties, including both Kerr-McGee and the State of Illinois, have engaged in very substantial discovery. Kress Creek is also proceeding quickly. By an ASLB order issued on September 27, 1985 (Exhibit A hereto), the parties have been directed to conclude deposition discovery by November 29, 1985, looking toward a hearing or trial on January 6, 1986 before the ASLB.

In light of the two NRC proceedings, Kerr-McGee has filed a motion for partial summary judgment in the instant

imposition of a more cumbersome procedure which will only delay completion of this phase of discovery.

4. Conclusion

For the foregoing reasons, plaintiff's Emergency Motion For Relief Regarding Expert Witnesses should be denied.

Respectfully submitted,

KERR-MCGEE CHEMICAL CORPORATION

DATED: October 2, 1985

By: John C. Berghoff, Jr.
One of Its Attorneys

OF COUNSEL:

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DU PAGE COUNTY I.D. #13675

CERTIFICATE OF SERVICE

I, Thomas P. Healy, Jr., an attorney of record, certify that I caused a copy of:

Response of Kerr-McGee Chemical Corporation
to Plaintiff's Emergency Motion For Relief
Regarding Expert Witnesses

to be personally served upon counsel for plaintiff, Anne Rapkin,
Assistant Attorney General, Environmental Control Division,
13th Floor, 100 West Randolph Street, Chicago, Illinois, on
October 2, 1985, before 5:00 p.m.

I also certify that I caused a copy of the aforementioned document to be mailed to the following counsel for plaintiff:

Steven Seiple, Esq.
Illinois Department of Nuclear Safety
1035 Outer Park Drive
Springfield, IL 62704

Donald Gimbel, Esq.
Illinois Environmental Protection Agency
1701 First Avenue
Maywood, IL 60153

through the United States Postal service mail chute located
at 233 South Wacker Drive, Chicago, Illinois on October 2,
1985, before 5:00 p.m. in a sealed and addressed envelope.

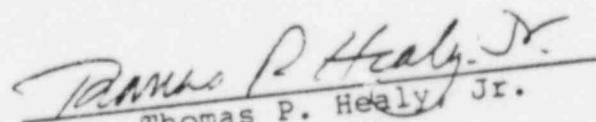

Thomas P. Healy, Jr.

EXHIBIT C

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September 25, 1985

BY TELECOPIER

SEP 25 1985

Anne Rapkin, Esq.
Assistant Attorney General
Environmental Control Division
100 West Randolph Street
13th Floor
Chicago, Illinois 60601

Re: State of Illinois v. Kerr-McGee Chemical
Corp., No. 80 CH 298

Dear Anne:

This responds to your letter of September 23,
1985. I will take up each of your numbered points in turn.

On your first point, we are not aware of any state
court requirement that a party must provide its adversary,
in advance of the deposition of a fact witness, a summary of
the witness' expected testimony. More importantly, we
expect that, if Messrs. Still, Schornick, Shelley, Stauter
and Smith testify at trial, their testimony will be offered
in large part to rebut the trial testimony or exhibits of
the State's witnesses, or to clarify matters of a technical
nature as appropriate in light of the evidence presented
during the State's case in chief. Such testimony cannot be
summarized in advance of the trial. Accordingly, you should
not expect to receive from us a summary of the testimony of
these witnesses in advance of their depositions.

Anne Rapkin, Esq,
September 25, 1985
Page 3

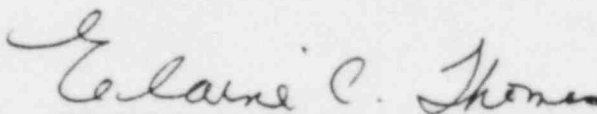
Your fifth point relates to the amount of backup material that is to be exchanged in advance of the upcoming depositions of the parties' experts. Contrary to the suggestion in your letter of a delay in our response to you on this point, I advised Mr. Eggert on September 20 that Kerr-McGee's views remain the same as those outlined for you by Peter Nickles on September 11: due to the complexity of the technical issues to be litigated, the number of experts who will probably be testifying, and the voluminous files that have been generated by a number of the experts in connection with the ongoing NRC proceeding, it makes most sense to limit the pre-deposition exchange of documents to a 5-8 page summary of each expert's opinions, a listing of the documents or other studies that support the expert's opinions, and an exchange of any such supporting materials that are not already a matter of public record either in the NRC proceedings or otherwise. In this connection, we will move to quash any subpoenas to expert witnesses that contain unreasonable requests for further documentation.

We will promptly supply you with the addresses of Kerr-McGee's expert witnesses.

As to your sixth point, we discussed the conflict between the Vreeland and Minning deposition schedules by telephone on September 20, and I confirmed the new date (October 23) with Mr. Vreeland the same day. I was thus quite surprised to see that you are now trying to condition the new date for Mr. Vreeland on Kerr-McGee being willing to incur the expenses and the professional dislocations of bringing Messrs. Still, Stauter and Schornick from Oklahoma City to Chicago for their depositions. Apart from the fact that your proposal comes as a total surprise -- you mentioned nothing in this connection on September 20 -- there is no logic to your proposed quid pro quo. Mr. Vreeland is a third party who has expressed a quite understandable preference to have his deposition taken in his hometown; the question of timing is purely for the convenience of the lawyers -- in this instance of Kerr-McGee's lawyers. The location of the Still, Stauter and Schornick depositions is a different problem entirely. As I told you in our earlier conversation on this subject, Messrs. Still and Stauter are key employees whose absence from Oklahoma City would cause considerable disruption of their responsibilities in areas wholly unrelated to West Chicago. The same may be said for Bill Garus, whom you have also proposed for a Chicago deposition. Mr. Schornick, whom we have not previously discussed, may be in a different category. There is also the

PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn under oath do state that I have this 15th day of October, 1985 served copies of the foregoing People Of The State Of Illinois' Motion To Stay Proceeding upon the persons listed on the attached Service List by placing same in envelopes addressed to said persons, by first class mail, postage prepaid, and depositing same with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.



ELAINE C. THOMAS

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 15TH DAY
OF OCTOBER, 1985.

NOTARY PUBLIC



SERVICE LIST

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