ILLINOIS POLLUTION CONTROL BOARD
November 2, 1989

LEFTON IRON AND METAL COMPANY, INC., a Missouri Corporation, and LEFTON LAND AND DEVELOPMENT COMPANY, INC., a Missouri Corporation, Complainants, v. MOSS-AMERICAN, INC., a Delaware Corporation, and KERR-MCGEE CHEMICAL CORPORATION, a Delaware Corporation, Respondents.	)	PCB 87-191 (Enforcement)
KERR-MCGEE CHEMICAL CORPORATION, a Delaware Corporation, Counterclaimant, v. LEFTON IRON AND METAL COMPANY, INC., a Missouri Corporation, and LEFTON LAND AND DEVELOPMENT COMPANY, INC., a Missouri Corporation, Counterrespondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

On October 6, 1989, Moss-America, Inc. and Kerr-McGee Chemical Corporation (hereafter referred to collectively as respondents) filed a Motion for Clarification. Lefton Iron and Metal Company, Inc., and Lefton Land and Development Company, Inc. (collectively, Lefton), has not filed a response. Specifically, the respondents request that the Board clarify the meaning of its September 28, 1989 order which denied various motions for summary judgment. While the Board takes the position that the words of the September 28, 1989 order are unambiguous and clear, the Board will respond to the concerns raised by the respondents. To that extent, the motion is granted.

The respondents assert that the Board's order is not based on the facts of this case. According to the respondents, the order includes "criticism unfairly directed toward the respondents" and is "highly prejudicial" against the respondents.

The respondents specifically refer to that portion of the September 28th order which addressed the respondents' contention that they were entitled to summary judgment because Moss-American, Inc., not Moss-American Corporation, was the predecessor in interest to Kerr-McGee Chemical Corporation. The complainants had named Moss-American Corporation as a respondent. In response to that argument, the complainants requested leave to amend its pleadings to correct the misnomer. The Board granted the complainants' request, citing 35 Ill. Adm. Code 103.121(b).

The September 28th order further stated:

> Additionally, the Board is concerned that this misnomer was not brought to its attention earlier. Lefton's complaint was filed on November 30, 1987. Now, almost two years later, the respondents have informed the Board that Lefton has wrongly named one respondent. It certainly has been clear from the beginning of this proceeding that Lefton's intention was to bring an action against Kerr-McGee and its predecessor-in-interest. Delay in correcting this misnomer has served to create numerous less than precise pleadings and Board orders.
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> (September 28, 1989 order, slip op. at 5).

Apparently, it is the above-quoted passage which serves as the basis for the respondents' accusation that the Board has unfairly criticized the respondents in a manner that is highly prejudicial to the respondents.

In support of their accusation the respondents state that several filings made in 1988 indicate that Moss-American, Inc., not Moss-American Corporation, was the predecessor in interest to Kerr-McGee Chemical Corporation. Such a representation is true. However, prior to the August 29, 1989 cross-motion for summary judgment, the respondents never requested that the Board dismiss the complaint against Moss-American Corporation or enter a judgment in favor of Moss-American Corporation on the basis that the complainants had named a wrong party as a respondent.

It is also true that the November 30, 1987 complaint was brought against Moss-American Corporation on the allegation that Kerr-McGee Chemical Corporation had acquired all the assets of Moss-American Corporation. Certainly, the respondents were in

the best position to ascertain that a misnomer had been committed by the complainants.

Additionally, it is true that delay in correcting this misnomer has created many less than precise pleadings and Board orders. That is the primary concern of the Board. Accurate and precise pleadings will foster an efficient adjudicative process. The Board encourages and expects parties to cooperate to the extent that an action may be honed down to the issues which are truly contested. That is why discovery procedures are available.

The Board does not believe that the above-quoted passage from the September 28, 1989 order can be interpreted as unfair criticism solely directed at the respondents. Certainly, the complainants carry a responsibility to perfect their pleadings as new information is made known through the discovery process. The Board was merely expressing its frustration with respect to the manner in which this action is progressing. After almost two years, the first hearing in this proceeding is scheduled for today, November 2, 1989.

Finally, the Board does not believe that its order is prejudicial, in any way, to either party.

The respondents also request that the Board clarify the following passage of the Board's September 28, 1989 order:

> Consequently, Lefton's request to amend its pleadings is granted insofar as the Board will construe the filings of Lefton's, which were filed prior to today's date, as referring to "Moss-American, Inc." wherever "Moss-American Corporation" is mentioned. The Board expects all future pleadings to reference the correct parties of this action. The caption of today's Order reflects the correction.
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> (September 28, 1989 order, slip op. at 5).

Specifically, the respondents want the Board to "clarify" the above-quoted passage by holding that Kerr-McGee Chemical Corporation is the only proper respondent to this case. The respondents assert that Moss-American, Inc. ceased to exist when it was merged into Kerr-McGee Chemical corporation in 1974. As a result, the respondents conclude that it would be an error to have Moss-American, Inc. as a party to this case.

The Board believes that the meaning of the above-quoted passage is self explanatory. The Board simply meant that all future pleadings should refer to the respondents as being Moss-American, Inc. and Kerr-McGee Chemical Corporation. This would reflect the corrected misnomer.

However, the respondents, in their motion for clarification, request that the Board expand on that plain meaning and hold that Moss-American, Inc. should not be a party to this action. In other words, the respondents request that the Board "clarify" the September 28th order by addressing an issue which was not intended to be addressed by the September 28th order. The respondents' request may be more appropriately made in the context of a motion to dismiss which contains supporting legal arguments.

IT IS SO ORDERED.

R. Flemal was not present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 2nd day of November, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board