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December 4, 1985

John H. Frye, III, Esq.
The Atomic Safety and Licensing Board
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: Kerr-McGee Chemical Corporation (West-Chicago Rare Earths Facility), Docket No. 40-2061-ML;
ASLBP No. 83-495-01-ML

40-2061 ML

Dear Judge Frye:

As you know, the State of Illinois is pursuing litigation against Kerr-McGee Chemical Corporation in connection with the West Chicago Rare Earths Facility in the Circuit Court of DuPage County. Among other relief, the State is seeking an injunction that would require Kerr-McGee to move the materials on the site elsewhere.

In light of the decision of the United States Court of Appeals for the Seventh Circuit in Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1235 (7th Cir. 1985), Kerr-McGee filed a motion for partial summary judgment in the circuit court concerning the defendant's request for injunctive relief. The judge denied the motion, but did certify the matter, thereby entitling Kerr-McGee to seek leave to appeal. I enclose copies of papers that were



DS03

filed yesterday with the Appellate Court of Illinois and with the United States District Court in connection with the proceeding.

Sincerely,

Richard A. Meserve

Enclosures

cc: Stephen H. Lewis, Esq. (w/enclosures)
Dr. James H. Carpenter (w/out enclosures)
Dr. Peter A. Morris
Ann P. Hodgdon, Esq.
Anne Rapkin, Esq.
William J. Barzano, Jr., Esq.
Russell R. Eggert, Esq.
Steven Seiple, Esq.
Thomas W. Fawell, Esq.
Docketing and Service Section

NO. 85-
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>KERR-McGEE CHEMICAL CORPORATION,<br><br>Defendant-Petitioner. | ) | Appeal from the Circuit Court of DuPage County, Illinois, County Department, Chancery Division<br><br>No. 80 CH 298<br><br>Hon. Fredrick Henzi<br>Associate Judge |

NOTICE OF FILING

TO: Anne Rapkin
Assistant Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that the attached Application for Leave to Appeal and accompanying record was filed with the Clerk of the Appellate Court of Illinois, Second Judicial District, this 3rd day of December, 1985, a copy of which is hereby served upon you.

Attorney for Defendant-Appellant
Kerr-McGee Chemical Corporation

Peter J. Nickles
Theodore Voorhees, Jr.
Covington & Burling
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NO. 85-

APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, v. KERR-McGEE CHEMICAL CORPORATION, Defendant-Petitioner. | ) | Appeal from the Circuit Court of DuPage County, Illinois, County Department, Chancery Division<br>No. 80 CH 298<br>Hon. Fredrick Henzi Associate Judge |

## APPLICATION FOR LEAVE TO APPEAL

Defendant-petitioner, Kerr-McGee Chemical Corporation ("Kerr-McGee"), by its attorneys, petitions this Court, pursuant to Rule 308(b) of the Illinois Supreme Court Rules, Ill. Rev. Stat. Ch. 110A, § 308 (1983), for leave to take an interlocutory appeal from an order of the trial court denying defendant's motion for partial summary judgment on two specifically certified issues .1/ The motion for partial summary judgment was directed only against those portions of the Complaint which seek a state-law injunction compelling Kerr-McGee to remove certain radioactive waste materials from the City of West Chicago and

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1/ Defendant has also filed with the Circuit Court of DuPage County a Notice of Interlocutory Appeal, pursuant to Rule 307, of the trial court's denial of defendant's motion for a stay of the trial court proceedings based on the doctrine of primary jurisdiction.

The trial court record, consisting of a certified copy of the trial court order and other papers necesary for a determination of this application, accompanies this filing. Material in this record is cited herein as "R. ____."

dispose of them at some unspecified "distant location." The basis for the motion was a final decision by the United States Court of Appeals for the Seventh Circuit in a related case[2/], which held that a complaint seeking precisely the same relief as here, on precisely the same alleged safety grounds and over precisely the same radioactive materials, must be dismissed because: ". . . federal law preempts plaintiffs' request that the district court order the defendant Kerr-McGee to move the waste material to another location." (R. C113).

The trial judge refused to follow this decision of the Seventh Circuit. However, the court did certify the issues raised, pursuant to Rule 308(a), for this application for leave to appeal.

## I. STATEMENT OF FACTS

The present action ("State case") involves the State's attempt to control the disposition of low-level radioactive wastes located at a site owned by Kerr-McCee in West Chicago, Illinois. From the early 1930's until 1973, the facility processed naturally occurring radioactive ores. As a possessor of radioactive materials, the facility received a nuclear materials license from the Atomic Energy Commission in 1956. This license has been continuously renewed, even though manufacturing operations ceased over a decade ago, because the process wastes on the site are contaminated with thorium and uranium residues which emit radiation. The waste materials

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2/ Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985). (R. C112-C136).

therefore constitute "by-product materials" under the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and any effort either to dispose of the materials on-site or to remove the materials from the site requires an amendment to Kerr-McGee's license. The West Chicago site is currently the subject of a United States Nuclear Regulatory Commission (NRC) decommissioning proceeding, the purpose of which is to determine an appropriate disposal site for the West Chicago waste materials and to determine whether to grant Kerr-McGee an amendment to its license to permit on-site stabilization of the materials. The State is a party to the NRC proceeding. To date, the NRC staff has recommended on-site disposition of the waste materials.

On April 28, 1980, the State began this action against Kerr-McGee in the Circuit Court of DuPage County, claiming that the non-radioactive aspects of the waste materials violate various Illinois statutes and administrative regulations relating to waste disposal and environmental protection. (R. C1-C21). Although the State claims to regulate only non-radiological matters, it has conceded that the radiological and non-radiological aspects of the wastes are "inextricably intermixed." (R. C123). In its prayer for relief, the State seeks, inter alia, a mandatory injunction commanding Kerr-McGee to remove all of the wastes to some unspecified location. (R. C4, C7, C14, C20).

After the filing of the State case, certain private landowners whose property abuts the Kerr-McGee property in West Chicago filed an action against Kerr-McGee, Brown v. Kerr-McGee

Chemical Corporation No. 82 C 6323 (N.D.Ill. 1982). (R. C142-C165). The Brown complaint is virtually identical to the State's complaint and requests the precise injunctive relief sought by the State. On February 13, 1984, Chief Judge Frank J. McGarr issued an opinion and order holding that the Brown plaintiffs' claim for injunctive relief was barred by the doctrine of federal preemption and that the NRC has exclusive jurisdiction to determine a disposal site for radioactive waste materials. (R. C166). Chief Judge McGarr held that:

> Clearly, an order of this court requiring that the wastes be disposed of at some other location and precluding on-site encapsulation would conflict with the NRC's exclusive authority over the disposal of these radioactive materials. Thus, the court holds that the plaintiffs' claim for this form of injunctive relief is preempted by federal law, which law places this controversy in a forum other than this court.

(R. C170).

The Brown plaintiffs appealed Chief Judge McGarr's decision to the United States Court of Appeals for the Seventh Circuit. On that appeal, the State appeared as an active amicus curiae in support of the Brown plaintiffs. On July 18, 1985, the Seventh Circuit affirmed the district court and stated:

> Plaintiffs asked the district court to order Kerr-McGee to remove the wastes to "some other safe and distant location." Plaintiffs and amicus [plaintiff in the instant case] . . . suggest that the district court can find that the non-radiation hazards violate Illinois pollution laws and can order Kerr-McGee to move the wastes . . . .
>
> . . . Such state law remedies, though not attempts to regulate the radiation hazards of by-product material, nonetheless interfere with the NRC's ability to choose the method

> of disposal . . . . We therefore hold that plaintiffs' request for an injunction ordering the Kerr-McGee wastes moved elsewhere is preempted because, if granted, the injunction would stand "as an obstacle to the accomplishment of the full purposes and objectives" of federal regulation of radiation hazards. Silkwood, 104 S. Ct. at 621."

Brown v. Kerr-McGee Chem. Corp., 767 F.2d 1234, 1242 (7th Cir. 1985). (R. C125-126).

Judge Cudahy dissented from the majority ruling in the Seventh Circuit's Brown decision but still would have granted defendant's motion. In his dissenting opinion Judge Cudahy stated that "primary jurisdiction [in the NRC] is applicable here." (R. C134). As Judge Cudahy noted,

> The question underlying the plaintiffs' request for injunctive relief -- whether the mill tailings material should be disposed of at the West Chicago site or elsewhere -- is presently pending in the NRC administrative proceeding. The State of Illinois is one of the parties to that proceeding and has advanced the same position asserted by plaintiffs here. There is no contention that the state has not been adequately representing the plaintiffs' interests.
>
> * * *
>
> The State of Illinois argues as amicus that primary jurisdiction is not applicable here because the plaintiffs' claims are based on state law and the NRC cannot enforce the relief requested. This argument is beside the point because primary jurisdiction is applicable even though the agency cannot grant the relief requested.

767 F.2d at 1247. (R. C133-C135). Thus, even Judge Cudahy would require a stay of all judicial proceedings relating to disposal of the waste until completion of the pending NRC proceedings.

Following the decision by the Seventh Circuit in Brown, Kerr-McGee filed a Motion for Partial Summary Judgment, or in the Alternative, for a Stay of Proceedings in this case seeking a ruling, consistent with the Brown ruling, that the State's request for identical injunctive relief is preempted by federal law. (R. C190-C273). On October 25, 1985, one day after the Seventh Circuit denied a petition for rehearing in Brown, Kerr-McGee argued its motion before Judge Henzi of the Circuit Court of DuPage County. The motion was denied. (R. C367). Trial of this case, including the State's request for injunctive relief, is scheduled to begin on February 4, 1986.

## II. QUESTIONS OF LAW CERTIFIED BY THE TRIAL COURT

On the day that the defendant's motions were denied, defendant also moved that the issues be certified for appeal before this Court and for a stay pending appeal. The trial court agreed that the issues should be certified for immediate interlocutory appeal but denied a motion for a stay pending appeal. Pursuant to Rule 308, the trial court certified two questions:

1. Does federal authority relative to the thorium mill tailings at issue in this action preempt the injunctive relief sought by the plaintiff? (See, e.g., Brown v. Kerr-McGee Chemical Corporation No. 84-1294; United States Court of Appeals for the Seventh Circuit, July 15, 1985, rehearing denied, October 24, 1985.)

2. Does the doctrine of "primary jurisdiction" dictate that this state court proceeding be stayed until the NRC rules on Kerr-McGee's pending application for an amendment to its NRC license concerning final disposal of the wastes?

The trial judge also found that an immediate appeal may materially advance the ultimate termination of this litigation. (R. C368).

## III. APPLICATION FOR LEAVE TO APPEAL SHOULD BE GRANTED

### A. The Trial Court Action Denying the Motion for Partial Summary Judgment Reflects a Substantial Difference of Opinion

To note that defendant's motions raised a "substantial ground for difference of opinion" as required by Rule 308(a) is an understatement. Usually such a "difference" refers to a disputed argument on a particular point of law. Here, in contrast, is an unusual instance of one court (the federal court of appeals) deciding an action one way and another court (the trial court) deciding the identical matter the opposite way. The difference of opinion in this case is well-defined. Two different courts, reviewing the exact same factual situation, legal arguments, and complaint allegations, reached conclusions which are diametrically opposite.

The basis of Kerr-McGee's Motion for Partial Summary Judgment and this Application is the recent decision in Brown v. Kerr-McGee, 767 F.2d 1234 (7th Cir. 1985). There the Seventh Circuit, following the Supreme Court decisions on the issue, correctly ruled that a decision as to where the Kerr-McGee by-product wastes should be stabilized has been entrusted by Congress to the NRC and that judicial intervention in that process on state law grounds would "stand as an obstacle to the accomplishment of the full purposes and objectives of federal

regulation of radiation hazards." (R. C126). Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Com'n, 461 U.S. 190 (1983). The federal appellate court found that the injunction requested by the Brown plaintiffs would prevent the NRC from choosing the site recommended by the NRC staff. Moreover, the court noted that, if it could rule that the radioactive wastes should be moved pursuant to state law standards, "nothing prevents neighbors of other prospective sites from relying on state law to obtain injunctions preventing NRC consideration of those locations." 767 F.2d at 1242. (R. C125). Thus the Seventh Circuit, rejecting arguments by the State to the contrary, properly held that attempts to remove the materials from the site under color of state law conflict with the federal regulatory scheme and are preempted by federal law.

The Seventh Circuit's ruling is consistent with other appellate court decisions holding that a claim for an injunction against a nuclear facility, asserted under state tort law, is preempted by federal law. See Pennsylvania v. General Public Utilities Corp., 710 F.2d 117, 120 (3d Cir. 1983) ("Private litigants therefore may not obtain by way of injunctive relief pursuant to state law an order abating as a public nuisance, because of public safety standards, activity of a duly licensed nuclear generating plant."); County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 59-60 (2d Cir. 1984) (". . . a court-ordered inspection, whether it be for safety or non-safety

purposes, would obviously invade the NRC's exclusive regulatory province"). The State has cited no cases to the contrary.

The conflict between the lower court's order and the holdings of the foregoing preemption cases demonstrates the clear and undeniable difference of opinion on this issue and provides the necessary requisite for this appeal.3/ The conflicting decisions have created a dilemma for Kerr-McGee. One court has said that disposal of the waste materials is to be governed by federal law after NRC proceedings while the trial court here holds itself out as final arbiter of the question. An immediate resolution of this issue is essential. Accordingly, this Court should grant Kerr-McGee's Application for Leave to Appeal and should give full consideration to this critical issue.

B. The Trial Court Action Denying the Motion for Stay of Proceedings Reflects a Substantial Difference of Opinion

Kerr-McGee argued below that the question of where the radioactive materials should be disposed was one over which the NRC has primary jurisdiction. The NRC is now considering proposals for the safe disposition of the West Chicago by-product materials in a hearing before a panel of the Atomic Safety Licensing Board ("ASLB"), empanelled by order of the NRC at the request of the State. The ASLB will be reviewing a number of

3/ This Court has held generally that attempts to regulate radioactive material under Illinois law are preempted by federal law. Commonwealth Edison Company v. Pollution Control Board, 5 Ill. App. 3d 800, 284 N.E.2d 342 (3rd Dist. 1972).

alternatives for the disposition of these materials, including both on-site encapsulation under NRC supervision, as well as removal to distant sites. Since the precise position advanced by the State in support of injunctive relief in this action is before the NRC in an administrative proceeding in which the State is a party, this action should be stayed pending a final NRC determination.

In his dissent from the majority ruling in the Brown decision, Judge Cudahy agreed that "primary jurisdiction [in the NRC] is applicable here." 767 F.2d at 1247. (R. C134). In so doing, he specifically rejected contentions advanced by the State. As Judge Cudahy recognized, the doctrine of primary jurisdiction dictates that judicial proceedings be stayed until the agency with the responsibility for regulating the subject matter has completed its proceedings. The application of the primary jurisdiction doctrine is consistent with the Brown majority's observation that Congress has charged the NRC with responsibility for insuring that the disposal of by-product material will protect the public from both radiological and non-radiological hazards.

Judge Cudahy's findings are supported by other cases involving claims of radiation hazards and requests for deference to NRC proceedings. Indeed, regulation of radioactive materials is an area where the courts have consistently applied the doctrine of primary jurisdiction. See Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979); Nader v. Ray, 363 F. Supp. 946

(D.D.C. 1973); Paskavitch v. U.S. Nuclear Regulatory Commission, 458 F. Supp. 216 (D.Conn. 1978).

As with its preemption decision, the lower court's refusal to stay proceedings pending a decision by the NRC is against the clear weight of authority. A substantial basis for difference of opinion therefore exists as to this issue and immediate appellate review is required.

## IV. AN IMMEDIATE APPEAL WILL ADVANCE THE TERMINATION OF LITIGATION

If Kerr-McGee prevails on appeal, the lengthy and expensive trial of the State's request for injunctive relief will be avoided. At the very least, the trial will be stayed until the NRC administrative hearing on this matter is complete and the NRC judgment rendered. Without an interlocutory ruling, there is no question the trial of this action will be lengthy and complex. Both sides agree that this will be a huge undertaking involving a two to three month trial, and a large allocation of resources from the State, defendant and County of DuPage. The nature of the State's claims and Kerr-McGee's defenses will require extensive testimony and proofs from numerous experts, including officials of the NRC, officials of the parties and experts in the fields of radiation, radiation health safety, geochemistry, and hydrogeology.4/ But as the counsel for the State noted at the

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4/ For these very reasons, defendant will also file a motion requesting this Court to immediately stay the Circuit Court proceedings pending the outcome of this appeal and defendant's Rule 307 appeal.

argument before the trial court, a decision on the availability of state injunctive relief is crucial to the State case:

> At this point, to dismiss our request for injunctive relief essentially would be to render the rest of the case a sterile exercise because if the Court is prohibited from enforcing whatever conclusion it reaches about state law, there is really not much point in having a judgment on that.

(R. C348). Without an immediate hearing from this Court on the application, the parties will expend massive resources at a trial which might be wholly unnecessary, depending on the outcome here.

Moreover, there is no need to proceed directly to trial: the State has conceded and the NRC has confirmed that the waste materials in question pose no imminent danger to public health. See Statement of Ass't Att'y Gen. Rapkin, in Kerr-McGee Chem. Corp., (West Chicago Rare Earths Facility), Docket No. 40-2061-ML, ASLBP No. 83-495-01-ML, Transcript at 30 (Feb. 2, 1984) (R. C302); Deposition of Terry Lash, State v. Kerr-McGee Chem. Corp., No. 80 CH 298, at 4, 92-94 (Oct. 10, 1985) (R. C373-C374); Affidavit of Merri Horn, NRC Environmental Engineer, in Kerr-McGee Chem. Corp. (West Chicago Rare Earths Facility), supra. (R. C308-C315). There is ample time for this Court to resolve this conflict now, without the parties first expending huge amounts of time and money perhaps unnecessarily.

WHEREFORE, defendant-petitioner Kerr-McGee Chemical Corporation respectfully requests this Court to grant its Application for Leave to Appeal for the reasons set forth herein.

KERR-McGEE CHEMICAL CORPORATION

Dated: December 3, 1985

By: _____
One of Its Attorneys

Peter J. Nickles
Theodore Voorhees, Jr.
Covington & Burling
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Chicago, Illinois 60606
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of defendant-appellant's "Application for Leave to Appeal" and accompanying record was served upon:

Anne Rapkin
Assistant Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

by personal delivery to the foregoing address this 3rd day of December, 1985.

Attorney for
Kerr-McGee Chemical Corporation

IN THE CIRCUIT COURT FOR THE EIGHTEENTH
JUDICIAL CIRCUIT OF ILLINOIS
DuPAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 80 CH 298 |
| | ) | |
| KERR-McGEE CHEMICAL CORPORATION, | ) | Hon. Fredrick Henzi |
| | ) | Associate Judge |
| Defendant. | ) | |

NOTICE OF FILING

TO: Anne Rapkin
Assistant Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that the attached Notice of Interlocutory Appeal was filed with the Clerk of the Circuit Court for the Eighteenth Judicial Circuit in DuPage County, Illinois, this 3rd day of December, 1985, a copy of which is hereby served upon you.

David E. Kay
Attorney for Defendant-Appellant
Kerr-McGee Chemical Corporation

Peter J. Nickles
Theodore Voorhees, Jr.
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APPEAL TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT FROM THE CIRCUIT COURT OF DuPAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | No. 80 CH 298 |
| | ) | |
| KERR-McGEE CHEMICAL CORPORATION, | ) | Hon. Fredrick Henzi |
| | ) | Associate Judge |
| Defendant-Appellant. | ) | |

NOTICE OF INTERLOCUTORY APPEAL

TO: Anne Rapkin, Assistant Attorney General
Russell R. Eggert, Administrative Assistant
Assistant Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that Kerr-McGee Chemical Corporation, defendant in the above-entitled cause, pursuant to Rule 307 of the Illinois Supreme Court Rules hereby appeals to the Appellate Court of Illinois, Second Judicial District from the judgment rendered and entered in the Circuit Court of DuPage County, Illinois, on the 15th day of November, 1985, denying defendant's Motion for Stay of Proceedings and requests the reviewing court to reverse the lower court's Order.

By: _____
One of the Attorneys for
Kerr-McGee Chemical Corporation

John C. Berghoff, Jr.
Thomas P. Healy, Jr.
8500 Sears Tower
233 South Wacker Drive
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(312) 876-2100

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Theodore Voorhees, Jr.
1201 Pennsylvania Ave., N.W.
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(202) 662-6000

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies a true and correct copy of defendant's Notice of Interlocutory Appeal and Notice of Filing were served upon:

Anne Rapkin
Assistant Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

by personal delivery to the foregoing address this 3rd day of December, 1985.

Attorney for
Kerr-McGee Chemical Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KERR-McGEE CHEMICAL CORPORATION,

Plaintiff,

vs.

NEIL HARTIGAN, Attorney General of The State of Illinois,

Defendant.

No. 85C10068

RECEIVED

DEC 03 1985

JUDGE JAMES F. HOLDERMAN
UNITED STATES DISTRICT COURT

NOTICE OF FILING

TO: Neil F. Hartigan
Attorney General for the
State of Illinois
Anne Rapkin
Ass't Attorney General
100 W. Randolph St.
Chicago, IL 60601

PLEASE TAKE NOTICE that the attached Motion for Preliminary Injunction was filed with the clerk of the United States District Court for the Northern District of Illinois, Eastern Division, this 3rd day of December, 1985, a copy of which is hereby served upon you.

Attorney for Plaintiff
Kerr-McGee Chemical Corporation

Peter J. Nickles
Theodore Voorhees, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

| | |
|---|---|
| KERR-McGEE CHEMICAL CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>NEIL HARTIGAN, Attorney General of the State of Illinois,<br><br>Defendant. | 85C10068<br><br>No. _____ |

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Kerr-McGee Chemical Corporation, by its attorneys, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, moves this Court for a preliminary injunction prohibiting defendant, Neil Hartigan, Attorney General of the State of Illinois, from relitigating in the Circuit Court of DuPage County, Illinois, a claim for injunctive relief which has already been determined in this Court. The grounds for this motion, as more fully set forth in the accompanying Complaint and Memorandum in Support of Kerr-McGee's Motion for Preliminary Injunction, are as follows:

1. In Brown v. Kerr-McGee Chemical Corp., 82 C 6323 (N.D.Ill., February 13, 1984), aff'd No. 84-1294 (7th Cir.

July 18, 1985), this Court determined that a request for injunctive relief ordering Kerr-McGee to relocate certain radioactive waste materials from a storage site in West Chicago, Illinois was preempted by federal law. Although the defendant participated in that action, he is now attempting to relitigate the same issue in state court in an action entitled Illinois v. Kerr-McGee Chemical Corp., 80 CH 298. In addition to pursuing this state court action, the defendant has filed a motion to stay proceedings concerning the West Chicago site now pending before the Nuclear Regulatory Commission ("NRC"), despite the ruling of this Court and the Court of Appeals for the Seventh Circuit that the NRC is the appropriate and exclusive forum for resolution of the issues.

2. If the defendant is not enjoined from proceeding with his claim for injunctive relief in state court, plaintiff will suffer immediate and irreparable injury, loss, and damage.

3. The issuance of a preliminary injunction will not cause any damage, loss or inconvenience to defendant since the waste materials have been on the site in their present condition for a lengthy period of time, defendant has sought no interim relief nor made any showing that the materials at issue present any imminent health or safety danger, and defendant's interests are fully represented in his capacity as an intervenor in the NRC proceeding.

WHEREFORE, plaintiff requests this Court to issue a preliminary injunction prohibiting defendant from relitigating its claim for injunctive relief in state court, and requests that a hearing on plaintiff's motion be scheduled as soon as the Court's calendar permits.

Dated:

Attorney for Plaintiff,
Kerr-McGee Chemical Corporation

OF COUNSEL:

Peter J. Nickles
Theodore Voorhees, Jr.
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John C. Berghoff, Jr.
Brian J. Redding
Chadwell & Kayser, Ltd.
8500 Sears Tower
Chicago, Illinois 60606
(312) 876-2100

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing Motion for Preliminary Injunction was served upon:

Neil F. Hartigan, Attorney General
for the State of Illinois
Anne Rapkin, Assistant
Attorney General
100 W. Randolph St., 13th Floor
Chicago, IL 60601

by personal delivery this 3rd day of December, 1985.

_____

Attorney for
Kerr-McGee Chemical Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KERR-McGEE CHEMICAL CORPORATION,

Plaintiff,

v.

NEIL HARTIGAN, Attorney General of the State of Illinois,

Defendant.

85 C 10068

No. JUDGE HOLDERMAN

COMPLAINT FOR INJUNCTIVE RELIEF

Kerr-McGee Chemical Corporation ("Kerr-McGee"), by its attorneys, files this Complaint against defendant, Neil Hartigan, Attorney General of the State of Illinois, and states as follows:

1. This is a civil action for an injunction in which this Court has original jurisdiction pursuant to 28 U.S.C. § 1331 in that this action arises under Article VI cl.2 of the Constitution of the United States, under the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq. and under 28 U.S.C. § 2283. Jurisdiction is also based on the ancilliary jurisdiction doctrine in that this action is ancillary to another action pending before this Court, Brown v. Kerr-McGee Chemical Corp., 82 C 6323.

2. Plaintiff Kerr-McGee owns a non-operating manufacturing facility in the City of West Chicago, Illinois. From 1932 to 1973, Kerr-McGee and its predecessor companies used the facility to process ores containing thorium, a natural radioactive element. Since the cessation of manufacturing activities, the facility has been used for storage of radioactive waste materials currently under license by the Nuclear Regulatory Commission ("NRC").

3. On April 28, 1980, the State of Illinois, by its Attorney General, commenced an action against Kerr-McGee in the Circuit Court of Illinois, DuPage County, Illinois v. Kerr-McGee Chemical Corp., No. 80 CH 298, requesting, inter alia, an injunction ordering Kerr-McGee to remove the waste materials from the West Chicago site and dispose of them at some other location.

4. On September 18, 1982, the owners of certain residential property abutting the Kerr-McGee facility commenced an action against Kerr-McGee in the Circuit Court of Illinois, DuPage County, Brown v. Kerr-McGee Chemical Corp., 82 L 1154. The complaint, based upon and in many respects identical to the complaint filed by the State of Illinois, also requested an injunction ordering Kerr-McGee to remove the waste materials from the West Chicago site to another location.

5. The case filed by the Brown plaintiffs was removed to federal court on October 15, 1982. Thereafter, Kerr-McGee filed a motion for partial dismissal seeking a

ruling that the Brown plaintiffs' request for injunctive relief was preempted by the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq. On February 13, 1984, The Honorable Chief Judge Frank J. McGarr issued an opinion and order stating that the plaintiffs' claim for injunctive relief was barred by the doctrine of federal preemption.

6. The plaintiffs in Brown v. Kerr-McGee Chemical Corp. appealed the district court decision to the Seventh Circuit Court of Appeals. The State of Illinois, through its Attorney General, defendant herein, participated vigorously in the Court of Appeals. That participation included filing a 37-page amicus curiae brief and a 13-page reply brief supporting the Brown plaintiffs' position. The Seventh Circuit Court of Appeals affirmed the district court decision on July 18, 1985. A petition for rehearing, supported by the State of Illinois' 15-page amicus brief, was denied on October 24, 1985.

7. Following the decision by the Seventh Circuit Court of Appeals, Kerr-McGee filed a motion for partial summary judgment in Illinois v. Kerr-McGee Chemical Corp. seeking a ruling, consistent with the federal court ruling in Brown v. Kerr-McGee Chemical Corp., that the State's request for injunctive relief was preempted by the Atomic Energy Act. On October 25, 1985, Judge Henzi of the Circuit Court of DuPage County denied Kerr-McGee's motion for partial summary judgment.

8. Trial of Illinois v. Kerr-McGee Chemical Corp. in the state court, including the defendant's claims for injunctive relief, is scheduled for February, 1986.

9. The defendant is an intervenor in an ongoing proceeding before the Nuclear Regulatory Commission wherein the NRC must determine the propriety under federal law of Kerr-McGee's plan to dispose of the West Chicago waste materials on-site. Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), Docket No. 40-2061-ML; ASLBP No. 83-495-01-ML. Despite this Court's holding in Brown that the disposition of the West Chicago wastes is a matter within the NRC's exclusive jurisdiction, the defendant has continued to seek injunctive relief in state court and has moved for a stay of the NRC proceedings pending resolution of the state court action.

10. The injunctive relief requested by the defendant in Illinois v. Kerr-McGee Chemical Corp. interferes with this Court's judgment in Brown v. Kerr-McGee that the Nuclear Regulatory Commission has exclusive jurisdiction to determine a disposal site for radioactive waste materials and that the NRC should exercise that jurisdiction without interference from Illinois state law. If defendant's request for injunctive relief prohibiting disposal of the West Chicago wastes on-site is granted by the state court, the state court order would conflict and interfere with the NRC's free exercise of jurisdiction guaranteed to it by this Court's order.

11. An order of this Court enjoining the state court relitigation of claims for injunctive relief is necessary to protect and effectuate the judgment of this Court in Brown v. Kerr-McGee, and is authorized by 28 U.S.C. § 2283.

12. Kerr-McGee will suffer irreparable harm if it is compelled to relitigate the exact claims for injunctive relief that were decided by this Court in Brown v. Kerr-McGee.

13. Kerr-McGee has no adequate remedy at law.

14. The injunction sought herein will serve the public interest by ensuring that the disposition of the West Chicago waste materials is determined by the regulatory agency charged by Congress with the responsibility to regulate radioactive materials in a manner consistent with safety, sound environmental practice, and the national public interest.

15. Defendant, who is a party to the NRC proceeding and whose interests are fully represented therein, will suffer no hardship if plaintiff's injunction is granted.

WHEREFORE, Kerr-McGee prays that this Court:

(a) Enjoin Neil Hartigan, Attorney General of the State of Illinois, his agents, servants, employees, and all persons under his direction, control, permission, or license, preliminarily and permanently, from relitigating a claim in state court against Kerr-McGee for injunctive relief, because that claim was previously held by this Court to be preempted;

(b) Award Kerr-McGee the costs and disbursements of this action; and

(c) Award Kerr-McGee such other, further, and different relief as the Court may deem just and proper.

Dated:

Attorney for Plaintiff,
Kerr-McGee Chemical Corporation

OF COUNSEL:

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Theodore Voorhees, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KERR-McGEE CHEMICAL CORPORATION,

Plaintiff,

vs.

NEIL HARTIGAN, Attorney General of The State of Illinois,

Defendant.

No. 85C10068

JUDGE HOLDERMAN

RECEIVED

DEC 05 1985

JUDGE JAMES F. HOLDERMAN
UNITED STATES DISTRICT COURT

NOTICE OF FILING

TO: Neil F. Hartigan
Attorney General for the
State of Illinois
Anne Rapkin
Ass't Attorney General
100 W. Randolph St.
Chicago, IL 60601

PLEASE TAKE NOTICE that the attached Memorandum in Support of Kerr-McGee's Motion for Preliminary Injunction was filed with the clerk of the United States District Court for the Northern District of Illinois, Eastern Division, this 3rd day of December, 1985, a copy of which is hereby served upon you.

Attorney for Plaintiff
Kerr-McGee Chemical Corporation

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION



KERR-McGEE CHEMICAL CORPORATION,

Plaintiff,

vs.

NEIL HARTIGAN, Attorney General of The State of Illinois,

Defendant.

No. 85C10068

JUDGE HOLDERMAN

MEMORANDUM IN SUPPORT OF KERR-McGEE'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Kerr-McGee Chemical Corporation ("Kerr-McGee") has moved for a preliminary injunction to restrain the defendant, Neil Hartigan ("defendant") from pursuing an action for injunctive relief in the Circuit Court of DuPage County, Illinois (hereinafter the "state action"). In the state action defendant seeks to litigate the precise issue resolved by this Court in Brown v. Kerr-McGee Chemical Corp., No. 82 C 6323 (N.D. Ill. 1984):

> Whether pursuant to state law Kerr-McGee must remove from its West Chicago site non-radioactive wastes that are physically inseparable from radioactive wastes, despite the Congress' express delegation to the Nuclear Regulatory Commission of exclusive authority to regulate radioactive wastes.

This Court determined in Brown that an action under state law to compel the removal of the materials would necessarily interfere with exclusive Nuclear Regulatory Commission ("NRC") authority to determine an appropriate disposal site and that

the remedy sought by the plaintiffs was therefore preempted by federal law.*/ The Court's determination was affirmed by the United States Court of Appeals for the Seventh Circuit in Brown v. Kerr-McGee Chemical Corp. ("Brown"), 767 F.2d 1234 (7th Cir. 1985), reh'g denied, October 24, 1985.**/

## I. JURISDICTION

This Court has previously determined that the same injunctive relief as that sought by the defendant in the state action is preempted by federal authority. The injunction which Kerr-McGee seeks is intended to effectuate this Court's prior decision in Brown. Therefore, this case arises under the Constitution, laws, or treaties of the United States, see U.S. CONST. Art. I, § 8, cl. 3, and Art. VI, cl. 2, and jurisdiction lies under 28 U.S.C. § 1331. See Illinois v. General Electric Co., 683 F.2d 206, 210-11 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983); Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976); Southern Pacific Transp. Co. v. Public Utilities Comm'n, 716 F.2d 1285 (9th Cir. 1983). Jurisdiction is also proper under the doctrine of ancillary jurisdiction. See Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d at 45.

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*/ A copy of this Court's opinion in Brown is attached hereto as Exhibit A.

**/ A copy of the Appellate decision is attached hereto as Exhibit B.

## II. STATEMENT OF FACTS

Plaintiff Kerr-McGee owns a non-operating manufacturing facility in the City of West Chicago, Illinois. Since the cessation of manufacturing activities in 1973, the facility has been used for storage of radioactive waste materials known as "tailings," which are subject to license and regulation by the NRC. Atomic Energy Act, 42 U.S.C. § 2011, et seq. (hereinafter "AEA"). Any effort either to stabilize the materials on-site or to remove the tailings from the site requires an amendment to Kerr-McGee's license. In fact, the West Chicago site is currently the subject of an NRC decommissioning proceeding, the purpose of which is to determine an appropriate disposal site for the West Chicago tailings and to determine whether to grant to Kerr-McGee an amendment to its license to permit on-site disposal of the materials.

On April 28, 1980, the defendant commenced an action against Kerr-McGee in the Circuit Court of Illinois, DuPage County, entitled Illinois v. Kerr-McGee Chemical Corp., No. 80 CH 298, requesting, pursuant to state law, an injunction ordering Kerr-McGee to remove non-radioactive waste materials from the West Chicago site.*/ The defendant has acknowledged in the state action that the non-radioactive waste materials are physically inseparable from the radioactive waste

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*/ A copy of the complaint in the state action is attached hereto as Exhibit C. A copy of the complaint in Brown is also attached, as Exhibit D.

materials that are subject to NRC regulation, so that removal of the one requires removal of the other. The defendant has also asserted that, if granted, the state court injunction would moot the NRC's current consideration of on-site disposal.

As this Court will recognize, the injunctive relief sought by the defendant is identical to that denied by this Court in Brown v. Kerr-McGee Chemical Corp., No. 82 C 6323 (N.D. Ill. 1984). In Brown, this Court concluded that the NRC has exclusive jurisdiction to determine an appropriate disposal site for the materials, and held that any effort, pursuant to state law, to narrow the disposal options available to the NRC is preempted by the AEA.*/

The Brown plaintiffs appealed that decision to the United States Court of Appeals for the Seventh Circuit. The State of Illinois, through its attorney general (the defendant in the instant action) appeared as amicus curiae and filed a 37-page brief and 13-page reply brief in support of the Brown plaintiffs' position. As grounds for the State's participation as amicus curiae, defendant cited the pendency of the state action seeking the same injunctive relief and argued that the decision in Brown "may affect" the pending action

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*/ The Court so held in its ruling on Kerr-McGee's motion for partial dismissal, which was converted to a motion for partial summary judgment by the submission of supporting materials. See Brown v. Kerr-McGee Chem. Corp., 767 F.2d 1234, 1237 n.2 (7th Cir. 1985).

in state court.*/ The Court of Appeals affirmed this Court's decision on July 18, 1985, and concluded:

> [P]laintiffs' request for an injunction ordering the Kerr-McGee wastes moved elsewhere . . . if granted . . . would stand "as an obstacle to the accomplishment of the full purposes and objectives" of federal regulation of radiation hazards. Silkwood [v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)]. . . . [P]laintiffs' request for injunctive relief ordering Kerr-McGee to remove the mill tailings and other wastes to "some other safe and distant location" is preempted by federal law.

767 F.2d at 1242-43. The Brown plaintiffs filed an 8-page petition for rehearing which merely incorporated, by reference, the defendant's 15-page amicus brief in support of rehearing. That petition was denied on October 24, 1985.

Following the decision by the Seventh Circuit in Brown, Kerr-McGee filed a motion for partial summary judgment in the state action seeking a ruling, consistent with the Brown ruling, that the defendant's request for injunctive relief is preempted by the AEA. On October 25, 1985, one day after the Seventh Circuit denied the petition for rehearing

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*/ Defendant stated:

> Like the Brown plaintiffs, the People seek an injunction requiring Kerr-McGee to remove industrial wastes from their present location in West Chicago. The DuPage County action involves some of the same issues as this case.

State of Illinois, amicus brief, p. 1.

in Brown, Kerr-McGee's motion was denied.*/ Trial of the state action, including the claim for injunctive relief, is scheduled for February 4, 1986.

## III. ARGUMENT

For this Court to issue a preliminary injunction, Kerr-McGee must show: (1) some likelihood of success on the merits; (2) no adequate remedy at law and irreparable damage if the Court does not grant its motion; (3) grant of the injunction is consistent with the public interest; and (4) the balance of hardships between movant and respondent does not tilt significantly in favor of the latter. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 386-88 (7th Cir. 1984). Certainly under the criteria traditionally used to determine the propriety of a preliminary injunction, defendant's action in relitigating a claim previously resolved on the merits by this Court warrants swift injunctive relief.

### A. Plaintiff is Likely to Succeed on the Merits

It is well settled that under the "Full Faith and Credit Act," 17 U.S.C. 1738, a state court is required to accord full preclusive effect to the judgments of federal courts which sit in that state. See Stoll v. Gottlieb, 305 U.S. 165, 170-71 (1938); Hancock National Bank v. Farnum,

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*/ The court entered an order denying the motion on November 15, 1985. Kerr-McGee filed its Notice of Interlocutory Appeal on December 3, 1985.

176 U.S. 640, 645 (1899); Metcalf v. Watertown, 153 U.S. 671, 678-81 (1893). When a state court refuses to treat prior federal litigation as preclusive of the issues resolved, a federal court must protect and effectuate its prior judgment by enjoining relitigation in the state court of those issues. Hence, the so-called "Anti-Injunction Act", 28 U.S.C. § 2283, which generally precludes issuance by a federal court of an injunction against the continuance of a state court proceeding, expressly permits such injunctions when necessary "to protect or effectuate [the federal court's] judgments." See Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939, 946-47 (7th Cir. 1981).*/ When principles of res judicata or collateral estoppel would bar the claim had it been brought in federal court, the federal court must step in and enjoin state proceedings which threaten relitigation of the claim. E.g., Samuel C. Ennis & Co. v. Woodmar Realty Co., 542 F.2d 45 (7th Cir. 1976); Lee v. Terminal Transport Co., 282 F.2d 805 (7th Cir. 1960), cert. denied, 365 U.S. 828 (1961).**/

A failure by the federal court to act would nullify the important policies which underlie the authority of a

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*/ Mitchum v. Foster, 407 U.S. 225 (1972); Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1980); 17 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction, § 4226, at 340-41 (quoting reviser's note to 1948 Judicial Code, 28 U.S.C. § 2283).

**/ Bank of Heflin v. Mile, 621 F.2d 108 (5th Cir. 1981); Seaboard Coast Line R. Co. v. Union Camp Corp., 613 F.2d 604 (5th Cir. 1980).

federal court to effectuate its judgments: "[N]othing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps upset . . . a judgment of a federal court." Jacksonville Blow Pipe Co. v. RFC, 244 F.2d 394, 400 (5th Cir. 1954). When that federal court judgment concerns matters as to which federal law preempts state law, the federal Constitution requires that such friction be avoided. U.S. CONST. Art. VI, cl.2; Illinois v. General Electric Co., 683 F.2d at 214-16.*/

That the defendant's state court claim for injunctive relief is the very interference prohibited by this Court's decision in Brown is clear. **/ But the defendant has gone farther than merely ignoring this Court's ruling: he is now attempting to bring to a halt the very NRC proceeding

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*/ During the proceedings in the Circuit Court of DuPage county the defendant suggested that the doctrine of abstention set forth in Younger v. Harris, 401 U.S. 37 (1971), might preclude judicial interference with the enforcement of Illinois environmental law. Younger abstention, however, is not applicable when the interest asserted by the State is preempted by federal law. Middle South Energy, Inc. v. Arkansas Public Service Comm'n, Fed. Sec. L. Rep. ¶ 92,265 (8th Cir. 1985); Champion Int'l Corp. v. Brown, 731 F.2d 1406 (9th Cir. 1984); Baggett v. Department of Professional Reg. Bd. of Pilot Comm'rs, 717 F.2d 521 (11th Cir. 1983). Since the defendant's request for injunctive relief has been held to be preempted by the Atomic Energy Act, it is inappropriate for this Court to abstain.

**/ The defendant concedes as much when he argues, as he has in state court, that "[a] decision of any federal court except the United States Supreme Court is not binding upon [the State Circuit Court]." Plaintiff's Memorandum in Opposition to Kerr-McGee's Motion for Partial Summary Judgment, at 2, in People v. Kerr-McGee Chem. Corp., No. 80 CH 298 (attached hereto as Exhibit E).

which this Court ruled is the exclusive forum for determining the disposition of the waste materials at the West Chicago site. Contrary to the Seventh Circuit's expectation that the State would continue to represent the interests of its citizens before the NRC, see 767 F.2d at 1242-43, the defendant has requested a stay of that proceeding, arguing that prosecution of the State action will render the NRC proceeding moot:

> [I]f 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.

People of the State of Illinois' Motion to Stay Proceeding, at 8, in Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), Docket No. 40-2061-ML, ASLBP No. 83-495-01-ML (hereinafter "Kerr-McGee Chem. Corp.") (attached hereto as Exhibit F). The defendant has further threatened to obtain a state court injunction against continuance of the NRC proceeding:

> [W]e may have to move against Kerr-McGee for an injunction against them proceeding in this forum in the State Court. The State Judge does have that authority.

Statement by Ass't Att'y Gen'l Eggert, in Kerr-McGee Chem. Corp., Tr. at 199, September 11, 1985.*/ Contrary to this

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*/ Hereinafter cited as "NRC Transcript" (attached hereto as Exhibit G).

Court's ruling that federal law preempts any state action that would foreclose options available to the NRC for disposal of the materials, the defendant has asserted:

> Only . . . a determination that the West Chicago site is the sole acceptable site, anywhere in the nation, for disposing of the wastes . . . would create the type of conflict with state law capable of preempting [the state court's] authority.

People's Position on Waiver of Part 51, at 3, in Kerr-McGee Chem. Corp. (attached hereto as Exhibit H). This Court rejected precisely this contention in Brown, and should not countenance the defendant's continued efforts to turn federal preemption law on its head by seeking to prevent the NRC from exercising its exclusive authority.

Under federal collateral estoppel principles, relitigation of a particular issue is barred if it was actually litigated, on the merits, in a prior proceeding between the same parties or non-parties in privity with them. See Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n.1 (1984); Woods Exploration & Production Co. v. Aluminum Co. of America, 438 F.2d 1286, 1312-13 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972). Application of this test demonstrates that the defendant is collaterally estopped from seeking to compel removal of the waste materials from the West Chicago site.

A judgment is binding not only on those who were actual parties to the prior litigation, but also on other

individuals who occupy certain relationships to parties. Traditionally, such relationships as "privity" or "successorship" have been found sufficient to preclude relitigation by nonparties. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179 (1973). It is now well settled, however, that a nonparty can be precluded from relitigating an issue when that nonparty's interests were adequately represented in the prior litigation. See Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975); Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84 (1977); Doe v. Ceci, 517 F.2d 1206 (7th Cir. 1975).*/

As noted above, the defendant participated as an amicus in the appeal from the Brown decision. Indeed, his participation was more extensive, in some respects, than that of the putative plaintiffs. Additionally, there is no question as to the identity of interests between the plaintiffs in Brown -- private citizens of the State -- and the defendant -- the agent through whom the State protects the interests of its private citizens. Further, the defendant's extensive

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*/ For example, in Southwest Airlines, the Fifth Circuit held that several Civil Aeronautics Board carriers, nonparties to a prior federal action, were precluded from relitigating issues determined in that action in a subsequent state court action because the original plaintiff, the City of Dallas, had adequately represented their interests. The court found that "even though they were not parties to that action and have never presented evidence on the validity of the 1968 ordinance, [the carriers'] interests were sufficiently represented by the public authorities" to warrant the application of collateral estoppel. Id. at 102.

involvement in Brown estops him from challenging the adequacy or quality of the legal representation. Because the defendant's interests were adequately represented in Brown, he is bound by the determination made in that case. See Montana v. United States, 440 U.S. 147 (1979); Montgomery County Bd. of Education v. Shelton, 327 F. Supp. 811, 815 (N.D. Miss. 1971).

B. Kerr-McGee Has No Adequate Remedy at Law and Will Suffer Irreparable Injury

If the defendant is not enjoined from relitigating the claim for injunctive relief in state court, Kerr-McGee will have no adequate remedy at law and will suffer irreparable injury. Contrary to defendant's assertions, a final state court order requiring Kerr-McGee to remove the waste materials will not moot the NRC proceeding. Instead, it will force Kerr-McGee to choose between following the state court order and violating NRC regulations governing the disposition of the wastes or complying with those regulations and subjecting itself to a finding of contempt. Only an order by this Court could prevent such a dilemma, see Thomason v. Cooper, 254 F.2d 808, 810-11 (8th Cir. 1958), and only an injunction can protect Kerr-McGee from the burden and expense of relitigating this issue. Broadcast Music, Inc. v. CBS, Inc., 424 F. Supp. 799, 802 (S.D.N.Y. 1976); see Browning Debenture Holders' Comm. v. DASA Corp., 454 F. Supp. 88, 104 (S.D.N.Y.), aff'd, 605 F.2d 35 (2nd Cir. 1978); Meredith v. John Deere Plow Co., 261 F.2d 121, 124 (8th Cir. 1959). Plaintiff should not be

forced to litigate in two fora an issue which this Court has ruled should be resolved in one.

C. Granting the Preliminary Injunction Will Serve the Public Interest

The public has an overwhelming interest in the proper determination of a disposal site for the radioactive waste materials. Neither the state court nor the defendant, however, has the degree of expertise that is possessed by the federal agency authorized by Congress to evaluate all disposal options. Nor does the defendant have the ability -- or the incentive -- to achieve a permanent resolution of the disposition of the wastes, since such a resolution requires NRC approval.

As the Court of Appeals pointed out in Brown, unless the NRC's exclusive authority is protected, ultimate disposal may be stalled indefinitely as injunctions are sought against each new disposal site proposed. 767 F.2d at 1242. This result is inconsistent with the public interest in expeditious disposal of radioactive wastes. Moreover, because the State has thus far refused to suggest a specific alternative disposal site in the State of Illinois, defendant's action in relitigating this claim may lead to the very sort of interstate dispute that exclusive federal regulation is intended to prevent. See Rollins Environmental Services, Inc. v. Parish of St. James, No. 85-3092, slip op. (5th Cir. Nov. 1, 1985) (attached hereto as Exhibit I). Thus, an order to resolve this matter, once

and for all, in the forum to which Congress delegated national regulatory authority will ensure a single, binding decision that takes into account all appropriate health and safety factors for the nation as a whole.

D. The Balance of Hardships Weighs In Favor of Kerr-McGee

The defendant cannot contend that a preliminary injunction will work a greater hardship on the State than the denial of an injunction would work on Kerr-McGee. Kerr-McGee has outlined the irreparable injury it will suffer if the injunction is denied. The defendant, on the other hand, has affirmatively stated that maintenance of the materials on site poses no imminent danger to the public:

> [I]n response to the question about whether or not we need to move hastily or quickly, I don't see a sudden need to start moving quickly. The material has been sitting on the site, in essentially its present condition, at least for 10 or 11 years.

Statement of Ass't Att'y Gen'l Rapkin, NRC Transcript, at 30 (Feb. 2, 1984) (attached hereto as Exhibit J).*/ Indeed, the defendant made no attempt to have the material removed until the complaint was filed in 1980, and in the intervening years has sought no emergency relief. Now that the NRC has this

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*/ The State's own Director of the Department of Nuclear Safety has testified that the risk to public safety for the next five years is not enough to warrant action at this time by Kerr-McGee. Deposition of Terry Lash, State v. Kerr-McGee Chem. Corp., No. 80 CH 298, at 4, 92-94 (Oct. 10, 1985) (attached hereto as Exhibit K).

problem before it for consideration, there is no likelihood of harm to the defendant in the future.*/

## CONCLUSION

The danger of a state court ruling which would negate this Court's previous order in Brown and frustrate exclusive NRC jurisdiction can be avoided only by an order prohibiting the defendant from pursuing a claim for injunctive relief. Since Kerr-McGee has made the requisite showing for the grant of a preliminary injunction, the defendant should be enjoined immediately.

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Kerr-McGee Chemical Corporation

OF COUNSEL:

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Dated: December 3, 1985

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*/ The NRC itself has confirmed that action taken by Kerr-McGee to date has eliminated the threat of injury or health risk from the materials in question, either at present or in the near future. See Affidavit of Merri Horn, NRC Environmental Engineer, with attachments (attached hereto as Exhibit L).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONADL E. BROWN; EDITH R. BROWN;
EDWIN E. BROWN; BETTY WOLSFELD;
and WEST CHICAGO STATE BANK,
as Trustee u/t/a 213,
dated September 16, 1969,

Plaintiffs,

v.

KERR-McGEE CHEMICAL CORPORATION,
a Delaware corporation,

Defendant.

No. 82 C 6323

MEMORANDUM OPINION AND ORDER

This action involves a forty-three acre site owned by the defendant, Kerr-McGee Chemical Corporation ("Kerr-McGee") which is located in West Chicago, Illinois. That site consists of eight acres containing factory and other buildings, twenty-seven acres used for waste disposal, and eight acres which separate the factory and disposal areas. Since 1956, the site has been licensed by the Nuclear Regulatory Commission ("NRC") and its predecessor, the Atomic Energy Commission, to mill a radioactive element called thorium ore. The defendant, Kerr-McGee, ceased these operations in 1973 and the site is currently in the process of being decommissioned. Decommissioning requires that the facility and site be decontaminated and the wastes collected and stabilized at some location. An amendment to Kerr-McGee's license is required before these decommissioning activities can occur.

Pursuant to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq., the NRC has prepared draft and final Environmental Impact Statements ("EIS") relative to the decommissioning of the Kerr-McGee site. The final EIS is a 270-page document which examines various alternatives for decommissioning the site and recommends a preferred course of action. Specifically, it recommends that the wastes at Kerr-McGee's West Chicago site be encapsulated and stored on the site for an indeterminate period. That recommendation is currently being challenged in proceedings before the NRC by the State of Illinois and the West Chicago Chamber of Commerce.

The plaintiffs in this action are owners of a piece of property located in West Chicago which is adjacent to the Kerr-McGee site. They have brought this action against Kerr-McGee based on a variety of state law tort theories. Specifically, plaintiffs allege that the Kerr-McGee site is presently in such a state of disrepair that it constitutes a public and private nuisance and that the conditions on the site violate a variety of state statutes and municipal ordinances. Plaintiffs seek a mandatory injunction ordering Kerr-McGee to accomplish removal of the pollutants and other hazardous materials on the site and to transfer them to some other location for storage. Plaintiffs also seek an injunction requiring Kerr-McGee to clean up the site and repair all deteriorating structures. In addition, plaintiffs request compensatory and punitive damages.

Kerr-McGee has now moved to dismiss that portion of plaintiffs' complaint which seeks an injunction requiring Kerr-McGee to remove the wastes from the West Chicago site and dispose of them at some other location. Kerr-McGee contends that the exclusive authority to regulate the possession, production, and disposal of radioactive materials is vested in the NRC by the Atomic Energy Act. Thus, Kerr-McGee argues that disposal of the wastes is not subject to state or local control either through legislative action or through state common law nuisance doctrine. It contends that because the injunctive relief sought by plaintiffs invades an area within the exclusive control of the NRC, it is preempted by federal law.

The court agrees with defendant that plaintiffs' claim for injunctive relief concerning the manner in which the wastes at the Kerr-McGee site are disposed of is barred by the doctrine of federal preemption. It is well established that Congress may, either expressly or impliedly, preempt a state's authority to act in a given area. In general, absent explicit preemptive language, congressional intent to supercede state law may be implied from the existence of a pervasive scheme of federal regulation or where there is an actual conflict between state and federal law. Pacific Gas & Electric v. State Energy Resources Conservation & Development, ____U.S.____, 103 S.Ct. 1713, 1722 (1983). The preemptive effect of federal law has been held to extend to state common law doctrines as well as state legislative or administrative

schemes. See Commonwealth of Pennsylvania v. General Public Utilities Corp., 710 F.2d 117 (3d Cir. 1983).

At issue in this case is the extent to which the Atomic Energy Act, 42 U.S.C. §§2021 et seq., preempts the state common law remedy sought by plaintiffs. In Illinois v. Kerr-McGee, 677 F.2d 571 (7th Cir. 1982), the Seventh Circuit recently considered the preemptive effect of the Atomic Energy Act in a similar context. There, the court studied the legislative history of the Act as well as the administrative regulations issued by the NRC and concluded that, although states may regulate non-radiation hazards, the NRC possesses "exclusive authority to regulate radiation hazards associates with materials and activities covered by the Atomic Energy Act." Id. at 581. Thus, it held that the Act expressly and impliedly preempts state regulation of the hazards associated with nuclear materials.

In this case, it is clear that the injunctive relief sought by plaintiffs will interfere with the NRC's exclusive authority over the disposal of the radioactive wastes at the Kerr-McGee site. Plaintiffs ask that this court order Kerr-McGee to dispose of the wastes at the West Chicago site at some "safe and distant location." Plaintiffs do not contest that these wastes contain radioactive materials.[1] As discussed above, the NRC is currently

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1. In this respect, this case differs from Illinois v. Kerr-McGee, 677 F.2d 571 (7th Cir. 1982). There, the court found that the injunctive relief sought by plaintiffs did not involve radioactive materials.

in the process of developing a plan for disposal of these wastes in the licensing proceedings before it. The NRC has already conducted studies into the impacts of various disposal plans and has recommended that the wastes be encapsulated and stored at the West Chicago site. Plaintiffs admittedly seek to preclude implementation of this plan. Clearly, an order of this court requiring that the wastes be disposed of at some other location and precluding on-site encapsulation would conflict with the NRC's exclusive authority over the disposal of these radioactive materials. Thus, the court holds that the plaintiffs' claim for this form of injunctive relief is preempted by federal law, which law places this controversy in a forum other than this court.

The court notes that it is significant that there are administrative procedures for challenging the NRC's recommendation regarding the disposal of the wastes at the West Chicago site. The NRC's recommendation of encapsulation and on-site storage is currently being challenged in the licensing proceedings before the NRC by the State of Illinois and the West Chicago Chamber of Commerce. Thus, it is likely that plaintiffs' interests in this regard are already being adequately protected.

The court's decision in this case is consistent with the Supreme Court's most recent decisionsregarding the preemptive effect of federal law in the field of nuclear energy. In Pacific Gas & Electric v. State Energy Resources Conservation & Development, ____U.S.____, 103 S.Ct. 1713, 1726 (1983), the Supreme

Court held that the federal government maintains complete control of the safety and nuclear aspects of energy generation while the states retain traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making and the like. In essence, Pacific Gas establishes that federal preemption in the field of safety regulation is complete. In this case, regulation of the manner in which radioactive wastes are disposed of at the Kerr-McGee site is clearly within the field of safety regulation.

The court rejects the contention that the United States Supreme Court's recent decision in Silkwood v. Kerr-McGee, ____U.S.____, 104 S.Ct. 615 (1984) supports plaintiffs' position that there is no preemption in this case. In Silkwood, the Court held that federal law did not preempt the compensatory and punitive damage claims of an individual injured as a result of exposure to radiation at a federally licensed nuclear facility. That case did not deal with preemption in the context of a state law claim for injunctive relief which directly conflicts with the NRC's authority over the regulation of the disposal of nuclear wastes. Defendant here has not challenged plaintiffs' damage claims.

In sum, the court holds that plaintiffs' claim for injunctive relief regarding the disposal of the materials at the Kerr-McGee site is preempted by federal law, which law places the controversy within the jurisdiction of the Nuclear Regulatory Commission. Thus, defendant's motion to dismiss this aspect of

plaintiffs' complaint is granted.

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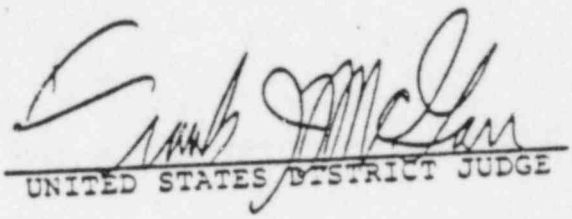

UNITED STATES DISTRICT JUDGE

DATED: February 13, 1984

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable FRANK J. McGARR

Date 2/13/84

Cause No. 82 C 6323

Title of Cause DONALD E. BROWN, et al. v. KERR-McGEE CHEMICAL CORPORATION, etc.

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent

Reserve space below for notations by minute clerk

Pursuant to memorandum opinion and order entered this day, defendant's motion to dismiss that portion of plaintiffs' claim which requests injunctive relief regarding the disposal of the materials at the Kerr-McGee site, is granted.--DRAFT

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

rights actions. *See City of Newport v. Fact Concerts*, 453 U.S. 247 (1981); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1270 (7th Cir.1984).[12] The district court might have meant "CTA" to refer to all of the defendants in the action. If this were true, however, the finding is conclusory: it is devoid of subsidiary findings that would establish the requisite state of mind for each of the individuals.

Our discussion of this point is academic, however. CTA does not appeal from a final judgment; the issue of damages remains to be litigated. *See Western Geophysical Company of America, Inc. v. Bolt Associates, Inc.*, 463 F.2d 101 (2d Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 523, 34 L.Ed.2d 489 (1972) (judgment determining liability but not fixing damages not final under 28 U.S.C. § 1291). Our jurisdiction over this appeal is based on 28 U.S.C. § 1292(a)(1), which authorizes immediate appeal from orders granting or denying injunctions. The challenged finding has nothing to do with the issue of the appropriateness of the injunctive relief ordered by the district court; it goes only to the issue of damages. While lack of jurisdiction does not bar us from considering questions going only to the issue of damages, *see* 9 J. Moore, Moore's Federal Practice ¶ 110.25[1] (1985), we have previously noted the "strong judicial policy ... against allowing piecemeal appeals through the review" of otherwise unappealable questions in the course of reviewing substantively unrelated interlocutory appeals. *Alexander v. Chicago Park District*, 709 F.2d 463, 470 (7th Cir.1983); *see also Helene Curtis Industries, Inc. v. Church and Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir.1977), *cert. denied*, 434 U.S. 1070, 98 S.Ct. 1252, 55 L.Ed.2d 772 (1978). CTA will be able to obtain review of the district court's findings and conclusions as they relate to damages after a final judgment is entered in the case. Thus we decline to consider questions relating to damages at this point.

V.

For the reasons expressed above, the order of the district court is affirmed.

AFFIRMED.

**Donald E. BROWN; Edith R. Brown; Edwin E. Brown; Betty Wolsfeld; and West Chicago State Bank, as Trustee u/t/a 213, dated September 16, 1969, Plaintiffs-Appellants,**

**v.**

**KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation, Defendant-Appellee.**

**No. 84-1294.**

United States Court of Appeals, Seventh Circuit.

Argued Nov. 9, 1984.

Decided July 18, 1985.

Adjacent property owners brought action requesting state law injunction ordering facility owner to remove toxic wastes. The United States District Court for the Northern District of Illinois, Frank J. McGarr, Chief Judge, granted partial summary judgment in favor of defendants on count seeking an injunction against facility owner. On appeal, the Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) Court of Appeals had jurisdiction over the interlocutory order; (2) plaintiffs' failure to seek preliminary injunction did not preclude finding that serious or irreparable harm would result pending district court's final decision; (3) when radiation

12. However, a local government entity's "immunity from damages, including liability for punitive damages, may be waived by federal or state law." *Bell*, 746 F.2d at 1271. *See Kolar v. County of Sangamon*, 756 F.2d 564, 567 (7th Cir.1985) (finding immunity of Illinois county waived by statute).

and nonradiation hazards are inseparable, federal law under the Atomic Energy Act preempts a state-law injunction ordering removal of the wastes; and (4) request for injunction was preempted by federal law.

Affirmed.

Cudahy, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Federal Courts ⇐573

An order having practical effect of denying an injunction is considered a denial of an injunction for purposes of 28 U.S.C.A. § 1292(a)(1), which provides that appellate courts have jurisdiction of interlocutory district court orders granting, continuing, modifying, refusing or dissolving injunctions.

2. Health and Environment ⇐25.15(3.2)

By granting partial summary judgment in favor of facility owner on adjoining property owners' request that toxic wastes be moved elsewhere, district court denied plaintiffs part of the injunctive relief they sought; therefore, that order constituted a denial of an injunction giving Court of Appeals jurisdiction under 28 U.S.C.A. § 1292(a)(1), which provides for appellate court jurisdiction of interlocutory district court orders granting, continuing, modifying, refusing or dissolving injunctions.

3. Federal Courts ⇐573

While a party's failure to seek preliminary injunctive relief is a good indication that the status quo can be maintained until the ultimate conclusion of the litigation, it is not a conclusive bar to interlocutory appeal.

4. Health and Environment ⇐25.15(3.2)

Failure by adjoining property owners to request preliminary injunction in suit alleging that toxic wastes on facility owner's property had caused harm to their health and property did not preclude finding that interlocutory order granting partial summary judgment for facility owner on count seeking order that facility owner repair or destroy existing structures and remove all hazardous wastes to some other location would result in serious, perhaps irreparable, consequences that could be effectively challenged only by immediate appeal.

5. States ⇐4.12

When radiation and nonradiation hazards are inseparable, federal law under the Atomic Energy Act [42 U.S.C.A. § 2011 et seq.] preempts a state-law injunction ordering removal of the wastes. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.

6. States ⇐4.10

State law and state law remedies, are preempted if federal law so pervades a given field as to evidence a congressional intent to occupy that field.

7. States ⇐4.10

Even if Congress has not entirely displaced state law in a field, state law is still preempted if an actual conflict exists between state and federal law; such a conflict occurs when it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of full purposes and objectives of Congress.

8. States ⇐4.10

Notwithstanding federal regulation of radioactive materials, a private plaintiff may rely on state law to obtain injunctive relief from nonradiation hazards that do not involve radiation hazards.

9. States ⇐4.10

When Congress evidences an intent to occupy a given field, any state law if only within that field is preempted.

10. States ⇐4.12

Adjacent property owners' request for an injunction ordering facility owner to move toxic wastes elsewhere was preempted by federal law, notwithstanding that injunction would not have ordered the Nuclear Regulatory Commission to license a specific waste disposal site, as it would have prevented the NRC from choosing the site recommended by the NRC staff, and thus would have stood as an obstacle to the

accomplishment of the full purposes and objectives of federal regulation and radiation hazards. Atomic Energy Act of 1954, §§ 11(e)(2), 83, 84, as amended, 42 U.S.C.A. §§ 2014(e)(2), 2113, 2114.

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Walter P. Maksym, Jr., Botti Marinaccio & Maksym, Oak Brook, Ill., for plaintiffs-appellants.

John C. Berghoff, Jr., Chadwell & Kayser, Ltd., Chicago, Ill., for defendant-appellee.

Before WOOD and CUDAHY, Circuit Judges, and WISDOM, Senior Circuit Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

This case is yet another lawsuit concerning the approximately forty-three acres of land known as the Kerr-McGee West Chicago Rare Earths Facility. *See City of West Chicago v. United States Nuclear Regulatory Commission*, 701 F.2d 632 (7th Cir. 1983); *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982). This time we are asked to decide whether the Atomic Energy Act, as amended, 42 U.S.C. § 2011 *et seq.*, preempts a request for a state-law injunction to remove nonradioactive hazards when the nonradioactive and radioactive materials are inseparable. We hold that the federal law preempts plaintiffs' request that the district court order the defendant Kerr-McGee to move the waste material to another location.

## I.

The Kerr-McGee property in West Chicago consists of an eight acre factory site, a twenty-seven acre storage and disposal site, and an eight acre intermediate site connecting the other two. From 1932 to 1973, Kerr-McGee and its predecessor companies used the factory area to process monazite ores containing thorium, a natural radioactive element, and then disposed of the solid and liquid wastes in the storage area. Kerr-McGee stopped processing monazite ores in 1973, but continues, under license from the Nuclear Regulatory Commission ("NRC"), to possess and store thorium ores at the West Chicago site. Pursuant to a July 1977 order of the NRC, Kerr-McGee has submitted to the NRC a proposed plan for decommissioning the inactive West Chicago site and for disposing of the contaminated materials. On May 2, 1983, the NRC issued its Final Environmental Statement ("FES"), which outlined eight alternative proposals and recommended that the buildings be razed and the waste be encapsulated and stored on the site for an indeterminate time period. The Commission subsequently authorized the Atomic Safety Licensing Board ("ASLB") to hold a hearing on the FES—as requested by the Illinois Attorney General.

Plaintiffs-appellants Donald E. Brown, Edith R. Brown, and Betty Wolsfeld are the equitable and beneficial owners of two parcels of residential property whose back yards abut the Kerr-McGee site. Plaintiffs rent the 904 Joliet Street residence to Mr. and Mrs. R. Gill, and Donald Brown and his mother Edith reside at 914 Joliet Street.

Plaintiffs brought this action on a variety of state law tort theories. Plaintiffs allege that the buildings on the Kerr-McGee property are in such a state of disrepair as to constitute a public and private nuisance.[1] In addition, plaintiffs claim

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* The Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

1. The plaintiffs allege that the current conditions existing in the factory area include:
   a) open pits filled with refuse and chemicals;
   b) holes in floors two through four of building 9, averaging three feet in diameter;
   c) loose glass in windows;
   d) broken glass on pavement below windows;
   e) boards off windows;
   f) animal litter scattered throughout the buildings;
   g) fallen walls, debris, abandoned equipment and chemicals;
   h) fallen, collapsed, and sagging roofing; and
   i) scattered empty beer cans, bottles, and other litter.

that rats from the disposal site have entered the Browns' backyard and made numerous holes. The plaintiffs also allege that the wastes dumped in the storage area include hazardous chemicals such as barium sulfate, sodium phosphate, ammonia, ethylenediaminetetraacetic acid, sulfuric acid, and kerosene. According to plaintiffs, the liquid wastes deposited in ponds at the disposal site by Kerr-McGee and its predecessors have permeated the soil and polluted the water table. The water table is further polluted, plaintiffs allege, as rain and melting snow percolate through the mounds of solid waste and thereby become contaminated. Plaintiffs claim that the underground waters near the Kerr-McGee site exceed the water pollution standards set by the Illinois Pollution Control Board. Donald Brown also stated at his deposition that rain drains off the waste piles and into his yard.

Plaintiffs' complaint requested three types of relief. Count I sought an injunction ordering Kerr-McGee to repair or destroy the existing structures on the property and to remove all the hazardous wastes to some other location. Count II sought compensatory damages, and count III sought compensatory and punitive damages. Kerr-McGee, offering affidavits that all the wastes are radioactive and arguing that federal law preempts a state-law injunction, moved for dismissal of that part of count I requesting that the wastes be removed and stored at some other location. The district court agreed that federal law preempted such relief and granted partial summary judgment for defendant Kerr-McGee.[2] Plaintiffs appealed the summary judgment order to this court.

## II.

We first consider whether the district court order granting partial summary judgment for defendant on count I is appealable. The order is obviously not final, and the district court did not certify the issue under 28 U.S.C. § 1292(b). Appellants argue, however, that this court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the summary judgment had the practical effect of denying plaintiffs' request for permanent injunctive relief. We agree.

[1, 2] Section 1292(a)(1) provides that appellate courts have jurisdiction of interlocutory district court orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (1982). The plaintiffs never moved for an injunction, but an order having the practical effect of denying an injunction is considered a denial of an injunction for purposes of section 1292(a)(1). *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83–84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981); *Data Cash Systems, Inc. v. JS & A Group, Inc.*, 628 F.2d 1038, 1040 (7th Cir.1980). Here the plaintiffs' complaint sought injunctive relief in count I and damages in counts II and III. By granting partial summary judgment in favor of the defendant on plaintiffs' request that the wastes be moved elsewhere, the court denied the plaintiffs part of the injunctive relief they sought; thus the court's order constitutes a denial of an injunction for purposes of section 1292(a)(1). *See Plymouth County Nuclear Information Committee, Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir.1981).

Prior to the Supreme Court's decision in *Carson*, a finding that the summary judgment had the practical effect of denying an injunction would end our inquiry and we would take jurisdiction. *See Data Cash Systems, Inc.*, 628 F.2d at 1040; *cf. South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir.1984). *Carson*, however, requires

Plaintiffs further claim that the area is accessible to the "public in general and children in particular through and over fences," and has "inadequate security and lighting."

2. Although the defendant phrased its motion as one to dismiss part of the complaint, the defendant submitted a copy of the FES, two affidavits, and portions of deposition testimony in support of its motion. Since the district court relied on at least the FES, we treat the motion as one for summary judgment. Fed.R.Civ.P. 12(c).

more. In *Carson*, the Court held that an interlocutory order of a district court is immediately appealable under section 1292(a)(1) only if the appellant demonstrates that the order has a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 84, 101 S.Ct. at 996 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L.Ed. 233 (1955)). Although this two-part test seems straightforward, there is some disagreement—both among circuits and within this circuit—as to whether *Carson* applies when the interlocutory order addresses the merits of the claim.

In *Carson*, a discrimination case, the Supreme Court held that an appeal lay from a district court order denying a joint motion of the parties to approve and enter a negotiated consent decree. The Court decided that, because the order would cause the plaintiffs to lose both their right to settle the case and any job opportunities that might arise under the consent decree, the order had " 'serious, perhaps irreparable, consequences' that petitioners [could] 'effectually challenge' only by an immediate appeal." 450 U.S. at 90, 101 S.Ct. at 999.

*Carson* has raised some questions because, although the Supreme Court states that the "serious, perhaps irreparable, consequences" test is applicable to interlocutory judgments appealed under section 1292(a)(2), *id.* at 84, 101 S.Ct. at 996, the Court relies primarily on cases in which the interlocutory orders were not decisions on the merits of the appellants' claims. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978) (order denying class certification); *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24–25, 87 S.Ct. 193, 194–195, 17 L.Ed.2d 23 (1966) (appellants sought interlocutory review of district court's denial of appellants' motion for summary judgment); *Baltimore Contractors*, 348 U.S. at 177, 75 S.Ct. at 250 (district court order refusing to stay a state court accounting action pending arbitration). Consequently, several courts, including a panel of this circuit, have read *Carson* narrowly to apply only to interlocutory orders that did not reach the merits of appellants' claims or did not dispose of all requests for injunctive relief. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260–61 (7th Cir.1984); *Center for National Security Studies v. Central Intelligence Agency*, 711 F.2d 409, 412 (D.C.Cir.1983); *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 446–47 (3rd Cir.1981), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3508, 73 L.Ed.2d 1383 (1982). These courts rely on *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433, 53 S.Ct. 202, 203, 77 L.Ed. 408 (1932), for the rule that an interlocutory order disposing of all requests for injunctive relief and addressing the merits of the case is immediately appealable under section 1292(a)(1) and *Gardner* and *Carson* for the proposition that an order either not disposing of all requests for injunctive relief or not addressing the merits is immediately appealable only if the appellant shows a "serious, perhaps irreparable, consequence" that can be effectually challenged only by immediate appeal. *See Winterland Concessions*, 735 F.2d at 261 (citing *Gardner*, 437 U.S. at 481, 98 S.Ct. at 2453); *Center for National Security Studies*, 711 F.2d at 412-13 & n. 6; *see also Gardner*, 437 U.S. at 481 n. 7, 98 S.Ct. at 2453 n. 7 ("There is an important distinction between an order denying an injunction on the merits and 'one based on alleged abuse of a discretionary power over the scope of the action.' ") (quoting *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 825 (2nd Cir.1963) (Friendly, J., dissenting)).

Other courts, including a different panel of this circuit, have held that *Carson* prescribes a broad rule applicable to all appeals under section 1292(a)(1)—whether or not the district court addressed the merits of the appellant's claim. *See Carson*, 450 U.S. at 84, 101 S.Ct. at 996; *South Bend Consumers Club*, 742 F.2d at 393–94; *see also United States v. RMI Co.*, 661 F.2d 279, 281–82 (3rd Cir.1981); *Gould v. Control Laser Corp.*, 650 F.2d 617, 621 (5th Cir.1981). This

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Cir.1981). This position is supported by the Supreme Court's suggestion in *Carson* that each of the prior cases on appellate jurisdiction under section 1292(a)(1) could be explained in terms of the "serious, perhaps irreparable, consequences" requirement. *Carson*, 450 U.S. at 84–86, 101 S.Ct. at 996–997; *see Donovan v. Robbins*, 752 F.2d 1170, 1173–74 (7th Cir.1985). Indeed, the Court even suggested that *Marvel*, the case now used as the basis for the "merits" distinction, reflected a finding by the Court that "serious, perhaps irreparable, consequences" would have resulted without an immediate appeal. *Carson*, 450 U.S. at 86 n. 11, 101 S.Ct. at 997 n. 11; *see also Shirey v. Bensalem Township*, 663 F.2d 472, 477 (3rd Cir.1981).

We need not resolve these inconsistencies, however, because in the present case the two analyses yield the same result. The courts adopting the "addressing the merits" approach have held that an interlocutory order denying, on the merits, a request for an injunction is immediately appealable under section 1292(a)(1) only if the order disposes of all pending requests for injunctive relief. *See Winterland Concessions*, 735 F.2d at 261. If some requests for injunctive relief are still pending in the district court, the appellant must show that the interlocutory order will cause serious, perhaps irreparable, consequences that can be effectually challenged only by immediate appeal. *See Center for National Security Studies*, 711 F.2d at 413. In the present case, the district court granted summary judgment for the defendant with respect to plaintiffs' request for an injunction ordering the wastes removed to "some other safe and distant location," but the court did not decide whether plaintiffs are entitled to the other requested injunctive relief. Thus, even though the district court addressed the merits of plaintiffs' claim for an injunction ordering removal of the wastes, the *Winterland Concessions* approach would require plaintiffs to show that the interlocutory order will result in serious, perhaps irreparable, harm. Since, as we noted above, the *South Bend Consumers Club* approach requires a showing of serious, perhaps irreparable, consequences for any appeal under section 1292(a)(1), *see* 742 F.2d at 393–94, in this case both interpretations of *Carson* will yield the same result.

In the present case, the depositions and the Final Environmental Impact Statement support plaintiffs' contention that toxic wastes at the Kerr-McGee site have contaminated their land. Plaintiffs-appellants further claim that such contamination has adversely affected their health. Since in reviewing a summary judgment we view all pleadings and supporting papers in the light most favorable to the non-moving party, *see Trulson v. Trane Co.*, 738 F.2d 770, 771 (7th Cir.1984), we assume that detrimental health effects will result between now and the district court's final decision. *Cf. RMI Co.*, 661 F.2d at 282 (no continuing harm during trial). Furthermore, according to plaintiffs, every rainfall or melting snow flushes more of the toxic wastes into their water supply. These effects, because they are more than compensable economic losses, *cf. South Bend Consumer Club*, 742 F.2d at 394, are serious, perhaps irreparable, consequences that plaintiffs can effectually challenge only by immediate appeal.[1] *See Carson*, 450 U.S. at 86–90, 101 S.Ct. at 997–999 (lost job opportunities constitute serious, perhaps irreparable, harm).

[3] Citing *Plymouth County Nuclear Information Committee, Inc.*, 655 F.2d at 18, defendant Kerr-McGee argues that plaintiffs' failure to seek a preliminary in-

1. Although *Carson* requires both that the order cause "serious, perhaps irreparable, consequences" and that the order can be "effectually challenged" only by immediate appeal, the Supreme Court found the second prong satisfied in *Carson* because the serious, irreparable consequences could result between the time of the interlocutory order and the district court's final decision. Because the irreparable effects could result between the summary judgment and the appeal from the final judgment in the present case, an appeal from the final judgment may not provide plaintiffs adequate relief from the intervening harm. Thus the order can be effectually challenged only by immediate appeal.

junction precludes a finding that serious or irreparable harm will result pending the district court's final decision. We agree that a party's failure to seek preliminary injunctive relief is a good indication that the status quo can be maintained until the ultimate conclusion of the litigation. *See South Bend Consumers Club*, 742 F.2d at 394. But "a good indication" is not a conclusive bar to interlocutory appeal. *See Kartell v. Blue Shield of Massachusetts, Inc.*, 687 F.2d 543, 553 n. 21 (1st Cir.1982). In *Plymouth County*, the plaintiff waited nearly a year and a half between the denial of its motion for a preliminary injunction and its appeal of the dismissal of that part of the complaint requesting injunctive relief. 655 F.2d at 17–18. In *South Bend Consumers Club*, the appellant delayed requesting a preliminary injunction. 742 F.2d at 394. Thus in both cases the parties' actions implied that no serious harm would occur without a preliminary injunction.

[4] The present case differs in that here preliminary injunctive relief was impractical. Plaintiffs claim that the toxic wastes on Kerr-McGee's property have caused, and continue to cause, serious, perhaps irreparable, harm to plaintiffs' health and to their property. If Kerr-McGee were still creating and dumping toxic wastes on the site, plaintiffs could request a preliminary injunction enjoining Kerr-McGee from further dumping. But plaintiffs admit that Kerr-McGee has not operated the factory since 1973, and it would be irrational for a district court to enter a *preliminary* injunction ordering Kerr-McGee to remove all toxic wastes from the West Chicago site. *See Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1360 (2nd Cir.1976) (purpose of a preliminary injunction is to maintain the status quo, not to give the moving party affirmative relief equivalent to the ultimate relief sought). Consequently, in the unusual circumstances of this case, we believe that plaintiffs' failure to request preliminary injunctive relief does not preclude a finding that the district court order will result in serious, perhaps irreparable, consequences that can be effectually challenged only by immediate appeal. We believe that appellants have met their burden to prove such consequences and we therefore find the order appealable under section 1292(a)(1).

## III.

[5] The district court held that plaintiffs' request for an injunction ordering that the wastes be removed and stored elsewhere was preempted because such an order would conflict with the Commission's exclusive authority over the disposal of radioactive materials. Plaintiffs and amicus State of Illinois, relying on *Illinois v. Kerr-McGee* and 42 U.S.C. § 2021(k), argue that federal law preempts state regulation of *radiation hazards* but not state regulation of *nonradiation hazards*. Furthermore, appellants argue, since Illinois law permits a court to order exhumation of hazardous wastes, *see Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 31–36, 55 Ill.Dec. 499, 514–16, 426 N.E.2d 824, 839–41 (1981), the district court can find that the nonradiation hazards of the Kerr-McGee wastes justify the removal of the wastes to another site. We disagree, however, and hold that when the radiation and nonradiation hazards are inseparable, federal law preempts a state-law injunction ordering removal of the wastes.

[6, 7] State law, and thus state law remedies, are preempted if federal law so pervades a given field as to evidence a congressional intent to occupy that field. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). Even if Congress has not entirely displaced state law in a field, state law is still preempted if an "actual conflict" exists between state and federal law. *Id.* Such a conflict occurs "when it is impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.*

[8] When a state regulation concerns an activity involving radioactive materials, the preemption issue normally turns on

whether the state is regulating radiation or nonradiation hazards. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149–54 (8th Cir.1971) (radiation hazards), *aff'd* 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972); *Marshall v. Consumers Power Co.*, 65 Mich.App. 237, 247, 237 N.W.2d 266 (1976) (nonradiation hazards). This distinction is reflected by the language of section 274(k) of the Atomic Energy Act ("AEA"), which states:

> (k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k) (1982).[4] Thus the AEA preempts a state attempt to impose more stringent limitations on the radioactive effluents of a nuclear power plant. *See Northern States Power*, 447 F.2d at 1147–50. By contrast, states retain the power to determine the need for additional electrical capacity and they may choose not to build a nuclear power plant for economic reasons. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205–06, 103 S.Ct. 1713, 1722–24, 75 L.Ed.2d 752 (1983). Analogously, a private plaintiff may rely on state law to obtain injunctive relief from nonradiation hazards that do not involve radiation hazards. *Illinois v. Kerr-McGee*, 677 F.2d at 582.

If the nonradiation hazards at the Kerr-McGee site were separable from the radiation hazards, plaintiffs could maintain an action to have the nonradioactive wastes removed "to some other safe and distant location." *See Village of Wilsonville*, 86 Ill.2d at 35–36, 55 Ill.Dec. at 516, 426 N.E.2d at 841. Congress clearly did not intend federal law to "occupy the field" of nonradioactive hazardous waste disposal. *See* 42 U.S.C. § 6929 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620–21 n. 4, 98 S.Ct. 2531, 2533–34 n. 4, 57 L.Ed.2d 745 (1978). Furthermore, because the plaintiffs seek to abate the nonradiation rather than the radiation hazards, removal of separable, nonradioactive material would not cause a conflict between state and federal law. *See Illinois v. Kerr-McGee*, 677 F.2d at 582. Our analysis is made somewhat more complex because, as both parties agree, the radioactive and nonradioactive materials are "inextricably intermixed."

[9, 10] In this case, we find no explicit congressional intent or pervasive federal scheme that preempts the state laws relied on by plaintiffs. When Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. *Silkwood*, 104 S.Ct. at 621. Thus the AEA, which provides a pervasive scheme for regulating radioactive materials, preempts any state regulation of radiation hazards.[5] *Northern States Power Co.*, 447 F.2d at 1147–50. But while an Illinois law regulating radiation hazards would be void, *see Commonwealth Edison Co. v. Pollution Control Board*, 5 Ill.App.3d 800, 801, 284 N.E.2d 342, 342 (1972), the laws relied on by plaintiffs are undoubtedly valid in some circumstances. These laws do not regulate radiation hazards but instead concern pollution standards, building codes, and public nuisance. Indeed, as we held in *Illinois v. Kerr-McGee*, plaintiffs can bring an action based on these laws against Kerr-McGee as long as the remedy involves no radioactive materials. 677 F.2d at 582.

Nonetheless, plaintiffs' request for injunctive relief is still preempted if a conflict exists between state and federal law. To determine whether a conflict exists, we

4. Although this provision applies only to the preemptive effect of section 274, the Supreme Court has interpreted section 274(k) as a reflection of the general distinction between federal and state authority to regulate activities covered by the Atomic Energy Act, as amended. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 210, 103 S.Ct. 1713, 1725, 75 L.Ed.2d 752 (1983).

5. States may assume responsibility for the regulation of some radiation hazards by entering an agreement with the NRC. 42 U.S.C. § 2021(b). This provision is not applicable here, however, since Illinois has not entered such an agreement.

must look to the facts of the case. *Illinois v. Kerr-McGee*, 677 F.2d at 581. The wastes at the West Chicago site, because they consist of "the tailings or wastes produced by the extraction or concentration of ... thorium from any ore processed primarily for its source material content," constitute "byproduct material" under the Atomic Energy Act, as amended by the Uranium Mill Tailings Radiation Control Act. 42 U.S.C. § 2014(e)(2); *see* FES, at H–4, H–5 ("[A]t least 60% of the monazite ore was processed primarily for its source material content and the resulting tailings and wastes are clearly byproduct material."). The NRC has exclusive authority to regulate the radiation hazards of the byproduct material[6] and Kerr-McGee must obtain a license from the NRC for decommissioning the West Chicago site and disposing of the wastes. *See* 42 U.S.C. § 2113–14.

Plaintiffs asked the district court to order Kerr-McGee to remove the wastes to "some other safe and distant location." Plaintiffs and amicus argue that the inseparability of the materials should not alter the analysis of *Illinois v. Kerr-McGee*; they suggest that the district court can find that the nonradiation hazards violate Illinois pollution laws and can order Kerr-McGee to move the wastes to some site that both satisfies Illinois pollution standards and meets the licensing standards of the Nuclear Regulatory Commission. This argument reads *Illinois v. Kerr-McGee* too broadly. In that case, we held only that, with respect to the nonradiation hazards, the City of West Chicago could "pursue its own remedies only to the extent that they do not conflict with NRC regulation of radiation hazards." 677 F.2d at 584.

In the Final Environmental Statement for the Kerr-McGee site, the NRC staff analyzed eight different disposal alternatives and recommended on-site encapsulation as the best alternative. Although the Commission has not yet decided which alternative to license, an injunction ordering Kerr-McGee to remove the byproduct material from the West Chicago site would, in effect, substitute the judgment of the district court for that of the NRC as to whether on-site encapsulation is the best method of storing this byproduct material. True, the injunction sought by plaintiffs would not order the NRC to license a specific waste disposal site, but it would prevent the NRC from choosing the site recommended by the NRC staff. Furthermore, if federal law does not preempt plaintiffs' request for an injunction, nothing prevents neighbors of other prospective sites from relying on state law to obtain injunctions preventing NRC consideration of those locations. Such state law remedies, though not attempts to regulate the *radiation* hazards of byproduct material, nonetheless interfere with the NRC's ability to choose the method of disposal that, in light of radiation, nonradiation, and economic considerations, is the most appropriate. We therefore hold that plaintiffs' request for an injunction ordering the Kerr-McGee wastes moved elsewhere is preempted because, if granted, the injunction would stand "as an obstacle to the accomplishment of the full purposes and objectives" of federal regulation of radiation hazards. *Silkwood*, 104 S.Ct. at 621.

Our holding does not leave plaintiffs without a remedy. *Cf. Silkwood*, 104 S.Ct. at 623; *Illinois v. Kerr-McGee*, 677 F.2d at 583. Congress instructed the NRC to ensure "that the management of any byproduct material ... is carried out in such a manner as ... the Commission deems appropriate to protect the public health and safety and the environment from *radiological* and *nonradiological* hazards" associated with the possession of byproduct material. 42 U.S.C. § 2114(a)(1) (emphasis added); *see also* 42 U.S.C. § 2114(c) (licensee may propose alternatives to Commission's requirements, but Commission may accept alternatives only if they will achieve an equivalent or greater level of safety). The Commission must also ensure that the

6. As noted above, Illinois has not entered an agreement with the NRC to regulate the radiation hazards of byproduct material. *See* 42 U.S.C. § 2021(b).

approved disposal plan conforms with the standards set by the Environmental Protection Agency for the protection of the public health and the environment from the radiation and nonradiation hazards associated with the disposal of byproduct material. *See* 42 U.S.C. § 2114(a)(2); *see also* 42 U.S.C. § 2022(b)(1); Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings, 40 C.F.R. §§ 192.40–42 (1984). In the present case, the NRC staff has evaluated the radiation and nonradiation hazards of the eight alternatives, weighed these hazards against the costs of the alternatives, and recommended on-site encapsulation of the wastes. At the hearing on the FES, the plaintiffs may try to convince the NRC that, for reasons related to either *radiation* of *nonradiation* hazards, the West Chicago site is unfit for storing the byproduct material. If plaintiffs decide that participating in the upcoming hearing is too expensive, they can rely on the State of Illinois and the City of West Chicago, who will participate, to represent their interests.

For the foregoing reasons, plaintiffs' request for injunctive relief ordering Kerr-McGee to remove the mill tailings and other wastes to "some other safe and distant location" is preempted by federal law.[7] The order of the district court is

AFFIRMED.

7. In his dissent, Judge Cudahy suggests that our holding cannot be valid after *Silkwood*. The *Silkwood* decision was based on legislative history that revealed a congressional intent to allow plaintiffs to recover damages for injuries caused by nuclear hazards. 104 S.Ct. at 622–25. Even in allowing the recovery of punitive damages, however, the Supreme Court suggested that federal law would preempt a state law damage award if the award caused an irreconcilable conflict between state and federal standards or if the imposition of a state standard would frustrate the objectives of the federal law. *Id.* at 626. Here, although the request is based on state regulation of nonradioactive hazards, an injunction ordering the wastes moved to some other location frustrates the objectives of federal law by preventing the NRC from choosing what may be the most appropriate method of storing this radioactive material. Therefore the request for an injunction is preempted.

In addition, Judge Cudahy's second footnote suggests that he may have read our holding too broadly. This appeal concerns only the plaintiffs' request for an injunction ordering the removal of the radioactive material from the West Chicago site. The plaintiffs may be able to obtain injunctive relief that does not require the removal of radioactive materials (*e.g.*, erection of fences to prevent entry, extermination of rats). Moreover, once the NRC licenses a site, the state may regulate the nonradiation hazards so long as that regulation does not create an irreconcilable conflict or frustrate the objectives of the federal law. But neither of these issues has been tried or is before us. For today we hold only that federal law preempts a nonagreement state, *see supra* notes 5–6, or a plaintiff relying on state law from obtaining an injunction ordering the removal of radioactive wastes to some other site.

CUDAHY, Circuit Judge, concurring in part and dissenting in part.

I agree with the analysis of the majority in section II of its opinion, in which it reasons that the district court order granting summary judgment on that portion of the complaint which seeks an injunction requiring Kerr-McGee to remove wastes from the West Chicago site is appealable, and that therefore this court has jurisdiction.

However, the majority finds preemption much too easily in section III. We are faced here with a situation in which legitimate concerns of the states and local residents may be ignored by the Nuclear Regulatory Commission. In this whole field Congress has been very reluctant to override state prerogatives. I do not think the courts should crash through the tangled thicket of waste disposal, and in the process upset the balance achieved by Congress between state and federal law.[1]

It is important, I believe, to begin by recognizing that this is not an action to force reduction in levels of radiological hazards as such. As the majority recognizes, the plaintiffs' action is based on state law concerning pollution standards, building codes and public nuisances. The majority also concedes that none of these fields of

1. Whether Congress's reluctance to preempt is sound public policy for the long run is not for us to decide. It is abundantly clear to me, however, that Congress has been reluctant.

state regulation are preempted by the Atomic Energy Act. Further, since the suit is based on these grounds, I think *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), and *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), not to mention this court's recent decision in *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982), are more apposite than *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir.1971), *summarily aff'd*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972). Indeed, it seems to me that *Silkwood* requires that we find no preemption here.

It is also important that we recognize, as the district court apparently did not, the nature of the proceedings presently pending before the NRC. *See generally* Kerr-McGee App. 22–32. Kerr-McGee is required to seek amendment of the license under which it operates the West Chicago site. It is presently asking the *permission* of the NRC to undertake its preferred course of disposal of the wastes in question, on-site encapsulation. Even if the NRC approves that application, it will only be permission for Kerr-McGee to so dispose of the wastes. Kerr-McGee will not be *required* to do so, and there appears to be nothing other than Kerr-McGee's economic interest which prevents it from applying to the NRC for permission to dispose of the wastes in a manner which complies with both federal *and* state law.

There is little doubt that state regulation of the radiation hazards associated with nuclear power generation is preempted by federal regulation, *Northern States Power*, 447 F.2d 1143, because "the Federal Government has occupied the entire field of nuclear safety concerns," *Pacific Gas & Electric*, 461 U.S. at 212, 103 S.Ct. at 1726, *see Silkwood*, 104 S.Ct. at 617. *Cf. Pacific Gas & Electric*, 461 U.S. at 205, 103 S.Ct. at 1722 (state regulation of "radiological safety aspects involved in the construction and operation of a nuclear plant" is preempted); *id.* at 223–29, 103 S.Ct. at 1732–35 (Blackmun, J. concurring) (state safety regulation not wholly preempted). However, Congress intended to preempt only the regulation of radiological hazards. *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 923 (9th Cir.1981), *aff'd sub nom. Pacific Gas & Electric*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Northern States Power*, 447 F.2d at 1149–50. *See also Pacific Legal Foundation*, 659 F.2d at 923 n. 32 (collecting cases holding same). "[T]he States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, *land use*, ratemaking, and the like." *Pacific Gas & Electric*, 461 U.S. at 212, 103 S.Ct. at 1726 (emphasis supplied; footnote omitted). This is in accord with the language of section 274(k) of the Atomic Energy Act, which permits the states "to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). *See Pacific Gas & Electric*, 461 U.S. at 210, 103 S.Ct. at 1725.

The purpose of the state regulation is critical in determining whether the regulation is preempted. *Pacific Gas & Electric*, 461 U.S. at 213–16, 103 S.Ct. at 1727–28; *Silkwood*, 104 S.Ct. at 631 (Blackmun, J. dissenting). There is no claim here that the purpose of Illinois' nuisance law, building codes and pollution standards is to regulate the radiological hazards or nuclear safety aspects of nuclear fuel processing. Therefore these are not preempted by the Atomic Energy Act and the subsequent federal regulation. *Pacific Gas & Electric*, 461 U.S. at 216, 103 S.Ct. at 1728 ("[W]e accept California's avowed economic purpose as the rationale for enacting § 25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation." (footnote omitted)). The fact that enforcement of these state laws may impact on how Kerr-McGee carries out its business at the West Chicago site is not conclusive that they are preempted. Indeed, the Supreme Court has twice in the

past two terms allowed state regulation which has directly impacted on aspects of the nuclear industry that are regulated by the federal government.

In *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the Court held that a California statute which prohibited the construction of any nuclear generating plants until a method for disposal of radioactive wastes was approved by the NRC was not preempted. The statute was based on the supposed possible economic unviability of nuclear generation of electricity unless such a disposal method was developed. Although the statute was based on economic considerations, which have long been regulated by the states, the statute gave the state an effective veto over the construction of any nuclear generating stations within its borders until certain safety issues were dealt with by the federal government. Since the purpose of the state statute was economic not radiation safety, it was not preempted, 461 U.S. at 216, 103 S.Ct. at 1728, even though it had an effect on the radiation hazards to which the people of California were exposed.

Just last year the court went even further when it decided *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). In *Silkwood* the Court upheld a state-authorized award of punitive damages for injuries caused by nuclear hazards even though the NRC was vested with exclusive regulatory authority over the safety aspects of nuclear development and there had been no significant violation of the federal safety standards. 104 S.Ct. at 619, 626. Punitive damage awards have a clear impact on federal safety standards, for in effect they set independent state safety standards. *See Silkwood*, 104 S.Ct. at 628–30 (Blackmun, J. dissenting); *id.* at 635 (Powell, J. dissenting). Yet the Court held that the award of punitive damages was not preempted. If punitive damages for violating a jury-imposed standard of radiological safety are not barred, then clearly injunctive relief based on state laws not having as their purpose the imposition of radiological safety standards cannot be preempted.

The majority makes much of the fact that the radioactive and nonradioactive materials are "inextricably intermixed," arguing that because of this inseparability state regulation of the nonradioactive materials is preempted by federal regulation of the radiological safety aspects of the radioactive material. While this argument might have some plausibility as an initial matter, it cannot be valid after *Silkwood*. Karen Silkwood was contaminated with plutonium from a Kerr-McGee processing plant. As the majority surely knows, plutonium is itself a radioactive material. The punitive damages awarded by the jury were to penalize the company for its conduct which allowed the release of this very material. On the majority's theory, these punitive damages are preempted, for if material *is* radioactive, then any nonradioactive aspects are "inextricably intermixed" with its radioactive aspects. Yet the Supreme Court held that the punitive damages were not preempted by the NRC's regulation of the safety aspects of the production of plutonium. *A fortiori* state regulation for otherwise permissible purposes of material that is not radioactive cannot be preempted even when the material is "inextricably intermixed" with radioactive material.

The majority notes that the NRC is currently considering a number of alternative sites for disposing of the wastes presently at the West Chicago site. The majority then speculates that individuals residing adjacent to these other sites or state authorities *might* bring injunctive actions similar to this one, and jumps to the conclusion that therefore *this* action is preempted. This approach is simply inadmissible. The majority is correct to be aware of the *possibility* of this conflict, in which the several states bar each of the options approved or considered by the NRC. But so far this conflict is possible, not actual, and it is sheer speculation to conclude that it will ever transpire. Currently there is no conflict between the federal and state schemes because it is not "physically im-

possible" for Kerr-McGee to comply with both. *Silkwood*, 104 S.Ct. at 626; *Pacific Gas & Electric*, 461 U.S. at 204, 103 S.Ct. at 1722; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S.Ct. 1210, 1217–18, 10 L.Ed.2d 248 (1963). A court should not delve into hypothetical situations seeking out conflicts where none clearly exist. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130–31, 98 S.Ct. 2207, 2216, 57 L.Ed.2d 91 (1978); *see Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960).

This court has recognized these very principles in *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982). In that case we stated that there must be "a direct conflict between federal and state law that *cannot* be reconciled. Courts are not to seek out conflicts *where none necessarily exist*...." 677 F.2d at 579 (citations omitted: emphasis supplied). With all respect, it seems to me that the majority is seeking out a conflict where one does not necessarily exist in order to bolster its shaky argument for preemption. All Kerr-McGee need do in order to preclude any conflict is to request NRC permission for a disposal alternative which satisfies state law. Further, the hypothetical conflict postulated by the majority is one in which the state law might prohibit something the NRC would merely permit. "This sort of hypothetical conflict is not sufficient to warrant pre-emption." *Exxon Corp.*, 437 U.S. at 131, 98 S.Ct. at 2216. *See Pacific Gas & Electric*, 461 U.S. at 218–19, 103 S.Ct. at 1729–30 ("Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and § 25524.2 [the state statute] is possible."). I therefore conclude that the injunctive relief requested by plaintiffs is not preempted.

However, it does not follow from the fact that the requested injunctive relief is not preempted that it would be proper to grant that relief at this time. I believe that this is an apt and proper case for application of the doctrine of primary jurisdiction. The question underlying the plaintiffs' request for injunctive relief—whether the mill tailings material should be disposed of at the West Chicago site or elsewhere—is presently pending in the NRC administrative proceeding. The State of Illinois is one of the parties to that proceeding and has advanced the same position asserted by plaintiffs here. There is no contention that the state has not been adequately representing the plaintiffs' interests.

Primary jurisdiction is a common law doctrine dating back at least to *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). Primary jurisdiction

> applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

*United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956). The Supreme Court has explained the reasoning underlying primary jurisdiction as follows:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight

gained through experience, and by more flexible procedure.

*Far East Conference v. United States*, 342 U.S. 570, 574–75, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1952). *See also Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943, 949 (7th Cir.1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 797, 50 L.Ed.2d 784 (1977); *see generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 22 (2d ed. 1983); B. SCHWARTZ, ADMINISTRATIVE LAW 481–497 (1976).

Primary jurisdiction is applicable here. There are currently proceedings pending before the NRC concerning Kerr-McGee's application for a license for on-site encapsulation of the materials now located at the West Chicago site. The NRC is considering eight disposal alternatives. There is a possible, though not yet any actual, conflict between NRC recommendations and state law. Most important, the NRC presumably has some specialized knowledge and expertise in this field. Finally, I note that several other courts have applied the doctrine of primary jurisdiction in closely analogous situations when NRC proceedings were pending. *See, e.g., Honicker v. Hendrie*, 465 F.Supp. 414, 419 (M.D.Tenn.1979), *aff'd mem.*, 605 F.2d 556 (6th Cir.), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980); *Paskavitch v. United States Nuclear Regulatory Commission*, 458 F.Supp. 216 (D.Conn.1978); *Nader v. Ray*, 363 F.Supp. 946, 953 (D.D.C.1973).

The State of Illinois argues as *amicus* that primary jurisdiction is not applicable here because the plaintiffs' claims are based on state law and the NRC cannot enforce the relief requested. This argument is beside the point because primary jurisdiction is applicable even though the agency cannot grant the relief requested. *See United States v. ICC*, 337 U.S. 426, 464 n. 11, 69 S.Ct. 1410, 1430 n. 11, 93 L.Ed. 1451 (1949) (Frankfurter, J. dissenting); *Lichten v. Eastern Air Lines*, 189 F.2d 939 (2d Cir.1951); SCHWARTZ, *supra*, 491; *see also id.* 492 n. 253 (collecting cases). As a practical matter, if the NRC does adopt certain of the disposal proposals now before it, the plaintiffs will get the relief they seek, though on different legal grounds. If, on the other hand, the NRC fails to adopt one of those alternatives, the plaintiffs will not be left without a remedy. It must "be emphasized that primary jurisdiction gives the agency the first, not the last, word on the matter." SCHWARTZ, *supra*, 493. The initial, but not the final decision is given to the agency. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 496–99, 78 S.Ct. 851, 860–62, 2 L.Ed.2d 926 (1958) (invalidating rate structure held to be within primary jurisdiction of Board in *Far East Conference*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576, and *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932)); *see* DAVIS, *supra*, § 22:7.

In sum, I do not believe that this injunctive action based on state law has been preempted, but rather that the NRC has primary jurisdiction over the issue underlying this action. Therefore the majority errs in affirming the dismissal of count I of the complaint. But it would also be error to reverse and remand for further proceedings at this time. The proper course would be for the district court to stay its proceedings pending the NRC's decision in the proceedings now before it. *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202, 80 S.Ct. 1131, 4 L.Ed.2d 1165 (1960); *Western Pacific Railroad*, 352 U.S. at 64, 77 S.Ct. at 165; DAVIS, *supra*, 91–92. *Cf. Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976) (stay under doctrine of primary jurisdiction of common law tort action for fraudulent misrepresentation not appropriate where, *inter alia*, no technical expertise was relevant, there was no need for regulatory uniformity and the issues were within the court's competence). With the NRC's consideration of the disposal issue before it, the district court could then go on to consider whether the state law interests have been adequately considered, whether there is an actual conflict between the state and federal requirements, and, if it is not physically impossible for Kerr-McGee to

obey both state and federal law, what is the proper relief for these plaintiffs.[2]

WISCONSIN ACTION COALITION, a charitable non-profit Wisconsin corporation, and Charles Chapman, Plaintiffs-Appellees,

v.

CITY OF KENOSHA, a municipal corporation of the State of Wisconsin; and Joseph H. Trotta, Chief of Police of the City of Kenosha; and their agents, employees, assistants, successors, and all others acting in concert with them or under their control, Defendants-Appellants.

No. 84-2006.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 14, 1985.

Decided July 19, 1985.

Charitable nonprofit corporation brought action challenging constitutionality of city ordinance prohibiting charitable, religious, and political solicitation between 8:00 p.m. and 8:00 a.m. The United States District Court for the Eastern District of Wisconsin, Terence T. Evans, J., invalidated ordinance as applied between 8:00 p.m. and 9:00 p.m., and city appealed. The Court of Appeals, Cudahy, Circuit Judge, held that antisolicitation ordinance, as applied to bar door-to-door canvassing for charitable and political causes in residential areas between hours of 8:00 p.m. and 9:00 p.m., violated First Amendment.

Affirmed.

1. **Constitutional Law** ⇐90.1(1.1)

Door-to-door canvassing and solicitation is form of speech protected by First Amendment. U.S.C.A. Const.Amend. 1.

2. **Constitutional Law** ⇐90(3)

First Amendment does not guarantee right to communicate one's views at all times and places or in any manner that one may desire. U.S.C.A. Const.Amend. 1.

3. **Constitutional Law** ⇐90.1(1.1)

Municipality has power to regulate activities of canvassers and solicitors if regulation is in furtherance of legitimate governmental objective; protection of privacy of residents, which includes securing for them peaceful enjoyment of their homes, is legitimate and obviously important governmental interest sufficient to support regulation of door-to-door solicitation and canvassing, as is prevention of crime. U.S.C.A. Const.Amend. 1.

4. **Constitutional Law** ⇐48(1)

When statute infringes on exercise of First Amendment rights, burden of establishing its constitutionality is on its proponent.

5. **Constitutional Law** ⇐90(3)

To justify time, place, and manner restrictions on First Amendment activities, government which promulgated such restrictions is required to show that restriction is content neutral and serves significantly protectable and subordinating interest, that restriction is narrowly tailored to serve interest by demonstrating actual connection between restriction and served interest, that less restrictive alternative limitations are not adequate to protect interest and that channels of communication left open provide ample and adequate alternatives. U.S.C.A. Const.Amend. 1.

6. **Constitutional Law** ⇐90.1(1.1)

City antisolicitation ordinance, as applied to bar door-to-door canvassing for charitable and political causes in residential areas between hours of 8:00 p.m. and 9:00

2. The majority reaches the extreme and unprecedented conclusion that the NRC has, in effect, exclusive jurisdiction over nonradiation hazards at the site in question.

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, | ) | |
| vs. | ) | NO. 80 CH 298 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware corporation, Defendant. | ) | |

FIRST AMENDED COMPLAINT FOR INJUNCTION AND STATUTORY PENALTIES

NOW COMES Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, by its attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, at the request of the Illinois Environmental Protection Agency and on his own motion, and complains of Defendant KERR-McGEE CHEMICAL CORPORATION as follows:

COUNT I

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This Count concerns open dumping of industrial wastes. The violations of law alleged in this Count pertain only to nonradioactive aspects of such wastes.

2. Defendant KERR-McGEE CHEMICAL CORPORATION is a Delaware corporation licensed to do business in Illinois and doing business in DuPage County, Illinois.

3. Defendant owns and manages a site ("site") in the City of West Chicago, DuPage County, Illinois, of approximately 43 acres. The site is bounded on the north approximately by Ann Street, on the west approximately by the Elgin, Joliet and Eastern Railroad, on the south approximately by Roosevelt Road, and on the northeast approximately by Factory Street and Weyrauch Street.

4. Defendant purchased the site in or around 1967 and ceased manufacturing activities at the site in or around 1973.

5. The site consists of approximately 8 acres containing factory and other buildings ("factory area"), approximately 27 acres used for waste disposal ("disposal area"), and approximately 8 acres between the disposal area and factory area.

6. Defendant and its predecessor companies operated the site since 1932 to manufacture a variety of chemical compounds containing thorium, a naturally occurring radioactive element, and rare earth elements. The chemical compounds manufactured by Defendant and its predecessors were sold for use in gas light mantles, chemical research and manufacturing, nuclear fuel, color television phosphors, and for other uses.

7. The thorium and rare earth elements were extracted at the site from ore. Extraction and purification of the thorium and rare earths was accomplished by processing with various nonradioactive chemicals, including highly concentrated sulfuric acid, caustic soda, hydrochloric acid, and other highly toxic substances.

8. Manufacturing activities at the site resulted in the production of enormous quantities of process waste, both liquid and solid in nature. These process wastes were contaminated with

residues of the chemicals used in the industrial process. These process wastes included toxic and other hazardous wastes.

9. Liquid waste was generated at the site at the rate of 400,000 to 600,000 gallons per day, such waste containing approximately 50,000 pounds of dissolved solids. This liquid waste was piped from the factory area to the disposal area and discharged into ponds. The ponds acted as infiltration ponds from which the liquid percolated to the groundwater. Insoluble sediments were deposited on the bottom of the ponds.

10. Solid waste was piled in mounds on the disposal area. Such waste included insoluble sediments removed from the infiltration ponds, ore residues, and contaminated process equipment such as tanks and drums.

11. At the present time, there are at least 549,000 cubic feet of solid process waste, including hazardous waste, remaining in the ponds, at least 722,000 cubic feet of solid process waste, including hazardous waste, piled in mounds, and at least 110,000 cubic feet of contaminated process equipment scattered on the disposal area. In addition, there are approximately 11,000 cubic feet of rare earth chemical compounds stored in a building in the disposal area which will probably have to be disposed of as waste.

12. Section 21(a) of the Act (formerly, Section 21(b)), Ill.Rev.Stat. ch. 111 1/2, §1021(a), provides:

[No person shall:]

a. Cause or allow the open dumping of any refuse.

13. The term "open dumping" is defined by Section 3(r) (formerly, Section 3(o) and, prior to that, Section 3(h)), of the Act as:

[T]he consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill.

14. Chapter 7 of the Illinois Pollution Control Board ("Board") Rules and Regulations ("Waste Rules") governs, inter alia, the design, operation, and maintenance of sanitary landfills for disposal of wastes. The Waste Rules became effective on July 27, 1973.

15. At all times pertinent hereto, Defendant's design, operation and maintenance of the site, as described in Paragraphs 2 through 11 hereinabove, have not complied with the requirements of the Waste Rules.

16. Since July 27, 1973, the effective date of the Waste Rules up to and including the present, Defendant has continuously caused or allowed open dumping of refuse at the site, in violation of Section 21(a) of the Act.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as

set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT II

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Act, Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This Count concerns disposal of industrial wastes at a site not meeting regulatory requirements. The violations of law alleged in this Count pertain only to nonradioactive aspects of such wastes.

2-11. As Paragraphs 2 through 11 of this Count II, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. Section 21(e) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1021(e), as amended by P.A. 82-380, eff. Sept. 3, 1981, provides:

[No person shall:]

e. Dispose, treat, or store any waste, . . . except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

13. Prior to the 1981 amendment cited hereinabove, Section 21(e) of the Act (formerly, Section 21(f)) provided:

[No person shall:]

e. Dispose of any refuse, ... except at a site or facility which meets the requirements of this Act and of regulations thereunder.

14. The Board's Waste Rules govern the design, operation, and maintenance of sanitary landfills for disposal of wastes. The

Waste Rules became effective on July 27, 1973.

15. At all times pertinent hereto, Defendant's design, operation, and maintenance of the site, as described in Paragraphs 2 through 11 hereinabove, have not complied with the requirements of the Waste Rules.

16. From July 27, 1973, the effective date of the Waste Rules, until September 2, 1981 Defendant continuously disposed of wastes at the site in violation of former Section 21(f)) of the Act, and since September 3, 1981 up to and including the present, Defendant has continuously disposed, treated, or stored waste at the site in violation of Section 21(e) of the Act.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev. Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

## COUNT III

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Act, Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This Count concerns disposal of industrial wastes in violation of regulatory requirements. The violations of law alleged herein pertain only to nonradioactive aspects of such wastes.

2-11. As Paragraphs 2 through 11 of this Count III, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. Section 21(d)(2) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1021(d)(2), as amended by P.A. 82-830, eff. Sept. 3, 1981, provides:

> [No person shall:]
>
> d. Conduct any waste-storage, waste-treatment, waste disposal, or special waste-transportation operation:. . . (2) In violation of any regulations or standards, adopted by the Board under this Act.
>
> This subsection (d) shall not apply to hazardous waste.

13. The Board's Waste Rules govern the disposal of wastes, including the design, operation, and maintenance of sanitary landfil

14. At all times pertinent hereto, Defendant's storage, treatment, or disposal of waste at the site, insofar as such waste is nonhazardous, has not complied with the requirements of the Waste Rules.

15. From September 3, 1981 up to and including the present Defendant has continuously conducted waste-storage, waste-treatment, or waste-disposal operations at the site in violation of Section 21(d)(2) of the Act.

WHEREFORE, Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT IV

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Act, Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This Count concerns handling of hazardous industrial wastes in violation of regulatory requirements. The violations of law alleged in this Count pertain only to nonradioactive aspects of such wastes.

2-11. As Paragraphs 2 through 11 of this Count IV, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. Section 21(f)(2) of the Act, Ill.Rev.Stat. ch. 111 1/2 §1021(f)(2), as amended by P.A. 82-830, eff. Sept. 3, 1981, provides:

[No person shall:]

f. Conduct any hazardous waste-storage, hazardous waste-treatment, or hazardous waste-disposal operations . . . . (2) In violation of any regulations or standards adopted by the Board under this Act.

13. Regulations of the Board appearing at Parts 700-725, 35 Ill.Adm.Code, Subtitle G ("Hazardous Waste Regulations"), govern the storage, treatment, and disposal of hazardous wastes. The Hazardous Waste Regulations became effective on May 17, 1982.

14. At all times pertinent hereto, Defendant's storage, treatment, or disposal of waste at the site, insofar as such waste is hazardous, has not complied with the requirements of the Hazardous Waste Regulations.

15. From May 17, 1982 up to and including the present, Defendant has continuously conducted hazardous waste-storage, hazardous waste-treatment, or hazardous waste-disposal operations at the site in violation of Section 21(f)(2) of the Act.

WHEREFORE, Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT V

1. This Count is for a statutory civil penalty and is brought pursuant to Section 3.1 of the Illinois Refuse Disposal Law ("Disposal Law"), Ill.Rev.Stat. (1969), repealed July 1, 1970, ch. 111 1/2, §473.1. This Count concerns violations of previously-applicable requirements for disposal of wastes. The violations of law alleged in this Count pertain only to non-radioactive aspects of such wastes.

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill. Const.Art. 5, §15,; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill.Rev.Stat. (1981) ch. 14, §12; and having all the powers and duties of the Attorney General at common law.

3-11. As paragraphs 3 through 11 of this Count V, Plaintiff realleges and incorporates Paragraphs 2 through 10 of Count I.

12. Section 1 of the Disposal Law, Ill.Rev.Stat. (1969) ch. 111 ½ §471, provided in pertinent part:

> The Department of Public Health, hereinafter referred to as the Department, shall supervise the operation and maintenance of refuse disposal sites and facilities.... The Department shall prepare and adopt and may revise from time to time minimum standards for the location, design, construction, sanitation, operation, maintenance and discontinuance of the operation of refuse disposal sites and facilities and shall adopt such rules and regulations relating to the operation, maintenance, and discontinuance of the

operation of refuse disposal sites and facilities as it considers necessary from time to time to carry out this Act.

13. Section 2 of the Disposal Law, Ill.Rev.Stat. (1969) ch. 111 1/2, §472, provided in pertinent part:

> After the Department has promulgated minimum standards for the location, design, construction, operation, maintenance and discontinuance of the operation of refuse disposal sites and facilities pursuant to Section 1, and except as provided in Section 6 of this Act, no person, firm or corporation, whether public or private, may establish, maintain, conduct or operate a refuse disposal site or facility without first registering that site or facility with the Department.

14. The Illinois Department of Public Health promulgated Rules and Regulations for Refuse Disposal Sites and Facilities ("IDPH Rules") pursuant to the Disposal Law on March 22, 1966.

15. IDPH Rule 1.01 provided:

> All refuse disposal sites or facilities shall be registered with the Illinois Department of Public Health on forms to be provided by the Department.

16. IDPH Rule 3.04 provided:

> Open dumping is prohibited.

17. Articles IV and V of the IDPH Rules governed the standards, operation and maintenance of sanitary landfills.

18. IDPH Rule 5.08 provided:

> [L]iquid or hazardous substances shall not be discharged to a sanitary landfill until written approval has been obtained from the Department.

19. Section 49 of the Illinois Environmental Protection Act, Ill.Rev.Stat. ch. 111 1/2, §1049, provides:

b. All proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred. All proceedings instituted for actions taken after the effective date of this Act shall be governed by this Act.

c. All rules and regulations of the. . . Department of Public Health relating to subjects embraced within this Act shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act.

20. From March 22, 1966 until July 27, 1973, the date of the supercession of the IDPH rules by the Board's Waste Rules governing waste disposal, Defendant continuously failed to register its disposal facilities with the Department of Public Health, in violation of the Disposal Law and IDPH Rule 1.01, and failed to dispose of its wastes, including liquid and hazardous wastes, in accordance with the IDPH Rules cited hereinabove, in violation of such Rules.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter judgment against Defendant, pursuant to Section 3.1 of the Disposal Law, Ill.Rev.Stat. ch. 111 1/2, §473.1, imposing a civil penalty of $100 per day for each day during which Defendant's violations of the Disposal Law and IDPH Rules, as set out in this Count, continued.

B. Grant such other and further relief as is appropriate under the circumstances.

## COUNT VI

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Act,

Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This Count concerns the creation of a water pollution hazard. The violations of law alleged in this Count pertain only to non-radioactive hazards.

2-11. As Paragraphs 2 through 11 of this Count V, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. Section 12(d) of the Act, Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1012(d), provides:

> [No person shall:]
>
> d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

13. The term contaminant is defined by Section 3(d) of the Act, as:

> [A]ny solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

14. The term "water pollution" is defined by Section 3(m) of the Act as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurous to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

15. The term "waters" is defined by Section 3(oo) of the Act as:

> [A]ll accumulations of water, surface and underground, natural and artificial, public or private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

16. During the time relevant herein, and as described hereinabove, Defendant has deposited upon the site process wastes contaminated by various nonradioactive chemicals and chemical compounds used in Defendant's industrial process.

17. The depositing of such chemicals and chemical compounds created and continues to create a serious pollution hazard to ground and surface waters in the vicinity of the site, which are waters of the State of Illinois.

18. The pollution hazard to the groundwater consists in the fact that the millions of gallons of liquid wastes deposited into the infiltration ponds at the site have over the years infiltrated into the ground, threatening the shallow aquifer. In addition, rain and melting snow have percolated, and continue to percolate, through the accumulations of solid waste at the site, thereby becoming contaminated and infiltrating into the ground, threatening the shallow aquifer. The shallow aquifer under the site is generally only several feet below the surface. The shallow aquifer is hydraulically connected to an aquifer lying deeper below the surface; this aquifer is used as a water source by households in unincorporated areas primarily west and southwest of the site and as a standby water source for the City of West Chicago.

19. The pollution hazard to the surface water consists in the fact that water on the surface of the site, resulting from rainfall and melting snow, becomes contaminated

by contact with the wastes on the site and, via a storm sewer originating just north of the site, is discharged into Kress Creek. Kress Creek is a tributary to the DuPage River.

20. Since July 1, 1970, the effective date of the Act, Defendant has continuously created a water pollution hazard by its depositing of contaminants on the site, in violation of Section 12(d) of the Act.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the wastes located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in this Count, and an additional $1,000 for each day during which said violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

## COUNT VII

1. This Count is for injunctive relief and a statutory civil penalty and is brought pursuant to Section 42 of the Act, Ill.Rev.Stat. (1981), as amended, ch. 111 1/2, §1042. This

concerns water pollution. The violations of law alleged in this Count pertain only to nonradioactive pollution.

2-11. As Paragraphs 2 through 11 of this Count, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. Section 12(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1012(a), provides:

> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

13. The term waters is defined by Section 3(oo) of the Act as:

> [A]ll accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

14. Regulations of the Board appearing at Parts 301-312, 35 Ill.Adm.Code, Subtitle C ("Water Pollution Rules") govern, inter alia, water quality standards, including permissible levels of chemical constituents in water, and effluent standards.

15. Section 303.201 of the Water Pollution Rules provides:

> Except as otherwise specifically provided, all waters of the State must meet the general use standards of Subpart B of Part 302.

16. Section 303.203 of the Water Pollution Rules provides:

> The underground waters of Illinois which are a present or potential source of water for public or food processing supply shall meet the general use and public and food processing water supply standards of Subparts B and C, Part 302, except due to natural causes.

17. The underground waters at or around the site are a present and potential source of water for public and food processing supply.

18. Section 302.208 of the Water Pollution Rules sets out the maximum level of certain chemical constituents in waters subject to the general use water quality standards.

19. Section 302.304 of the Water Pollution Rules sets out the maximum level of certain chemical constituents in waters subject to the public and food processing water supply standards.

20. Section 304.105 of the Water Pollution Rules provides in pertinent part:

> In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard.

21. At various times since July 1, 1970, the effective date of the Act, Defendant caused or allowed the underground water at the site to contain concentrations of chloride, manganese, sulfates, selenium, and total dissolved solids in excess of the maximum permissible levels set out in Section 302.208 of the Water Pollution Rules, in violation of Section 12(a) of the Act.

22. At various times since July 1, 1970, the effective date of the Act, Defendant caused or allowed the underground water at the site to contain concentrations of fluoride in excess of the maximum permissible level set out in Section 302.304 of the Water Pollution Rules, in violation of Section 12(a) of the Act.

23. Section 304.124 of the Water Pollution Rules sets out the maximum permissible level of chemical constituents in any effluent.

24. The term "effluent" is defined by Section 301.275 of the Water Pollution Rules as:

> Any wastewater discharged, directly or indirectly, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges. . . .

25. Surface water on the site, resulting from rainfall and melting snow, has been and continues to be contaminated by contact with the wastes at the site. Such contaminated runoff enters, and at all times pertinent herein has entered, a storm sewer just north of the site, and is discharged therefrom into Kress Creek, a tributary to the DuPage River.

26. At various times since July 1, 1970, the effective date of the Act, Defendant caused or allowed effluent from the site to contain concentrations of chloride and manganese in excess of the maximum permissible levels set out in Section 304.124 of the Water Pollution Rules, in violation of Section 12(a) of the Act.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111 1/2, §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as

set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT VIII

1. This Count is for injunctive relief and is brought pursuant to the Illinois Public Nuisance Act, Ill.Rev.Stat. (1981) ch. 100 1/2, §26 ("Nuisance Act"). This Count concerns the maintenance of a statutory public nuisance. The violations of law alleged in this Count pertain only to nonradioactive matters.

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill.Const.Art. 5, §15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill.Rev.Stat. ch. 14, §12; and having all the powers and duties of the Attorney General at common law.

3. The Nuisance Act provides:

> It is a public nuisance:
>
> 1. To cause or suffer... filth or noisome substances to be collected, deposited, or to remain in any place, to the prejudice of others.
>
> . . .
>
> 3. To corrupt or render unwholesome or render impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others.

4-13. As Paragraphs 4 through 13 of this Count VIII, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

14 -17. As Paragraphs 14 through 17 of this Count VIII, Plaintiff realleges and incorporates Paragraphs 16 through 19 of Count I.

18-19. As Paragraph 18 and 19 of this Count VIII, Plaintiff realleges and incorporates Paragraphs 21 and 22 of Count VII.

20. As Paragraph 20 of this Count VIII, Plaintiff realleges and incorporates Paragraph 25 of Count VII.

21. Since approximately 1967 and continuing until the present, Defendant has operated and maintained the site in such manner as to constitute a public nuisance, in that noisome substances have been caused or suffered to be collected and deposited and to remain at the site, and waters of Illinois have been corrupted and rendered impure and unwholesome, to the injury and prejudice of People of the State of Illinois, in violation of the Nuisance Law. Further, unless such public nuisance is abated it will continue to so prejudice and injure the People of the State of Illinois.

22. Plaintiff has no adequate remedy at law with respect to the public nuisance alleged herein.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of such waste in accordance with all applicable law.

B. Grant such other and further relief as is appropriate under the circumstances.

## COUNT IX

1. This Count is for injunctive relief and is brought pursuant to the common law of Illinois. This Count concerns the maintenance of a common law public nuisance. The violations of law alleged in this Court pertain only to nonradioactive matters.

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill. Const.Art. 5, §15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill.Rev.Stat. ch. 14, §12; and having all the powers and duties of the Attorney General at common law.

3-12. As Paragraphs 3 through 12 of this Count IX, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

13-16. As Paragraphs 13 through 16 of this Count IX, Plaintiff realleges and incorporates Paragraphs 16 through 19 of Count VI.

17-18. As Paragraphs 17 and 18 of this Count IX, Plaintiff realleges and incorporates Paragraphs 21 and 22 of Count VII.

19. As Paragraph 19 of this Count IX, Plaintiff realleges and incorporates Paragraph 25 of Count VII.

20. Since approximately 1967 and continuing until the present, Defendant has operated and maintained the site in such manner as to constitute a public nuisance, in that Defendant has rendered impure and unwholesome waters of this State, thus unreasonably injuring the public health and well-being and interferin with the public right to enjoyment of the waters of the State of

Illinois. Further, unless such public nuisance is abated it will continue to so injure the People of the State of Illinois.

21. Plaintiff has no adequate remedy at law with respect to the public nuisance alleged herein.

WHEREFORE Plaintiff PEOPLE OF THE STATE OF ILLINOIS prays that this Court:

A. Enter an injunction ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of such waste in accordance with all applicable law.

B. Grant such other and further relief as is appropriate under the circumstances.

PEOPLE OF THE STATE OF ILLINOIS

NEIL F. HARTIGAN
Attorney General
State of Illinois

By: _____
ANNE RAPKIN
Assistant Attorney General

JOHN VAN VRANKEN, Chief,
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IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, | ) | |
| v. | ) | NO. 80 CH 299 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation, Defendant. | ) | |

SECOND AMENDED COMPLAINT FOR
INJUNCTION AND STATUTORY PENALTIES

NOW COMES Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, by its attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, at the request of the Illinois Department of Nuclear Safety and on his own motion, and adds the following two Counts to the First Amended Complaint previously filed herein:

COUNT X

1. This Count is for injunctive relief and a statutory penalty and is brought pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill.Rev.Stat. (1983), as amended, ch. 111-1/2, §1042. This Count concerns air pollution.

2-11. As Paragraphs 2 through 11 of this Count, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

12. The wastes at the site are contaminated with thorium and uranium. Thorium and uranium are radioactive elements, i.e., their nuclei spontaneously decay over time into other elements and, in the process of decaying, emit energy in the form of radiation.

13. Among the decay products of thorium and uranium are isotopes--i.e. atomic varieties--of radon, a radioactive gas. Radon is emitted into the air, where it decays into further elements, including radioactive isotopes of lead. These leads take the form of fine particulates.

14. Radiation poses a danger of cancer and adverse genetic effects to human and animal life. Radon gas is dangerous not only because it directly emits radiation to tissue but also because the fine radioactive particulates into which it decays lodge in the respiratory tract and there emit radiation to internal tissue for substantial time periods.

15. The wastes at the Kerr-McGee site continuously emit radiation and radon gas into the surrounding air.

16. Section 9(a) of the Act, Ill.Rev.Stat. ch. 111-1/2, §1009(a), provides:

> No person shall:
>
> a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any state so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, ...

17. The term "air pollution" is defined by Section 3(b) of the Act as:

> the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life,or to property, or to unreasonably interfere with the enjoyment of life or property.

The term "contaminant" is defined by Section 3(d) of the Act as:

> any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

18. Defendant has caused, threatened, or allowed the emission of such levels of radiation and radioactive material into air at the site as to cause air pollution, in violation of Section 9(a) of the Act.

19. Such violation will continue unless abated by order of this Court.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill.Rev.Stat. ch. 111-1/2, §1042(d), ordering Defendant to remove all of the waste located at the site, in a manner which shall first be approved by the Illinois Environmental Protection Agency and the Illinois Department of Nuclear Safety, and to dispose of said waste in accordance with all applicable law.

B. Enter judgment against Defendant pursuant to Section 42(a) of the Act, Ill.Rev.Stat. ch. 111-1/2 §1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in this Count, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

## COUNT XI

1. This Count is for injunctive relief and is brought pursuant to the common law of Illinois. This Count concerns the maintenance of a common law public nuisance.

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by

law, Ill.Const.Art. 5, §15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill.Rev.Stat. (1983) ch. 14 §12; and having all the powers and duties of the Attorney General at common law.

3-12. As Paragraphs 3 through 12 of this Count, Plaintiff realleges and incorporates Paragraphs 2 through 11 of Count I.

13-16. As Paragraphs 13 through 16 of this Count, Plaintiff realleges and incorporates Paragraphs 12 through 15 of Count X.

17. Defendant has caused, threatened, or allowed the emission of such levels of radiation and radioactive material into air at the site as to unreasonably endanger the public health, welfare, and the environment, thereby causing and maintaining a public nuisance.

18. The public injury caused by said public nuisance is irreparable, and one for which Plaintiff has no adequate remedy at law.

19. Such nuisance will continue unless abated by order of this Court.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction ordering Defendant to remove all of the waste located at the site, in a manner which shall first be approved by the Illinois Environmental Protection Agency and Illinois Department of Nuclear Safety, and to dispose of such waste in accordance with all applicable law.

B. Grant such other and further relief as is appropriate under the circumstances.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: _____
ANNE RAPKIN
Assistant Attorney General
Environmental Control Division

ANNE RAPKIN
WILLIAM J. BARZANO, JR.
Assistant Attorneys General
Environmental Control Division
RUSSELL EGGERT
Administrative Assistant
160 North LaSalle Street
Room 900
Chicago, Illinois 60601
[312] 793-2512

PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn and under oath do state that I have this 19th day of February, 1985 served copies of the foregoing Notice, Motion For Leave To File Second Amended Complaint, and Second Amended Complaint For Injunction And Statutory Penalties, upon the persons to whom said Notice is directed 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 19TH DAY
OF FEBRUARY, 1985.

NOTARY PUBLIC

FILED

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

| | |
|---|---|
| DONALD E. BROWN; EDITH R. BROWN; EDWIN E. BROWN; BETTY WOLSFELD; and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, | 82L 1154 |
| Plaintiffs, | |
| vs. | NO. |
| KERR-MC GEE CHEMICAL CORPORATION, a Delaware Corporation, | JURY TRIAL DEMANDED AS TO ALL COUNTS |
| Defendant. | |

## COMPLAINT

NOW COMES Plaintiffs herein, DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, and each of them, by and through their attorneys, BOTTI, MARINACCIO & MAKSYM, LTD., complaining of KERR-MC GEE CHEMICAL CORPORATION, a Delaware Corporation, and states as follows:

## COUNT I

1. That at all times herein, Plaintiffs DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, and each of them are the legal, equitable and beneficial owners of the following legally described real property commonly known as 914 Joliet Street, West Chicago, Illinois, and 904 Joliet Street, West Chicago, Illinois, and legally described as follows:

The North 85 feet of the East 400 feet of Lot 2 of Wienecke's Assessment Plat in Section 16, Township 39 North, Range 9, East of the Third Principal Meridian, reference being had to the record thereof on June 18, 1946, as document 500297, in DuPage County, Illinois. Commonly known as 914 Joliet Street, West Chicago, Illinois.

The East 400 feet of Lot 2 of Wienecke's Assessment Plat (except the North 85 feet thereof) in Section 16, Township 39 North, Range 9, East of the Third Principal Meridian, reference being had to the record thereof on June 18, 1946, as document 500297, in DuPage County, Illinois. Commonly known as 904 Joliet Street, West Chicago, Illinois.

2. That at all times herein, Plaintiffs are residents of the City of West Chicago, County of DuPage, State of Illinois.

3. That at all times herein mentioned, KERR-MC GEE CHEMICAL CORPORATION, (hereinafter referred to as "KERR-MC GEE"), is a Delaware corporation, licensed to do business in the State of Illinois, and from 1967 to 1973 did own and operate a factory which manufactured a variety of chemical compounds containing thorium, a naturally occurring radioactive element, and rare earth elements. The chemical compounds manufactured by Defendant and its predecessors were used in gas light mantels, chemical research and manufacturing, nuclear fuel, color television phosphors, and for other sundry uses. Said factory is located upon a 40-acre premises in the City of West Chicago, and more particularly is bounded on the north by Ann Street and the west by Elgin, Joliet and Eastern Railroad, on the South by Roosevelt Road and on the East by Factory Street and Weyrauch Street.

4. That the above-mentioned 40-acre site was purchased by the Defendant, KERR-MC GEE, in or about the year 1967.

5. The Defendant purchased approximately 43 acres of the above-mentioned site in or about the year 1967.

6. That the site includes three parcels of land, being a certain factory site, a certain disposal-storage site, and a certain intermediate site. The factory site covers approximately eight acres and was the area used for manufacturing operations, offices and a certain utility supply system of KERR-MC GEE. The disposal-storage site consists of approximately 27 acres and was used for disposal, storage, residues, sludges, and liquids from KERR-MC GEE'S factory. The intermediate site covers approximately eight acres and is located betowen the factory and disposal-storage sites and was purchased by KERR-MC GEE in or about the year 1979 to provide unrestricted access between the sites.

7. That on or about the factory site, (hereinafter referred to as the "factory area" or "factory site"), 27 acres of land have been used for waste disposal.

8. That the Defendant, KERR-MC GEE, ceased manufacturing activities on said site in or about the year 1973.

9. That the factory area or site is surrounded on or about three sides by a certain residential neighborhood wherein

the individual Plaintiffs have resided within the Village of West Chicago, Illinois.

10. That in or about the year 1931, the Lindsey Light and Chemical Company established a mill in West Chicago, Illinois for the extraction of thorium and non-radioactive elements from monazite and other ores. Subsequently, the site was used for manufacturing of gas light mantels which contained thorium, mezothorium, and during World War II, hydrochloric acids. Ownership of the facility was transferred from Lindsey Company to American Potash and Chemical Company in 1958 and to its successor, KERR-MC GEE CHEMICAL CORPORATION, in the year 1967. Operations on the site continued until in or about the year 1973 when KERR-MC GEE, the current owner, closed the subject plant.

11. That the buildings on the subject grounds that comprise the factory site or area are in such a state of disrepair so as to be physically offensive that it makes life uncomfortable for surrounding inhabitants and otherwise interfers with the comfort, health, safety and enjoyment of Plaintiffs and other West Chicago residents and the public in general and constitutes a public and private nuisance.

12. That said current conditions which exist on the factory area include but are not limited to the following:

a) open pits filled with refuse and chemicals;

b) holes in floors two through four of building 9, averaging three feet in diameter;

c) loose glass in windows;

d) broken glass on pavement below windows;

e) boards off windows;

f) animal litter scattered throughout the buildings;

g) fallen walls, debris, abandoned equipment and chemicals;

h) fallen, collapsed, and sagging roofing;

i) scattered empty beer cans, bottles and other litter.

13. That said current conditions include accessability by the public in general and children in particular through and over fences, inadequate security and lighting.

14. That at all times pertinent hereto, Defendants allowed the factory to constitute a nuisance in violation of West Chicago Code, Chapter 10, which provides:

> "It shall be unlawful to create, continue or suffer a nuisance to exist . . . .
>
> For the purpose of this section, whatever is offensive physically to the sense and by such offensiveness makes life uncomfortable, is a nuisance; and any act or business which causes annoyance that materially interfers with the ordinary comforts of human existence or enjoyment of property is a nuisance."

15. That the above-mentioned property has immediate proximity to Plaintiffs' property hereinbefore described and is contiguous to said property.

16. That said condition further violates the Village of West Chicago's Code, Chapter 4, Section 26, which provides as follows:

"The term 'dangerous building' as used in this article is hereby defined to mean and include:

1) Any building, shed, fence, or other man-made structure which is dangerous to the public health because of its construction or condition, or which may cause or aid in the spread of disease or cause injury to the health of the occupants of it or of the neighboring structures;

2) Any building, shed, fence, or other man-made structure which, because of faulty construction, age, lack of proper repair or any other cause, is especially liable to fire and constitutes or creates a fire hazard;

3) Any building, shed, fence, or other man-made structure which, because of faulty construction, age, lack of proper repair or any other cause, is liable to cause injury or damage by collapsing;

4) Any building, shed, fence or other man-made structure which, because of its condition is frequented by persons who are not lawful occupants of such structure."

17. That said Code of West Chicago, Chapter 4, Section 27 further provides:

"Any dangerous building in the City is hereby declared to be a nuisance."

18. That said City Code of West Chicago, Chapter 4, Section 28 further provides:

"It shall be unlawful to permit the existence or occupancy of any dangerous building in the City and no person in custody of any such building shall permit the same to remain in a dangerous condition."

19. Defendant still owns and manages the above-mentioned site.

20. That the thorium and rare elements were extracted at the site from monazite ore. Extraction and purification of thorium and rare earths was accomplished by processing with various chemicals, including highly concentrated sulfuric acid, caustic sode, hydrochloric acid, and other toxic substances.

21. That the manufacturing activities on the site resulted in production of enormous quantities of processed wastes, both liquid and solid in nature.

22. That the liquid wastes were generated at the above-mentioned site and within the above-mentioned area of KERR-MC GEE at a rate of approximately 400,000 to 600,000 gallons per day. Such wastes contained approximately 50,000 pounds of dissolved solids. Said liquid wastes were piped from the factory area to the disposal area and discharged into ponds. That the ponds acted as filtration ponds from which the liquid percolated into ground water and soluable settlements deposited on the bottom of said ponds. Said liquid wastes which percolated into the ground water contained hazardous elements, were toxic to human beings, including your Plaintiffs, and were filtrated into Plaintiffs' ground water supply, thereby contaminating said ground water and making the same unfit for human consumption.

23. That Defendant piled solid wastes in mounds on the disposal area. Such wastes included insoluable sediments removed from the infiltration ponds, ore residues and contaminated process equipment such as tanks and drums.

24. That at the present time, there are at least 549,000 cubic feet of insoluable processed wastes remaining in said ponds, at least 722,000 cubic feet of processed wastes piled in mounds, and at least 110,000 cubic feet of contaminated process equipment on the disposal area. In addition, there are approximately 11,000 cubic feet of rare earth chemical compounds stored in a building in the disposal area which will probably have to be disposed of as waste.

25. That Illinois Revised Statutes, Chapt. 111½, para. 1021(a), Section 21(a), as amended by P. A. 81-856, effective January 1, 1980, provides:

"[No person shall:]

a. Cause or allow the open dumping of any refuse."

26. That the term "open dumping" as defined by Section 3(o) (formerly letter (h)) of the Act, as amended, as:

> "[T]he consolidation of refuse from one or more sources at a central disposal site that does not fullfill the land requirement of a sanitary landfill."

27. That Rules 301, 303, 304, 305, 306, 310, 311, 312, 313, 314, 315 and 318 of Chapter 7 of the Illinois Pollution Control Board ("Boards") are rules and regulations which govern the design, operation and maintenance of sanitary landfills for the disposal of wastes, including hazardous and liquid wastes.

28. That at all times pertinent hereto, Defendant's design, operation and maintenance of the above-mentioned site adjacent to the residential property of Plaintiffs, as described above, have not complied with the requirements of said Board's rules.

29. That since January 1, 1980, the effective date of Section 21(a) of the Act, as amended, Defendant has continuously failed and refused to comply with the requirements of said Board and has, therefore, continuously caused or allowed open dumping refuse at said site in violation of said Sections.

30. That Section 21(b) of Illinois Revised Statutes, Chapt. 111½, Section 1021(b), 1977, (current version - Illinois Revised Statutes, Chapt. 111½, Section 1021(a), provides:

> "[No person shall:]
>
> (b) Cause or allow open dumping of any . . . refuse in violation of regulations adopted by the [Illinois Pollution] Board;"

31. That Illinois Revised Statutes, Chapt. 111½, Section 1221(e), Section 21(e) (formerly letter (f)) of said Act, as amended, provides:

> "[No person shall:]
>
> (e) Dispose of any refuse . . . except at a site or facility which meets the requirements of this Act and regulations thereunder."

32. That the term "disposal" is defined by Section 3(e) of the Act, Illinois Revised Statutes, Chapt. 111½, Section 1003(e), 1977, as amended, as:

> "[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste or hazardous waste into or on any land or water so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

33. That at all times relevant to this action, Defendant has failed to and continues to fail to comply with the above-mentioned statutes and rules.

34. That the wastes described herein have been disposed of by Defendant at said site and on the lands adjacent to Plaintiffs include hazardous wastes in that such wastes have been contaminated by hazardous chemicals and chemical compounds detrimental to human life and well-being, including but not limited to barium sulfate, sodium sulfate, sodium chloride, sodium floride, sodium phosphate, ammonia, ammonium chloride, ammonium sulfate, ammonium nitrate, calcium chloride, ethylhexyl phosphate, ethylenediaminetetraacetic acid, sulfuric acid and kerosene.

35. That Illinois Revised Statutes, Chapter 111½, Section 1021(d), Section 21(d), (formerly letter (e)) of said Act, as amended, provides:

"[No person shall:]

(d) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the [Illinois Environmental Protection] Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the [Illinois Pollution Control] Board has adopted standards for the location, design, operation, and maintenance of such facilities. The above exception shall not apply to any hazardous wastes . . . ."

36. That Chapter 7 of said Board's rules and regulations govern the waste management and the design, operation and maintenance of sanitary landfills for the disposal of wastes, including hazardous and liquid wastes.

37. That Rule 202(b)(1) of said Board's rules provides:

"[N]o person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations."

38. That said Board's rules became effective on July 27, 1973.

39. Since July 27, 1974, Defendant has continuously conducted refuse-disposal operations at said site without having first obtained a permit from the Illinois Environmental Protection Agency, in violation of Board Rule 202(b)(1) and Section 21(d) of said Act, as amended.

40. That Section 2 of the Disposal Law, Illinois Revised Statutes, Chapt. 111½, Section 472, provides in pertinent part as follows:

> ". . . no person, firm or corporation, whether public or private, may establish, maintain, conduct or operate a refuse disposal site or facility without first registering that site or facility with the Department . . . ."

41. That the Illinois Department of Public Health promulgated Rules and Regulations for Refuse Disposal Sites and Facilities ("IDPH Rules") pursuant to the Disposal Law on March 22, 1966.

42. That IDPA Rule 1.01 provided:

> "All refuse disposal sites or facilities shall be registered with the Illinois Department of Public Health on forms to be provided by the Department."

43. That IDPH Rule 3.04 provides:

> "Open dumping is prohibited."

44. That IDPH Rule 508 provided:

> "[L]iquid or hazardous substances shall not be discharged to a sanitary landfill until written approval has been obtained from the Department"

45. That from 1967 until July 27, 1973, the date of the supercession of the IDPH rules by Chapter 7 of the Board's rules and regulations governing waste disposal, Defendant continuously failed to register its disposal facilities with the Department of Public Health in violation of the

Disposal Law and IDPH Rule 1.01, and failed to dispose of its wastes, including liquid and hazardous wastes in accordance with IDPH Rules cited hereinabove, in violation of such rules.

46. That Illinois Revised Statutes, Chapt. 111½, Section 1012(d), Section 12(d), provides:

> "[No person shall:]
>
> (d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;"

47. That the term "contaminant" is defined by Section 3(d) of Illinois Revised Statutes, Chapt. 111½, Section 1003(d), 1977, as follows:

> "[A]ny solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source."

48. The term "water pollution" is defined by Section 3(hh) (formerly lettered (n)) of Illinois Revised Statutes, Chapt. 111½, Section 1003(hh), 1977, as amended:

> "[S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or aquatic life."

49. That during the time relevant herein, Defendant has deposited upon the site liquid wastes, contaminated by

various chemicals and chemical compounds. Such chemicals and chemical compounds, include but are not limited to barium sulfate, sodium sulfate, sodium chloride, sodium floride, sodium phosphate, ammonia, ammonium chloride, ammonium sulfate, ammonium nitrate, calcium chloride, ethylhexyl phosphate, ethylenediaminetetraacetic acid, sulfuric acid and kerosene. That depositing such chemicals and chemical compounds creates and continues to create a serious pollution hazard to ground and surface waters which flow upon the lands of Plaintiffs.

50. That the pollution hazard to the ground water, which flows under the land of Plaintiffs' property, consists of millions of gallons of liquid waste deposited into the ponds at the disposal site and have over the years infiltrated into the ground, threatening the water table. Further, rain and melting snow have percolated, and continue to percolate through the accumulation of solid wastes at the disposal site, thereby becoming contaminated and infiltrating into the ground, threatening the water. The water table under the site is generally forming several feet below the surface. The water table is hydraulically connected to an aquifer lying deeper below the surface. Said aquifer is used as a water source to households, including, on information and belief, Plaintiffs' households and as a standby ground water source for the City of West Chicago, Illinois, and therefore, Plaintiffs.

51. That the pollution hazard to the surface waters of Illinois consists in the fact that the water on the surface of the disposal site resulting in rain-fall and melting snow becomes contaminated by pollutants thereon and via storms originating north of the site, discharge into Kress Creek, a natural waterway situated within the County of DuPage, State of Illinois.

52. That since July 1, 1970, the effective date of the Act, Defendant has continuously created a water pollution hazard by depositing contaminants on the site in violation of Section 12(d) of the Act of 1977 as set forth above.

53. That Illinois Revised Statutes, Chapt. 111½, Section 1012(a), Section 12(a), provides:

> "[No person shall:]
>
> (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

54. That Chapter 3 of the rules and regulations of the Illinois Pollution Control Board and, inter alia, establishing standards for chemical constituents allowed in waters of the State of Illinois, including underground and surface waters.

55. That Rule 207 of said Board's rules and regulations provides:

> "The underground waters of Illinois which are a present or potential source of water for public or food processing supply shall meet the General and Public and Food Processing Water Supply Standards except due to natural causes."

56. That underground waters at and around the site are presently a potential source of water for public and food processing supply, including water supplied to Plaintiffs.

57. That Rule 204 of the Board's rules and regulations prescribe Public and Food Processing Water Supply Standards; and under such Rule, the following levels of constituents in such water supplies shall not exceed:

| | |
|---|---|
| Chloride: | 250 mg/l |
| Manganese: | .05 mg/l |
| Sulfates: | 250 mg/l |
| Total Dissolved Solids: | 500 mg/l |
| Selenium: | .01 mg/l |

58. That Rule 203 of the Board's rules and regulations provide general standards which state that the level of floride in underground water shall not exceed 1.4 mg/l.

59. That Part IV of said Board's rules and regulations prescribe the maximum concentrations for various contaminants that may be discharged into waters of the State of Illinois. Under Rule 408 of said Part IV, the following levels of

contaminants shall not be exceeded in an effluent:

| | |
|---|---|
| Floride: | 15 mg/l |
| Manganese: | 1 mg/l |

60. That in or around December, 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of chloride in excess of 250 mg/l, in violation of Board Rule 204. In or around December, 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of chloride in excess of 1.4 mg/l in violation of Board Rule 203.

61. That in or around December, 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of manganese in excess of .05 mg/l, in violation of Board Rule 204.

62. That in or around December, 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of sulfates in excess of 250 mg/l, in violation of Board Rule 204.

63. That in or around December, 1976, Defendant caused or allowed the ground water at the disposal site to contain concentrations of total dissolved solids in excess of 500 mg/l, in violation of Board Rule 204.

64. That in or around October, 1976, Defendant caused or allowed the underground water at the disposal site to

contain concentrations of selenium in excess of .01 mg/l, in violation of Board Rule 204.

65. Water on the site resulting from rainfall and melting snow enters and at all times pertinent herein, has entered storm sewers originating just north of the site and the ground water which serves Plaintiffs' property.

66. That Illinois Revised Statutes, Chapt. 14, Section 12 provides that it is a nuisance:

> 1. To cause or suffer . . . filth or noisome substances to be collected, deposited, or to remain in any place, to the prejudice of others.
>
> . . .
>
> 3. To corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake to the injury or prejudice of others.

67. That in the past and continuing through the present, the Defendant has operated and maintained the above-mentioned site in such a manner as to constitute a nuisance as to your Plaintiffs in that noisome substances have been caused or suffer to be collected and deposited and remain at said site; and the waters filtering into the lands of Plaintiffs have been corrupted and rendered impure and unwholesome to the injury and prejudice of Plaintiffs, in violation of statutory law and common law pertaining to nuisances. Further, such nuisance, until abated, continues to so prejudice the Plaintiffs.

68. Recently, Defendant has posted signs on said property, on the border of the property facing Plaintiffs' property, which publicly declares that said property contains dangerous and hazardous materials and will continue to maintain said sign and the above-mentioned nuisance until and unless ordered by this Court to remove all of the above-mentioned unwholesome, toxic and hazardous materials and fully decontaminate the above-mentioned site so that is may be released and used for wholesome and non-distasteful purposes.

69. That the only way in which present and future decontamination of the above-mentioned ground water could be accomplished would be to remove all of the above-mentioned existing waste materials and move said waste materials to some other storage site in accordance with appropriate governmental regulations.

70. That the only way to retrieve the aesthetic appearance of the above-mentioned property would be to destroy the existing structures on the property, to clean up and remove all of the above-mentioned wastes and contaminants on said property.

71. That Defendant will refuse to remove said materials unless a mandatory Order of this Court requires said removal.

72. That certain of the above-mentioned chemicals, upon drying, are hazardous to human health and the organs of the human body and particularly affect human bones and lungs, plus other parts of the human body. Said chemicals have been deposited and will continue to be deposited upon

Plaintiffs' land through circulation of natural air currents, unless Defendant is mandated by an Order of this Court to remove all said wastes from the subject property.

73. That Plaintiffs' real property is unique and cannot be replaced.

74. That the full enjoyment and use of the Plaintiffs' property has been lost and cannot be regained unless and until a mandatory Order of this Court is issued.

WHEREFORE, Plaintiffs DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, by their attorneys, pray as follows:

A. That a mandatory injunction be entered by this Court directing, ordering and compelling Defendant, KERR-MC GEE CHEMICAL CORPORATION, a Delaware Corporation, to forthwith take all appropriate and proper safety precautions and measures to fully accomplish removal of all aforementioned contaminants, pollutants, nuisances and other hazardous materials from the subject premises to some other safe and distant location for storage in accordance with the laws of this State. Also, that Defendant be ordered to clean up, repair, bring into lawful compliance or demolish and remove all deteriorating structures and debris on the subject site.

B. That this Court award Plaintiffs reasonable attorney's fees and costs.

C. That this Court award Plaintiff such other and further relief as may be just and equitable in the premises.

COUNT II

1-74. Plaintiffs re-allege, adopt and hereby incorporate by this reference paragraphs 1 through 74 of Count I of this Complaint as if fully set forth herein.

75. That by reason of the foregoing wrongful and illegal acts of the Defendant, the above-mentioned hazardous contaminants produced and manufactured by Defendant have invaded Plaintiffs' property, lands and the abode thereon, causing great damage to Plaintiffs' persons and their property.

WHEREFORE, Plaintiffs DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, by their attorneys, pray as follows:

A. For a judgment awarding actual compensatory damages no less than but in great excess of the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

B. For an award of reasonable attorney's fees and costs.

C. For such other and further relief as may be just in the premises.

That Defendant [illegible] COUNT III [illegible]

1-74. Plaintiffs re-allege, adopt and hereby incorporate by this reference paragraphs 1-74 of Count I of this Complaint as if fully set forth herein.

75. Plaintiffs re-allege, adopt and hereby incorporate by this reference paragraph 75 of Count II of this Complaint as if fully set forth herein.

76. That the Defendant, as successor, in interest in the factory of Lindsey Light and Chemical Company, at all relevant times, knew or should have known that since at least 1942, there has been continuously stored upon and emitted from the subject site substantially all of the above-mentioned unwholesome contaminants.

77. That since August 15, 1945, the aforementioned unwholesome, offensive, unhealthy, harmful and destructive contaminants have been intentionally, knowingly, recklessly, willfully and wantonly stored and emitted by the Defendant and its predecessors in interest with respect to the factory site with a total callous disregard for any and all harmful effects such activities may or might have on any and all persons, property and generations yet unborn which may or may not be adversely affected by said negative externalities.

78. That Defendant, KERR-MC GEE CHEMICAL CORPORATION, is a business concern possessed of a multi-billion dollar net worth.

79. That Defendant, KERR-MC GEE CHEMICAL CORPORATION, and its predecessors have heretofore knowingly and willfully refused to cease said continuing illegal activities or to promptly and voluntarily take all steps necessary to make safe and wholesome said site solely for lucre.

80. That Defendant, KERR-MC GEE CHEMICAL CORPORATION, and its predecessors, have intentionally concealed from the public the true known nature and extent of chemical and health hazards maintained at said site so as to avoid legal responsibility to Plaintiffs and others, for lucre, and to avoid highly adverse publicity, public scorn and ridicule.

WHEREFORE, Plaintiffs, DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, by their attorneys, pray as follows:

A. For a judgment awarding actual compensatory damages no less than but in great excess of the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

B. That a judgment granting punitive damages be entered in favor of Plaintiffs and against Defendant, KERR-MC GEE CHEMICAL CORPORATION, taking into account the actual net worth of said Defendant in a sum no less than but in great excess of Ten Million Dollars ($10,000,000.00) so that Defendants may be punished and others may be deterred from such reprehensible acts.

C. That this Court award Plaintiffs reasonable attorney's fees and costs.

D. That Plaintiffs be awarded such other and further relief as may be just and equitable in the premises.

Respectfully submitted,

DONALD E. BROWN, EDITH R. BROWN, EDWIN E. BROWN, BETTY WOLSFELD, and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969, Plaintiffs

BY: _____
Aldo E. Botti

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#7640

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, | ) | |
| v. | ) | NO. 80 CH 298 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware corporation, Defendant. | ) | |

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
KERR-McGEE'S MOTION FOR PARTIAL SUMMARY
JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL STAY OF PROCEEDINGS

Defendant Kerr-McGee Chemical Corporation ("Kerr-McGee") has filed what it styles a motion for partial summary judgment or, alternatively, a motion to stay the case. In reality, the motion is nothing more than a renewal of a motion to dismiss that Judge Scidmore denied in this case in March 1984, and amounts to nothing more than a request to second-guess Judge Scidmore's decision. (A copy of Judge Scidmore's decision, already part of the common-law record in this case, is appended to Kerr-McGee's memorandum as Exhibit B.) The substantive arguments in the present motion are identical to those that Judge Scidmore rejected; the only difference is in the caption.

Judge Scidmore recognized that Kerr-McGee's arguments are erroneous in all respects, and raise basic issues which, if decided as Kerr-McGee desires, would threaten the bases of our federal system of government. Nothing that has occurred since Judge Scidmore's decision changes that, or mandates a different result. Moreover, Kerr-McGee has already had an opportunity for

review of Judge Scidmore's decision. After the decision was issued, Defendant asked him to certify the questions presented (preemption and primary jurisdiction). Judge Scidmore did certify the questions, though he declined to stay the action pending appeal due to the concern for public health and safety. Having sought and received certification, however, Kerr-McGee failed to take an appeal. Now, 2-1/2 years later, Defendant seeks delay of the trial and reconsideration in this Court of issues which could long since have been determined by the Appellate Court.

The following points summarize Plaintiff's response to Kerr-McGee's motion:

1. Kerr-McGee suggests that a recent decision of the U.S. Court of Appeals for the Seventh Circuit disposes of this case. A decision of any federal court except the United States Supreme Court is not binding upon this Court, and certainly not dispositive of this case. People v. Stansberry, 47 Ill.2d 541, 544, cert. denied 404 U.S. 873 (1971) (lower federal court decisions "have no binding effect until the issue is considered and determined by the Supreme Court.").

2. The recent divided-panel decision upon which Kerr-McGee relies, Brown v. Kerr-McGee Chemical Corporation, 767 F.2d 1234 (7th Cir. 1985), is not final, and in any event is clearly wrongly decided. The panel decision conflicts with applicable Supreme Court precedent, e.g. Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S.Ct. 615 (1984), Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n., 461 U.S. 190 (1983), and is contrary to two federal statutes: (a) Sec. 274(k) of the Atomic Energy Act, 42 U.S.C. §2021(k), which

allows States to apply their own law to the nonradiation hazards of NRC-regulated material, and (b) a 1977 amendment (P.L. 95-95) to the Clean Air Act, 42 U.S.C. §§ 7401 et seq., which, with respect to airborne radiation hazards like those involved in Counts X and XI of the Second Amended Complaint, legislatively overruled earlier court decisions that held preempted State law affecting the radiation hazards of NRC-regulated material. The panel's decision in Brown is also flatly contrary to the Seventh Circuit's prior ruling in People v. Kerr-McGee Chemical Corporation, 677 F.2d 571 (7th Cir. 1982), about the preemptive scope of the Atomic Energy Act, a ruling Defendant omits to mention in its present motion and memorandum.

3. Finally, Kerr-McGee's reliance on the pending NRC proceeding as a basis for staying this case is misguided. Illinois courts have routinely and consistently rejected this argument in exactly the same circumstances, holding that lawsuits to abate pollution based upon common law nuisance and the Illinois Environmental Protection Act must proceed independently of any federal administrative action. People ex rel. Scott v. U.S. Steel Corp., 40 Ill.App.3d 607, 609-14 (1st Dist. 1976); Metropolitan Sanitary Dist. v. U.S. Steel Corp., 30 Ill.App.3d 360, 361-75 (1st Dist. 1975), leave to appeal denied 60 Ill.2d 579, cert. denied 424 U.S.976 (1976). The Appellate Court summarized the Illinois cases accurately in Village of Wilsonville v. SCA Services, 77 Ill.App.3d 618, 626 (4th Dist. 1979), aff'd 86 Ill.2d 1 (1981):

> Although many Illinois cases have alluded to the need of Illinois courts to defer to the expertise of administrative agencies, none have held error to have occurred because a

court failed to apply the "primary jurisdiction" doctrine.

## I. The Brown Decision Provides No Basis For Entering Judgment In This Case

Contrary to Kerr-McGee's suggestion, nothing in the Brown decision is dispositive of this case. Brown is merely a non-final[1] divided-panel decision from a lower federal court. It does not--and constitutionally cannot--bind this Court[2] or dispose of this case. People v. Stansberry, 47 Ill.2d 541, 544, cert. den. 404 U.S. 873 (1971) (lower federal court decisions "have no binding effect until the issue is considered and decided by the Supreme Court"). The only force that Brown has is the strength--or weakness--of its reasoning.

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1 A petition for rehearing is pending before the Seventh Circuit and Kerr-McGee has been ordered to file a response. Under the Federal Rules of appellate Procedure, "a petition for rehearing will ordinarily not be granted in the absence" of a request for such a response. Fed.R.App.P. 40(a). The Seven Circuit's order therefore suggests it is considering granting rehearing.

2 Kerr-McGee suggests in its memorandum (p.8) that "[t]he Supreme Court of Illinois has recognized that direct conflicts with judgments of the federal courts, particularly on questions of federal preemption, must be avoided when possible." In support of this dubious proposition Kerr-McGee offers only a non-specific citation to Provident Federal Savings & Loan Ass'n. v. Realty Centre, Ltd., 97 Ill.2d 187 (1983).

Provident Federal says no such thing. That case involved the application of a decision by the Supreme Court of the United States--not a lower federal court--on an issue of statutory construction. The U.S. Supreme--and only the U.S. Supreme Court--has the pwoer to bind State courts, and Provident Federal is merely a recognition of that principle, which was settled before Illinois became a State. Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 (1816). But there is no comparable power--and under the foundations of "Our Federalism", Younger v. Harris, 401 U.S. 37, 44 (1971), there can be no comparable power--vested in the lower federal courts to bind State courts.

On those terms Brown has no force at all, because the panel majority's reasoning is absolutely and fatally flawed. The State has set forth in detail the errors in Kerr-McGee's arguments, and the mistakes in the panel majority's reasoning, in two amicus curiae briefs filed with the Seventh Circuit. For the Court's information, copies of those briefs are appended hereto as exhibits. While those briefs largely speak for themselves, a few points bear emphasis here:

a. Nothing in any federal statute preempts State law over nonradiation hazards and airborne radiation hazards--the subjects of the complaint here. The Atomic Energy Act preempts State law over nonradiation hazards and airborne radiation hazards only to the extent that State law actually conflicts with federal law, in the sense that State law prevents compliance with the federal law. An example of such conflict here would be an NRC decision in the pending administrative proceeding which required Kerr-McGee to permanently dispose of its wastes in West Chicago and prohibited disposal of those wastes anywhere else in the world. But not even Kerr-McGee has ever suggested that the NRC will likely make such a decision. The most the NRC may do is

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3 Kerr-McGee points to the Brown panel majority opinion, and raises the hypothetical possibility that other prospective sites for disposal of its waste migh also be prohibited by State law. (Memorandum, pp. 6-7) If that concern has any basis in fact--and there is absolutely nothing in the record here or in the pleadings before the Court that even remotely suggests that it will be legally or technically impossible to remove the wastes to a more suiteable site--it is a concern properly addressed to Congress. In other words, if that concern is anything more than a figment of Defendant's imagination, it is a policy concern that can and should be dealt with legislatively.

grant Kerr-McGee the permission it seeks to dispose of the wastes onsite. NRC permission to permanently dispose onsite would not mean that Kerr-McGee must dispose onsite, and would not be inconsistent with an injunction by this Court ordering Kerr-McGee to remove the wastes from West Chicago and dispose of them in such place and manner as complies with both State and federal law. Hence, there is no actual conflict between federal and State law, and both can and should be applied.[3] Cf. Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S.Ct. 615 (1983); People ex rel. Scott v. U.S. Steel Corp., 40 Ill.App.3d 607, 614 (1st Dist. 1976).

b. The other federal statute relevant to this case, the Clean Air Act, 42 U.S.C. §§ 7401 et seq., affirmatively authorizes resort to State law:

> ...Congress has specifically authorized the states to regulate radioactive air pollutants from NRC-licensed facilities, Clean Air Act Amendments of 1977, sec. 122, 42 U.S.C. sec. 7422 (Supp.III 1979)...
>
> Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Comm'n., 461 U.S. 190, 103 S.Ct. 1713, 1724,n.25 (1983).

Indeed, the legislative history of the 1977 amendments to the Clean Air Act, P.L. 95-95, makes clear that with respect to airborne radiation hazards, Congress expressly intended to legislatively overrule earlier court decisions holding that under the

Atomic Energy Act State law affecting radiation hazards is preempted:[4]

> Thus, the committee would not preempt States from setting and enforcing stricter air pollution standards, and would not follow the holding of Northe[illegible]ates Power Co. v. State of Minnesota, 4[illegible] 1143 (8th Cir. 1971), aff'd 92 S.C[illegible], 405 U.S. 1035, 31 L.Ed.2d 576 (1972), [illegible] context of radioactive air pollution.
>
> H.Rep. 95-294 (95th Cong., 1st Sess.), p.43 n.8 (reprinted in 1977 U.S. Code Cong. & Adm. News, p.1121) (emphasis added).

In short, Brown is not binding on this Court or controlling in this case. Its reasoning is fundamentally and fatally flawed, and should not be followed. Defendant's motion for partial summary judgment should therefore be denied.

II. The Primary Jurisdiction Doctrine Does Not Require Or Allow A Stay In This Case

Based on the dissenting opinion in Brown, Kerr-McGee requests in the alternative that all proceedings in this five-year-old case be stayed until some indefinite time in the future.

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[4] One of the cases that Kerr-McGee relies upon in its memorandum (p. 8) is the per curiam opinion in Commonwealth Edison Company v. Pollution Control Board, 5 Ill.App.3d 800 (3d Dist. 1972). That decision was based solely on the ten-recent decision in Northern States Power. In light of Congress' subsequent action disapproving Northern States Power with respect to airborne radiation hazards, the Commonwealth Edison decision is no longer an accurate statement of the law.

Kerr-McGee points to no authority, other than the dissenting opinion in Brown[5], as support for its argument.

In fact, there is no support for Kerr-McGee's argument. The case law in Illinois is very clear that the primary jurisdiction doctrine does not compel, or even allow, a Circuit Court to stay proceedings in a case like this. Indeed, most of the pertinent Illinois case law has been decided in situations exactly like this one, where an allegedly polluting corporation attempted to delay a Circuit Court action grounded in common law nuisance and State environmental statutes, because of a pending federal administrative proceeding. The courts have uniformly held that the primary jurisdiction doctrine is no basis in such circumstances for a stay of the Circuit Court proceedings. See Village of Wilsonville v. SCA Services, 77 Ill.App.3d 618, 626 (4th Dist. 1979), aff'd 86 Ill.2d 1 (1981); People ex rel. Scott v. U.S.Steel Corp., 40 Ill.App.3d 607, 609-14 (1st Dist. 1976); Metropolitan Sanitary District v. U.S. Steel Corp., 30 Ill.App.3d 360, 361-75 (1st Dist. 1975), leave to app. den., 60 Ill.2d 597,

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5 Remarkably, the dissent's discussion of the primary jurisdiction doctrine relies exclusively on federal cases and federal authority: not a single Illinois case is mentioned. But Brown was originally filed in this Court, and the complaint sounded in State law only. Removal to the federal courts was solely by reason of citizenship. As such, the applicable law--and the law that should have been applied on the question of primary jurisdiction--was State law. Erie R. Co. v. Tompkins, 304 U.D. 64 (1938), held that a federal court, exercising its diversity jurisdiction, must apply the law of the State in which it sits. Judge Cudahy's reliance on the federal primary jurisdiction doctrine was accordingly completely erroneous, and on that issue his views are entitled to no weight whatsover.

cert. den. 424 U.S. 976 (1976) (discussing the primary jurisdiction doctrine in painstaking detail, and rejecting its application in pollution cases like this one). As the Appellate Court observed in Village of Wilsonville:

> Although many Illinois cases have alluded to the need of Illinois courts to defer to the expertise of administrative agencies, none have held error to have occurred because a court failed to apply the doctrine of "primary jurisdiction."
>
> 77 Ill.App.3d at 626 (emphasis added).

Application of the primary jurisdiction doctrine would be especially inappropriate in this case for at least two reasons. First, the NRC proceeding in which Kerr-McGee puts its hopes is years away from completion. The NRC Staff, according to recent submissions in that proceeding, is at least a year-and-a-half away from issuing a new environmental impact statement, which is a prerequisite to hearings before the NRC hearing board. Given the likely protracted nature of the NRC hearings when they are ultimately held, coupled with the almost inevitable administrative and judicial review to follow, the NRC process is likely to extend until some time in the early 1990's. It would be most inappropriate to stay this case, which bears a 1980 docket number, for so long a period of time.[6]

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6 It would also likely be wasteful in the long run. Assuming, hypothetically, that the NRC concludes that federal law allows Kerr-McGee to bury the waste in West Chicago, and that at a subsequent trial this Court decised that State law prohibits onsite, burial, Kerr-McGee will have to return to the Nrc in order to get federal approval for some different site that is allowed by both federal and State law.

Second, and perhaps more important, the NRC proceeding is significantly different than this action. Although the physical subject matter is the same--the five million-plus cubic feet of radioactive and chemical waste piled at the Kerr-McGee site in residential West Chicago--the questions before the NRC differ in certain important respects from the questions before this Court. This Court must determine whether Kerr-McGee has violated Illinois statutes and regulations by its waste-handling practices at the site, whether Kerr-McGee has polluted air and groundwater, whether civil penalties under the Illinois Environmental Protection Act should be imposed, and whether consistently with that statute Kerr-McGee may bury the wastes in West Chicago. The NRC hearing board, on the other hand, will address the question--and only the question--whether Kerr-McGee's proposal for onsite burial satisfies the requirements of the Atomic Energy Act and NRC regulations. Moreover, the hearing board has decided that it will not evaluate Kerr-McGee's proposal in light of Illinois pollution standards, some of which are considerably more stringent than federal standards. In addition, the NRC hearing board will be constrained by federal law to address certain issues which this Court need not--indeed, may not[7]--address under Sec. 42 of the Illinois Environmental Protection Act (the provision authorizing injunction relief)--for example, the costs of complying with an injunction. Given these major differences in focus

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7 People of the State of Illinois v. Keeven, 68 Ill. App.3d 91 (5th Dist. 1979).

between the two proceedings, the primary jurisdiction doctrine has no place. Cf. Metropolitan Sanitary District v. U.S. Steel Corp., supra, 30 Ill.App.3d at 372; People ex rel. Scott v. U.S. Steel Corp., supra, 40 Ill.App.3d at 614.

In short, the primary jurisdiction doctrine does not justify a stay of the proceedings in this case.

## Conclusion

When Judge Scidmore denied Defendant's motion to dismiss in March 1984, he made an observation in his written opinion that has some relevance here:

> [T]his Court is mindful of the history of this case which represents a bona fide effort of the State of Illinois to deal with an alleged immediate hazard to the life and property of Illinois citizens. This effort commenced in 1980. The case was unilaterally transferred into federal jurisdiction by the U.S. District Court, who thereupon dismissed the complaint.
>
> Now three years later the case is returned to this Court for further action. In the meantime nothing has been done to meet the obvious public need of this allegedly clear and present danger.
>
> - Memorandum of Opinion, March 21, 1984, p. 4.

Since Judge Scidmore wrote those words, a year and a half has passed. The parties have devoted enormous time and effort to prepare for trial, which is scheduled to begin next February. In the meantime the waste is still sitting in West Chicago and, from all that has appeared thus far, will continue to sit there until such time as this Court may order otherwise. Plaintiff submits that further delay of trial and decision on the merits would be contrary to the public interest.

For these reasons Plaintiff urges the Court to deny Defendant's motion and re-affirm the scheduled February trial date.

Respectfully submitted,

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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) | ) | |

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 a[illegible]nd 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").

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

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[1] If 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.

[2] For 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.

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

[4]These 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 pretrial 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 pretrial 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.

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[5]Mr. 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

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[6]An 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

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[7]The 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

NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: _____
H. ALFRED RYAN
Chief, Environmental Control Division
Assistant Attorney General

BY: _____
RUSSELL R. EGGERT
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JOHN PERCONTI
Assistant Attorneys General
RUSSELL R. EGGERT
Administrative Assistant
Assistant Attorney General
100 West Randolph Street
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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:

Peter J. Nickles
Theodore Voorhees, Jr.
Covington & Burling
1201 Pennsylvania Ave., N.W.
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DU PAGE COUNTY I.D. #13675

EXHIBIT A

COVINGTON & BURLING
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WASHINGTON, D. C. 20044

(202) 662-6000
WRITER'S DIRECT DIAL NUMBER
(202) 662-5394

September 16, 1985

BY TELECOPIER

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

Re: People of the State of Illinois v. Kerr-McGee Chemical Corporation, 80 CH 298

Dear Anne:

This letter is to provide you with a summary of the expert testimony that Kerr-McGee will present at trial. As you will recall, I indicated during our meeting after the Prehearing Conference in the NRC proceedings on September 11 that I would forward this information to you today.

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

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.

Oktav 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

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, | ) | |
| v. | ) | No. 80 CH 298 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware corporation, Defendant. | ) | |

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

## 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, Evnironmental 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

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P. O. BOX 7566
WASHINGTON, D. C. 20044

(202) 662-5236

September 25, 1985

BY TELECOPIER

SEP 26 am

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 198

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, Statter 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.

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 Manning 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 Genus, 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

ELAINE C. THOMAS

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

NOTARY PUBLIC

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

ELAINE C. THOMAS

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

NOTARY PUBLIC

## SERVICE LIST

Chief, Docketing and Service
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Office of the Secretary
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Thomas J. McDaniel
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Kerr-McGee Center
Oklahoma City, Oklahoma 73215

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

KERR-McGEE CHEMICAL CORPORATION

(Kress Creek Decontamination)

Docket No. 40-2061-SC

Source Material

License No. STA-583

ASLBP No. 84-502-01 SC

Location: Bethesda, Maryland
Date: Wednesday, September 11, 1985

Pages: 176- 204

ANN RILEY & ASSOCIATES
Court Reporters
1625 I St., N.W.
Suite 921
Washington, D.C. 20006
(202) 293-3950

matters, and certainly October 11, which is 30 days, is plenty, and we would hope that the Board would not deviate from that position.

JUDGE FRYE: I think we will give you a ruling on this when we have the papers on the certification matter in West Chicago before us and when we have the answers to the Staff's motion to hold Kress Creek in abeyance.

But I want to caution you. We are not at all sympathetic to delaying until next year.

MS. RAPKIN: We understand that, Your Honor, but we need to make our position clear on the record.

JUDGE FRYE: I understand that, and you certainly have every opportunity to do that.

MR. EGGERT: And just so the record is clear, Your Honor -- and I say this with all respect to this forum and to the parties -- if we're in a position where we're being forced, where we're being squeezed -- and I think that's the attempt that is going on -- and where I think there's an attempt to derail a trial date that was set last February in a case that's five and a half years old, we may have to move against Kerr-McGee for an injunction against them proceeding in this forum in the State Court. The State Judge does have that authority. I hope it doesn't come to that, but I don't want anybody here to walk out of here today and say that I didn't put them on notice.

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) | ) | |

PEOPLE'S POSITION ON WAIVER OF PART 51

At the September 11, 1985 pre-hearing conference the Board instructed the parties to comment on its proposal to request the Commission to waive certain requirements of 10 CFR Part 51 and permit the hearing in this matter to take place next Summer, i.e. after the draft supplemental environmental statement is issued but before the final supplemental environmental statement is issued.

Sec. 51.100(a)(1)(ii) provides that the decision on a proposed action may not be made until thirty days after notice has been published that the FES has been filed with USEPA, and Sec. 51.104(a)(1) provides that the Staff may not take a position on environmental matters until the FES is filed with USEPA. The purpose of these provisions to assure that the goals of NEPA are fulfilled by allowing all interested persons and public agencies and officials an opportunity to comment on the draft environmental statement and allow the NRC staff an adequate opportunity to consider and react to those comments before adopting a final position on environmental matters. Thus, Part 51 is concerned not only with Staff consideration of the views of parties to the proceeding but also of non-parties who want to be, and should be,

heard.

The People believe it is premature to take a position on whether the public interest would best be served in this case by waiving these provisions of Part 51. First, Kerr-McGee's pending license amendment application and the Staff's forthcoming DSES may be mooted by the outcome of the DuPage County Circuit Court action to be tried this Winter. If the Court rules as Plaintiff has asked it to rule, it will find that the wastes have caused and will continue to cause violations of state law (including the Illinois Environmental Protection Act, 111-1/2 Ill.Rev.Stat. §§1001 et seq.) and must therefore be removed from the site and disposed of elsewhere. In that event, the option of the West Chicago Site will be gone; Kerr-McGee will have to find another location for disposing of the waste, and will have to propose such other location to the NRC in an entirely new license amendment application. Any permission which the Commission might ultimately give to Kerr-McGee to bury the wastes onsite will have been rendered completely ineffective by the state court's action. We emphasize that the Commission's ultimate approval of Kerr-McGee's present application can in no way preempt Judge Henzi's authority. The most the Commission can do is give federal sanction to what the Staff has characterized as Kerr-McGee's "preferred" plan (see §10 of the Affidavit of William A. Nixon dated June 9, 1980 and filed by Kerr-McGee in the U.S. District Court for the Northern District of Illinois in People v. Kerr-McGee, 80C2276.) In so doing the Commission may express its view that the cost to Kerr-McGee is not worth the benefits of moving the

waste to another location.[1] But that does not constitute a determination that the wastes could not safely be disposed of elsewhere and therefore must be left in West Chicago. Only such a Commission determination -- i.e., a determination that the West Chicago site is the sole acceptable site, anywhere in the Nation, for disposing of the wastes -- would create the type of conflict with state law capable of preempting Judge Henzi's authority.

Second, assuming the company's present application is not mooted by state court action, the propriety of waiving Part 51 can best be evaluated after we see the SDES. Depending on the SDES's conclusions and the complexity or controversial nature of the bases for those conclusions, the Staff might do better to grapple with the public comments at the internal administrative level before rushing to defend its position in the adversary atmosphere of a hearing.

---

[1]Plaintiff notes that in determining whether an injunction should issue under the Illinois Environmental Protection Act, the state court will not consider such equitable factors as the cost to Kerr-McGee of complying with the statute. People v. Keeven, 385 N.E.2d 804, 68 Ill. App. 3d 91 (5th Dist. 1979).

In sum, the People believe that the Board, before deciding whether to seek a waiver, should await the completion of the DuPage County trial and, if necessary, the issuance of the SDES.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: _____
ANNE RAPKIN
Assistant Attorney General
Environmental Control Division

ANNE RAPKIN
JAMES CARROLL
JAMES COGHLAN
JOHN PERCONTI
Assistant Attorneys General
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100 West Randolph, 13th Floor
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(312) 917-2512

PROOF OF SERVICE

I, DONNA R. WARD, having been sworn and under oath do state that I have this 7th day of October, 1985, served a copy of the foregoing People's Motion to File Instanter and also served a copy of the foregoing People's Position on Waiver of Part 51, 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.

Donna R. Ward

SUBSCRIBED AND SWORN TO
before me this 7th day of
October, 1985.

Phyllis Dunton
Notary Public

## SERVICE LIST

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Mead Hedglon
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Kerr-McGee Center
Oklahoma City, Oklahoma 73215

Slip Opinion

ROLLINS ENVIRONMENTAL SERVICES (FS), INC., a Delaware Corporation, Plaintiff-Appellant, v. THE PARISH OF ST. JAMES, a political subdivision of the State of Louisiana, et al., Defendants-Appellees

No. 85-3092

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Slip Opinion

November 1, 1985

APPEAL-STATEMENT:
Appeal from the United States District Court for the Eastern District of Louisiana Peter Beer, District Judge, Presiding

COUNSEL:
FOR APPELLANT: Emile C. Rolfs, III, P.O. Box 3551, Baton Rouge, LA 70821, Robert L. Boese P.O. Box 3551, Baton Rouge, LA 70821, (AMICUS-HAZARDOUS WASTE TREATMENT COUNCIL), Ridgway M. Hall, Jr., 1100 Connecticut Ave., N.W., Wash., D.C. 20036, MORGAN, LEWIS & BOCKIUS, William H. Lewis, Jr., 1800 M. Street,

Slip Opinion

N.W., Wash. DC 20036

FOR APPELLEE: (FOR PARISH OF ST. JAMES), Stephen M. Irving, 355 Napoleon St., Baton Rouge, 70802, (FOR PATRICIA M. NORTON-SEC., LA. DEPT. OF ENV. QUALITY), Peter M. Arnow, Asst. Atty. Gen., Environmental Enforcement, Section 7434 Perkins Road, B.R., La. 70808, John B. Sheppard, Jr., Section 7434 Perkins Road, B.R., La. 70808, (U.S. Env. Protection Agency), David C. Shilton, Atty., Appellate Section, Land & Natural Resources Div. Justice Dept., Wash., D.C. 20530, Martin W. Matzen

OPINIONBY: GOLDBERG

OPINION:

O P I N I O N

Before: Goldberg, Reavley and Garwood, Circuit Judges.
GOLDBERG, Circuit Judge:

Slip Opinion

This case presents a classic confrontation over the principles of federalism. Appellant Rollins has developed a national system of toxic waste disposal facilities and wishes to locate an intermediate processing plant in St. James Parish, Louisiana. No one contends in this case that Rollins' proposed and existing facilities, and its plans for operating them, do not conform to Congress' directives in the Toxic Substances Control Act and to applicable regulations issued by the Environmental Protection Agency. Nevertheless, the Parish, for reasons that are not difficult to comprehend, does not want this or any other toxic waste proposal facility located within its boundaries. After passing an ordinance that explicitly prohibited the type of toxic waste disposal at issue here, the Parish settled on a version that accomplished indirectly what the earlier ordinance set out to accomplish directly. The district court, Beer, J., found as a fact that the second ordinance amounted to an outright prohibition of Rollins' activities, but decided ultimately that it lacked subject matter jurisdiction over the case. We hold that there was jurisdiction and conclude that the challenged ordinance has been preempted by the Toxic Substances Control Act.

I. FACTUAL AND PROCEDURAL BACKGROUND

Slip Opinion

Plaintiff-appellant Rollins Environmental Services (FS), Inc. (" Rollins" ) is in the business of handling, transporting, and cleaning up hazardous wastes. This case arises from Rollins' proposed treatment of certain particularly toxic and deadly substances known as polychlorinated biphenyls ("PCBs") that are found, among other places, in the insulating fluid of large electrical transformers and capacitors. PCBs are carcinogenic agents, and direct exposure even to minute quantities of them can be fatal. For this reason Congress established in the Toxic Substance Control Act ("TOSCA") a broad range of programs to dispose of PCBs safely and to phase out their use. P.L. 94-469, 15 U.S.C. § 2601 et se. (1976).

In November, 1984, Rollins commenced PCB disposal operations at a facility located in Union, Louisiana, in the Parish of St. James. The site of the facility is about one-quarter mile from the Romeville Elementary School. Rollins planned to receive obsolete electrical transformers (some weighing several thousand pounds) at the facility by truck or rail, to drain off the fluid containing PCB's, and to rinse out the interiors of the transformers with diesel fuel. The insulating fluid and spent diesel fuel would then be placed in containers and shipped to another Rollins facility in Texas for final disposal; the transformers themselves were to be shipped to a landfill in Nevada for burial. 2 Record on Appeal, Transcript of Proceedings ("Tr.") at 88. This procedure was designed by Rollins as part of a national program for the safe

disposal of PCB's. Rollins has decontaminated thousands of transformers in this way, as specified by EPA regulations, see 40 C.F.R. 761.40-761.79 (1984), and its Texas incinerator is one of only three in the nation approved for the destruction of large quantities of PCBs. Tr. at 91, 95-98, 100-06. n1

n1 See also Defendant's Exhibit 3 (letter from EPA administrator to Rollins stating in part that "A PCB disposal permit is not required for an activity which is specifically authorized by the PCB disposal regulation. Therefore, you may drain and flush PCB transformers in accordance with the procedures described in 40 CFR 761.60(b)(1) without an EPA permit.").

The first shipment of transformers arrived in Rollins' Union, Louisiana, facility on November 27, 1984. On December 19, 1984, the St. James Parish Council enacted Emergency Ordinance 84-29, "An Ordinance Regulating Hazardous Wastes and PCBs in St. James Parish," which provided in part:

> The treatment, storage, and disposal of polychlorinated biphenyls (PCB and PCB's) at commercial waste disposal facilities within the Parish of St. James is hereby prohibited.



> The transporting of polychlorinated biphenyls (PCB and PCB's) through the Parish of St. James shall require that the transporting agent supply a manifest to, and obtain a permit from, the Sheriffs [sic] Department of St. James Parish.

Two days later Rollins brought an action in the United States District Court for the Eastern District of Louisiana, challenging the Ordinance as violative of the Commerce Clause and Supremacy Clause of the U.S. Constitution and demanding declaratory and injunctive relief.

Ordinance 84-29 remained on the books for less than a month. At its next meeting, on January 29, 1985, the St. James Parish Council repealed Ordinance 84-29 and replaced it with Emergency Ordinance 85-1. Tr. at 19, 71. The new Ordinance is styled "An Ordinance Regulating Commercial Solvent Cleaning Businesses in St. James Parish," and it includes the following "prohibitions":

> A. No commercial solvent cleaning business may be conducted within one mile of any area of special

concern.

B. No commercial solvent cleaning business may be located in an area of special environmental concern or conducted so as to drain or discharge any spent solvent into any area of special environmental concern.

C. No commercial solvent cleaning business may conduct any part of the cleaning operation except in a "contained area" as described in this ordinance. n2

Rollins amended its complaint to challenge Ordinance 85-1, and it is this Ordinance that is at issue in the present case.

n2 The Ordinance defines an are. of special concern as "a school, day care center, nursing home, grain elevator, public building or auditorium, hospital, church, or theater"; an area of special environmental concern as "a flood hazard area or flood plain, wetland, surface or subsurface drinking water source in St. James Parish"; and a contained area as "a concrete slab at least two feet thick and sloped to collect any spilled solvent." The Ordinance also imposes a



number of special building requirements on commercial solvent cleaning businesses and empowers the Parish Council to determine whether "a need for the proposed facility exists and the proposal is the best alternative to fill that need." "[O]n site cleaning or decontamination by any owner or his contractor" and "machinery or motor vehicle repair businesses" are specifically exempted from the scope of the Ordinance.

A full hearing was held in the district court on Rollins' request for a temporary restraining order. Rollins put on four witnesses: the President of St. James Parish, a civil engineer and land surveyor, a member of the St. James Parish Council, and the Vice-President of Rollins. After hearing their testimony and the arguments of counsel, including that of an Environmental Protection Agency ("EPA") representative, the district court found as a fact that Ordinance 85-1 amounted to, and had the practical effect of, an absolute prohibition of Rollins' activities in the Parish. See Tr. at 137-38, 139, 145, 149-50, 154-55. Nevertheless, the district court determined that it lacked subject matter jurisdiction and dismissed Rollins' suit. The key factor in the court's decision seems to have been the EPA's ambivalent position on the issue of preemption. See id. at 83-85, 117-18, 150, 151, 152-53 (describing EPA not ambiguously confirm that Ordinance 85-1 was preempted under TOSCA, the court was reluctant to disturb what it saw as an otherwise legitimate exercise of the Parish's political rulemaking and the local police powers.

## II. JURISDICTION

The issue of jurisdiction is a threshold matter. Although some consideratin of the merits may occasionally be necessary for a decision on jurisdiction, in this case the district court need not have looked very far to find jurisdiction.

The most obvious source of federal jurisdiction in this case is 28 U.S.C. § 1331, which confers original jurisdiction on the district courts to adjudicate "all civil actions arising under the Constitution, laws, or treaties of the United States." In its amended Complaint Rollins invokes, inter alia, the Supremacy Clause of the U.S. Constitution, the Commerce Clause of the U.S. Constitution, and specific provisions of the Toxic Substances Control Act as bases for its claims. For a finding of federal question jurisdiction is not incumbent on the party asserting jurisdiction to prove in advance that it will ultimately prevail on the merits of its federal claims. Bell v. Hood, 327 U.S. 678, 682 (1946). Rather, the party asserting jurisdiction need only advance plausible, colorable claims that "arise under" federal law. As the Supreme Court stated in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), for purposes of jurisdiction it is sufficient that a party present claims that are



not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy . . . whatever may be the ultimate resolution of the federal issues on the merits." Id. at 666-67; see also SED, Inc. v. City of Dayton, 515 F.Supp. 737, 740-41 (S.D. Ohio 1981) (EPA's position on preemption of ordinance regulating PCB's irrelevant to issue of jurisdiction).

In this case it is clear that federal law supplies essential elements of Rollins' claims. First, Rollins asserts that Ordinance 85-1 regulates an area of concern that is expressly preempted under TOSCA, § 18(a)(2)(B), and thus directly violates the Supremacy Clause of the U.S. Constitution. Second, Rollins maintains that Ordinance 85-1 conflicts with implied Congressional goals and purposes, expressed through enactments in the same field-namely, the comprehensive legislative and regulatory scheme enacted in TOSCA-and is thus unconstitutional under the implied preemption doctrine of the Supremacy Clause. Finally, Rollins alleges that the Ordinance constitutes a substantial burden on interstate commerce and thereby violates the Commerce Clause of the U.S. Constitution. Clearly, these claims are plausible enough and present sufficiently substantial federal questions to get Rollins into federal court. n3

n3 Since we find federal question jurisdiction under 28 U.S.C. § 1331 it is unnecessary for us to consider whether, as appears to be the case, federal jurisdiction would also lie in the district court under 28 U.S.C. § 1332 (diversity jurisdiction) and 28 U.S.C. § 1337 (jurisdiction under commerce regulation).

Our finding of jurisdiction is buttressed by the fact that appellee St. James Parish did not seriously contest the issue in its brief and virtually conceded jurisdiction at oral argument.

## III. SCOPE OF REVIEW

Ordinarily we would have no occasion to reach the merits of a case dismissed in federal court for want of jurisdiction. In the present case, however, it is clear that the district court based its jurisdictional ruling on the merits of Rollins' federal claim. A brief examination of the record confirms this interpretation of the proceedings below.

At the outset of the hearing on Rollins' request for a temporary restraining order the district court directed counsel for both parties to



focus their efforts on the "threshold" issue of jurisdiction. Tr. at 4-5. The court then proceeded to hear four witnesses, noting that "the whole question of preemption seems to require a certain amount of, I guess you would have to say, testimony on the merits. . . ." Id. at 52. The witnesses testified in detail on such diverse subjects as the porosity of concrete, the location of a 1,000-year flood plain in St. James Parish, and the volume of water that would pass through an eight-inch water line at sixty pounds per square inch pressure during six hours of continuous use. At the end of this testimony, and after hearing the arguments of counsel, the district court concluded that, but for its perceived lack of jurisdiction," the district court stated,

> then I would have to say to the very able and I think distinguished parish Council, you all are in trouble. Because I think as a factual matter, the result of your Ordinance, however well intended, however much was your feeling that that was the will of the people you are elected by, the fact of the matter is that it does effectively kick Rollins out of the Parish, insofar as this activity is concerned.

Id. at 154.

As will be more fully developed below, the purpose and effect of Ordinance 85-1 are the only real factual issues in this case. On these issues, the district court made explicit findings of fact. See id. at 137-38, 139, 145-50, 154. n4

n4 In reaching the merits of this case we note that counsel for both parties briefed these issues fully. In their briefs, and at oral argument, both parties appear to have acknowledged the propriety of appellate review on the merits. See Appellee's Brief at 2 ("In order to determine that ordinance 85-1 was bona fide the Court had to hear the evidence about what the ordinance did and what Rollins proposed to do. All evidentiary issues were fully explored in the Court below."); id. at 3 ("Statement of the Issues Presented for Review"); id. at 19 ("The. . .jurisdictional issue is closely intertwined with the merits. For this reason, as Rollins concedes in brief, the case was fully tried in the court below. All evidence to support the Rollins claims is now before this Court."); Appellant's Brief at 21 ("Remand of the case for findings as to the applicability of the ordinance and its validity is unnecessary, and would be wasteful of judicial resources since no issues of material fact remain and the legal issues can be fully briefed and argued in this appeal."); Appellant's Reply Brief at 3 ("The question of whether Ordinance 85-1 is constitutional,



as well as the question of whether subject matter jurisdiction resides in the district court, should both be decided in this appeal."); see also Independent Bankers Association v. Heimann, 613 F.2d 1164, 1167 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).

## IV. PREEMPTION

The overall purpose of the Toxic Substances Control Act was to set in place a comprehensive, national scheme to protect humans and the environment from the dangers of toxic substances. Congress recognized that state and local ordinances might thwart the effectiveness of a national legislative and regulatory scheme; accordingly, section 2 of TOSCA states that "the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures." 15 U.S.C. § 2601(a)(3). n5

n5 The House report on TOSCA explains that

The Committee has extended the reach of the regulatory authority of the bill to all chemical substances and mixtures whether an interstate commerce or not

since the size and scope of the chemical industry makes it impossible to distinguish between those in interstate commerce and those which are not. Further, commerce in those which are arguably only in intrastate commerce may affect commerce in those which are in interstate commerce, and consequently there cannot be effective regulation of the latter without regulation of the former. Also regulation of only those in interstate commerce without regulation of the others could depress commerce and discriminate against those in interstate commerce and adversely burden, obstruct, and affect such commerce.

H.R. Rep No. 94-1341, 94th Cong., 2d Sess. (1976), reprinted in House Committee on Interstate and Foreign Commerce Legislative History of the Toxic Substances Control Act at 417.

Sections 2604 and 2605 of Title 15 are the basic provisions of TOSCA mandating a comprehensive regulatory scheme for toxic substances. Section 2605(e)(1) provides in part:

> (e) Polychlorinated biphenyls.-(1) Within six months after January 2, 1977, the Administrator shall promulgate rules to- . .

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> (A) prescribe methods for the disposal of polychlorinated biphenyls, and
>
> (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions, with respect to their processing, distribution in commerce, use or disposal or with respect to any combination of such activities.

To effectuate Congress' national regulatory objectives, Section 18(a)(2)(B) of TOSCA, codified at 15 U.S.C. § 2617, contains an explicit preemption provision, which reads as follows:

Preemption

. . . .

Except as provided in subsection (b) of this section-. . .

. . . .

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> . . . if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

15 U.S.C. § 2617(a)(2)(B). n6

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n6 Congressman McCollister, the floor manager of the bill, explained the preemption provision as follows: State law is preempted only when the EPA has issued a rule under section 4, section 5 or section 6 [of TOSCA]. If the EPA has not acted, the States are free to act. If the EPA has acted, then the States must apply for an exemption from the preemption.

Before the State can put a different requirement into effect, it has to ask for an exemption from the preemption.

This provision was designed to discourage State requirements which would put an undue burden on those companies that do business in a number of States.

House Debate, August 23, 1976, reprinted in House Committee on Interstate and Foreign Commerce Legislative History of the Toxic Substances Control Act at 625.

In 1978 the EPA promulgated a comprehensive set of PCB disposal regulations pursuant to its authority under section 2605. See 43 Fed. Reg. 7150 (Feb 17, 1978). These regulations have been codified at 40 C.F.R. §§ 761.40-761.79

(1984). The Parish of St. James does not maintain that Ordinance 85-1 qualifies for any of the three above-numbered exceptions to the preemption provision. Subsection (b) details a procedure for obtaining exemptions from the preemption provision, but the Parish has not applied for such an exemption. Thus all the conditions necessary to trigger the preemption provisions of TOSCA have been met. n7

n7 As noted above, the EPA regulations governing PCBs were promulgated under the authority of subsection (e)(1) of section 2605 of Title 15 (TOSCA section 6(e)(1)), not subsection 2605. See 43 Fed. Reg. 7150 (Feb. 17, 1978). Thus the parenthetical exception to the preemption provision-"(other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title)" -does not apply. See SED, Inc. v. City of Dayton, 519 F.Supp. 979, 987-88 (S.D. Ohio 1981).

Article VI of the U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land." It is well established that Congress may, within constitutional limits, absolutely preempt state and local rulemaking authority in a given area. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Pacific Gas and Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203-04 (1983). Even where Congress has not entirely displaced state and local



rulemaking in a specific area, those lower laws are preempted to the extent that they conflict with federal law. Where a lower law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941), it is preempted. Preemption may also be "inferred" from the existence of a comprehensive Congressional scheme covering an area of activity. Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Here, however, Congress has explicitly mandated that TOSCA, and regulations promulgated under it by the EPA, preempt state and local regulation of PCB disposal. n8

n8 See Warren County v. North Carolina, 528 F.Supp. 276 (E.D. N.C. 1981):

> If [the Supremacy Clause] of the Constitution means anything it must mean that a county may not pass an ordinance, the effect of which is to totally frustrate an entire statutory plan enacted by the Congress for the protection of citizens in all fifty states. Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee, South Carolina and Georgia would also object to our carrying such wastes into their states. The Warren County ordinance clearly stands as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress under the Toxic Substances Control Act and, therefore, is void.

Id. at 290. See also Twitty v. North Carolina, 527 F.Supp. 778 (E.D. N.C. 1981) (companion case to Warren County), aff'd, 696 F.2d 992 (4th Cir. 1982); Chemical Waste Management, Inc. v. Broadwater, Civil Action No. 84-G-1208-W (N.D. Ala. 1984), appeal dismissed, 758 F.2d 1538 (11th Cir. 1985); SED, Inc. v. City of Dayton, 519 F.Supp. 979 (S.D. Ohio 1981). But see Chappell v. SCA Services, Inc., 540 F.Supp. 1087 (C.D. Ill. 1982).

Against this legal background, appellee St. James Parish wisely declines to dispute the validity of Congressional preemption as a general proposition. The Parish acknowledges that an outright ban or prohibition of PCB disposal activity would be impermissible under TOSCA. See, e.g., Warren County, 528 F.Supp. at 290. However, in response to the foregoing analysis the Parish insists that its challenged Ordinance is not a PCB ordinance at all. There is no mention of "PCBs," "transformers," or "toxic substances" in Ordinance 85-1; instead, it refers exclusively to "commercial solvent cleaning" operations and the like. In other words, the Parish argues that its Ordinance does not regulate the same field of activity preempted by Congress. n9 In terms of TOSCA, the Parish has to be saying that its Ordinance is not "applicable to" the same "chemical substance or mixture" that Congress had in mind, and that it is not "designed to protect



against a risk of injury to health or the environment associated with such substance or mixture." 15 U.S.C. § 2617. Only if the Ordinance were a "sham"-which counsel for the Parish defined at oral argument as a "total subterfuge"-would it be invalid. We accept appellee's definition and hold today that Ordinance 85-1 is indeed a sham.

n9 See, e.g., Appellee's Answer [P] 7 ("At the present time, the St. James Parish Council does not have in effect any regulations on PCB compounds.").

At the very least, an exercise of legislative rulemaking authority must be a reasonable means of attaining legitimate governmental objectives. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Jiminez v. Weinberger, 417 U.S. 628 (1974). Here, of course, the question is not so much whether the challenged Ordinance is rationally related to legitimate objectives, but whether it trenches impermissibly upon a field preempted by Congress. Nevertheless, the two analyses are related. Insofar as Ordinance 85-1 amounts to an outright ban of prohibition of appellant's PCB disposal activities, it has the legitimate objective of regulating a field preempted by Congress. Alternatively, even viewed as a "commercial solvent cleaning" regulation, the Ordinance would be an unreasonably burdensome and restrictive means of attaining that end, and would thus be in violation of the Commerce Clause. n10

n10 See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Kassal v. Consolidated Freightways Corp., 450 U.S. 662, 670-71 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617, 622, 626-29 (1978) (garbage); Hardage v. Atkins, 619 F.2d 871 (10th Cir. 1980) (industrial wastes); Washington State Building And Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Foundation v. Washington, 461 U.S. 913 (1983) (low-level radioactive waste); Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1982), cert. denied sub nom. Hartigan v. General Electric Co., 461 U.S. 913 (1983) (nuclear wastes); see also Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208, 219-20 (1959):

> The Court . . . appears to use essentially the same reasoning process in a case nominally hinging on pre-emption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [T]he Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the pre-emption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market.



In construing Ordinance 85-1 we look to its purpose and effect. Guidance in interpreting the Ordinance is provided by (1) the chronology of events leading up to its passage--its "legislative history," so to speak; (2) the testimony below on several notable features of the Ordinance; and (3) the explicit findings of fact made by the trial judge.

Although an examination of the motives and intentions of those who enacted a measure is no substitute for a reading of its plain language, such an inquiry can provide useful context for understanding the real meaning and import of legislation. n11 In this case, as has been noted above, the challenged measure was immediately preceded by Ordinance 84-29, enacted on December 29, 1984, which provided for an express ban or prohibition of PCB disposal activities: "The treatment, storage and disposal of polychlorinated biphenyls (PCB and PCB's) at commercial waste disposal facilities within the Parish of St. James is hereby prohibited." Appellee concedes in its brief that "The original ordinance contained a ban on PCB disposal practices. . . .This ordinance had problems under the commerce clause and [under] several district court decisions interpreting the Toxic Substances Control Act. . . ." Appellee's Brief at 4. The Agenda for the next meeting of the Parish Council included two references to "Amending Ordinance 84-29," and at that meeting the challenged Ordinance 85-1 was enacted to replace Ordinance 84-29. See Testimony of Paul Keller, President of St. James Parish, Tr. at 19 (Ordinance 85-1 "was intended to replace"

84-29); Testimony of Robert Benn, Jr., St. James Parish Councilman, Tr. at 71 (same). In light of the foregoing, it hardly takes a leap of faith to conclude that Ordinance 85-1 has the same purpose as the rescinded Ordinance 84-29, namely to ban or prohibit PCB disposal activity in the Parish. n12

n11 See Pacific Gas and Electric, 461 U.S. at 216; United States v. O'Brien, 391 U.S. 367, 383 (1968).

n12 Further evidence that the purpose of the Ordinance was to ban or prohibit PCB disposal activities in general, and Rollins' business in particular, is to be found in the provisions of the Ordinance that inexplicitly exempt local businesses from its prohibitions:

> The term ["Commercial Solvent Cleaning Business"] shall not include on site cleaning or decontamination by any owner or his contractor nor does it include machinery or motor vehicle repair businesses when cleaning and decontamination is incidental to a bona-fide effort to repair the machinery or vehicle.

The district court below heard uncontroverted testimony to the effect that Ordinance 85-1 amounted either to an outright prohibition of Rollins' PCB disposal activities or an unreasonably burdensome and restrictive regulation of its "commercial solvent cleaning" business. Several key features of the



Ordinance call attention to themselves. First, it provides that no commercial solvent cleaning business may be conducted within one mile of any "area of special concern," which the Ordinance defines as "a school, day care center, nursing home, grain elevator, public building or auditorium, hospital, church, or theater." The Parish President testified that this provision alone would exclude 83% of the Parish from consideration as a "commercial solvent cleaning business" site. Tr. at 26. Second, the Ordinance provides that no commercial solvent cleaning business may be located in "an area of special environmental concern," which the Ordinance defines as "a flood hazard area of flood plain, wetland, surface or sursurface drinking water source in St. James Parish." The Parish President testified that, under various possible interpretations of these terms, the entire Parish would be excluded from consideration as a "commercial solvent cleaning business" site. See Tr. at 32-37.

Finally, Ordinance 85-1 imposes a number of special building requirements for commercial solvent cleaning business, including the requirements that such businesses be built on a concrete slab "at least two feet thick" and that they have on site "at least one 8" water line capable of maintaining normal pressure through at least six hours of continuous use." The Parish President testified that he had "no [idea] whatsoever" why a two-foot thick slab of concrete would necessary for commercial solvent cleaning operations, and added that he knew of no other Ordinance imposing this requirement in the Parish. Tr. at 42.

Rollins then put on an expert engineer who testified that the requirement of a two-foot thick concrete slab was "unreasonable" from an engineering point of view and that Rollins' six-inch thick slab was "totally adequate" for its intended purpose. Testimony of Ronald K. Ferris, Tr. at 55. This engineer also testified that the water supply required by the Ordinance would cover the Rollins facility to a height of fifty-eight feet. Id. at 57.

In the face of this testimony, we have no difficulty upholding the district court's finding of fact that Ordinance 85-1 was so unreasonably burdensome and restrictive that it amounted to an impermissible ban or prohibition of Rollins' PCB disposal business. The court below was explicit as to its findings:

> [A]s a practical matter, in order that some reviewing Court may know how it all strikes me, I do believe that it is very well intended, but nevertheless calculated effort to say no without actually really ever saying no.
>
> In other words, I don't want any of the parties or the attorneys or the record or any reviewing

Slip Opinion

> Court to have to labor with one determination that I think I should make [as] a fact-finder and that determination is that whatever good faith I may ascribe to the witnesses who testified, and I do ascribe total good faith to them, I am still pretty much convinced that the end result sought by this Ordinance is to do exactly what you say it isn't to do, and that is to stop this company's clock, as far as operating in St. James Parish is concerned.

Tr. at 137-38; see also id. at 139, 154-55. Elsewhere in its findings of fact the district court expressly rejected the Parish's contention that its Ordinance is not a PCB regulation at all, but rather an ordinance of general applicability regulating "commercial solvent cleaning" businesses:

> I perceive the Ordinance to be more far reaching than its title indicates, and . . . I am convinced as a practical person and as a fact finder that the essential implications of the Ordinance are not necessarily to

control a particular cleaning substance, but to stop the operations of Rollins in this parish, at least at this point in time and at this physical location.

Id. at 149-50; see also id. at 145. The district court's findings are amply supported by the record in this case. We conclude therefore that Ordinance 85-1 is an impermissible intrusion into territory preempted under TOSCA and that enforcement of it would violate the Supremacy Clause of the federal Constitution.

## V. CONCLUSION

This court is not insentitive to the concerns expressed by the Parish of St. James in this case. No one wants a toxic waste disposal facility "in his own back yard"-and for good reason. The uncontrolled chemical emissions that have occurred elsewhere this year lend sober perspective to the sanguine assurances of scientists that such mishaps will not-indeed, cannot-occur. These concerns are rightfully intensified when, as here, a hazardous facility appears to have



been located almost deliberately on the most inauspicious possible site, one-quarter mile from a local elementary school.

Precisely because of such concerns, Congress enacted in the Toxic Substances Control Act a broad national program of measures of prevent and guard against the uncontrolled and hazardous emission of substances such as PCBs. If every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated. And, for all we know, electrical transformers of the Romeville Elementary School may present at this very moment far greater dangers of uncontrolled and disastrous PCB emission than the Rollins facility.

Moreover, our holding today does not mean that the Parish must simply resign itself to the present location of Rollins' ill-fated facility. As noted above, Congress also provided in TOSCA an orderly procedure by which exemptions from its preemption provisions can be sought and obtained. But the enactment of an ordinance that can only be characterized as a subterfuge is not an appropriate response to legitimate concerns over the dangers of PCBs.

The Continental Congress knew that, without a powerful preemption doctrine, its chances of forming a more perfect union of the struggling states, with

their variegated philosophies and economics, would have been nil. For this reason a strong Supremecy Clause was inserted in the Constitution, and it has been justified by the events of the founding years and throughout the history of our country.

In the 1960's, for example, the Civil Rights legislation and the Voting Rights Act were distinctly distasteful to some of the states of the Union. These states responded with an agenda of frustrating and nullifying and eviscerating the benign principles of Brown v. Board of Education and the subsequent Civil Rights legislation. Thus, the state legislatures busily engaged in the legislative process, passing bills and convening the legislature in the midnight hours-at times to negate what Congress and the President had put into law the day before. It quickly became obvious that the federal supremacy fostered by the Constitution, and the doctrine of preemption as it applies when federal statutes are involved, were indispensable in assuring that there could be no interdiction of the progress of civil rights through state legislative action.

Preemption is an absolute necessity, an imperative, if the federal government is to be a federal government. To do what is asked for by the appellee in this case is really to change the whole constitutional structure of our country and to bury federalism many feet below the surface of a babbling group of states and an utterly ineffective federal government. The Constitution of the United



States prevents the erection of 50 Towers of Babel.

Accordingly, we REVERSE and grant Rollins Environmental Services' petition to enjoin enforcement of Ordinance 85-1.

REVERSED.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the matter of:

| | |
|---|---|
| KERR-McGEE CHEMICAL CORP. | Docket No. |
| (West Chicago Rare Earths Facility) | 40-2061-ML |

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Location: Chicago, Illinois
Date: Thursday, February 2, 1984

Pages: 1 - 219

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

| | |
|---|---|
| In the matter of: | |
| KERR-McGEE CHEMICAL CORP. | Docket No. 40-2061-ML |
| (West Chicago Rare Earths Facility) | |

U.S. Court of Appeals
Room 2781
219 South Dearborn Street
Chicago, Illinois 60604

Thursday, February 2, 1984

The above-entitled matter came on for hearing at 9:30 a.m., pursuant to notice.

BEFORE:

JOHN H. FRYE, III, Esq.
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

PETER A. MORRIS,
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

JAMES H. CARPENTER,
Administrative Judge
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Oak Brook, Illinois 60521

which there is information and for which there is adequate basis, as quick as possible. And that if additional information is developed or if there are defects in the FES, that they be cured during the hearing proceeding and that we not hold up the hearing, and that we not proceed in lock-step, one after the other.

Kerr-McGee is interested in getting along with the stabilization and decommissioning of that site and we would ask this Board to consider that in terms of scheduling and moving on the proceeding.

MS. RAPKIN: If I might respond briefly.

JUDGE FRYE: Yes.

MS. RAPKIN: First of all, in response to the question about whether or not we need to move hastily or quickly, I don't see a sudden need to start moving quickly. The material has been sitting on the site, in essentially its present condition, for 10 or 11 years and the NRC only recently came out with an EIS. The Applicant, only in December of '81, came out with a final stabilization plan.

We agree there are distinct health concerns out there, but I certainly don't think that they are so imminent that we should not move in a reasonable fashion.

The other response is more specific, and that is to Bob's comment that in other cases, such as nuclear power plant proceedings, the Board goes forward regardless of whether

STATE OF ILLINOIS )
) SS
COUNTY OF DuPAGE )

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff | ) | |
| -vs- | ) | No. 80 CH 298 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation, Defendant | ) | |

Discovery deposition of TERRY R. LASH, taken at the instance of the Defendant, on the 10th day of October, 1985, at the hour of 9:30 A.M., at Springfield Hilton Hotel, Springfield, Illinois, before Laura L. Boyd, CSR and Notary Public, pursuant to the stipulation attached hereto.

EXAMINATION BY

MR. VOORHEES:

Q State your name, please.

A Terry Reynolds Lash.

Q And where do you live, Mr. Lash?

A Springfield, Illinois.

Q By whom are you presently employed?

A State of Illinois.

Q What capacity?

A I'm the Director of the Illinois Department of Nuclear Safety.

A How long have you been Director of IDNS?

A I was appointed by Governor Thompson in November of last year and confirmed by the State Senate, I believe, in March of this year.

Q Prior to being a Director, what was your position?

A I was Deputy Director at the Department of Nuclear Safety.

Q Over what period of time?

A From September 1983 until I was appointed Director.

Q And who was the Director during your term as Deputy Director?

files that would relate to it. So let me ask you to think a little bit more about what it is that you'd like and put that --

MR. VOORHEES: Well, we'll write you a letter.

MS. RAPKIN: Yes, I was going to say, put that in writing. Thank you, Ted.

Q Dr. Lash, have you considered whether the low level radioactive materials that are currently present in West Chicago pose any health risk of an imminent nature to any resident of the City of West Chicago?

MS. RAPKIN: Let me just ask for clarification. Is the question referring to the materials that are at the Kerr-McGee site or the -- and/or materials that are scattered elsewhere throughout the --

MR. VOORHEES: Limited to the materials at the Kerr-McGee West Chicago site.

A Yes.

Q You considered that question?

A Yes.

Q When did you consider it?

A I considered it since I joined the

Department of Nuclear Safety as Deputy Director and was assigned the Director responsibility to take a look at the Kerr-McGee situation.

Q And did you ever reach a conclusion on that question?

A Yes.

Q What was your conclusion?

A While there is a risk to the population adjacent to the facility, it is not sufficiently large in the short term that immediate or emergency actions are required other than the action that the company has already taken to reduce substantially the radon and thorium emanation from the tailings spot.

Q What do you mean by the word "short term"?

A For the next few years.

Q What do you mean by the next few years?

A I haven't specified it any further than that.

Q Is that because you can't specify it further than that?

A A selection of any particular year would be arbitrary.

Q Can you give me a range of what you mean

by the next few years?

A Five or so.

Q I'll ask for a range. "Or so" may provide a range, but I don't know what that range would be.

A As I say, I haven't specified in my own mind a precise numerical answer to your question. I can't give much more guidance at this time other than I do not believe that via the air pathway, that there is a radiological hazard to the surrounding population sufficient to justify immediate or emergency action beyond those already taken by the company. My focus is on the longer term issues, and it's my understanding that the company itself would not propose to leave the tailings in their current state for the indefinite future.

Q And as to what you mean by the term "short term", the best you can do is five years or so?

A Sitting at this table, yes.

Q You mentioned in your prior answer "by air pathways". Have you reached any conclusion as to whether any imminent health hazard exists for residents of the City of West Chicago via pathways other than the air?

MS. RAPKIN: May I ask for some

STATE OF ILLINOIS )
) SS
COUNTY OF DuPAGE )

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff | ) | |
| -vs- | ) | No. 80 CH 298 |
| KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation, Defendant | ) | |

Discovery deposition of TERRY R. LASH, taken at the instance of the Defendant, on the 10th day of October, 1985, at the hour of 9:30 A.M., at Springfield Hilton Hotel, Springfield, Illinois, before Laura L. Boyd, CSR and Notary Public, pursuant to the stipulation attached hereto.

EXAMINATION BY

MR. VOORHEES:

Q State your name, please.

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MS. RAPKIN: May I ask for some

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| KERR-MCGEE CHEMICAL CORPORATION | ) | Docket No. 40-2061-ML |
| | ) | |
| (West Chicago Rare Earths Facility) | ) | ASLBP No. 83-495-01-ML |

AFFIDAVIT OF MERRI HORN

I, Merri Horn, being duly sworn, state as follows:

1. I am employed as an environmental engineer by the U.S. Nuclear Regulatory Commission in the Uranium Process Licensing Section, Uranium Fuel Licensing Branch, Division of Fuel Cycle and Material Safety, Office of Nuclear Materials Safety and Safeguards.

2. In my capacity as an environmental engineer assigned to the review of the West Chicago Rare Earths Facility license amendment application, I have reviewed Inspection Report No. 40-2061/85001 (DRSS) and have spoken with the inspectors who prepared it regarding the matters addressed in the Inspection Report. In addition, I spoke with Dr. Steve Tsai of Argonne National Laboratory regarding the other matters addressed in the attached status report.

3. I have prepared the report entitled "Status of the West Chicago Site" based on the information noted above.

I hereby certify that the information in the report is true and correct to the best of my knowledge.

Merri Horn

Merri Horn

Subscribed and sworn to before me this 3rd day of October, 1985

Virginia Lee Thorpe

Notary Public

My commission expires: 7/1/86

# STATUS OF THE WEST CHICAGO SITE

Since the FES was issued in 1983, there have been some changes in the status of the site as to emissions. Kerr-McGee (K-M) installed an asphalt suppression system over the tailings pile in 1983 to reduce lead-212 concentrations in the air. This system consisted of a thin coat of asphalt emulsion followed by a non-woven geotechnical fabric and then a relatively thick topcoat of asphalt emulsion. This system was installed in response to the Notice of Violation from the NRC dated August 31, 1983. Region III personnel conducted an inspection in April 1985. Among the items covered was the environmental air sampling results for lead-212 and radon. The inspectors found that K-M was in compliance and did not exceed the MPC values. The asphalt covering has been effective in reducing the exposure and dose resulting from these emissions and should remain effective as long as the cover integrity is maintained.

The reported impacts in the FES due to the contaminants (chemical) in the groundwater should have remained the same as stated in section 5.6.2.1. There should remain a general trend of improvement in the quality as to chemical contaminants and there should be no radioactive contamination. The NRC does not collect and analyze groundwater samples at the site and has seen no data collected by other parties that would contradict the statements in section 5.6.2.1 of the FES. Therefore, the NRC staff has no reason to believe that the situation with respect to the groundwater quality has changed.

Kerr-McGee has finished the demolition of the buildings on the factory site and is in the process of incinerating all combustibles generated from the demolition, thus, significantly reducing the fire hazard that existed.

Kerr-McGee continues in their effort to clean up the contaminated areas in West Chicago. The excavated material is being stored on the disposal site. The only concern during storage is dispersal of material by wind, and Kerr-McGee is required to treat the material to prevent dusting. The radioactive content of this material is minor compared to the waste already at the site.

APR 30 1985

Docket No. 40-2061

Kerr-McGee Chemical Corporation
ATTN: Dr. John C. Stauter
Director of Nuclear
Licensing and Regulation
Kerr-McGee Center
Oklahoma City, OK 73125

Gentlemen:

This refers to the routine safety inspection conducted by A. G. Januska of this office on April 15 and 18, 1985, of activities at Kerr-McGee West Chicago Project authorized by NRC License No. STA-583 and to the discussion of our findings with Messrs. M. Krippel and D. Majors at the conclusion of the inspection.

The enclosed copy of our inspection report identifies areas examined during the inspection. Within these areas, the inspection consisted of a selective examination of procedures and representative records, observations, and interviews with personnel.

In accordance with 10 CFR 2.790 of the Commission's regulations, a copy of this letter and the enclosure will be placed in the NRC Public Document Room.

No items of noncompliance with NRC requirements were identified during the course of this inspection.

We will gladly discuss any questions you have concerning this inspection.

Sincerely,

C J Paperiello

C. J. Paperiello, Chief
Emergency Preparedness and
Radiological Protection Branch

Enclosure: Inspection Report
No. 40-2061/85001(DRSS)

cc w/encl:
M. L. Binstock, Director
of Cimarron Operations
DMB/Document Control Desk (RIDS)

U.S. NUCLEAR REGULATORY COMMISSION

REGION III

Report No. 40-2061/85001(DRSS)

Docket No. 40-2061 License No. STA-583

Licensee: Kerr-McGee Corporation
Kerr-McGee Center
Oklahoma City, OK 73125

Facility Name: Kerr-McGee West Chicago Project

Inspection At: Kerr-McGee West Chicago Project
West Chicago, IL

Inspection Conducted: April 15 and 18, 1985

M. Schumacher for 4/30/85

Inspector: A. G. Januska

M. Schumacher 4/30/85

Approved By: M. C. Schumacher, Chief
Independent Measurements and
Environmental Protection Section
Date

Inspection Summary:

Inspection on April 15 and 18, 1985 (Report No. 40-2061/85001(DRSS))
Areas Inspected: Routine, unannounced inspection of environmental air sampling, liquid waste disposal, incineration of contaminated combustibles, demolition of Building 9, and personnel air sampling. The inspection involved 9.5 inspector-hours on site by one NRC inspector.
Results: No apparent items of noncompliance were noticed.

## DETAILS

1. Persons Contacted

*M. Krippel, Health Physicist
K. Lambert, Health Physics Supervisor
*D. Majors, Staff Regulatory Compliance Specialist

*Denotes those present at exit interview.

2. Airborne Exposures

The licensee reported that a driller assigned to K-M Rig 3 accumulated 58.3 MPC-hours exposure to natural thorium while drilling and sampling on the pond sediment pile between March 4-8, 1985. This exceeded the 40-hour control limit established in 10 CFR 20.103(b)(2). An evaluation by the Health Physicist, comparing the exposure concentration of the driller and a substitute driller on the same rig on March 6 when 26 of the 58.3 MPC-hours were accumulated, determined that the exposure concentration was localized. Daily surveys to monitor the extent of loose contamination on the drilling rigs have been initiated. As of March 15, 1985 the involved individual had accumulated 125.7 MPC-hours (24% of the allowable 13 week exposure) for the first quarter of 1985 starting January 1, 1985.

The inspector also reviewed air sampling data taken in conjunction with demolition work on Building 9 during the period November through March 31, 1985. The maximum air concentration on a single personal air sampler worn by an individual worker was 65% of the maximum permissible concentration (MPC). The maximum concentration indicated by air samples taken downwind of the work was 6% of offsite MPC.

3. Incineration

Thirty-eight burns of contaminated combustibles were conducted since the last inspection and through April 10, 1985. Burn C 69 on January 20, 1985 was the first burn conducted after the stack sampler was repaired and reinstalled. A review of the burn log containing details of each burn revealed two instantaneous pressure spikes exceeding a negative 0.1 inch of $H_2O$ and three occasions when smoke was noted escaping from around the incinerator door. All burns were reviewed by management and the logbook signed. The ongoing evaluations and corrections made by the incinerator operators and/or management were satisfactory. During the instances when smoke was noted, the exhaust plenum around the the door prevented the dispersion into the room and no personnel exposures to airborne activity were recorded.

The licensee reported two instances where incinerator stack air sample concentrations (burns C 93 on March 21, 1985 and C 94 on March 22, 1985) exceeded the 1.5 E-12 μ Ci/ml (License Amendment No. 2, Condition 6), the action level requiring system review and applicable procedure or equipment modifications. The condition was not identified by the

technicians counting the air samples on March 25, but it was identified by management reviews on April 9, 1985. Incinerator operation was suspended and an evaluation of the system was initiated. This evaluation, which is still in progress, revealed a leak in one HEPA filter and damage to several dust collector bags. These will be replaced and the system DOP tested before resuming operation. The Health Physicist also met with the technicians to emphasize the importance of recognizing appropriate MPCs and action levels.

Daily smear survey results for the incinerator were reviewed by the inspector with no trends or anomalies noted.

4. Water Monitoring

a. Laundry Water

Eighteen tanks of laundry waste were sampled between December 10, 1984 and April 3, 1985, analyzed and the contents, 32040 gallons, discharged to the sanitary sewer system. On one occasion, an additional one-half tank volume of dilution water was necessary to lower the concentration of one tank to below the release limit. In addition, eight tanks were pumped to tank T-108 for holdup and later discharge.

b. Surface Water

Available analytical results between September 1984 and March 1985 from the licensee's surface water (storm sewer, outfalls, Kress Creek and the south branch of the DuPage River) monitoring program were reviewed. All releases appeared to be within regulatory limits.

5. Environmental Air Sampling

The inspector examined results of the licensee's lead-212 and radon monitoring programs for December 6, 1984 through April 16, 1985. As of April 16, 1985, the end of the licensee's first complete year of monitoring for both lead and radon, the average exposures at EMS-11 were 45% and 52% of MPC, respectively, for a total of 0.97 MPC-days.

Since the last inspection the cleanup of Building 19, which included inventorying, sampling and repackaging of drums and the cleanup of bin No. 4, was completed in an effort to reduce site boundary airborne concentrations of lead-212. The licensee also plans to redress the asphalted areas on the disposal site later this spring or summer in an attempt to further reduce the site boundary concentrations.

7. Exit Interview

The inspector met with individuals noted in Section 1 at the end of the inspection. The scope and findings were discussed with and acknowledged by the licensee.

## CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing Memorandum in Support of Kerr-McGee's Motion for Preliminary Injunction was served upon:

Neil F. Hartigan, Attorney General
for the State of Illinois
Anne Rapkin, Assistant
Attorney General
100 W. Randolph St., 13th Floor
Chicago, IL 60601

by personal delivery this 3rd day of December, 1985.

Attorney for
Kerr-McGee Chemical Corporation