

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

In the Matter of)
) Docket No. 40-2061
KERR-McGEE CHEMICAL CORPORATION)
(Kress Creek Decontamination))

DOCKETED
USNRC

PEOPLE'S RESPONSE TO MOTION TO COMPEL⁸⁵
DOCUMENT PRODUCTION AND INTERROGATORY ANSWERS

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OFFICE OF SECRETARY
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I. INTRODUCTION

Kerr-McGee's motion to compel further document produc-
tion and interrogatory answers is a worthy example of that time-
honored sport known as paper churning. The company's complaints
about the People's discovery responses are at best strained and
at worst a misuse of the discovery process for purposes of har-
rassment and oppression. For the reasons set out below they
should be rejected in their entirety.

II. DOCUMENTS

A.

In a section entitled "Background Facts" Kerr-McGee
criticizes the People's discovery responses in this proceeding on
numerous grounds. First, Kerr-McGee complains that the People's
responses were filed two weeks late (KM Motion 1-2). Where is
the harm to Kerr-McGee?¹

Second, Kerr-McGee asserts that the number of documents
produced from the Illinois Department of Nuclear Safety ("IDNS")

¹Compare Kerr-McGee's continuing refusal, two years after
the licensing proceeding was instituted and six years after the
Stabilization Plan was proposed, to publicly identify any of its
expert witnesses in that proceeding and to allow discovery of
documents in the possession of experts virtually certain to be
called at hearing.

was "small" and that they came from the files of only two employees, Dr. John Cooper and Director Terry R. Lash (KM Motion 2).² It is true that the number of documents produced was small in comparison with Kerr-McGee's production. And it is true that only Dr. Cooper's and Dr. Lash's files were produced--for the reason that whatever responsive documents we initially located in the files of other staff members were duplicated in Dr. Cooper's files (Dr. Cooper heads the Department's environmental division). How do either of these facts--the number of documents produced and the fact that they came from the files of Dr. Lash and Dr. Cooper--indicate that the People have inadequately responded or that Kerr-McGee needs relief from the Board?³

Third, Kerr-McGee complains that the People's production has been "piecemeal" (KM Motion 2, 3, n.2), and that the documents were produced "well after applicable guidelines" (KM Motion 3). Again, where is the prejudice to Kerr-McGee?

Finally, Kerr-McGee complains that the People simultaneously produced documents in this and the licensing proceeding, "generally without distinguishing between its productions in each proceeding" (KM Motion 3, n.2). It is especially hard to

²The documents produced from IDNS and the Attorney General's Office referred to in Kerr-McGee's motion respond both to Kerr-McGee's second document request in the licensing proceeding and sole document request in this proceeding. The vast majority of the documents respond to the licensing proceeding request.

³It is interesting to note that neither in counsel's oft referred-to "informal" request for supplementation nor on any other occasion did Kerr-McGee suggest to the People that their document production was too "small" or improperly limited to particular employees. Had Kerr-McGee raised the issue we could have provided it with the same information we are now providing to the Board.

understand why Kerr-McGee is wasting time with this complaint, given that the undersigned told counsel beforehand that production would be carried out in this fashion, without any expression of dissatisfaction from him. Moreover, if the documents produced are as minuscule in number as Kerr-McGee claims, it should have no trouble reviewing them to determine which documents pertain to Kress Creek and which to the rare earths site.⁴

With this catalogue of gripes Kerr-McGee apparently intends to convey the impression that the People have deliberately withheld documents in their possession. We can only assure Kerr-McGee and the Board that, with the exception of thirteen pieces of paper discussed below, the People have, to the best of their knowledge, produced all (nonprivileged) documents in their possession responsive to Kerr-McGee's discovery request in this (as well as the licensing) proceeding. Several months ago the undersigned reviewed the files of all IDNS staff containing Kerr-McGee-related documents, designated for copying those documents responsive to the company's discovery request in this proceeding and second discovery request in the licensing proceeding, and withdrew certain items as privileged. IDNS's inhouse counsel then further screened the documents for privileged items, had the

⁴It is also worth noting that Kerr-McGee itself "simultaneously" produced documents pertaining to both proceedings. Last Fall's production of over a million documents contained thousands of Kress Creek-related items, including all of Kerr-McGee's raw monitoring of storm sewers and Kress Creek and scores of documents relating to the pathway of contamination. No distinction was made between Kress Creek and rare earth documents at that time. In response to the People's discovery request herein, Kerr-McGee stated that it "is not obligated to conduct a second search among those documents, or to produce those documents a second time." Response filed April 1, 1985, p. 43.

designated documents copied, and sent them to the Attorney General's Office, whence they were mailed to Covington & Burling.⁵ After receiving Kerr-McGee's motion to compel in the rare earths proceeding, and yet again after receiving Kerr-McGee's motion to compel in this proceeding, inhouse counsel asked the staff to search their files for any responsive documents which were not produced, with the result that thirteen sheets of paper were located; these are now in transit to the Attorney General's Office for review. See the Affidavit of Anne Rapkin attached hereto. In sum, the company's innuendo that we have deliberately withheld documents is completely unfounded.

B.

Kerr-McGee additionally raises the same issue it raised last December concerning the state agencies from whose files documents must be produced. Kerr-McGee argues that document production may not be limited to the files of the client agency, and claims that "there is every reason to believe that responsive documents are located in the files of the Illinois State Geological Survey ("ISGS"), Illinois State Water Survey ("ISWS"), the Illinois Environmental Protection Agency ("IEPA"), the Illinois Department of Public Health ("IDPH"), the Illinois Pollution

⁵The only responsive documents which were intentionally not produced are those of which Kerr-McGee already has copies, e.g., NRC inspection reports, the Figerio report, comments on the DES, the ORAU report, etc. However, the undersigned checked all such documents to ascertain whether IDNS staff had made any notes in them; anything with notes would have been produced. We also did not produce a large map of West Chicago's sewer system, since Kerr-McGee's counsel had previously inspected that map at the Attorney General's Office and declined a copy.

Control Board ("IPCB"), and the Governor's Office" (KM Motion 4). To repeat what we said in our December 17, 1984 Response To Kerr-McGee's Motion Concerning Discovery, Governor Thompson does not keep files on the technical issues raised in Kerr-McGee's discovery; the IDPH's radiation division was absorbed in 1980 into the new IDNS (see H.B. 3614), hence its relevant files were produced from IDNS's; and the IPCB, being solely an adjudicatory and rulemaking body, will not have any discoverable documents relating to Kerr-McGee (p. 3, n.2 of our Response). As for the other agencies mentioned, we do not understand what Kerr-McGee's problem is. All of IEPA's documents were produced last year in response to Kerr-McGee's first discovery request in the licensing proceeding, and even though the People did not believe themselves bound to do so, they produced at that time all of the relevant Kerr-McGee-related documents at the ISGS and ISWS. To the best of the People's knowledge, anything those three agencies have concerning Kress Creek is included among the documents already produced. Furthermore, when the undersigned became aware that a Kress Creek-related document had been generated at the Illinois Natural History Survey ("INHS"), that was also produced.

On page 5 of its motion Kerr-McGee makes a variety of remarks having absolutely no relevance to the issue we presume is raised here--i.e., have the People produced all documents in their possession responsive to Kerr-McGee's discovery request in this proceeding? Kerr-McGee tells us that the State

has utilized the services of Dr. Thomas Johnson (ISGS) and Larry Eastep (IEPA) in drafting its interrogatory responses in the License Amendment proceeding. It has indicated in interrogatory responses that various individuals from the IEPA, ISWS, and ISGS have

commented on the Kerr-McGee Stabilization Plan or the FES.

Quite true, but what do interrogatory answers in the licensing proceeding and comments on the Stabilization Plan or FES have to do with the issue here? Kerr-McGee goes on:

Documents produced indicate that surveys and studies of Kress Creek and the West Branch DuPage River ... have been conducted by IDPH and other state agencies, yet all of these surveys and studies have not been produced.

Whatever studies or surveys IDPH may have conducted have been produced, since IDNS now has custody of the relevant IDPH files. (As for the "other state agencies" Kerr-McGee refers to, specification would be appreciated.) If Kerr-McGee is implying that the studies we produced are incomplete in some fashion, there is nothing we can do about that. We produced documents in the condition in which we found them. Kerr-McGee's own studies and data were often exceedingly incomplete or confused; however, one does not find the People bellyaching about that to the Board. Finally, Kerr-McGee alleges that the People have "not honored" their commitment to produce all responsive documents in the licensing proceeding. While the patent error of this remark should already be clear, we will only point out here that if Kerr-McGee is unhappy about our conduct in the licensing proceeding, it should file an appropriate pleading in that proceeding.

The company also makes an argument that IDNS is not the Attorney General's client agency in this proceeding (KM Motion 6). To the contrary, just as in the Rare Earths proceeding, the People's intervention petition here was brought on the Attorney

General's motion and at the request of IDNS. See People's Petition For Leave To Intervene filed July 10, 1984, p. 2. As a general matter, the People limit document production to client agency files. As we said in our December 17 pleading, there are 274 agencies, departments, boards, and commissions of the State of Illinois, including the Prisoner Review Board, the Commission on Banks and Trusts, and the Department of Alcoholism and Substance Abuse. To search the files of all of them is considered unduly burdensome and, in a case like this, entirely unnecessary. The People produced documents from the files of both client agencies as well as from the other agencies on which the People have relied in connection with the Rare Earths site. We also produced from an agency with which we had had no previous contact as soon as it became known that a relevant document had been generated there (INHS). Therefore, in the absence of an order from this Board, the People will not search the files of the other state agencies, boards, and departments.

C.

Kerr-McGee next alleges that the People "improperly" limited their search of the Attorney General's Office files to those of the undersigned, and note that some of the People's interrogatory responses in this proceeding were prepared by two other Attorney General employees, James Van der Kloot and William Frerichs (KM Motion 7). Documents were not produced from the files of these individuals because those files contain only pleadings, public documents such as the ORAU report, or notes on

draft interrogatories or interrogatory responses.⁶

In this connection, we would like to note that while the People produced documents from counsel's files, Kerr-McGee did not do the same. Attached to Kerr-McGee's motion (Ex. 3) is a letter dated June 3, 1985 from the undersigned to Richard Meserve, transmitting the nonprivileged responsive documents from her files and identifying the responsive documents withheld as privileged. The last paragraph of which reads:

As I send you these materials from my files I am prompted to inquire why you and Chadwell Kayser did not produce responsive documents from your own files. I would appreciate an answer at your earliest convenience.

Almost two months have passed since that letter, and we still await the courtesy of a reply. In light of this, Kerr-McGee's present complaint about production from the Attorney General's files rings a bit hollow.

D.

Finally, Kerr-McGee argues that the People have not set forth an adequate basis for their claims of privilege respecting various documents identified as responsive from the Attorney General's and IDNS files. The People have reviewed each of these privileged documents and none of them relates to the Kress Creek

⁶Again, counsel did not bother to informally inquire about this matter before filing a motion. A five-minute phone call would likely have resolved the matter.

proceeding.⁷ To the extent that Kerr-McGee challenges our claims of privilege in its motion to compel in the licensing proceeding, we will respond accordingly in a pleading due to be filed on August 8.

III. INTERROGATORIES

A.

Kerr-McGee objects, first, that the People improperly answered Kerr-McGee Interrogatories 1(c), 3(b), 4(c), 5(d), and 15(d) by stating that the documents or information the People rely on for certain contentions include documents produced by Kerr-McGee and/or responses made by Kerr-McGee to interrogatories. Interrogatory 1(c) asks for the identity of all documents relating to the People's contention that residual process chemicals may be present in the Kress Creek contaminants. We answered: "The FES, Kerr-McGee's Stabilization Plan for decommissioning the Rare Earths Facility, and documents provided by Kerr-McGee in the Rare Earths Facility proceeding." In other words, the People's belief that residual process chemicals may be present in the contaminants arises from information in the FES, Stabilization Plan, and Kerr-McGee documents indicating--and of course Kerr-McGee has never disputed this--that the process

⁷The only exception is one paragraph on page 2 of privileged item #5. In this document Dr. Cooper, on May 9, 1984, briefed the Director and Deputy Director of IDNS concerning the status of the Kerr-McGee proceedings. This paragraph contains nothing of interest and was withheld primarily to avoid waiving privilege. While the People believe the document is obviously privileged, we will provide a copy to the Board for in camera review if the Board so desires.

wastes generated at the site contain not only radionuclides but also residuals of chemicals used in the milling and extraction process. Interrogatory 3(b) asks what documents support the People's contention that the contaminants originated at the rare earths site; the People answered by referring to the Show Cause Order, the FES, documents Kerr-McGee has produced, and interrogatory answers Kerr-McGee has given in this proceeding. In other words, Kerr-McGee's admissions and documents demonstrate that the Kress Creek contaminants originated at the rare earths site. Interrogatory 4(c) asks what documents relate to Kerr-McGee's failure to abide by the statutory and regulatory requirements to use licensed material so as to protect public health and safety. This interrogatory, in effect, asks the same question as interrogatory 3(b), since Kerr-McGee's failure to abide by the said statutory and regulatory requirements consists in its use of licensed material in such manner as to allow the migration of contaminants to Kress Creek. Hence the People's (supplemental) answer is basically the same as its answer for 3(b). Interrogatories 5(d) and 15(d) also inquire about documents indicating that the Kress Creek contaminants originated at the rare earths facility; the People's (supplemental) answer to 5(c) and answer to 15(d) accordingly reiterate the answer to 3(b).

Kerr-McGee's complaint that the People did not specify which specific interrogatories and which specific company documents support the proponents' case is not very compelling. First

of all, Kerr-McGee can surely figure out which of its interrogatory answers indicate the source of the Kress Creek contamination. Second, Kerr-McGee should be aware precisely what documents it gave us last Fall, counsel having, presumably, reviewed them carefully before finally turning them over to us in December. Third and most fundamentally, Kerr-McGee knows perfectly well that the contaminants at Kress Creek migrated from one place and one place only: the rare earths facility at Ann and Factory Streets; that the company persists in litigating this issue is remarkable (to say the least).

Beyond that, the People submit that Kerr-McGee's demand that we specify which of its interrogatory answers and documents prove our case is an improper demand that we "put on a dress rehearsal of the trial." Moore's Fed.Prac. 4A, §33.12.⁸ As counsel stated in her letter of May 24 (p. 3) (attached as Ex. 8 to Kerr-McGee's motion), the purpose of discovery should be

to enable a party to learn what relevant factual material the other side has beyond what is in the party's own knowledge and possession. It so happens here that the clearest and most compelling evidence of the source of the Kress Creek contention comes from Kerr-McGee's own files and admissions; and our answer to [interrogatories] indicates that, at least at this time, we rely primarily on that. [We] do not consider [ourselves] obliged, however, to send you an outline of the case we will put on at hearing.

⁸At least at present, the People do not rely on materials in state agency files to prove its case on the source of the Kress Creek contamination; and, in any event, everything (with the exception of the thirteen pieces of paper discussed above) from our files has been produced. Thus, we do not have probative evidence which Kerr-McGee does not itself have.

B.

Kerr-McGee argues next that the People answered Interrogatories 19, 20, and 24 improperly by referring to documents to be produced (and which have now been produced). Interrogatory 19 asks whether the State took samples at Kress Creek and for details on any such sampling. Interrogatory 20 asks whether the State analyzed any such samples and for details on the analyses. Interrogatory 24 asks whether the State or anyone else has studied the health and environmental effects of Kress Creek-type contaminants. In response to all of these interrogatories the People produced documents (including an INHS study relating to genetic variability in aquatic organisms at Kress Creek).

Kerr-McGee states that under F.R.Civ.P. 33(c) an answering party who relies on documents must sufficiently specify which documents are responsive so that the interrogator can identify them "as readily as can the party served." According to Kerr-McGee, the People produced a minuscule number of documents; surely the company can tell which ones relate to sampling and analysis.⁹ Indeed, the company does not allege that it cannot identify which documents relate to sampling and analysis. It states only that "the documents produced thus far contain only scattered references to State sampling activities and studies of the Creek and Kerr-McGee cannot begin to comprehend what sampling

⁹We note for the record that Kerr-McGee produced about a million documents last Fall and did not give a hint which of them were related to particular interrogatories.

and studies the State has undertaken" (KM Motion 17). What this suggests is that Kerr-McGee found the data incomplete. If that is so, then the remedy is to take a deposition. It would be as burdensome for the People as for Kerr-McGee to seek out and assemble the details on protocols, dates, exact locations, and so forth, that Kerr-McGee requests. In such a case, R. 33(c) allows the answering party to answer by producing documents. As the Court pointed out in Webb v. Westinghouse Elec. Corp., 81 FRD 431, 436 (E.D.Pa. 1978):

The information requested by the plaintiffs can be obtained from the records that defendant has made available. In effect, plaintiffs are asking us to shift the cost of preparing this case for trial to defendant, and we decline to do so absent a showing of willfulness or other egregious circumstances

In this regard, we consider it important to stress the fact that the party about whose discovery responses Kerr-McGee is complaining is not a wealthy corporation with multinational operations and brigades of lawyers, paralegals, clerks, and technical support personnel, but rather a governmental office and agency with serious budgetary constraints, whose increasingly limited staff are assigned to numerous tasks in addition to the Kerr-McGee proceedings. Procedural mechanisms like R. 33(c), which limit potentially unmanageable discovery burdens, make it possible for the State to carry on litigation in the face of enormous resource disparities like those involved here.

C.

Next, Kerr-McGee challenges the People's answer to Interrogatory 11, which asks:

Does the State contend that the mill tailings allegedly found at Kress Creek or the West Branch DuPage River pose significant risks to the public health, safety, or the environment? If so,

We objected on the ground, inter alia, that the word "significant" is vague. (Please note that the People asked Kerr-McGee in an interrogatory to define "significant" as that term is used in Kerr-McGee's affirmative defenses; the company would not do so, and the People have moved to compel an answer.)

Kerr-McGee asserts that the word significant is not vague "in the context of this proceeding" but has a "specific legal meaning". Unfortunately, Kerr-McGee omits to mention what that meaning is. The company refers to a prior memorandum it filed (KM Motion 18), but nowhere in that memorandum did Kerr-McGee define significant. Kerr-McGee also refers to Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 642 (1980), and "several [unspecified] decisions" (id.), but Industrial Union does not define significant and we do not know what other decisions Kerr-McGee has in mind.¹⁰

The point here is that the word "significant" is highly subjective. If we do not know precisely what Kerr-McGee means by it, at least in the context of this proceeding, we do not know what we need to prove at hearing in order to prevail. Therefore, unless Kerr-McGee explains, if not in absolute than in quantitatively comparative terms, what "significant risks" are, the

¹⁰Nor is the term "significant risk" defined by UMTRCA, the NRC's regulations, or USEPA's regulations.

People should not be asked to take a position on whether such risks are present at Kress Creek.

D.

Interrogatory 17 asks the People to "identify" every piece of correspondence the State has ever had with anyone under the sun regarding "the alleged contamination" at Kress Creek. The People objected on the ground that the interrogatory is vague, overbroad, and calls for potentially irrelevant material.¹¹ It is hard to understand why Kerr-McGee is before the Board challenging this answer, given the fact that we additionally stated that we would, and did in fact, produce all documents relating to all material issues in this proceeding. Whatever correspondence exists relating to such issues has therefore been produced.

E.

To be fully appreciated, Kerr-McGee's Interrogatory 18 must be quoted in toto:

Identify with reasonable specificity and describe the discussions that took place at all private and public meetings that the State participated in at which the alleged contamination at Kress Creek or the West Branch DuPage River was discussed, including meetings with Kerr-McGee or its predecessors in

¹¹In her letter of May 24 the undersigned noted that "merely because a letter--or any utterance, for that matter--refers to the contamination at Kress Creek, does not mean it is relevant to any contention raised in this proceeding by any party." The undersigned also said that if Kerr-McGee distrusted her ability to distinguish relevant from irrelevant documents, Kerr-McGee should provide guidelines specifying the subject matters with which it is concerned (p. 5). No such guidelines were ever provided.

interest; other citizens or property owners in West Chicago; any local or federal officials or regulatory bodies; or any members of the print, broadcast, television, or other media.

One cannot imagine a more broadly worded interrogatory--it asks for any word spoken by any state employee at any time at any place in any context to any human being concerning anything whatever related to the contamination at Kress Creek. How can Kerr-McGee possibly be surprised that we object?

As counsel said in her letter of May 24 (p. 5):

Let me also point out that government offices serve the public, and as a result they receive countless requests, visits, and phone calls every week from local residents, other citizens, newspaper and radio reporters, and anyone else you care to think of. To ask us to identify and describe all such communications, regardless of their relevance to any material issue in this proceeding, is unfair and, indeed, well-nigh impossible.

Counsel went on to state that if Kerr-McGee is looking for the identities of persons with knowledge of relevant facts, it should say so and we would supply a list. We also suggested that Kerr-McGee focus the interrogatory so as to avoid what appears to be nothing more than a fishing expedition. The People have not received a request for the identities of persons with knowledge, nor has the interrogatory been narrowed.

Again, we note that the evidence on the major issues raised here is in Kerr-McGee's hands: i.e., evidence concerning the source of the contamination and the costs of clean-up. Evidence concerning the level of contamination has been gathered by the NRC Staff through its contractors and by Kerr-McGee. All relevant documents in the People's possession, including the only

state study we know of on Kress Creek's environmental effects, have been produced. Moreover, if the time comes that the People must retain expert witnesses, they will be identified and made available to Kerr-McGee for deposition. Under these circumstances, Interrogatory 18 can serve no purpose in this proceeding other than harassment.

IV. CONCLUSION

For the reasons set out above, Kerr-McGee's motion to compel should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
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BY: 

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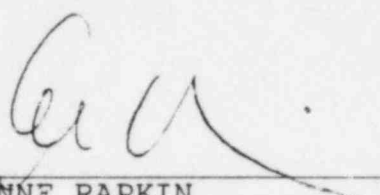
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of)
) Docket No. 40-2061
KERR-McGEE CHEMICAL CORPORATION)
(Kress Creek Decontamination))

A F F I D A V I T

I, ANNE RAPKIN, being on oath sworn do state that I have read the foregoing People's Response To Motion To Compel Document Production And Interrogatory Answers, and all facts stated therein of which I have knowledge are true to the best of my knowledge and belief.



ANNE RAPKIN

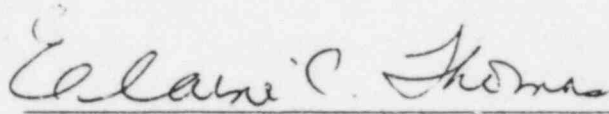
SUBSCRIBED AND SWORN TO
BEFORE ME THIS 29TH DAY
OF JULY, 1985.



NOTARY PUBLIC

PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn on oath do state that I have this 29th day of July, 1985 served copies of the foregoing Motion To File Instanter and People's Response To Motion To Compel Document Production And Interrogatory Answers upon the three members of the Board and Covington & Burling listed on the attached Service List by Express Mail and upon all others listed on the attached Service List by first class mail, postage prepaid, and depositing all with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.



ELAINE C. THOMAS

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 29TH DAY
OF JULY, 1985.



NOTARY PUBLIC

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