IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA
AND STATE OF WISCONSIN,

Plaintiffs,

v.

Case No. 91-C-1396
No. 92-C-0006

KERR-MCGEE CHEMICAL CORP.,

Defendant.

and

MILWAUKEE COUNTY,

Proposed Intervenor
and Third-Party Plaintiff.

PLAINTIFF STATE OF WISCONSIN'S BRIEF IN OPPOSITION TO MOTION TO INTERVENE

INTRODUCTION

This matter arises over Milwaukee County's ("proposed intervenor's" or "the county's") motion to intervene in the above-consolidated action, concerning cleanup of a creosote contaminated site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. § 9606, as amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"). The site formerly served as Kerr-McGee Chemical Corporation's ("Kerr-McGee's") wood preserving facility for the treatment of railroad ties, poles and fences with such chemicals as creosote.

In June 1991, the original parties to this action, the United States, the State of Wisconsin ("state") and Kerr-Mcgee, signed a consent decree,[1] wherein Kerr-McGee committed to implementing the remedy selected, with the state's concurrence, by the United States Environmental Protection Agency ("EPA") (see the Wisconsin Department of Natural Resources ("DNR") September 13, 1990, correspondence attached to the Record of Decision ("ROD") on file with the court). The plaintiffs will request entry of this consent decree following the close of the public comment period in early March 1992. The county could have been, but chose not to be, a part of the consent decree (see attached Special Notice of Liability letter from EPA to the county). The county presses now, instead, to intervene in this action, which seeks to finalize the consent decree that the proposed intervenor had previously rejected.

The county contends that it satisfies the requirements for intervention under CERCLA and Fed. R. Civ. P. 24(a) and (b), authorizing intervention of right and permissive intervention. The county essentially complains of having been excluded from EPA's remedy selection process, and that the DNR is the "owner" and "operator" of the contaminated site and that it, not the county, should therefore be held responsible for the cleanup. These claims have no basis in fact or law.

Not only did the county have opportunities to comment on the EPA selected remedy for the site, but it participated in seven

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[1]This consent decree was lodged with this court on December 30, 1991. All consent decree citations in the text of this brief refer to the lodged consent decree.

months of negotiation concerning implementation of the final remedy and then still refused to sign the consent decree. Furthermore, Wisconsin case law plainly provides that the county, as the riparian owner, holds title to the bed and banks of the Menomonee River, and hence it, not the state, owns the site. DNR is also not a CERCLA "operator" since the department did not exercise day-to-day control over the wood preserving facility, but rather acted only in its regulatory capacity, which is insufficient to confer liability under CERCLA.

The proposed intervenor's arguments amount to nothing more than complaints by a disgruntled non-settlor who now faces a potential contribution action from the settling defendant, Kerr-McGee.[2] Moreover, not having reached agreement with the United States, the county also has exposure for EPA's past costs incurred to investigate the scope of contamination at the former wood preserving facility. Fearful of this potential future litigation, the county seeks to intervene in this suit to derail the fair and reasonable settlement which the parties negotiated long and hard to achieve. This type of interest does not satisfy the requirements for intervention under CERCLA or Fed. R. Civ. P. 24(a) or (b).

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[2]CERCLA provides contribution protection to those who settle with the United States. Sec. 113(f)(2) of CERCLA, 42 U.S.C.A. § 9613(f)(2). If the United States or the state subsequently bring an action against the non-settlors, they are then precluded from seeking contribution from the settlors who have already entered into a consent decree with the governments.

ARGUMENT

I. THE COUNTY CANNOT INTERVENE UNDER SEC. 121(f)(2)(B) OF CERCLA, 42 U.S.C.A. § 9621(f)(2)(B).

A. The county is not the state.

The county contends that it has an unconditional right to intervene under sec. 121(f)(2)(B) of CERCLA, 42 U.S.C.A. § 9621(f)(2)(B), because it is the state for purposes of CERCLA (county's br. at 6). Since it is a political subdivision of the state, the county claims that it is afforded the same rights as granted to the state under CERCLA. This argument ignores the plain language of the statute.

The CERCLA intervention statute expressly states that if the state does not concur with EPA's selected remedy, the "[s]tate shall intervene in the action . . . before entry of the consent decree, to seek to have the remedial action [conform to the required state standards]. Such intervention shall be a matter of right." Sec. 121(f)(2)(B) of CERCLA, 42 U.S.C.A § 9621(f)(2)(B). The plain language of CERCLA's definition of "state" also does not encompass political subdivisions such as the county. Sec. 101(27) of CERCLA, 42 U.S.C.A. § 9601(27). The term "state" is therefore unambiguous, referring to states as in the several states of the United States and excluding its political subdivisions.

The plain meaning of the term "state" cannot be broadened by applying Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") case law to a CERCLA statute, as the proposed intervenor attempts to do (county's br. at 6). Unlike in Wisconsin Public Intervenor v. Mortier, 501 U.S. ___, 111 S. Ct. 2476 (1991), relied

on by the county, CERCLA does not consider the state and its political subdivisions as one in the same.

In Bedford v. Raytheon Co., 32 ERC 1548, 1550-51 (D. Mass. 1991), the court held that the plain language of CERCLA's natural resource damages statute provides that states and the Federal Government could sue for natural resource damages, not municipalities. The court specifically rejected the argument now advanced by the county that the term "state" should be expansively construed to include political subdivisions. Id. at 1550. The court explained that CERCLA's definition of "state" made clear that counties, towns and cities were excluded from the definition since those entities are vastly different from the sovereigns described under sec. 101(27) of CERCLA, 42 U.S.C.A. § 9601(27). Id. For the same reasons stated therein, the term "state" under CERCLA's intervention statute should not be construed to provide the county with an unconditional right to intervene in this action. It is only states, not counties, that are entitled to intervene under sec. 121(f)(2)(B) of CERCLA, 42 U.S.C.A. § 9621(f)(2)(B).

Moreover, the county should not be permitted to intervene to enforce the facility siting law, sec. 144.445, Stats.,[3] when the state could not even do the same. The gist of the county's argument is that since the state allegedly failed to include sec. 144.445, Stats., as an applicable or relevant and appropriate

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[3]Section 144.445, Stats., is Wisconsin's law requiring consideration of local interests in the siting of solid and hazardous waste facilities. The law is designed to run "side-by-side with the DNR licensing process [for new facilities]." "Wisconsin's Landfill Negotiation/Arbitration Statute," State Bar Bulletin 17 (Nov. 1985).

requirement ("ARAR"), the county should be authorized to intervene to enforce a law designed to protect local interests (county's br. at 7; county's complaint at 30 and 36). CERCLA does not afford such rights to non-federal parties.

In State of Colo. v. Idarado Min. Co., 916 F.2d 1486, 1495 (10th Cir. 1990), the court held that CERCLA did not grant the states authority to obtain injunctive relief at federal Superfund sites. The court held that after EPA selected a remedial action, the state could not then propose its own plan designed to achieve what the state regarded as ARARs and initiate an action compelling implementation of the state plan. Id. at 1495. It would certainly follow that if the state cannot enforce its ARARs after selection of the federal remedy, then the county should similarly be precluded from doing so.

B. The county had the opportunity to comment on EPA's selected remedy.

The county contends that the selected remedy should satisfy additional criteria which DNR allegedly waived (county's br. at 6-7). The county claims that prior to consenting to the federally selected remedy, DNR should have required compliance with sec. 144.445, Stats. (county's br. at 6-8; county's proposed complaint ("proposed complaint") at 32 and 36-37). These allegations are misleading, suggesting that the county has been excluded from the remedy selection process, and that the present remedy inadequately protects the environment. Nothing could be more disingenuous.

The county has known for years of the remedy development for the former Kerr-McGee wood preserving facility. As far back as 1985, the county had the opportunity but refused to conduct or participate in the remedial investigation (termed the "Remedial Investigation/Feasibility Study" "RI/FS"), which was then relied on to select the final cleanup remedy for the site. (See attached August 14, 1985, EPA correspondence from Frank Rollins to George Rice.) EPA instead had to perform the RI/FS (consent decree at 1-2). Rather than perform the site investigation, as it should have done since it is a responsible party, the county chose to do nothing but criticize EPA's and DNR's work.

This is also not the first time that the county complains of the inadequacy of the remedy selection process. Contrary to the county's allegation that it has been excluded from this process, the proposed intervenor has previously been heard on the ARARs issue. In responding to EPA's proposed remedy for the site, the county commented that the remedy should be required to conform with the facility siting law. (See Responsiveness Summary attached to ROD at 27-28). EPA declined to follow this suggestion and for good reason. The facility siting law is already being effectively satisfied with other cleanup criteria.

Section 144.445, Stats., which the county complains is not being followed, contains both substantive and procedural provisions relating to the siting of solid and hazardous waste facilities. (See also county's br. at 7; proposed complaint at 30). The substantive requirements such as protection of groundwater and soils are being satisfied with DNR's identification of other ARARs.

To satisfactorily implement the remedy, Kerr-McGee will have to design and close the hazardous waste landfill located on site in accordance with Wis. Admin. Code ch. 600 (ROD at 41). The remedy, too, must attain Wisconsin's stringent groundwater standards contained in Wis. Admin. Code ch. 140 (ROD at 43). That part of the remedy requiring rerouting of the river must also be performed so as to minimize destruction, loss or degradation of wetlands (ROD at 43). Wisconsin's endangered and threatened species laws must also be complied with in implementing the remedy (ROD at 43). The substantive provisions of the facility siting law are, therefore, being satisfied by inclusion of other state regulations and statutes as ARARs.

The procedural aspects of sec. 144.445, Stats., are also satisfied even though CERCLA does not require it. Inasmuch as the county contends that local approval must be obtained for the siting of the hazardous waste landfill, CERCLA plainly states that local permits and approvals are not required for remedial actions. Section 121(e) of CERCLA, 42 U.S.C.A. § 9621(e). The county's reliance on Nelson v. Department of Natural Resources, 88 Wis. 2d 1, 276 N.W.2d 302 (Ct. App. 1979), aff'd, 96 Wis. 2d 730, 292 N.W.2d 655 (1980), is, therefore, misplaced. Nelson involved DNR's licensing of a landfill in contravention of a municipal ordinance. This case concerns EPA's selection of a remedial action under CERCLA, which expressly waives compliance with local permitting and approval requirements. Local approval of the landfill under sec. 144.445, Stats., is, thus, not required at the CERCLA site.

Notwithstanding this, the intent of sec. 144.445, Stats., was achieved. The facility siting law is designed to provide municipalities the opportunity to participate in decisions on siting solid and hazardous waste facilities in their communities. This goal is clearly accomplished through CERCLA's public participation opportunities. See, e.g., secs. 113(k)(2)(b)(iv) and 117(b) of CERCLA, 42 U.S.C.A. §§ 9613(k)(2)(b)(iv) and 9617(b). In May 1990, EPA published notice of the completion of the RI/FS and of the proposed remedy for the site (consent decree at 2). The public was then invited to submit written comments on the proposed remedy (consent decree at 2). In June 1990, EPA then held a public meeting in Milwaukee, Wisconsin, on the proposed remedy (consent decree at 2). At the request of Kerr-McGee and the county, EPA also agreed to extend the written comment period for one additional month (consent decree at 2). The procedural provisions of sec. 144.445, Stats., are therefore satisfied in the selection of the final remedial action.

Since only states can intervene to require conformance with an ARAR, the county does not have an unconditional right to intervene under sec. 121(f)(2)(B) of CERCLA, 42 U.S.C.A. § 9621(f)(2)(B). Even if such a right existed, county intervention would still be unnecessary because there is compliance with the facility siting law. While the facility siting law is not expressly identified as an ARAR, its substantive and procedural provisions are met by the inclusion of other ARARs and the opportunities for public participation under CERCLA.

II. THE COUNTY CANNOT INTERVENE UNDER SEC. 113(i) OF CERCLA, 42 U.S.C.A. § 9613(i) OR FED. R. CIV. P. 24(a) OR (b) SINCE IT WILL NOT BE PREJUDICED IF INTERVENTION IS DENIED.

Even under the general rules governing intervention under CERCLA or the Federal Rules of Civil Procedure, the county should not be permitted to intervene. The county has failed to show how its interest will be impaired if intervention is denied.[4] Without satisfying this requirement for intervention, the county has no right, conditional or otherwise, to intervene in this action.

The county had over seven months to settle with the plaintiffs but did not. While it participated in the consent decree negotiations, the county refused to sign the consent decree. Its earlier failures cannot be now used to claim that it will be prejudiced in future contribution actions if intervention is denied. This argument was rejected in U.S. v. Mid-State Disposal, Inc., 131 F.R.D. 573 (W.D. Wis. 1990), a case directly on point but conspicuously absent from proposed intervenor's brief.

In Mid-State Disposal, the court held that non-settlors who had been provided ample opportunity to settle with the governments, like the county here, could not intervene to prevent entry of a consent decree. Without intervention, the non-settlors claimed that they could be prejudiced because they may be held liable for a disproportionate share of the cleanup costs since the settlors

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[4]For intervention to be granted, the proposed intervenor must show that its interest is "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). See also sec. 113(i) of CERCLA, 42 U.S.C.A. § 9613(i).

would have been afforded contribution protection under CERCLA.[5] The court stated in response that: "protection from contributions actions is a statutory incentive for settlement. After refusing to reach a settlement intervenors cannot now claim prejudice because of potential contribution actions against them." Id. at 577. Likewise, the county should not be permitted to upset this settlement in which it could have participated but did not.

Moreover, nothing precludes the county from later filing its suit against DNR, claiming then that DNR is liable under CERCLA.[6] DNR is not granted any contribution protection which could prejudice the county should it opt to pursue its alleged claims against the department subsequent to this action. Unlike in U.S. v. Acton Corp. on Behalf of Vikoa, 131 F.R.D. 431 (D.N.J. 1990), cited by the county,[7] the proposed intervenor's contribution right would not, therefore, be impaired if intervention is denied here.

Additionally, the county's right to argue about its fair share of the cleanup costs with the other potentially responsible parties would not be prejudiced if intervention is not granted. With Kerr-McGee, this can easily be accomplished when and if Kerr-McGee decides to seek contribution from the county for the costs incurred in implementing the consent decree. The county at that time would

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[5]CERCLA provides contribution protection to those who settle with the United States. Sec. 113(f)(2) of CERCLA, 42 U.S.C.A. § 9613(f)(2). If the United States or the state subsequently bring an action against the non-settlors, they are then precluded from seeking contribution from the settlors who have already entered into a consent decree with the governments.

[6](Proposed complaint at 16-17 and 38-39).

[7](County's br. at 8-9).

be free to raise its de minimus argument and any other defense. Also, the county may seek contribution from Chicago and Northwestern Railroad ("the railroad") at any time since it is not entitled to contribution protection. The county's interest in paying no more than its proportionate share of the cleanup costs can therefore be litigated in subsequent actions; intervention should, accordingly, be denied in this action since the county's interest will not otherwise be impaired.

Lastly, to allow the county to file its proposed complaint would only unnecessarily delay implementation of the remedy and complicate this case. Intervention at the expense of delaying the cleanup or needlessly complicating the litigation should always be avoided, if possible. See Bloomington, Ind. v. Westinghouse Elec. Corp., 824 F.2d 531, 536 (7th Cir. 1987); U.S. v. Akzo Coatings of America, Inc., 719 F. Supp. 571, 579 (E.D. Mich. 1989). Litigating the county's claims, even assuming they have merit, would result in unnecessary delays of this action and the site cleanup; unnecessary because the question of DNR's alleged liability could be resolved in a separate lawsuit. It is for all these reasons that the motion to intervene should be denied.

III. THE COUNTY CANNOT INTERVENE BECAUSE IT HAS FAILED TO STATE A LEGALLY SUFFICIENT CLAIM FOR RELIEF.

Fed. R. Civ. P. 24(c) conditions the right to intervene upon the proposed intervenor's statement of a valid substantive claim for relief. Akzo, 719 F. Supp. at 577. If the proposed complaint, as in this case, fails to state a claim for relief, then the motion to intervene should be denied for this additional reason. See

Akzo, 719 F. Supp. at 577-80 (granting intervention on only one of the six claims alleged by the state since the other six did not state a cause of action).

It should be noted initially that the county's complaint is very telling. It evidences the county's real reasons for seeking intervention, which is **not** to obtain a more protective remedy, but rather to pass off on DNR what should be the county's share of the cleanup costs. While the county alleges the inadequacy of the federally selected remedy,[8] nowhere in its complaint does the county request injunctive relief to modify the final remedy. Rather, the only relief requested is a judgment against DNR for its alleged response costs (see proposed complaint at 42). If there is no basis for DNR's lability under CERCLA, as is the case, then the county has failed to state a claim. Intervention should, accordingly, be denied.

A. DNR is not an "owner" under sec. 101(20)(a) of CERCLA, 42 U.S.C.A. § 9601(20)(a).

The county contends that under the public trust doctrine DNR is the owner of the contaminated river bed and banks and is therefore liable under sec. 107(a)(1) of CERCLA, 42 U.S.C.A. § 9607(a)(1) (proposed complaint at 14 and 39). This contention is, however, inconsistent with Wisconsin case law on riparian rights, which should control in deciding this question. See Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel, 429 U.S. 363, 375 (1977).

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[8](See proposed complaint at 29-32; 36-37 and county's br. at 7-10).

In Lac Courte Oreilles Band of Indians v. Wisconsin, 740 F. Supp. 1400, 1424 (W.D. Wis. 1990), the district court, applying state water rights law to a treaty rights case explained that:

> In Wisconsin, the beds of natural navigable lakes are owned by the state. State v. Trudeau, 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987). **The beds of rivers, streams and artificial flowages are owned by the riparians, that is, the persons owning the "uplands" abutting the water.** Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923).

(Emphasis added.) Private ownership of river beds was also discussed in Bright v. Superior, 163 Wis. 1, 13, 156 N.W. 600 (1916), where the court held that riparian owners could separate by conveyances ownership of the uplands from the beds of river. In Munninghoff v. Wisconsin Conservation Comm., 255 Wis. 252, 38 N.W.2d 712 (1949), the court addressed the scope of riparian rights as it relates to river beds. At issue was a riparian's right to a muskrat farm license for lands submerged in the Wisconsin River. The court held that it is not within the state's power to deprive the owner of the submerged land the use of the water which passed over his land. Munninghoff, 255 Wis. at 259. The court explained that:

> In Wisconsin the owner of the banks of the stream is the owner of the bed, regardless of whether the stream is navigable or nonnavigable. The owner of the submerged soil of a running stream does not own the running water, but he does have certain exclusive rights to make a reasonable use of the water as it passes over or along his land.

Id. at 259.[9] While use of the river water is subject to the public trust and the reasonable use doctrine,[10] the contaminated river bed and abutting uplands is owned by the county, not DNR or the state. There is no basis for the county's claim that DNR is the owner of the contaminated river beds or banks. Intervention cannot, therefore, be granted to pursue this legally insufficient claim for relief.

There is also no basis to the county's claim that its consent is required for realignment of the river segment flowing over the county's property (proposed complaint at 14 and 32). The authority to alter water courses, such as rivers, is ultimately vested with the state, not with the county.

Municipal jurisdiction over navigable waters flowing on its property was fully addressed in Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987). There, the village contended that it had the authority, independent of DNR, to alter a stream by dredging, grading the banks and placing riprap on the channel bed. Id. at 584. The court held that to permit the village to act without a DNR chapter 30, Stats., permit would violate the public trust doctrine.[11] Id. at 604. The court

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[9]See also Mayer v. Grueber, 29 Wis. 2d 168, 173, 138 N.W.2d 197 (1965); Diana Shooting Club v. Husting, 156 Wis. 261, 269, 145 N.W. 816 (1914).

[10]See also State v. Zawistowski, 95 Wis. 2d 250, 261, 290 N.W.2d 303 (1980).

[11]This doctrine, founded in art. IV of the Northwest Ordinance of 1787 and then incorporated into Wis. Const. art. IV, § 1, refers to the public's right to use without charge navigable waters for navigational as well as recreational purposes Muench v. Public Service Comm., 261 Wis. 492, 499-507, 53 N.W.2d 514 (1952).

reviewed the case law which clearly holds that the state may not delegate powers over matters of statewide concern to municipal governments. Id. at 599 (citing Muench, 261 Wis. at 506).[12] While such delegation which protects local human health and safety would be permissible, DNR cannot delegate its responsibility to generally protect navigable waters. Village of Menomonee Falls, 140 Wis. 2d at 599.

The authority to permanently alter the character of a navigable waterway, as planned with a segment of the Menomonee River rests therefore with DNR, not the county. Moreover, county approval is not required for CERCLA remedial actions. See, sec. 121(e) of CERCLA, 42 U.S.C.A. § 9621(e). Any claim based on this allegation should, therefore, fail; intervention cannot be granted to pursue this legally insufficient claim.

B. DNR is not an "operator" under sec. 101(20(a) of CERCLA, 42 U.S.C.A. § 9601(20((a).

If allowed to intervene, the county would also allege that DNR is an operator under CERCLA since in the mid-1970s it allegedly arranged for and controlled the disposal of creosote-contaminated dredgings along the riverbanks and other areas of the facility (proposed complaint at 16-17 and 39). DNR was, however, acting in its regulatory capacity and did not actually perform or direct

[12]In Muench, the court held that the law which granted county boards authority to construct dams in violation of the public's right to use and enjoy the water was constitutionally infirm. Id. at 514, 515k-515m. Such a delegation violated the public trust doctrine. In Madison v. Tolzmann, 7 Wis. 2d 570, 97 N.W.2d 513 (1959), the court held that a city did not have the authority to license boats using its lakes. This regulation was held to violate the public trust doctrine. Id. at 575-76.

these river dredging project(s). This distinction is significant. Agencies acting as regulators as opposed to proprietors are not held liable under CERCLA.

In U.S. v. Carolawn Co., Inc., 698 F. Supp. 616 (D.S.C. 1987), aff'd, 847 F.2d 144, 145-46 (4th Cir. 1988), the court held that the state agency could not be held liable as an "operator" because it was conducting a "series of regulatory actions consistent with its statutory mandate." Carolawn Co., Inc., 698 F. Supp. at 621. The defendants alleged that the agency, by ordering the owner to clean up the property; overseeing the bankrupt and abandoned property; and approving disposal practices, had acquired operator status. Carolawn Co., Inc., 698 F. Supp. at 621. Absent more active involvement, the court held that this kind of regulatory action did not constitute the level of control necessary to render the agency liable as an operator.

The same result was reached in U.S. v. New Castle County, 727 F. Supp. 854 (D. Del. 1989). The court in holding the state agency was not liable, commented that "[t]hus far, no court has held a state liable as a responsible person under CERCLA based on the activities of the state taken in its capacity as a regulator." New Castle County, 727 F. Supp. at 859 (citations omitted). While the agency had involved itself in the site selection, planning and operation of a solid waste disposal facility, the court found that these day-to-day activities were nothing more than the state implementing its regulatory requirements. Id. at 869. To confer operator status on a state agency, the inquiry should be on whether the agency "controlled the finances of the facility; managed the

employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility." Id. Since there was no evidence of the state controlling the solid waste disposal facility to this degree, and since it was only exercising its regulatory authority, the agency was not held to be an "operator." Cf. U.S. v. Stringfellow, 20 ELR 20656 (C.D. Cal. Jan. 9, 1990). (California held liable as operator since it went beyond its regulatory capacity by regularly visiting the site, hiring employees and making operational decisions.)

Even when an agency may violate its own regulations, this is still not enough to confer operator status on the regulating agency. In State of N.Y. v. City of Johnstown, N.Y., 701 F. Supp. 33 (N.D. N.Y. 1988), the court held that the state could not be held liable for arranging for disposal of the hazardous substances under sec. 107(a)(3) of CERCLA, 42 U.S.C.A. § 9607(a)(3) since it did not **own or possess** the hazardous materials of which it arranged to dispose. City of Johnstown, 701 F. Supp. at 36. Moreover, since the state was attempting to regulate the disposal of the hazardous material, albeit at an unpermitted facility, this conduct does not confer operator liability on the state. Id.

DNR acted in its regulatory capacity at the Kerr-McGee facility, and nothing more. The county's proposed complaint admits as much, as evidenced by the allegation that "[i]n the course of administering the State's ownership interest in the bed and banks of the River, . . . WDNR supervised and directed work performed by

Kerr-McGee to excavate the accumulated sludge and creosote residues from the settling ponds . . . ." (Proposed complaint at 16-17.). The complaint contains no allegations that DNR exercised the requisite degree of control required to hold an agency liable. In fact, the county states that it was Kerr-McGee, not DNR, who controlled the site (proposed complaint at 16). Other than DNR attempting to carry out its statutorily prescribed duties, which the county agrees is what DNR was doing, there are no allegations that DNR controlled the dredging activities in the 70's. The county has and could not allege that DNR controlled the finances, personnel or environmental management of Kerr-McGee, which is required for CERCLA liability to attach to the state. See New Castle County, 727 F. Supp. at 869. DNR cannot, therefore, be held liable as a CERCLA operator.

The county's two claims, alleging DNR's liability as an "owner" and "operator" are both legally insufficient. DNR is not the owner of the river bed or banks. DNR is not a CERCLA operator by virtue of regulating the dredging and disposal activities at the Kerr-McGee facility. The county has, thus, failed to condition its intervention on valid claims for relief. The motion to intervene should, accordingly, be denied.

CONCLUSION

Based upon the foregoing arguments, DNR submits that the county has failed to satisfy the requirements for intervention under secs. 121(f)(2)(B) of CERCLA, 42 U.S.C.A. § 9621(f)(2)(B),

113(i) of CERCLA, 42 U.S.C.A. § 9621(f)(2)(B), Fed. R. Civ. P. 24(a) and (b). The motion to intervene should, therefore, be denied.

Dated this 24th day of February, 1992.

JAMES E. DOYLE
Attorney General

LISA LEVIN
Assistant Attorney General

Attorneys for Plaintiff
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7630

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