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



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| In the Matter of | ) | |
| | ) | Docket No. 40-2061-SC |
| KERR-McGEE CHEMICAL CORPORATION | ) | |
| (Kress Creek Decontamination) | ) | |

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PEOPLE'S SUPPLEMENTAL RESPONSE
TO KERR-MCGEE'S MOTION FOR RECONSIDERATION
AND REQUEST FOR REFERRAL TO APPEAL BOARD

## I. Introduction

Kerr-McGee's motion to reconsider the Board's Second Prehearing Conference Order discusses matters which have been in dispute since Autumn of 1984. On October 16, 1984 the People of the State of Illinois asked the Board to establish a briefing schedule on Kerr-McGee's defenses, arguing that they are purely legal in nature. On October 29 the Board denied that request, suggesting that the defenses raise mixed questions of law and fact. One month later the proponents of the Show Cause Order jointly moved for summary disposition of Kerr-McGee's defenses at ¶¶10-13 of its Answer. The joint movants argued that there is no basis in law for the factual inquiries Kerr-McGee would have the NRC make before ordering remedial action. Following a Kerr-McGee memorandum in opposition to the joint motion, the Board, recognizing that the parties disagree on what needs to be shown to sustain the Show Cause Order, ordered the parties to brief the issues. The Board also ordered briefing on the question of who carries the burden of going forward with evidence and the burden of ultimate persuasion.

The parties responded with their briefs; Kerr-McGee, moreover, challenged the NRC's subject matter jurisdiction with



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respect to any order for remedial action away from the site of a licensed milling operation. The Board then ordered the parties to present oral argument, which they did on January 25, 1985. On February 7 the Board issued its Second Prehearing Conference Order 1) allowing the proceeding to go forward, 2) declining to decide whether the USEPA standards are an adequate measure of hazardousness, 3) finding that Kerr-McGee's Averments have no basis in law but giving Kerr-McGee the burden of going forward with respect to them, and 4) declining to decide who carries the burden of ultimate persuasion.

Kerr-McGee has now moved for reconsideration on the first three of these issues and asks the Board to decide that the NRC has no jurisdiction over the subject matter, that the USEPA standards do not apply in any event, and that if there is subject matter jurisdiction, the law requires the kinds of inquiries asserted in the defenses.

It is clear that all of the parties to this proceeding desire resolution of these issues. It is also, we submit, clear that the issues are purely legal ones, going to the basic structures of an enforcement proceeding--does the agency have subject matter jurisdiction, and what must be shown to prove liability under the governing statute and regulations (i.e., what are the elements of the agency's case against the respondent). Therefore, the People offer the following remarks to supplement the arguments made in the proponents' joint response to Kerr-McGee's motion for reconsideration.

## II. Subject Matter Jurisdiction

Kerr-McGee's motion on the question of subject matter jurisdiction merely reiterates the arguments the company has already put forward--to wit, prior to the enactment in 1978 of the Uranium Mill Tailings Radiation Control Act, P.L. 95-604 ("UMTRCA"), the NRC had no regulatory power with respect to mill tailings and, therefore, any power the NRC now has with respect to Kress Creek is limited to contaminants deposited after 1978.

As the proponents explained in an earlier brief (filed January 22) and during oral argument, the source of NRC jurisdiction to order a clean-up of Kress Creek is unrelated to UMTRCA. The Board recognized in the second pre-hearing conference order that the NRC's remedial authorities arise from Sec. 161(b) of the Atomic Energy Act ("AEA"), 42 USC §2201(b), empowering the NRC to "establish by ... order such standards or instructions to govern the possession and use of ... source material as the Commission may deem necessary or desirable ... to protect public health or to minimize danger to life or property." The regulations in 10 CFR Part 40--the regulations under which Kerr-McGee and its predecessors held their license to use and possess source material--provide that the Commission may incorporate in a license at any time requirements deemed "appropriate or necessary in order to ... protect health or to minimize danger of life or property." §40.41(e). Further, 10 CFR §2.202(a) provides for issuance of remedial orders where there are "violations", "potentially hazardous conditions", or "other facts deemed sufficient ground for the proposed action".

These provisions together make clear that one has a legal duty to use licensed material in such manner as to protect the public health and safety, and the NRC may take remedial action where that duty has not been discharged. What the instant show cause order basically alleges is that Kerr-McGee used licensed source material in such manner as to allow the release of radioactive materials at levels creating a potential hazard to health and safety, thus warranting remedial action.

Kerr-McGee's entire argument rests on the contention that prior to enactment of UMTRCA the NRC did not have independent licensing and regulatory jurisdiction over mill tailings, the type of radioactive material released from the site. Conceding arguendo the correctness of Kerr-McGee's contention, it is irrelevant. The Staff is not attempting to exercise independent regulatory jurisdiction over the Kress Creek tailings. The Staff is exercising regulatory jurisdiction over the manner in which licensed source material was used. And the fact that the Staff's exercise of jurisdiction is taking place now rather than at some earlier time has no bearing on the legitimacy of that jurisdiction.

There is nothing in the AEA or Commission's regulations suggesting that the NRC may control releases of radioactive materials during licensed activity only if such materials are independently licensable. On the contrary, the statutory and regulatory focus is on the protection of public health and safety from radiation hazards. Illustrating this point during oral argument, the People pointed to 10 CFR §20.106, which sets numerical limitations on the amounts of certain radioactive materials

which may be released in connection with the use, possession, and transfer of licensed materials. Among the types of radioactive materials whose release is controlled under this provision is radium (see Part 20, Appendix B). Radium, not being source, byproduct, or source material, is not independently licensed and regulated by the NRC. That fact, however, does not mean that Part 20, Appendix B is ultra vires, or that the NRC cannot order a licensee to limit its radioactive releases, or cannot require remedial action when radioactive material has been released in amounts potentially endangering public health and safety.[1]

For this reason the company's arguments about retroactivity are without merit. Sturges v. Carter, the seminal case cited by Kerr-McGee, states the general principle:

> Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

114 U.S. 511, 519 (1885). There are no vested rights at issue here[2], and no disability has attached. Moreover, the obligation the Staff is attempting to enforce is the one that was imposed in 1956 when the license issued--i.e., the obligation to use licensed material throughout the life of the license in such manner as to protect public health and safety.

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[1]For this reason, it does not matter whether the contaminants at Kress Creek can be classified as source material. See the Board's order pg. 5.

[2]Unless Kerr-McGee is suggesting that it had a vested right to contaminate Kress Creek!

As a related matter, Kerr-McGee states that the Staff has not cited a "pre-UMTRCA regulation or other Commission requirement that was violated." Kerr-McGee motion 4. As should already be clear, that is untrue. The Staff alleges that Kerr-McGee failed to use licensed material in accordance with its obligation to protect the public health and safety; the Show Cause Order implements Sec. 161(b) of the AEA and 10 CFR §2.202(a) by seeking to abate the hazard thus created. Insofar as Kerr-McGee is suggesting that only a numerical limitation or a specific license condition can support a show cause order, Kerr-McGee ignores the language of these statutory and regulatory provisions (as well as the policies underlying them).

Kerr-McGee also argues that the Staff may not direct a party "to remedy practices that were neither violations nor departures from acceptable procedures at the time they occurred." Kerr-McGee motion 5. The short answer to this is that merely because the Staff may not have known earlier that the licensee's activities were causing radioactive releases does not mean that the company's "procedures" were "acceptable" or consistent with the statutory obligation to protect health and safety.

What Kerr-McGee really seems to be arguing is that the NRC is precluded by reason of estoppel or laches from enforcing that obligation.[3] Estoppel and laches, however, are not defenses against government suits to enforce the laws of Congress.

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[3]E.g., Kerr-McGee characterizes the problem at Kress Creek as "the consequences of long-past activity." Kerr-McGee motion 5.

U.S. Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973). Moreover, the record here demonstrates that within a reasonable time after the discovery of contamination at Kress Creek and West Branch DuPage River, the NRC initiated action to effect a cleanup.

In sum, for the NRC to have subject matter jurisdiction all that need be alleged in the show cause order is that Kerr-McGee (and its predecessors) had a license to possess and use source material; that in connection with the use of that material radioactive contaminants migrated offsite; and that those contaminants pose a potential hazard to public health and safety. What facts will prove that the contaminants pose a potential hazard is a matter discussed in the next section of this memorandum.

## III. USEPA Standards

The show cause order cites USEPA's radium-in-soil standards (40 CFR §§192.12 and 192.32(b)) and alleges that the contaminants at Kress Creek greatly exceed those standards. From this the Staff concludes that the contaminants pose a potential hazard to public health and safety.

Kerr-McGee argues that this use of the USEPA standards also raises a retroactivity problem. That is incorrect. The show cause order does not allege that Kerr-McGee violated those standards in the past, i.e., before they were promulgated, and should be penalized as a result. Rather, the show cause order utilizes the standards as a measure of hazardousness. Utilizing them for this purpose makes sense, because in promulgating the

standards USEPA evaluated the risks, present and prospective, associated with various levels of radium in soil, and concluded that levels above those established in 40 CFR Part 192 threaten public health and safety. For the Staff not to have looked to the USEPA standards as a measure of hazardousness and a guideline for clean-up would have been irrational.

As an analogy, consider a nuisance suit. Suppose, as Kerr-McGee claims, the NRC has no jurisdiction over Kress Creek, and the People therefore file a claim in DuPage County Court alleging that the contamination along Kress Creek is a common law public nuisance. How would one determine whether in fact that the contamination is a nuisance, i.e. a potential hazard? One way would be to demonstrate that the levels at Kress Creek are in excess of levels an expert agency has determined should not be exceeded. Could Kerr-McGee intelligibly object on "retroactivity" grounds to that demonstration? Of course not. For the same reasons it cannot do so here.

What Kerr-McGee really wants is for the proponents to reinvent the wheel--to demonstrate all over again, as USEPA has already done, why radium in soil in excess of 5 pCi/g poses a potential hazard to health and safety. There is no legal justification for this, nor is there any other conceivable justification. To require the proponents to do so would needlessly burden not only the Staff and the Board, but the intervenors whose financial and manpower resources are incomparably inferior to Kerr-McGee's.

For this reason the proponents, and particularly the intervenors, need a ruling immediately as to whether proof that

the Kress Creek contaminants exceed USEPA's standards will satisfy the "potential hazard" language of 10 CFR §2.202(a). It should be kept in mind that if such proof will satisfy the regulation, not only will the time and cost of this proceeding dramatically decrease but it may well be possible at the close of discovery to resolve the liability question by summary disposition.

## IV. Kerr-McGee's Averments

Kerr-McGee requests reconsideration insofar as the Board determined that the defenses contained in ¶¶10-13 of the Answer have no basis in applicable statutes, regulations, or decisions. The People urge that this determination was correct but that the Board failed to take it to its logical conclusion by striking one of the Averments (¶10) and by explicitly limiting the others, assuming they are properly drafted, to the second phase of the proceeding.

In ¶10 of its Answer Kerr-McGee asserts that the Show Cause Order may not be enforced unless the Staff demonstrates a "specific significant" health or safety risk (whatever that means). The proponents have argued that 10 CFR §2.202(a) requires simply a showing of "potentially hazardous condition" and that the AEA requires nothing more. The Board correctly found in its order that there is

> no indication in the Commission's decisions that a specific, significant risk, something more than a hazardous condition, to the health and safety of the public or to the environment must be found if the Order is to be enforced.

Bd. Order 9.

Unfortunately, the Board refrained from explicitly concluding that Kerr-McGee's ¶10 is erroneous as a matter of law, and gave Kerr-McGee the "burden of going forward with a showing which would sustain its position." The Board also stated that it declined to decide "in the abstract without the benefit of an evidentiary record" the question whether something more must be shown by the Staff than exceedence of the USEPA standards. Id.[4]

The People respectfully submit that, by deciding that the law requires only a showing of a hazardous condition, the Board has implicitly ruled that Kerr-McGee's contention is erroneous as a matter of law. ¶10 therefore has no place in the proceeding and none of the parties should have any burden whatever with respect to it. As for the USEPA standards, we again urge that they are an appropriate measure for determining if Kress Creek poses a hazard within the meaning of 10 CFR §202.2(a); that whether they are or are not such an appropriate measure is a purely legal question; and that no evidence is necessary to decide that purely legal question. Striking ¶10 and ruling on the applicability of the USEPA standards would expedite this proceeding greatly.

In ¶13 of its Answer Kerr-McGee asserts that the Show Cause Order may not be enforced unless the Staff presents "a complete analysis of the costs and benefits of remedial action".

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[4]Actually, there are two questions here: First, whether a "specific significant risk" must be shown, as asserted by Kerr-McGee, or simply a "potentially hazardous condition," required by §2.202(a); and second, whether a showing that the contaminants exceed the levels specified by the USEPA standards constitutes a showing of a "potentially hazardous condition".

The proponents have argued that nothing in the AEA, the National Environmental Policy Act, 42 USC §§4321 et seq. ("NEPA"), or NRC or CEQ regulations requires a cost/benefit analysis here. (It is interesting to note that Kerr-McGee has not asserted that the economic or environmental costs of cleanup will outweigh the benefits.) In ¶¶11 and 12 Kerr-McGee asserts that the Show Cause Order may not be enforced unless the Staff presents "a complete analysis of risks to health and the environment associated with remedial action." Similarly, the proponents have argued that nothing in the AEA, NEPA, or regulations requires such an analysis here. (It is again interesting to note that Kerr-McGee has not asserted that environmental or health risks would attend remedial action so as to render it inappropriate.) The Board has now agreed with the proponents' position on all three of these Averments--i.e., that they have no basis in applicable statutes or regulations. Board order 9, 10.

However, the Board's order is ambiguous about the significance of the finding that ¶¶11-13 have no legal basis. From the outset the Board and parties have proceeded on the assumption that this proceeding would take place in two phases. During the first phase the Board would adjudicate Kerr-McGee's liability for the situation at Kress Creek--i.e., the Board would adjudicate whether a potentially hazard exists there and, if it does, whether the licensee caused it. Assuming the proponents established Kerr-McGee's liability, the second phase would commence, during which Kerr-McGee would submit a cleanup plan and the Board would consider the appropriateness of specific remedial measures. It is clear that questions about the costs and risks

of clean-up have no legal relevance to the licensee's liability, i.e., to the first phase of the proceeding. Questicns about costs and risks may be relevant to the second phase, assuming Kerr-McGee alleges that costs or risks outweigh benefits,[5] since such questions relate to the appropriateness of particular remedial actions. Therefore, the People urge the Board to clarify its order so as explicitly a) to eliminate all costs and risk issues from the first phase of the proceeding, and b) to allow them to be raised only in the second phase and only if they are properly alleged.

The question of the legal sufficiency of Kerr-McGee's Averments is not an academic one. It has profound implications for all the parties, and especially for the intervenors. The additional time and expense to prepare evidence on costs and

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[5]As already mentioned, Kerr-McGee has not alleged that remedial action will entail any unreasonable costs, or that an environmentally safe cleanup cannot be achieved. In the absence of such allegations, there is no reason for the parties to be put to the task of addressing costs and risks even at the second phase of the proceeding. Given the present state of Kerr-McGee's pleading, the company would apparently have the Board and parties engage in a theoretical exercise unrelated to the actual situation at Kress Creek. Kerr-McGee should therefore either draft an Answer that makes cost/benefit/risk issues genuinely relevant, or the Board should entirely eliminate them from this proceeding.

It is very interesting to note in this regard that, given the language of Kerr-McGee's Averments, the Board's order assigning to Kerr-McGee the burden of going forward with respect to them appears to require further legal briefing. ¶¶11-13 assert that there must be analyses of risk and costs and benefits before the Show Cause Order may be sustained. These are assertions about what the law requires, not about the facts involved here. Hence, the Board has effectively decided that Kerr-McGee bears the burden of going forward with a showing that the law requires analyses of risk and costs and benefits. This cannot be what the Board intended, and such an unusual result points up the need for Kerr-McGee to say what it means or for the Board to entirely strike ¶¶11-13 from the proceeding.

risks could be very significant. The Board has found that the Averments are without legal basis; therefore there is no reason not to eliminate them from the first phase of the proceeding. Furthermore, if Kerr-McGee does not believe in good faith that the costs and risks of cleanup outweigh the benefits--and it has not asserted that they do--then such issues should not be entertained even in the second phase. Otherwise the company will be able needlessly to drive up the costs and burdens of the administrative process, and the prospect of an expeditious cleanup will become even more remote.

## V. Burdens of Proof

While Kerr-McGee has not moved for reconsideration of the Board's decision on burden of persuasion, the People take this opportunity briefly to address it. The Board said that it would decide who carries the burden of persuasion only if the evidence at hearing is equally balanced. The problem with this approach is that unless the parties know who has the burden of persuasion, they do not know how much evidence to put on at hearing and, therefore, how to prepare for hearing. Must a party put on more evidence in its favor than the opponent puts on in its favor? Or need a party only put on enough evidence to cast doubt on the opponent's evidence? The People respectfully submit that efficient management of the adjudicatory process requires a Board decision on this matter some time in advance of the hearing.

## VI. Conclusion

In conclusion, the People urge the Board to reaffirm its holding that subject matter jurisdiction exists under the AEA.

The People further urge the Board to (1) decide whether proof that the Kress Creek contaminants exceed the USEPA standards will prove the existence of a "potentially hazardous condition" within the meaning of 10 CFR §2.202(a); (2) strike Kerr-McGee's ¶10; and (3) eliminate the issues raised in Kerr-McGee's ¶¶11-13 from the first phase of this proceeding.

10 CFR §2.730(f) provides that where a licensing board believes "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense," it may refer the matter for interlocutory review. NRC case law provides that interlocutory review is appropriate where the ruling below "affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). This proceeding involves questions of the first impression--the NRC's jurisdiction under a relatively new statute, the applicability of new generic standards, the components of the Staff's case, the burden of persuasion in a show cause proceeding involving mill tailings. The answers to these questions manifestly "affect[] the basic structure of the proceeding in a pervasive ... manner." Moreover, if the Board, having correctly found that there is no legal basis for Kerr-McGee's defenses, nonetheless permits them to be litigated, the proponents, especially the intervenors, will be put to "unusual delay and expense." For the proponents to have to prove a hazard despite the existence of applicable generic standards, and for the proponents to have to address economic costs and environmental risks where those matters are legally irrelevant to the first phase and not

meaningfully raised with respect to the second, will further prolong and complicate this proceeding and needlessly increase its burdens.[6]

The People stress that this is not a licensing proceeding, where the potentially hazardous condition or activity has yet to occur. This is an enforcement proceeding, in which the Staff has already determined, on the basis of a study by a respected laboratory, that contamination seriously in excess of generic standards exists along several miles of property in a suburban neighborhood. Hence, it is vital to resolve all procedural disputes that threaten to unnecessarily lengthen the resolution of the problem.

For these reasons, the People request certification or referral to the Atomic Safety and Licensing Appeal Board if this Board prefers not to decide the questions raised or decides them in Kerr-McGee's favor. A prompt ruling will at the very least remove from this proceeding the uncertainty and ambiguities that have dogged it from the outset. And if this Board or the Appeal

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[6]We remind the Board that the Kress Creek contaminants were first discovered in 1977; it is now 1985 and they have not yet been removed. If this proceeding cannot promptly be resolved in the proponents' favor, there are other avenues by which the public can try to effect a cleanup, including but not limited to a USEPA lawsuit under the Superfund statute. Hence, the sooner this proceeding is resolved, the sooner Kress Creek will be cleaned up, in one way or another.

Board decides in the proponents' favor, an expeditious resolution will be possible.

Respectfully submitted,

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DATED: March 15, 1985

PROOF OF SERVICE



I, ELAINE C. THOMAS, having been sworn and under oath do state that I have this 15th day of March, 1985 served copies of the foregoing People's Supplemental Response To Kerr-McGee's Motion For Reconsideration And Request For Referral To Appeal Board 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.

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

NOTARY PUBLIC

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