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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

SERVED SEP 30 1985

In the Matter of	Docket No. 40-2061-ML
KERR-McGEE CHEMICAL CORPORATION	ASLBP No. 83-495-01-ML
(West Chicago Rare Earth Facility)	

and

In the Matter of	Docket No. 40-2061-SC
KERR-McGEE CHEMICAL CORPORATION	ASLBP No. 84-502-01-SC
(Kress Creek Decontamination)	September 26, 1985

MEMORANDUM AND ORDER
(Ruling on Discovery Disputes)

Several discovery disputes have arisen between Kerr-McGee and the People of the State of Illinois (People) in these proceedings. In West Chicago, Kerr-McGee has filed motions to quash subpoenas issued to Catalytic, Inc. and Dr. James L. Grant at the request of the People.[1]

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1 The subpoenas were issued on May 20, 1985. Kerr-McGee moved to quash on June 6 and 7. The People answered to the motions on June 18. Kerr-McGee replied on June 27.

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Additionally, Kerr-McGee and the People each filed motions to compel against each other in both proceedings.[2]

These motions raise some questions which overlap. Hence we have elected to issue one Memorandum and Order covering both proceedings. For example, the applicability to NRC proceedings of Federal Rule of Civil Procedure 26(b)(4), governing expert discovery, is presented in both proceedings. Other issues common to both proceedings include questions concerning waiver of attorney-client and work-product privileges, the protection afforded by Rule 26(b)(4), and the adequacy of the People's document production. We begin with the question of the applicability of Rule 26(b)(4).

Applicability of Rule 26(b)(4)

The Rules of Practice provisions relating to discovery, although patterned after the Federal Rules of Civil Procedure, do not contain a parallel provision to Rule 26(b)(4). There are NRC decisions which have applied Rule 26(b)(4). Public Service of New Hampshire (Seabrook Station Unit 1 & 2), LBP-83-17, 17 NRC 490, 496-97 (1983); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 976-80 (1983); Boston Edison Co. (Pilgrim

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2 In West Chicago, these were filed on June 21 and June 28, respectively. Kerr-McGee and the People answered on August 8 and replied to each other's answer on August 15 and August 23, respectively.

Nuclear Generating Station, Unit 2), LBP-75-42, 2 NRC 159, 161 (1985); contra General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461 (1978); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2) LBP-78-37, 8 NRC 575, 581 (1978). Kerr-McGee advocated we apply 26(b)(4) and neither the People nor Staff object.

Although three of these decisions applied Rule 26(b)(4) to NRC proceedings, at least one decision strongly held otherwise. Each of the relevant decisions was rendered by a Licensing Board, and neither the Appeal Board nor the Commission has spoken to the issue.

The Appeal Board has on occasion applied Federal rules and practices in the absence of an analogous NRC rule. See Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 & 2), ALAB-374, 5 NRC 417, 421 (1977) additional views of Mr. Farrar, joined by the entire Board. The argument against this position was advanced in the Vallecitos case. General Electric Co., LBP-78-33, supra, 8 NRC 465-66. The Board in Vallecitos determined that where the Commission had not expressly adopted a provision analogous to a Federal rule, the correct inference is that "the Commission did not intend for the unselected Federal rules to control its proceeding." Id., at 466. The Seabrook, Shearon Harris, and Pilgrim Boards reached a wholly different conclusion. The Board in the Seabrook case, for instance, reviewed the rationale behind the decision in Vallecitos, but determined that it was not prevented from applying Rule 26(b)(4). Accord Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A,

17 NRC 971, 978 (1983). The Seabrook Board explained its decision as follows:

> While the Commission may have chosen to adopt only some of the federal rules of practice to apply to all cases, we need not infer that the Commission intended to preclude a licensing board from following the guidance of the federal rules and decisions in a specific case where there is no parallel NRC rule and where that guidance results in a fair determination of an issue. (Emphasis in original.)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-17, 17 NRC 490, 497 (1983). In short, we are in agreement with the reasoning employed in Seabrook, and because we find the situation before us to be analogous to the situation contemplated by rule 26(b)(4), See Consumers Power Co. (Midland Plant, Units 1 & 2) ALAB-379, 5 NRC 565, 568 n.13 (1977), where applicable that rule will guide us in determining the discovery disputes at hand.

Discovery of Experts under Rule 26(b)(4).

Having decided to apply Rule 26(b)(4), we turn to the disputes which involve it. The rule provides:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
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> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for

> each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
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> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(B).

First we address Kerr-McGee's motions to quash, or, in the alternative to modify the subpoenas directed to Catalytic Corp. and Dr. Grant. Stearns Catalytic Corp. and Dr. Grant joined Kerr-McGee in these motions.

On May 20, 1985, this Board acting at the request of the People issued subpoenas duces tecum to Dr. James L. Grant, and Catalytic, Inc. The subpoenas requested all documents in the recipients' possession relating in any way to the West Chicago site.

The motion to quash the Catalytic subpoena recites that in December, 1980, Kerr-McGee and Catalytic entered into a contract under which the latter was to provide engineering services with respect to decommissioning of the West Chicago plant and disposal of the thorium mill tailings located there. In August, 1984, Stearns Catalytic replaced Catalytic as a result of certain mergers and reorganizations and a new contract was entered into. The motion recites that "Stearns Catalytic does have a sister subsidiary named Catalytic, Inc. that

provides maintenance services, but that subsidiary does not now have an office or a custodian of records in Oak Brook."[3] The subpoena, addressed to the custodian of records, Catalytic, Inc., Oak Brook, Illinois, was in fact served on Stearns Catalytic in Oak Brook. Movants take the position that the subpoena as drafted is unenforceable and should be quashed for deficient service. In the event that the subpoena is not quashed, movants request that it be modified to apply only to documents produced in the ordinary course of business which are relevant.

While recognizing that it is ". . . very likely that a representative from Stearns Catalytic may ultimately be designated as an expert in this proceeding . . ."[4] movants assert that no final decision has yet been reached. Therefore, movants wish the subpoena modified to apply only to documents which are not related to this litigation. According to the motion, these are documents related to the dismantling of buildings and construction of the present incinerator.[5] None of these activities are encompassed within this proceeding.

Movants also maintain that discovery of litigation related documents is premature. They cite in support of this argument the People's allegedly inadequate response to their interrogatories on this

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3 Motion, p.2.

4 Motion, p. 3.

5 Motion, p. 7.

point and argue that to the extent discovery from experts is permitted, it should be reciprocal. Kerr-McGee notes its willingness to arrive at a mutually agreeable schedule for such discovery once the work of the experts is sufficiently advanced.[6]

In their opposition, the People maintain that quashing the subpoena would exalt form over substance and would only result in a second subpoena properly addressed to Stearns Catalytic. This result, according to the People, would not serve anyone's interest, and consequently the subpoena should be modified to reflect the proper recipients.[7]

The People also take issue with movants' arguments that the subpoena should be modified to exclude litigation related documents. They rely on the provisions of the contracts between Kerr-McGee and both Catalytic and Stearns Catalytic for the proposition that the work being performed is not litigation related in that it would have to be performed in support of Kerr-McGee's license amendment application in any event. Thus they argue that Catalytic and Stearns Catalytic were retained in the ordinary course of business, not as a result of this proceeding.[8]

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6 Motion, p. 7.

7 Answer, pp. 4-7.

8 Answer, pp. 5-9. The People have attached the two contracts to their answer.

Under these circumstances, the People maintain that the protection afforded experts by Rule 26(b)(4) is unavailable to support this position, the People point to the language of the Rule, the notes of the Advisory Committee explaining the rule, and two cases. Harazimowicz v. McCallister, 78 F.R.D. 319 (E.D. Pa. 1978) and In re Sinking of the Barge "Ranger I", 92 F.R.D. 486 (S.D. Tex. 1981).[9]

With respect to Kerr-McGee's argument that discovery of experts should be reciprocal, the People note that Kerr-McGee has not sought discovery beyond its interrogatories, that they have in fact identified their experts and turned over a substantial number of documents, and that, unlike Stearns Catalytic, their experts were retained for litigation and are thus entitled to protection of Rule 26(b)(4).

The motion and answer filed with respect to the subpoena directed to Dr. Grant raise similar issues, although there are some important factual differences. Movants note that Dr. Grant first provided advice to Kerr-McGee while employed by Law Engineering Testing Company. This advice concerned the design of the disposal cell which was incorporated in the amendments to the Stabilization Plan submitted to NRC. In September, 1983, Dr. Grant left Law Engineering and all of the documents relating to West Chicago in the possession of the firm were delivered to Kerr-McGee. After his departure from Law Engineering, Dr. Grant set up his own firm and that firm has been retained by Kerr-McGee to provide

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9 Answer, pp. 9-12.

expert advice on a variety of issues raised by the State and others in connection with this proceeding and related litigation.[10]

The plain wording of the rule leaves no doubt that it only applies to experts who have been retained or specially employed in anticipation of litigation. It does not allow the shielding of experts who develop pertinent knowledge in other contexts. That is, if facts and opinions are acquired while an individual is regularly employed or by virtue of being an actor in the controversy, the rule is not applicable. Thus, the first portion of our analysis must determine whether the subpoenas request discovery from experts who meet the requirement that they were retained in anticipation of litigation. Whether a subpoenaed party is an expert specially retained in anticipation of litigation is necessarily a factual determination, in this case based on the evidence of the expert's relationship with the licensee. USM Corp. v. American Aerosels, Inc., 631 F.2d 420, 424-25 (6th Cir. 1980); Ager v. Jane C. Stormont Hosp. v. Training School, etc., 622 F.2d 496, 501 (10th Cir. 1980); Healy v. Counts, 100 F.R.D. 493, 496 (D. Colo. 1984).

The advisory committee evidently was aware of the potential for difficulty in determining whether (26)(b)(4)(B) would be applied to all experts. The notes accompanying the 1970 amendment (which created 26(b)(4)(B) in its present form) are specific as to when the rule provides an expert with protection from discovery.

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10 Motion, pp. 1-2.

> It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 503 (1970).

We recognize that an expert may "wear two hats," that of an actor at first, and then of a litigation consultant.[11] We are sensitive, however, to the difficulty in determining when an expert's activity progresses from that done in the ordinary course of business to work in anticipation of litigation. We find a rough analogy in the court's handling of similar cases when the discovery is sought from an insurance company investigator. The insurance industry by its very nature requires that an insurance company investigate a claim to determine whether an insured is entitled to collect on his policy. But, it has been held that such an investigation is not necessarily done with the prospect of litigation in mind. Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972).

Because the courts have sustained a murky distinction between experts whose information was not acquired in preparation for trial and those specifically employed in anticipation of litigation, we find the

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11 Seiffer v. Topsy's Int'l., Inc., 69 F.R.D. 69, 72-73 & n.3 (D. Kan. 1975); Inspiration Consol. Copper Co. v. Lumberman Mut. Cas. Co., 60 F.R.D. 205, 210 (S.D.N.Y. 1973).

test set out in In Re Sinking of Barge Ranger I, 92 F.R.D. 486, 489 (S.D. Tex. 1981) to be helpful: "The test to be applied is whether, in light of the nature of the documents and factual situation in a particular case, the experts and their information can fairly be said to have been obtained or acquired because of the prospect of litigation." That Court espoused the test in the course of ruling on a motion to compel discovery of post casualty investigation reports written by in-house experts of the plaintiff corporation, APMC. The key determination was whether 26(b)(4)(B) was intended to afford protection to experts of this kind. In applying the test it set out, the Court was "persuaded that the names, and reports, notes, and data compilations of outside experts engaged by APMC in its post casualty investigation and regular APMC employees who participated in this endeavor are freely discoverable. . ."id.

The motion to quash stated that Stearns Catalytic was "retained by Kerr-McGee as a consultant to assist it in preparing for this and related proceedings before the Commission and the Courts."[12] The People insist that the contractual agreements it has submitted as exhibits substantiate their position that Stearns Catalytic's work was in the ordinary course of Kerr-McGee's business activities as a licensee, and not in anticipation of any litigation. The People hinge their argument

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12 Motion to Quash, or in the alternative, to Modify Subpoena, dated June 6, 1985, at 3.

on the fact that Kerr-McGee employed Stearns Catalytic to help it fulfill its obligations as a licensee under the Uranium Mill Tailings Radiation Control Act. P.L. 95-604 (UMTRCA).

The language of the UMTRCA requires a licensee, inter alia, to prepare a method for the cleanup and disposal of the hazardous waste product material and to persuade the NRC of its suitability. Before Kerr-McGee's license for the West Chicago Rare Earths facility may be terminated, disposal of their wastes must be accomplished. 42 U.S.C. § 2113. Because the Act requires a licensee to perform work similar to that for which Stearns Catalytic was employed, we found it necessary to look further, to the contract, to determine if there is any indication that Stearns was not simply enhancing Kerr-McGee's ability to fulfill its responsibilities as a licensee, but was hired to provide Kerr-McGee with litigation support.

Kerr-McGee argues that Stearns Catalytic was hired in anticipation of litigation, as the corporation's services were engaged after the State initiated litigation against Kerr-McGee in Illinois State Court.[13] The People counter Kerr-McGee's statement by asserting that Catalytic was hired more than two years before the State filed its petition leading to this litigation.

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13 Reply to the State's Consolidated Answer to Motions to Quash, dated June 27, 1985 at 1.

The People drew our attention to the contract between Kerr-McGee and Stearns Catalytic.[14] A fair reading of the document leads to the conclusion that Stearns Catalytic was not initially "specially" retained for litigation purposes. We draw this conclusion based on the general nature of the work specified.

Furthermore, the preparation of an acceptable decommissioning plan does not qualify as the kind of litigation contemplated under 26(b)(4)(B). It appears from the language of the contract that Stearns Catalytic's work encompasses many, if not most, of the facets of decommissioning and waste disposal which are the province of the licensee under ordinary circumstances attendant to terminating its license. Work performed by an expert for a licensee in the normal course of its relations with the NRC should not be shielded from discovery in subsequent litigation. At the prehearing conference, it was brought out that Stearns Catalytic was employed after the filing of the stabilization plan but before the last amendment to it and before the filing of Kerr-McGee's memorandum on compliance with UMTRCA. Work done by Stearns Catalytic on these matters falls in the category of that required in the normal course of Kerr-McGee's relationship with the NRC and should not be shielded from discovery. However, other work performed after the notice of opportunity for hearing directed toward

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14 Exhibit A, attached to the State's Consolidated Answer to the Motions to Quash.

this litigation should be shielded. It appears that most, if not all the work performed by Stearns Catalytic after the notice of opportunity for hearing falls in that category.

For the articulated reasons, we grant in part and deny in part Kerr-McGee's Motion to Quash. To the extent that we deny the motion, we will modify the subpoena to allow production at the Oak Brook Office of Stearns Catalytic, rather than the Attorney General's office.

The second subpoena at issue is directed to Dr. James L. Grant. As the submitted pleadings illustrate, in September 1983, following Dr. Grant's departure from Law Engineering Testing Company,[15] Dr. Grant (retained through his firm James L. Grant & Associates), was an expert retained in anticipation of litigation. Thus documents generated prior to September 1983 are discoverable, while those generated afterwards are not. The files and working papers created by Dr. Grant while at Law Engineering have been turned over to Kerr-McGee. Thus, the only documents responsive to the People's request are those generated after September, 1983. Consequently the motion to quash is granted.

Another controversy between Kerr-McGee and the People over Rule 26(b)(4) involves the People's Interrogatory 62 (West Chicago). The interrogatory and Kerr-McGee's responses are as follows:

> Interrogatory: Has Kerr-McGee or any other person or entity conducted any studies or inquiries of any kind, whether formal or informal, concerning property values in the vicinity of the

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15 Motion, to Quash, or in the Alternative, to Modify Subpoena of James L. Grant, dated June 7, 1985, p.2.

> site? If so, describe the nature of such studies or inquiries, when they took place and the person(s) who were involved in them, and any findings or conclusions arising from such studies or inquiries.
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> Answer: Yes. Kerr-McGee objects to the remainder of Interrogatory No. 62 in that it calls for the production of information regarding the work of experts without complying with the rules on expert discovery. Cf. Rule 26 F.R. Civ. P. Kerr-McGee also objects to Interrogatory No. 62 to the extent it calls for information protected by the attorney-client or work product privileges.
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> Supplemental Answer: In addition to its previously stated objection to this interrogatory, Kerr-McGee notes that it is not required to provide information concerning the ongoing work of its experts in the absence of a proper request in compliance with the rules on expert discovery.

Through this request the State seeks four items of information: the nature of the studies, when they were conducted, who performed them, and the conclusions drawn therefrom.

Although Kerr-McGee's objections raise the work product and attorney-client privileges, the parties have focused on the amount of information which must be provided under Rule 26(b)(4). We note at the outset our disagreement with the State's blanket assertion that "the identities of the persons who performed [the work] are not [privileged] and should therefore be disclosed as the interrogatory requests." While this proposition could be correct if the material were privileged under the attorney-client or work-product doctrine where the party asserting the privilege must justify its use, the case is not so clear under 26(b)(4). We strongly agree with the line of cases which holds that if the individuals are experts retained in anticipation of litigation but not expected to testify, then the identity and other collateral

information concerning such an expert is not discoverable unless a showing is made of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Ager v. Jane C. Stormant Hospital and Training School, 622 F.2d 496 (10th Cir. 1980). See also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 976-980 (1983).[16] Furthermore, if the State wanted to propound a 26(b)(4)(a)(i) interrogatory, it should have done so directly, not by couching its request within an interrogatory not clearly designed to elicit the names of the experts who will be witnesses.

If the Board were to require Kerr-McGee to describe the basis for asserting 26(b)(4)(B) protection for the individuals described in their answer to Interrogatory 62, the shield of confidentiality provided by the rule might be compromised. Carolina Power and Light Co., supra, 17 NRC at 979. We must draw a balance between these two competing needs; we conclude that the more prudent path is nondisclosure at this time.

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16 Those cases inopposite to Ager follow the reasoning contained in Baki v. B.F. Diamond Construction Co., 71 FRD 179, 182 (D.Md. 1976) where the court permitted discovery of the identity of experts retained in anticipation of litigation who were not expected to testify although no exceptional circumstances were shown. The Baki court did provide, however, that such information could not be irrelevant, privileged or otherwise nondisclosable.

The People argue that if the Board adopts Kerr-McGee's position, good cause[17] to compel an answer exists. We remind the People that 26(b)(4)(B) uses the phrase "exceptional circumstances" as the standard to be met to require an answer. The "good cause" asserted by the People is the great disparity in resources between the parties. We find this falls short of providing good cause, and far short of demonstrating exceptional circumstances.

For the reasons delineated above, the Board denies the State's motion to compel Kerr-McGee to answer more completely Interrogatory 62.

Waiver of Attorney-Client and Work Product Privileges.

The People's Interrogatory 17 [18] (West Chicago) has produced disagreement concerning waiver of attorney-client and work product privileges. Interrogatory 17 requests that Kerr-McGee

> Identify all persons who participated in Kerr-McGee's analysis of costs associated with disposal of the Kerr-McGee wastes, describe the work done by each such person, and describe each such person's educational background and field of expertise, if any.

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17 People's Motion to Compel Certain Discovery Responses, dated June 28, 1985 at 16.

18 See the People's Third Set of Interrogatories and Request for Documents, November 27, 1984.

Kerr-McGee provided the State with an Answer and a Supplemental Answer,[19] responding to Interrogatory 17 as follows:

> Answer: The following persons have, at various times, participated in the estimation of costs associated with disposal: Ralph Vreeland, George Hennigan, W. J. Shelley, I. Denny, Brad Snow, and Frank Lyons. More recent work on costs estimation was performed by Mr. Snow in 1983 at the request of Kerr-McGee counsel. Kerr-McGee objects to the production of Mr. Snow's memorandum and work papers reflecting such cost estimations on the grounds that they are subject to work product and attorney-client privileges. A description of the education and experience of the listed individuals is included in Appendix A.
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> Supplemental Answer: * * * Mr. Snow conducted a similar evaluation [i.e., of decommissioning costs] in 1983. This work was prepared under the supervision of counsel as part of Kerr-McGee's evaluation of its litigation risks and is clearly protected by the attorney-client and work product privileges. His work product was distributed primarily to Kerr-McGee's in-house and outside counsel. It was reviewed by Mr. Lyons, who is one of his supervisors ... . Copies have also been made available to Mr. Shelley and Mr. Denny [Mr. Shelley was until his retirement in 1984 employed by Kerr-McGee, and Mr. Denny is still employed by Kerr-McGee]. The document principally contains opinions as to facts; the facts cannot be readily segregated out for purposes of discovery. Kerr-McGee does not know at this time whether Mr. Snow will testify, or whether he will rely on this document if he does testify.
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> Finally, some work on costs has been performed by Kerr-McGee's consultants. The results of this ongoing work are protected from production at this time by the rules of discovery from experts. Cf. Rule 26(b)(4), F.R.Civ.P.

Despite Kerr-McGee's claim of the attorney-client and work-product privileges for the memorandum and working papers produced by Mr. Brad

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19 Answer and Supplemental Answer dated March 29 and May 28, 1985, respectively.

Snow, the People argue they are entitled to discover these materials. The essence of the People's argument, as we understand it, is that Kerr-McGee has waived its right to assert the attorney-client and work product privileges because it has provided for open, public dissemination[20] of other information relevant to the costs of the decommissioning. The People assert that Kerr-McGee seeks a favorable disposition of its application from the NRC, and has released documents which support its position. "Having revealed that much on the matter of costs, Kerr-McGee may not now selectively withhold other -- possibly inconsistent or impeaching -- information on the same matter."[21] The People's legal argument is that "a litigant may not selectively disclose some information and then withhold other information on the same subject matter [as it] is inconsistent with the general construction given the attorney-client privilege." [22]

We find the People's position difficult to justify. Their assertions are not supported by case law which precisely stands for the premise they advance, and we found no supporting cases in our research.

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20 The People argue Kerr-McGee took a public stance on the propriety of its proposal and publicly disseminated the information by publishing it in the Environmental Report required by the NRC. People's Motion to Compel Certain Discovery Responses, June 28, 1985, at 2-3.

21 People's Motion to Compel Certain Discovery Responses, dated June 28, 1985, at 3.

22 People's Motion at 4. Citation omitted.

In the situation before us, a corporate employee performed analytical studies or evaluations of decommissioning costs at the request of the corporate employer's counsel as part of the counsel's evaluation of litigation risks. The resultant reports were distributed to the corporation's counsel (inhouse and outside), a supervisor and two other employees. These facts fit into the construction of the attorney-client and work product privileges. Moreover, the People do not contend that the privileges did not apply, but that they were waived by the publication of the related, favorable information in the Environmental Report.

Our discussion of the People's mistaken use of the waiver argument need only be brief. While it is correct that the attorney-client and work product privileges may be waived by disclosure of the content of privileged communications,[23] the information disclosed by Kerr-McGee in the Environmental Report has never been claimed to be privileged. It includes the company's statement of facts and computations of those costs it expects it will incur in various decommissioning plans. The People do not claim partial disclosure of a single document, which would waive the privilege as to the remainder of that document. Instead, the People argue that any disclosure on a particular subject waives the privilege as to all communications on that subject. However, for a waiver to occur, "the specific content of the privileged communication

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23 See in re Sealed Case 676 F.2d 793 818 (CA D.C.)(1982).

must be disclosed; the mere discussion of facts which were the subject of the communication is insufficient to constitute waiver." 4 Moore's Federal Practice, ¶ 26.60[2], 26-203, ¶ 26.64[4], 26-390 et seq. (1984). The rationale underpinning the courts' recognition of waiver rests with the element of confidentiality. Once originally confidential information has been released, the privilege cannot be sustained. But here, the data released by Kerr-McGee was not of a confidential nature initially, and therefore the privilege was not reached.

The People argue information on decommissioning costs is peculiarly within Kerr-McGee's knowledge,[24] and that therefore the Snow memorandum should be produced or inspected in camera to segregate factual information. Kerr-McGee asserts the State could obtain with little difficulty the information it sought by analyzing the State's own construction project figures and land planning efforts. Further, Kerr-McGee points out that the People have made no showing that the factual information they seek is not available through normal discovery. We agree. The People have made no showing of substantial need for the Snow memorandum. Their motion is denied.

The People also present their waiver argument in connection with Interrogatory 1 (Kress Creek). This disagreement initially arose over the production of a memorandum (and its attachments) written by

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24 State's motion to Compel Certain Discovery Responses, dated June 28, 1985, at 5-6.

Kerr-McGee employee Edwin Still, in April 1982. The company's supplemental answer indicated that a further review of its files led to two other documents responsive to Interrogatory 1. These were also written by Mr. Still. The People argue they are entitled to all three documents.

Kerr-McGee asserts that the documents are privileged by the work-product privilege as set forth in 10 CFR § 2.740(b)(2).[25] Kerr-McGee explains that each document was prepared by Mr. Still while working with the company's counsel to prepare for meetings with the Staff after initiation of the Show Cause proceeding. Kerr-McGee claims the Still documents "were prepared during an NRC investigation, and in anticipation of further litigation, and each concerns the development of possible proposals to the NRC during the course of these proceedings."[26]

As an initial matter, the People assert that Interrogatory 1 concerns costs (environmental and economic) of cleaning Kress Creek and the Dupage River's west branch, matters which Kerr-McGee has raised as defenses. The People argue that because the Board found that these defenses lack a statutory basis, Kerr-McGee may not now refuse to disclose information in its possession bearing on these defenses.[27] The

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25 People's Motion to Compel Certain Discovery Responses, dated July 3, 1985 at 4.

26 KM Supplemental Answer.

27 People's Motion to Compel Certain Discovery Responses, dated July 3, 1985, at 5.

essence of the People's argument seems to be that because Kerr-McGee has raised what amounts to an affirmative defense, it has opened the door to related subject matter. Presumably the People have in mind the argument used to delve into a point on cross-examination which was brought out on direct and fairness dictates that it be open to cross-examination. The lack of a statutory basis for a defense or the allocation of the burden of proof are not relevant to whether a privilege attaches to a specific document. If the People seek to introduce information contrary to Kerr-McGee's contentions about costs, they may do so. If Kerr-McGee does not submit sufficient proof to convince the Board of its position on the record, then its defense will fail. But the People's undeveloped argument that there is a connection between lack of statutory basis or the burden of proof and the assertion of a privilege, strains our patience.

The People assert the same waiver argument with respect to the Still memoranda that they articulated with respect to the memorandum and working papers produced by Mr. Snow. See supra, 12-16. There we found no basis on which to rule for the People. Although the present issue is in the context of the work product privilege only, we are not persuaded to rule differently.

To be privileged under 26(b)(3) and 10 CFR 2.740(b)(2), the Still memoranda must have been prepared in anticipation of litigation by a party, his attorney, or another representative of that party. Furthermore, materials developed "in the ordinary course of business or pursuant to public requirements unrelated to litigation" are not given

immunity under 26(b)(3).[28] The purpose of the Rule is to shield each attorney's thought-processes and preparatory efforts from those of his adversary so as not to disclose trial strategy or legal conclusions.

Kerr-McGee takes the position that the documents fall within these standards and the People do not argue otherwise. The People argue that there has been disclosure of related subject matter sufficient to constitute a waiver because Kerr-McGee produced a discussion outline written by Mr. Still for a meeting between company representatives and the Staff. According to the People

> "the discussion outline contains a wide range of conclusions about the hazards of the Kress Creek decontamination and the hazards and economic costs of cleaning it up, all of which conclusions Kerr-McGee apparently presented to NRC at the March 1982 meeting..."[29]

The People claim that the case law is clear "that by disclosing the Still outline as well as the reports of the three outside consultants [NUS Corp., ALARA, Inc., and Woodward-Clyde, Inc.,] Kerr-McGee has waived any and all privileges it may have had with respect to other documents in its possession addressing the same matter."[30] In response we reiterate our conclusion that waiver occurs for a single document when a portion of it has been released to an adversary, thereby

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28 Advisory Committee Notes, 48 FRD 487,501.

29 People's Motion to Compel Certain Discovery Responses, dated July 3, 1985, at 7.

30 Id.

destroying its confidentiality. This is not true of documents otherwise privileged which may concern similar subject matter. 8 Wright and Miller, Federal Practice and Procedure, § 2024, at 209 (1970).

The People also request that Kerr-McGee segregate and produce the facts ensconced within the documents for which the work-product privilege is claimed. Kerr-McGee argues this intrudes on the thought processes of their attorneys in organizing the factual data in such a way as to buttress their position. We agree that the facts contained within the memo may reflect in their organization interaction between Mr. Still and the company's attorney, and as such remain within the bounds of the privilege.

Kerr-McGee also has identified other studies and cost estimates encompassed by Interrogatory 1, but which it claims are protected under Rule 26(b)(4)(B). The People object because the company does not offer any information on which to evaluate its claim of 26(b)(4)(B) protection. As we said earlier, see supra, at 18, under the Ager case, supra, 678 F.2d 496, a party is not required to disclose the identity of an expert who is not expected to be called as a witness.

The People argue that even if we agree that Kerr-McGee has correctly invoked the protection afforded by 26(b)(4)(B), good cause exists to justify our requiring production of the documents. None of the People's arguments meet the "exceptional circumstances" standard of the Rule, and we admonish the People not to clutter their pleadings with inappropriate "disparate resources" arguments. See supra, at 19.

For the foregoing reasons we deny the People's motion to compel production of documents in response to Interrogatory 1.

Identification of Persons Answering Interrogatories

The People's Interrogatory 75 (West Chicago) and Interrogatory 36 (Kress Creek) requested that Kerr-McGee identify the individuals who provided answers to each of the interrogatories and designate for each interrogatory the specific individual(s) responsible for the answer. Kerr-McGee responded that the interrogatory answers were created through the consultation of several people. Those involved were listed in an appendix to the submitted interrogatory answers. In its supplemental answer Kerr-McGee stated that to the extent the State requested it provide anything more, the interrogatory was "unduly burdensome and essentially meaningless."

Regardless of whether the request is in fact burdensome for Kerr-McGee, we are unaware of a discovery practice requiring a corporate party to identify the persons who have assisted in the preparation of answers to interrogatories. 8 Wright & Miller, § 2172, p. 538-539. Although a district court in Texas has held that a corporation may have to divulge the source from which it obtained the information on which it based its answer to a particular interrogatory, other courts have held to the contrary. B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 FRD 1, 4 (1959); contra Evans v. Local Union 2127, Intern. Brotherhood of Electrical Workers, AFL-CIO, 313 F. Supp. 1354, 1360

(1969). In a 1973 case decided in the Southern District of New York, the court was faced with a relevancy objection to an interrogatory which requested the defendants to identify any and all persons who helped prepare the answers to these interrogatories or were consulted in connection therewith." Maritime Cinema Service Corp. v. Movies En Route, Inc., 60 FRD 587, 591 (1973). The Court acknowledged the relevancy of the request since there were probably people with knowledge of the relevant facts among those consulted. However, the Court described the request as "certainly overbroad." id., and resolved the dispute by ordering the defendants "to respond simply by naming those persons consulted in the preparation of their answers who have knowledge of the relevant facts." id.

We garner from the case law that built into the determination of whether a corporation must specifically designate who composed the answer to each interrogatory is the element of reasonableness. For instance, if a party delegates responsibility for answering certain discrete interrogatories to various individuals, it would not be difficult later to ascertain the primary person involved in answering a given interrogatory. This seems to be the manner in which the People developed their answers to interrogatories propounded by Kerr-McGee. Alternatively, it is plausible for interrogatories to be answered by aggregating the knowledge of several people who work closely with one another to arrive at the answer ultimately submitted. Kerr-McGee ostensibly followed this course. With a small group such as that consisting of two or three people, we would agree with the claimed

assertion that it is difficult to extract one's thoughts from those of the collegial body. However, here where the group consisting of as many as nine people, we find it difficult to accept the proposition that all nine were primarily involved in answering all of the interrogatories. We require Kerr-McGee to determine the individuals or groups of individuals responsible for answering each interrogatory, to the extent that it is able to make this determination. We find this particularly appropriate as it is consistent with the Order of the State Court in a parallel proceeding in which substantially these same witnesses are involved.

Document Requests

In both West Chicago and Kress Creek, Kerr-McGee has raised questions of the adequacy of the People's responses to its document requests. In Kress Creek, Kerr-McGee has also argued that all State agencies and officers should respond to its document requests, rather than only the Attorney General and the Illinois Department of Nuclear Safety. (IDNS)[31].

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31 The Attorney General filed the petition to intervene on behalf of the People of the State of Illinois and at the request of IDNS. Kerr-McGee raised the same argument in West Chicago; we held that only parties need respond to discovery requests and pointed out that subpoenas are available with respect to nonparties. LBP-85-1, 21 NRC 11, 21-22 (1985).

The People, while maintaining that they are not required to do so, have searched the files of other State agencies for documents responsive to Kerr-McGee's requests. The People maintain that all responsive nonprivileged documents have been produced.

The question remains of precisely which files of which agencies were searched for each document request and when they were searched. We wish to know in detail the steps taken by the People in response to the document requests. In a letter of September 20, counsel for the People cited us to pages 3 and 4 of their July 29 response filed in Kress Creek. We find the information contained there insufficient. The People are to provide this information in the detail specified no later than ten days following service of this Memorandum and Order. With the information in hand, we will address the question of adequacy of document production, including the question of which agencies must respond.

The remaining discovery disputes involve primarily discreet factual issues and hence are dealt with separately under each proceeding.

Kerr-McGee's Motion to Compel in the West Chicago Proceeding

Kerr-McGee alleges that the People have offered neither objection nor answer to the following Interrogatories: 7(b), 7(c), 7(e), 7(f), 8(b), 8(c), 8(e), 8(f), 9(a), 9(b), 9(c), 9(d), 9(e), 9(f), 20(c), 20(e), 20(f), 20(g), 20(h), 24(e), 29(d), 35(b), 37(b), 38, 39(b), 103(b), 103(c), 103(d), 103(e), 104(b), 104(c), 109(b), 109(c), 109(d),

113(a), 113(b), 113(c), 113(d), 114(a), 114(b), and 114(c). Following the People's response, Kerr-McGee withdrew its motion with respect to 24(e), 29(d), 35(b), 37(b), 38, and 39(b). The People maintain that their answers to the opening inquiry of these interrogatories were adequate and that further answers to the specific subparts were not necessary.

Kerr-McGee's motion is granted with respect to all these interrogatories except 9(c) and (d), 104(b) and (c), and those as to which it withdrew its motion.

Kerr-McGee moves to compel answers to those parts of Interrogatories 4, 12, 20, 27, 28, 50, 52, 54, 56, 64, 65, 105, 106, 107, and 114 to which the People have objected as calling for a legal conclusion. In response, the People point out that interrogatories may properly enquire about legal conclusions and theories that apply to the facts of the case, but may not enquire about legal conclusions which do not so relate. We agree with this proposition. See 4A Moore's Federal Practice § 33.17[2] (1984 ed.). We find that all of the above interrogatories are proper under this standard. Further, we reject the People's arguments that some of the interrogatories are too vague or that answers to them are contained in other documents filed in this case. While it may be permissible to make specific references to pages of such documents in answering interrogatories, a blanket statement that the answers are to be found somewhere in the record is not satisfactory. Kerr-McGee's motion as to these interrogatories is granted.

Kerr-McGee moves to compel answers to six interrogatories which seek information concerning communications between officials of the State and others. Interrogatories 13 and 14 seek information regarding communications with Kerr-McGee and the U.S. Government, respectively, on the alternate sites issue. Interrogatories 54 and 55 seek information concerning communications with the NRC Staff on Kerr-McGee's disposal plan, while Interrogatory 63 seeks information on communications with officials of the City of West Chicago on the stabilization plan and the FES. Interrogatory 117 seeks information concerning communications between officials of the Illinois Department of Nuclear Safety and other State officials on matters at issue in this proceeding.

The People object that Interrogatory 13 seeks information which is already within the knowledge of Kerr-McGee. This is not a valid objection. See 4A Moore's Federal Practice § 33.13 (1984 ed.).

The People also raise objections that these interrogatories are vague and overbroad. We disagree; Kerr-McGee's motion is granted.

Kerr-McGee seeks answers to Interrogatories 15 through 18. These concern meetings on alternate sites which State officials have attended or declined to attend, the State's policy concerning cooperating in the search for alternative sites, and assistance which the State may provide in the future in this regard. The People object to Interrogatory 15 on the same grounds advanced for 13 and 14. They also advance vagueness and relevancy objections as to all four. We disagree; Kerr-McGee's motion is granted.

The People have objected to portions of the Interrogatories 64 and 65 which probe the Lash and Estep affidavits which were earlier submitted by the People. We have already disposed of their objections to 64(c), 64(o)-(Q), 65(e), and 65(l)-(m) which asserted that these subparts sought legal conclusions. The People object to 64(e)-(l) and 65(g)-(i) on the grounds that they call for answers protected by executive privilege. We find that 64(e)-(f), (h)-(l) and 65(h)-(i) clearly call for factual information and are proper. However, 64(g) and 65(g) require closer scrutiny.

Both subparts question the process engaged in by Illinois state agencies to develop the policies to which the People claim Kerr-McGee must adhere in the mill tailing disposal. The People argue that any documents explaining such a process are protected by executive privilege.[32]

The executive privilege may be invoked in NRC proceedings. Virginia Electric Power Co. (North Anna Power Station, Units 1&2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units No. 1&2), ALAB-33, 4 AEC 701 (1971). The privilege is designed to prevent the "public disclosure [of] governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.

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32 People's Answer to Motion to Compel, dated August 8, 1985, at 15-16.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) ALAB-773 19 NRC 1333, 1339 and n. 15 (1984). While the privilege is qualified, and may be overcome by an appropriate showing of need, the Court, and in this case the Board, must perform a balancing test pitting the party's need for the documents against the government's interest in confidentiality. Once the privilege is properly claimed by the government agency, the burden of demonstrating that there is sufficient need for the withheld information must be borne by the party seeking that information.

Kerr-McGee argues that the People have not complied with the requisite showing to demonstrate the privilege is proper as to the documents covered by the two interrogatory subparts. Kerr-Mc-Gee's claim that the People have not fully substantiated the executive privilege claim is well taken. The Licensing Board in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) LBP-83-72, 18 NRC 1221 (1983); rev'd on other grounds ALAB 773, 19 NRC 1333 (1984), discussed precisely this issue in relation to a discovery request by Suffolk County to the Federal Emergency Management Agency (FEMA) for certain documents created by the Agency. There the Licensing Board required the FEMA to have the claim asserted by the head of the agency, to specifically describe the documents for which the privilege is sought and to state the reasons for retaining the confidentiality of the documents. Shoreham, supra, 18 NRC at 1223. FEMA submitted an affidavit by the Agency Director which described the seven documents to

be withheld and a short explanation of his reasons for preventing their disclosure.

The reasons asserted by the FEMA director, that the disclosure of the documents would have a "chilling effect" on the ability of FEMA to receive written comments and opinions in the future," Shoreham, supra, 18 NRC at 1227 are neither expansive nor lengthy. Yet the Licensing Board found, and the Appeal Board agreed at 19 NRC 1341 that sufficient descriptions were given and the reason for preserving the confidentiality of the documents was articulated in compliance with the prerequisites for the claim of executive privilege. The Appeal Board, however, disagreed with the Licensing Board's conclusion that a sufficient showing of need had been made to justify overcoming the privilege.

Here the claim is not asserted by the heads of the agencies in question. However, in their answer to the Motion to Compel, the People articulate reasons similar to those used by the Director of FEMA which were found acceptable in Shoreham, although the privilege was not asserted by the heads of the Illinois agencies involved.

Otherwise, the situation before us falls squarely within the parameters of the executive privilege. We agree with the People that "how and why agency regulatory policy has developed . . . are improper [interrogatories] as inquiring into executive deliberative processes."[33]

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[33] People's Motion to Compel, dated August 8, 1985, at 16.

Furthermore, we find no evidence here of a waiver by the mere initiation of litigation by the governmental entity, as suggested by several of the citations submitted by Kerr-McGee.[34]

In short, unless the People file proper affidavits asserting the privilege executed by the heads of the agencies involved within ten days of the service of this Memorandum and Order, we will grant Kerr-McGee's motion.

Kerr-McGee challenges the People's objection to Interrogatory 44 as overbroad. This interrogatory inquires after studies of the toxicity or mobility of materials of the same type or chemically similar to the type to be disposed of at the site. The interrogatory is indeed broad, but less so than the People's Interrogatory 35 on the same subject. What's sauce for the goose is delectable diet for the gander; motion granted.

The People have agreed to supplement their answers in response to Kerr-McGee's motion and Interrogatory 35. Hence, no ruling is necessary.

We agree with the People's objection to Interrogatory 85 which asks whether the State agrees that above ground disposal of wastes sometimes may be appropriate. This proceeding concerns Kerr-McGee's proposal for above ground disposal with which the People disagree. Whether they

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34 Motion by Kerr-McGee Chemical Corporation to Compel Production of Documents and Answers to Interrogatories By the State of Illinois, dated July 3, 1985, at 9.

might agree with some other unspecified above ground disposal plan is not likely to lead to the discovery of relevant evidence.

The People object that Kerr-McGee's Interrogatories 93 through 96 and 98 through 102 are overly broad. These interrogatories seek information with respect to whether the People take issue with specific portions of the FES. While the portions of the FES identified do contain numerous assertions, we view the interrogatories as reasonable. To the extent that Kerr-McGee has identified portions of the FES which the People view as outside the scope of their contentions, a response to that effect is sufficient. However, to the extent that the portions identified are within the scope of the contentions, a specific answer must be given. The motion is granted.

Kerr-McGee asserts that the People's answers to Interrogatories 21 and 22 are evasive. These interrogatories ask whether it is the People's position that abandoned surface and coal mines and limestone/dolomite quarries might be "rendered suitable" for disposal of the West Chicago materials. In each case the People answered negatively and clarified their position. The question presented by this dispute appears to be one of semantics. While the People may have answered the specific questions posed, their answers appear to be evasive. Kerr-McGee's motion is granted.

The People's Motion to Compel in the West Chicago Proceeding

The People move to compel a responsive answer to their Interrogatory 21 which asks for a description of all measures necessary and appropriate to maintain the site after closure. Kerr-McGee has answered in terms of the measures it intends to take, thus raising the question whether other measures will be necessary after transfer of the site. However, Kerr-McGee's counsel made clear at the prehearing conference that the measures referred to in Kerr-McGee's answer (establishment and maintenance of the vegetative cover) are all the measures of which it is presently aware. Counsel agreed to so supplement the answer.

The People complain that Kerr-McGee's answer to Interrogatory 22 is evasive. This interrogatory asks what measures will be necessary to exclude humans from the site. Kerr-McGee's answer is none, once the vegetative cover is established. The People believe this answer is inconsistent with other answers to the effect that human use of the site could damage that cover. We disagree; the motion is denied.

The People move to compel responsive answers to Interrogatories 23 and 24 which ask for cost estimates for post-closure monitoring of the site. In its answer, Kerr-McGee objects that it does not know what monitoring measures will ultimately be required, and implies that it may have some cost data for the monitoring it has proposed. To the extent such data exist, they should be provided; the motion is granted.

Interrogatories 28 and 29 ask what uses might be made of the site after closure. The People quarrel with Kerr-McGee's answer that any use which is consistent with perpetual government ownership and surveillance, and which does not damage the vegetative cover, would be permissible. This is an adequate answer; the motion is denied.

Kerr-McGee's Motion To Compel In The Kress Creek Proceeding

Kerr-McGee has sought information from the People concerning the factual underpinning for their contentions and has asked for an identification of documents in this connection. In response, the People have in part referred to documents produced by Kerr-McGee and have refused to further identify these documents on the grounds that Kerr-McGee knows what it has produced and that to do so would result in a "dress rehearsal" of the People's case. We find these justifications inadequate. It is not sufficient to refuse to answer an interrogatory because the information sought is known to the interrogatory party. See 4A Moore's Federal Practice § 33.13 (1984 Ed.). While a party may not compel its opponent to put on a "dress rehearsal" of its case, interrogatories which seek the factual underpinning of that case are proper. Kerr-McGee's interrogatories are in the latter category. Kerr-McGee's motion to compel answers to Interrogatories 1(c), 3(b), 4(c), 5(d), and 15(d) is granted.

Kerr-McGee seeks an order compelling answers to Interrogatories 19, 20, and 24. These seek information regarding the State's Kress Creek

sampling program. The People have responded simply that all non-privileged documents have been produced. This is not sufficient, and these interrogatories must be answered. We do not agree with the People that answers to these interrogatories would require them to shoulder Kerr-McGee's burden of preparing its case. The interrogatories seek factual information and do not require any expenditure of effort beyond reporting that factual information. It is not sufficient under the Commission's rules to attempt to avoid this obligation by referring to documents which contain only scattered references to the information sought. If documents are to be used in providing the answer, the People must state specifically where the documents provide the answers. The interrogatories are proper and the motion is granted.

Interrogatory 11 asks whether the People "...contend that the mill tailings allegedly found at Kress Creek on the West Branch of the DuPage River pose significant risks...." The People object that Kerr-McGee has not defined the term "significant." However, the People surely know whether they regard the risks as significant and hence make that contention. The motion is granted.

Interrogatory 18 seeks information on all private and public meetings in which State officials participated at which the Kress Creek matter was discussed. The People object to the breadth of this inquiry. Kerr-McGee relies on In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 306-08 (S.D. N.Y. 1982) in which similar interrogatories were permitted.

We do not believe Shopping Carts justifies such a broad inquiry in this proceeding. In antitrust litigation, such interrogatories can well lead to important information concerning anticompetitive practices. Here we are concerned with the possibility that it may be necessary to clean up a contaminated stream. It seems unlikely that this interrogatory would produce much information of value, while at the same time the burden in answering it is obviously great. The motion is denied.

The People's Motion to Compel In the Kress Creek Proceeding

The People have asked Kerr-McGee whether the gamma radiation standard employed in the cleanup of "hot spots" in West Chicago would be appropriate for Kress Creek. Kerr-McGee responded that, in its view, no cleanup of Kress Creek was required, but should one be required, Kerr-McGee would require an opportunity to further study the matter before reaching a conclusion. At the prehearing conference, the People agreed that that is a satisfactory response.

In Interrogatory 12, the People ask what level of risk Kerr-McGee regards as "significant" as that term is used in Averment 10 of Kerr-McGee's amended answer. Kerr-McGee's answer refers to materials filed in this proceeding and states that the significance of a risk must be determined in relation to other risks. The People object that this does not answer the question. We agree that it does not answer the specific question. However, we believe it to be an adequate answer. It

is clear that Kerr-McGee does not regard the Kress Creek risks as significant, and we see nothing to be gained by requiring Kerr-McGee to speculate on what level of risk would be significant beyond the answer it has already given.

Interrogatory 20 asks for the identities of persons with knowledge of the costs and risks of remedial action at Kress Creek. Kerr-McGee has answered this; the motion is denied.

Contention AG-2(g) in West Chicago

We raised the question with the parties whether Contention AG-2(g) should be discussed in light of the ruling in Brown v. Kerr-McGee ___ F.2d ___ (7th Cir. 1985). After hearing the views of the parties we have determined to continue to hold this contention in abeyance. We see no harm in this course, because the contention will not be the subject of litigation while in this status. Should the seventh circuit agree with the People that Brown was wrongly decided, this contention might be appropriate for litigation.

Schedule for Further Proceedings

Kerr-McGee and the People differ with respect to the schedule which should be adopted in West Chicago. The former wishes to proceed with all deliberate speed while the latter wish to defer further proceedings pending completion of related litigation in the Illinois courts

scheduled for trial in February, 1986. The situation is further complicated by Staff's schedule for the issuance of its draft and final supplements to the environmental impact statement, slated for June 1986 and March 1987 respectively.

While we appreciate that counsel's time to devote to this proceeding may be affected by the state court litigation, we also note that the People are represented by the Illinois Attorney General and that the resources of that office are probably substantial. Further, we perceive no reason why this proceeding should abide the resolution of the state court litigation. Indeed, because both the People and Kerr-McGee have raised arguments concerning the possible pre-emption of State regulation, early resolution of this proceeding could be beneficial in determining to what extent an actual conflict exists between State and Federal regulation.

Consequently we are directing that all further discovery responses required by this Memorandum and Order, and any requests for admission pursuant to 10 CFR § 2.742, to be served within 30 days of service.

Further, any motions for summary disposition which the parties wish to file are to be served within 60 days of service of this Memorandum and Order. In particular, if any party wishes to argue that the Staff's alternate site evaluation methodology reflected in its August 16, 1985, letter to the Board is insufficient as a matter of law, this argument is to be made by a motion for summary disposition filed on this schedule.

At the prehearing conference, we raised the question whether we should seek Commission permission to proceed to hearing in West Chicago

on Staff's draft supplement to the environmental impact statement to avoid the delay incident to waiting for the final supplements. We will address further scheduling matters on receiving the parties' views on this question.

In Kress Creek, Staff has filed a motion to hold the proceeding in abeyance. We will address any scheduling concerns in our Memorandum and Order ruling on that motion. However, we see no reason to delay further discovery responses required by this Memorandum and Order and any requests for admissions under 10 CFR § 2.742 are to be filed within 30 days of the date of service.

ORDER
(West Chicago)

1. Kerr-McGee's and Dr. James L. Grant's motion to quash the subpoena directed to the latter is granted.

2. Kerr-McGee's and Stearns Catalytic's motion to quash the subpoena directed to the latter is granted in part and denied in part. See pages 13-14, supra.

3. Kerr-McGee's motion to compel is granted as to interrogatories:

a) Failure to respond: 7(b), (c), (e), and (f); 8(b), (c), (e), (f); 9(a), (b), (e), and (f); 20 (c), (e), (f), (g), (h); 24(e), 29(o); 35(b); 37(b); 38; 39(b); 103(b), (c), (d), and (e); 109(b), (c), and (d); 113(a), (b), (c), and (d); 114(a), (b), and (c).

b) Inappropriate objections:

i) Interrogatories concerning the People's contentions: 4, 12, 20, 27, 28, 50, 52, 54, 56, 64, 65, 105, 106, 107 and 114.

ii) Interrogatories about communications: 13, 14, 54, 55, 63, 117.

iii) Interrogatories about state participation in the evaluation of alternatives: 15, 16, 17, at 18.

iv) Interrogatories on the Lash and Estep affidavits: 64 and 65 (with possible exceptions of 64(q) and 65(q)).

v) Miscellaneous interrogatories: 4, 93 through 96, 98 through 102, 21, and 22.

The People are to supplement their response to Interrogatory 35 and to furnish further documentation of their claims at privilege. In addition, the People are to indicate specifically which files were searched with respect to each document request as when they were searched.

To the extent not covered above, Kerr-McGee's motion is denied.

2. The People's motion to compel is granted as to Interrogatories 23, 24, and 75. Kerr-McGee is to supplement its answer to Interrogatory 21. In all other respects the motion is denied.

3. Further discovery responses and any requests for admissions pursuant to 10 CFR § 2.742 are to be filed within 30 days of service of this Memorandum and Order.

4. Motions for summary disposition, if any, are to be filed within 60 days of service of this Memorandum and Order.

ORDER
(Kress Creek)

1. a) Kerr-McGee's motion to compel is granted as to Interrogatories 1(c), 3(b), 4(c), 5(d), 11, 15(d), 19, 20, 24.

b) Kerr-McGee's motion as to Interrogatory 18 is denied.

c) A ruling on Interrogatory 17 is withheld pending the People's compliance with subparagraph d) below.

d) The People are to indicate specifically which files were searched with respect to each document request and when they were searched.

2. a) The People's motion to compel is granted as to Interrogatory 36.

b) The People's motion to compel is denied as to Interrogatories 1, 4, 12, and 20.

3. Further discovery responses and any requests for admissions are to be filed within 30 days of service of this Memorandum and Order.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. James H. Carpenter
ADMINISTRATIVE JUDGE

Dr. Peter A. Morris
ADMINISTRATIVE JUDGE

John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 26, 1985