

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

In the Matter of)
) Docket No. 40-2061-ML
FERR-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 B10 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.

¹Plaintiff 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 COGLAN
JOHN PERCONTI
Assistant Attorneys General
RUSSELL R. EGGERT
Assistant Attorney General
Administrative Assistant
100 West Randolph, 13th Floor
Chicago, Illinois 60601
(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

Chief, Docketing and Service
Section (3)
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Peter J. Nickles
Richard A. Meserve
Covington & Burling
P.O. Box 7566
Washington, D.C. 20044

John C. Berghoff, Jr.
Chadwell & Kayser, Ltd.
8500 Sears Tower
Chicago, Illinois 60606

Thomas W. Fawell
Fawell & Marutzky
2021 Midwest Road
Suite 206
Oak Brook, Illinois 60521

Stephen Lewis
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Thomas J. McDaniel
Mead Hedglon
Kerr-McGee Corporation
Kerr-McGee Center
Oklahoma City, Oklahoma 73215