



**KERR-McGEE CORPORATION**

KERR-McGEE CENTER • OKLAHOMA CITY, OKLAHOMA 73125

Law Department  
Environmental Remediation

W. O. Green, III  
Senior Counsel

Writer's Direct Number  
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July 26, 1999

**RECEIVED**

JUL 27 1999 2

**VIA FEDERAL EXPRESS**

William Frey, Esq.  
Deputy Attorney General  
State of Nevada  
100 North Carson Street  
Carson City, Nevada 89701

**OFFICE OF ATTORNEY GENERAL  
DEPUTY ATTORNEY GENERAL**

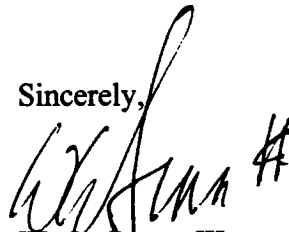
Dear Bill:

Enclosed are two executed originals of the Consent Agreement by and between the State of Nevada, Department of Conservation and Natural Resources, Division of Environmental Protection ("NDEP" or "Division") and Kerr-McGee Chemical LLC, a Delaware Limited Liability Company ("Kerr-McGee"). After the Division has signed both sets of the Consent Agreement, please keep one executed set for your files and return one executed set back to this office at the following address:

Kerr-McGee Corporation  
Attn: W. O. Green, III  
123 Robert S. Kerr Ave.  
Oklahoma City, OK 73102

Thank you for your assistance in this matter.

Sincerely,

  
W. O. Green, III  
Senior Attorney

WOG/rb

Enclosures

cc: P. Corbett  
J. T. Smith

## CONSENT AGREEMENT

This Consent Agreement is made and entered into this 26 day of July, 1999, by and between the State of Nevada, Department of Conservation and Natural Resources, Division of Environmental Protection ("NDEP" or "Division") and Kerr-McGee Chemical LLC, a Delaware Limited Liability Company ("Kerr-McGee"). Kerr-McGee and the Division are referred to collectively herein as the "Parties."

**WHEREAS**, the Division is designated as the state water pollution control agency for Nevada and is empowered to administer and enforce the Nevada Water Pollution Control Law, Nevada Revised Statutes ("NRS") §§ 445.131 to 445.354, inclusive;

**WHEREAS**, Kerr-McGee has since 1967 owned and operated a plant at Henderson, Nevada used to produce ammonium perchlorate, which same facility Kerr-McGee asserts was previously owned by the United States Navy and others for the manufacture of perchlorate products and intermediates;

**WHEREAS**, in Henderson, to the southwest of Kerr-McGee's facility, ammonium perchlorate was manufactured by Pacific Engineering and Production Co. of Nevada ("PEPCON");

**WHEREAS**, sampling of groundwater at Kerr-McGee's and PEPCON's sites and in areas to the north and east of these facilities, approaching the Las Vegas Wash has indicated elevated levels of perchlorate in groundwater which are presumptively associated with historical operations at Kerr-McGee's and PEPCON's facilities;

**WHEREAS**, the Division has recently identified a groundwater seep north of the BMI lower ponds and adjacent to the Las Vegas Wash, believed to be located within the SE/4 of the

SE/4 of the SW/4, Sec. 30, T21S, R63, Clark County, Nevada, and the Division believes that expeditious action to capture this seep should materially and substantially reduce the amount of perchlorate reaching the Las Vegas Wash and Lake Mead in the near term;

**WHEREAS**, Kerr-McGee has been cooperating with the Division in the further delineation of groundwater plumes of perchlorate and in the investigation of appropriate and feasible means to remediate this contamination, and Kerr-McGee has already constructed an eleven acre, lined impoundment at its Henderson facility and through use of this impoundment is currently removing substantial quantities of perchlorate from groundwater each day;

**WHEREAS**, Kerr-McGee desires to continue to cooperate fully with the Division in addressing the potential problem of perchlorate contamination in the Henderson, Nevada area, while preserving its rights to seek contribution from third parties who are likely to share responsibility for perchlorate contamination, including the United States Navy and PEPCON;

**NOW, THEREFORE**, in consideration of and in exchange for the mutual undertakings and covenants herein, and intending to be legally bound hereby, the Division and Kerr-McGee agree as follows:

**I. STATEMENT OF PURPOSE**

The Division and Kerr-McGee are entering into this agreement for three interrelated purposes:

1. To assure prompt implementation of a removal action to capture and contain perchlorate contaminated groundwater (the "seep") surfacing north of the BMI lower ponds and adjacent to the Las Vegas Wash and thereby to materially and substantially reduce the amount of perchlorate reaching the Las Vegas Wash and Lake Mead in the near term;

2. To establish a framework for continued development by Kerr-McGee, in cooperation with the Division, of a plan to address more broadly perchlorate contamination in groundwater at Henderson, Nevada, including activities to address perchlorate at the Pittman Lateral area, and thereby achieve substantial, long-term remediation of perchlorate contamination at Henderson.

3. To provide for reimbursement to the Division of Kerr-McGee's fair share of oversight costs that the Division has incurred, and may in the future incur, with respect to the investigation and remediation of this perchlorate contamination in groundwater.

## **II. WORK TO BE PERFORMED**

1. The parties intend that the work to be performed in accordance with this Agreement shall be carried out in manner consistent with applicable federal and Nevada statutes, implementing regulations, and with the National Contingency Plan, 40 C.F.R. § 300.1 *et seq.*

2. Within 15 days of execution of this Agreement, Kerr-McGee shall submit a Workplan detailing the removal measures that it plans to implement to capture and control the groundwater seep identified in the Las Vegas Wash area. The plan shall be consistent with the following key elements:

- (a). Kerr-McGee anticipates that completion of testing, site construction and equipment deliveries will allow the initiation of recovery of perchlorate at the seep in October 1999.
- (b). Treatment of perchlorate is expected to involve removing at least 97 percent of the perchlorate by ion exchange prior to discharge of the water.

(c). The parties recognize that permitting for seep access, construction and treated water discharge will require a concerted effort between Kerr-McGee and the agencies involved to meet the October 1999 deadline.

(d). Although Kerr-McGee believes that initial ion exchange technical results are promising, if technical obstacles arise, Kerr-McGee may submit a modified treatment plan to the Division.

The plan shall contain a schedule for implementation of the necessary control measures. Upon approval of this Workplan, it shall become an enforceable obligation pursuant to this decree. The parties will endeavor to reach mutual agreement on any changes to the Workplan after its submission, but, failing such agreement, the Division's written determination of necessary changes shall control, subject to Kerr-McGee's right to seek dispute resolution under Section IV below. The parties acknowledge that any such Workplan and schedule must take into account the necessity of a permit or other approval for discharge of water from the seep after removal of perchlorate.

3. No later than 60 days from the date of execution of this Agreement, Kerr-McGee shall submit a second Workplan and schedule setting forth a proposed long-term remedy to perchlorate contamination in the groundwater at Henderson. The Workplan must identify a system for long-term capture and treatment of perchlorate contamination in groundwater and for discharge of effluent from this perchlorate removal system. Such plan, at a minimum, shall include activities addressed to recover perchlorate contamination at the Pittman Lateral area, which activities will begin no later than December 31, 1999.

4. The parties agree that, upon submission of this second Workplan addressing long-term remedial issues, they will promptly enter good faith discussions of a consent agreement to

govern implementation and operation of this long-term remedy. The parties further agree to cooperate in resolving any issues that may remain regarding discharge of groundwater after treatment for perchlorate, including cooperation on issues relating to necessary permits.

### **III. STIPULATED PENALTIES**

Unless there has been a written modification approved by NDEP or a Force Majeure under Section V, any failure by Kerr-McGee to meet a schedule deadline or an approved Workplan condition may result in NDEP assessing stipulated penalties against Kerr-McGee. The following table reflects the maximum penalties that may be imposed. Nothing in this Agreement shall be construed to limit in any manner NDEP's discretion with respect to whether to take enforcement action or to assess less than the maximum penalty. Failure to commence or complete work as described in the approved Workplan at the scheduled time may result in the following penalties subject, however, to a cap of \$250,000:

<u>Period of Noncompliance</u>	<u>Maximum Penalty per Day</u>
1 <sup>st</sup> – 7 <sup>th</sup> day	\$ 1,000
8 <sup>th</sup> – 21 <sup>st</sup> day	\$ 2,500
22 <sup>nd</sup> day and thereafter	\$ 5,000

The assessment of stipulated penalties shall not alter Kerr-McGee's obligation to comply with the terms of this Agreement.

### **IV. DISPUTE RESOLUTION**

1. The Parties shall use their best efforts informally and in good faith to resolve any dispute or differences of opinion. The Parties agree that the procedures contained in this Section are the sole and exclusive procedures for resolving disputes arising under this Consent

Agreement. If Kerr-McGee fails to follow any of the requirements contained in this Section, then it shall have waived its right to further consideration of the dispute in issue.

2. If Kerr-McGee disagrees, in whole or in part, with any written determination by the Division pursuant to this Consent Agreement, Kerr-McGee shall notify the Division in writing of the dispute ("Notice of Dispute").

3. Any dispute which arises under or with respect to this Consent Agreement shall in the first instance be the subject of informal negotiations between the Parties. The period for informal negotiations shall not exceed ten (10) days following the date the dispute arises, unless such period is extended by written agreement of the Parties. The dispute shall be considered to have arisen when the Division receives a written Notice of Dispute.

4. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the position advanced by the Division shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, Kerr-McGee invokes the formal dispute resolution procedures of this Section by serving on the Division Administrator a written Statement of Position which shall set forth the specific points of the dispute, the position Kerr-McGee claims should be adopted as consistent with the requirements of this Consent Agreement, the basis for Kerr-McGee's position, any factual data, analysis or opinion supporting that position, any supporting documentation relied upon by Kerr-McGee, and any matters which it considers necessary for the Administrator's determination. The Statement of Position also may include a request for an opportunity to make an oral presentation of factual data, supporting documentation and expert testimony to the Administrator and to

answer questions that the Administrator may pose. It is within the sole discretion of the Administrator to grant or deny a request for an oral presentation.

5. Within fifteen (15) days following receipt of a Statement of Position, or after any oral presentation by Kerr-McGee, the Administrator shall issue his/her decision. The Administrator's written decision shall include a response to Kerr-McGee's arguments and evidence. The written decision of the Administrator shall be incorporated into and become an enforceable element of this Consent Agreement, and shall be considered the Department's final decision and an exhaustion of Kerr-McGee's administrative remedies.

6. As to any final decision of the Administrator, Kerr-McGee may seek judicial review as provided by State law and regulations.

#### V. FORCE MAJEURE

1. Kerr-McGee shall perform the requirements of this Consent Agreement within the time limits prescribed, unless the performance is prevented or delayed by events which constitute a *force majeure*. Kerr-McGee shall have the burden of proving such a *force majeure*. A *force majeure*, for purposes of this Consent Agreement, is defined as any event arising from causes not reasonably foreseeable and beyond the reasonable control of Kerr-McGee, or of any person or entity controlled by Kerr-McGee, which delays or prevents the timely performance of any obligation under this Consent Agreement despite Kerr-McGee's best efforts to fulfill such obligation. A *force majeure* may include: extraordinary weather events, natural disasters, strikes and lockouts, by other than Kerr-McGee employees, national emergencies, delays in obtaining access or use of property not owned or controlled by Kerr-McGee despite timely best efforts to obtain such access or use approval, and delays in obtaining any required approval or permit from



the Division or any other public agency that occur despite Kerr-McGee's complete, timely and appropriate submission of all information and documentation required for approval or applications for permits within a timeframe that would allow the work to proceed in a manner contemplated by the schedule of the Consent Agreement. A *force majeure* does not include (i) increased costs of the work to be performed under the Consent Agreement, (ii) financial inability to complete the work or (iii) normal precipitation events.

2. If any event occurs or has occurred that may delay the performance of Kerr-McGee's obligations under this Consent Agreement, whether or not caused by a *force majeure* event, Kerr-McGee shall notify the Division orally within two (2) business days of when Kerr-McGee first knew that the event might cause a delay. If Kerr-McGee wishes to claim a *force majeure* event, then within five (5) business days thereafter, Kerr-McGee shall provide to the Division a written explanation and description of the obligation(s) delayed or affected by the *force majeure* event; the reasons for the delay; the anticipated duration of the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Kerr-McGee's rationale for attributing such delay to a *force majeure* event; and a statement as to whether, in the opinion of Kerr-McGee, such event may cause or contribute to an imminent and substantial hazard to human health, welfare, or the environment. Kerr-McGee shall include with any notice all available documentation supporting its claim that the delay was attributable to a *force majeure*. Failure to comply with the above requirements shall preclude Kerr-McGee from asserting any claim of *force majeure* for that event.

3. The Division shall notify Kerr-McGee in writing of its *force majeure* determination within ten (10) days after receipt of the written notice from Kerr-McGee. If the Division determines that the delay has been or will be caused by circumstances constituting a

*force majeure* event, the time for performance of the obligations under this Consent Agreement that are affected by the *force majeure* event will be extended by the Division in writing for such time as the Division determines is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation, unless Kerr-McGee can demonstrate to the Division's satisfaction that more than one obligation was affected by the *force majeure* event.

4. In the event that the Division and Kerr-McGee cannot agree that any delay or failure has been or will be caused by circumstances constituting a *force majeure*, or if there is no agreement on the length of the extension, the dispute shall be resolved in accordance with the dispute resolution provisions set forth in Section IV of this Consent Agreement.

## **VI. REIMBURSEMENT OF OVERSIGHT COSTS**

1. Kerr-McGee shall reimburse the Division for costs reasonably incurred for the oversight of this Consent Agreement, following the effective date and for the effective period of this Consent Agreement. Kerr-McGee also agrees upon the effectiveness of this Agreement promptly to reimburse the Division for its share of the past oversight costs related to perchlorate as of the 30th day of June 1, 1999, in the amount of \$52,824.91.

2. The Division shall account for oversight costs associated with implementing this Consent Agreement and related work and shall submit to Kerr-McGee copies of all invoices on a quarterly basis, commencing with the first calendar quarter after the effective date of this Consent Agreement. Submittals shall be made promptly after the Division's internal review. Such invoices shall contain sufficient detail to identify individual daily time entries and all invoices or cost details for administrative and vendor expenses (such as travel, training,

equipment, photocopying expense and similar items). These invoices shall be prepared consistent with standard State billing practices and shall not require the creation of new billing practices. Amounts due hereunder shall be paid within thirty (30) days after receipt by Kerr-McGee of the invoices. Kerr-McGee may dispute particular invoiced costs if it determines that the Division has made an accounting error or if it alleges that the particular cost is not reimbursable pursuant to paragraph 3. In the event of any such dispute, Kerr-McGee shall pay in a timely fashion undisputed costs. With respect to the disputed cost, Kerr-McGee may pay such amount under protest and without prejudice to recovery of all or any portion thereof at the conclusion of any dispute resolution timely commenced pursuant to Section IV.

3. All payments due by Kerr-McGee shall be by checks payable to the State of Nevada for the full amount due and owing to:

Nevada Division of Environmental Protection  
333 W. Nye Lane  
Carson City, Nevada 89710

ATTENTION: Chief, Bureau of Corrective Actions

All checks shall reference the Site and Kerr-McGee's name and address.

## **VII. RESERVATION OF RIGHTS**

1. The Division reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, which may pertain to Kerr-McGee's failure to comply with any of the requirements of this Consent Agreement or of any requirement of federal or state laws, regulations, or permit conditions. Except as provided in Section VIII (Other Claims; Covenant Not to Sue), this Consent Agreement shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, and/or authorities, civil or criminal, which the Division has under any applicable statutory or common law authority of the State.

This Consent Agreement in no way relieves Kerr-McGee of its responsibility to comply with any federal, state or local law or regulation.

2. The Division reserves the right to disapprove work performed by Kerr-McGee pursuant to this Consent Agreement subject to Dispute Resolution under Section IV.

3. The Division reserves any and all legal rights and equitable remedies available to enforce (1) the provisions of this Agreement, or (2) any applicable provision of state or federal law, subject to the Covenant Not To Sue under Section VIII.

4. Kerr-McGee reserves all rights, claims and/or defenses it may have in any action brought or taken by the Division, the EPA or any third party pursuant to applicable law, with respect to the specific claims that can be asserted and further reserves the right to pursue potentially responsible parties to recover all costs incurred in the performance of this Agreement.

5. Nothing in this Consent Agreement shall be construed as an admission of liability or fault by Kerr-McGee.

#### **VIII. OTHER CLAIMS; COVENANT NOT TO SUE**

Nothing in this Consent Agreement shall constitute or be construed as a release from, or covenant not to sue with respect to, any claim, cause of action, demand or defense in law or equity, against any person, firm, partnership, or corporation for, or in respect of any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, management, transportation, release, threatened release, or disposal of any perchlorate at or otherwise associated with the Site, except that the Division covenants not to sue Kerr-McGee with respect to the Division's past oversight costs and its obligations to perform the perchlorate

remediation at the seep adjacent to the Las Vegas Wash so long as Kerr-McGee is in compliance with the terms of this Consent Agreement.

**IX. APPLICABLE LAW**

This Agreement shall be construed in accordance with and governed by the law of the State of Nevada.

**X. EFFECTIVE DATE**

This Agreement shall become effective when it is fully executed by the parties. The effective date will be the date of last signature.

**XI. TERMINATION**

This Agreement shall terminate upon the occurrence of any of the following three events:

1. The Division and Kerr-McGee enter a new consent agreement to govern long-term remedial activity with respect to perchlorate contamination in groundwater at Henderson, and this later agreement expressly supersedes the present Agreement.
2. Kerr-McGee completes the work required under the removal Workplan pursuant to this Agreement and certifies to the Division that it has completed the work, and the Division issues written notice to Kerr-McGee confirming that its obligations under the Agreement have been fulfilled.
3. Any agency or department of the United States government asserts and undertakes lead responsibility for addressing perchlorate contamination at Henderson.

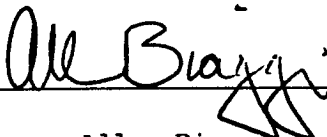
**XII. SIGNATORIES**

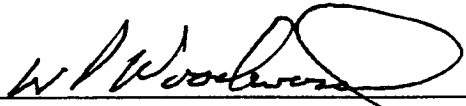
Each undersigned individual represents and warrants that he or she is fully authorized by the party he or she represents to enter into this Agreement and to legally bind such party to the terms and conditions of this Agreement.

**IN WITNESS WHEREOF**, the Division and Kerr-McGee execute this Consent Agreement by their duly authorized representatives on this 26 day of July, 1999.

THE STATE OF NEVADA  
DIVISION OF ENVIRONMENTAL  
PROTECTION

KERR-McGEE CHEMICAL LLC

By:   
Name: Allen Biaggi  
Title: Administrator  
Date: July 28, 1999

By:   
Name: W. Pete Woodward  
Title: Senior Vice President  
Date: July 26, 1999

APPROVED AS TO FORM ONLY this 28<sup>th</sup> day of July, 1999.

ATTORNEY GENERAL

By: 