



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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March 25th, 2004

A. Keith Watson
Kerr-McGee Chemical, LLC
P.O. Box 25861
Oklahoma City, OK 73125

Subject: Incidental Take Authorization - Moss-American Superfund Site, Reaches 2 and 3

Dear Mr. Watson:

Enclosed is the Department's Record of Decision (ROD) regarding the incidental take of Butler's gartersnake (*Thamnophis butleri*) for the proposed remediation of Phases 2 and 3 of the Moss-American Superfund site on the Little Menomonee River in Milwaukee County.

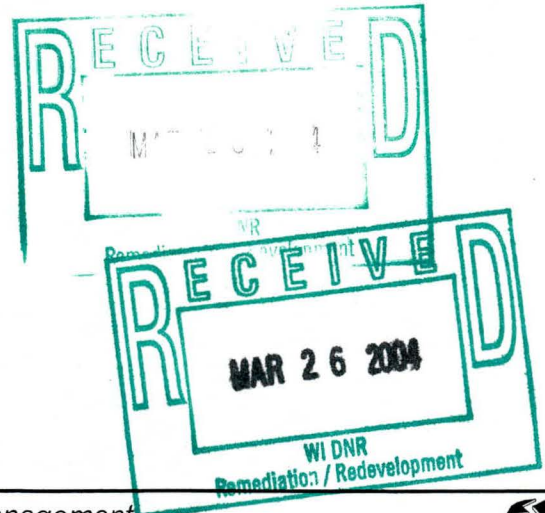
The Department issued a public notice describing its intent to authorize Kerr-McGee Chemical, LLC to incidentally take Butler's gartersnake for the proposed project on February 16th, 2004. No comments were received during the public comment period. As such, the Department issued the attached order on March 25, 2004 allowing Kerr-McGee Chemical, LLC and their agents to incidentally take Butler's gartersnake within Reaches 2 and 3 of the Superfund site according to the conditions set forth in the ROD.

If you have any questions or need additional information, please contact me at 608/264-8968.

Sincerely,

Andrew P. Galvin
Incidental Take Consultation Specialist
WI Endangered Resources Program

cc: Jennifer Bardeen, DNR ER/4
Bob Hay, DNR ER/4
Gary Edelstein, DNR RR/3
William Wawrzyn, DNR SER-Milwaukee
Gary Casper, Casper Consulting
Thomas Graan, Weston Solutions
Russell Hart, RPM, U.S. EPA



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DIVISION

11/11/53

BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

In the Matter of Whether)
Kerr-McGee Chemical, LLC may Receive)
Authorization to Incidentally Take)
an Animal Species, Under s.29.604(6r),)
Stats, Which is Listed as Threatened.)

Authorization to incidentally take the state threatened Butler's gartersnake (*Thamnophis butleri*) described herein during and as a result of the remediation of the former Moss-American wood-treating facility, Reaches 2 and 3, along the Little Menomonee River in Milwaukee County (Moss-American Superfund site) is granted as provided herein.

FINDINGS OF FACT

1. Kerr-McGee Chemical, LLC is performing a remediation of the Moss-American Superfund Site including approximately 6 miles of the Little Menomonee River, from just south of West Brown Deer Road to the river's confluence with the Menomonee River in Milwaukee County. The contaminant source was the former Moss-American wood-treating facility on the Little Menomonee River south of West Brown Deer Road. The current proposed project includes work on Reaches 2 and 3, including approximately 2.24 miles of the river between West Bradley Road south to Highway 145. Authorization for Reach 1 of the project was approved on September 28, 2002.
2. The Wisconsin Department of Natural Resources (WDNR) became involved with the project after the U.S. Environmental Protection Agency-Region 5 submitted project plans to the Bureau of Remediation and Redevelopment to ensure they meet the standards of WDNR's environmental regulations.
3. The project involves rerouting the river corridor within each reach. Remedial action includes the excavation of some contaminated sediments from the existing river channel and its backfill. A new river channel will be constructed and stabilized within the river floodplain.
4. Surveys conducted through June and July of 2003 confirmed the presence in both reaches of the river of the Butler's gartersnake (*Thamnophis butleri*), state listed as threatened in Wisconsin. High quality snake habitat was identified within both reaches of the project area.
5. The project is likely to result in the incidental taking of some snakes as a result of construction activities. However, take has been minimized by avoiding the high quality snake habitat that exists in the project area and by adhering to conservation measures described below.
6. The WDNR entered into an intra-agency consultation for the purpose of evaluating and

proposing to authorize incidental take in accordance with s. 29.604(6r), Stats.

7. Kerr-McGee Chemical, LLC and their agents agree to minimize any incidental taking of the Butler's gartersnake in the following ways:
 - a. Site the wetland mitigation outside of the highest quality snake habitat as proposed in the Butler's Gartersnake Survey Report: Moss-American Reaches 2 and 3, Casper Consulting, December 3, 2003.
 - b. Follow the construction limits as outlined in the Butler's Gartersnake Survey Report: Moss-American Reaches 2 and 3, Casper Consulting, December 3, 2003, to avoid encroaching on all highest quality and most primary snake habitat.
 - c. Install silt fencing by March 15, 2004 between snake habitat and construction areas (see Figure 5 and 6, Butler's Gartersnake Survey Report: Moss-American Reaches 2 and 3, Casper Consulting, December 3, 2003).
 - d. Maintain silt fence between March 15, 2004 and November 5, 2004 throughout the remainder of the project. Fence inspections must be made three times per week on non-consecutive days and immediately following all significant rain events (>3/4" in a downpour or more than 1.5 inches in a 24 hour period) and repairs must be made within 24 hours of fencing failures (as defined in Casper Consulting's Dec 3, 2003 report).
 - e. Develop and implement an ecological restoration plan as proposed in the Butler's Gartersnake Survey Report: Moss-American Reaches 2 and 3, Casper Consulting, December 3, 2003. The Department must approve this plan. The recipient of this authorization is responsible for the plan's implementation.
 - f. Monitor Butler's gartersnake remediation as proposed in the Butler's Gartersnake Survey Report: Moss-American Reaches 2 and 3, Casper Consulting, December 3, 2003.
8. Incidental take of the Butler's gartersnake as a result of the remediation of Reaches 2 and 3 of the Moss-American wood-treating facility is not likely to jeopardize the snake's continued existence and recovery, or the whole plant-animal community of which it is a part, within the state; and the activity is not likely to result in the destruction or adverse modification of habitat that is critical to the continued existence of the species within the state, if the Conservation Measures described above are implemented.
9. The Department has complied with s. 1.11, Stats., and ch. NR 150, Wis. Adm. Code.
10. The Department issued a public notice, dated February 16th, 2004 and closing on March 18th, 2004 that described the proposed incidental take. DNR provided the public notice to the news media throughout the state, to the parties listed in NR 27, and to other parties who have requested in writing to receive incidental taking notices.

No responses were received from the public.
11. The Department has concluded that the proposed site remediation will provide benefits to the public health, safety and welfare.

CONCLUSIONS OF LAW

1. The Department has the authority pursuant to s. 29.604(6r), Stats., to authorize the incidental take of state endangered or threatened species.
2. The Department has complied with appropriate statutes and administrative rules in making this decision.

ORDER

Kerr-McGee Chemical, LLC and their employees, agents and contractors, are authorized to incidentally take the Butler's gartersnake (*Thamnophis butleri*) as a result of the remediation of Reaches 2 and 3 of the Moss-American Superfund site in Milwaukee County, provided that the above conditions identified in the Findings of Fact #7 are met.

APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes, administrative rules and case law establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to sections 227.52 and 227.53, Stats., you must file a petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This 25TH day of March, 2004

State of Wisconsin
Department of Natural Resources
For the Secretary

By: *Signe L. Holtz for Laurie Osterndorf*

Director
Division of Land
Wisconsin Department of Natural Resources