UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

KERR-MCGEE CHEMICAL CORPORATION'S
RESPONSE TO THE STATE'S MOTION
TO COMPEL CERTAIN DISCOVERY RESPONSES

On March 1, 1985, Kerr-McGee Chemical Corporation ("Kerr-McGee") filed answers to a set of seventy-six interrogatories propounded by the State of Illinois ("State"). On May 28, Kerr-McGee's counsel responded to certain inquiries by the State, explaining in more detail the answers and objections that the State had questioned. A set of supplemental answers was filed on the same day.1/

1/ The State's motion implies that the supplemental answers constituted Kerr-McGee's only response to its letter, and although the State's own letter is appended to its motion, Kerr-McGee's response is not. Further, the State has selectively excerpted Kerr-McGee's answers in its motion. In some cases, this practice presents an inaccurate and misleading picture of Kerr-McGee's response. As the Appeal Board has stated:

(Footnote Continued)

In this motion, the State seeks an order requiring Kerr-McGee to supplement further its responses to nine interrogatories. Because Kerr-McGee has already provided the most complete answers to those interrogatories that are currently available to it, the motion should be denied.

Interrogatory No. 17

The State's objection to Kerr-McGee's response to Interrogatory No. 17 concerns primarily Kerr-McGee's claim that a certain memorandum prepared by a Kerr-McGee employee, Brad Snow, at the direction of Kerr-McGee's counsel is protected by the attorney-client and work product privileges. The memorandum concerns certain estimated costs associated with the decommissioning of the West Chicago facility and was prepared in 1983 to assist Kerr-McGee's counsel in evaluating the Company's

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(Footnote Continued)

> An administrative adjudicatory body, no less than a court, has every right to expect total abstinence from such practices upon the part of those who appear before it. Put another way, we should be free to assume that, in a brief or other submission, nothing will be excised from a quoted passage unless its lack of relevance to the question under discussion is beyond substantial dispute.

Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 N.R.C. 1391, 1395 (1977). Accordingly, Kerr-McGee requests that the Board examine the entire answer submitted by Kerr-McGee as it considers the State's motion. Kerr-McGee's initial response to the interrogatories at issue here, its letter answering the State's questions, and its supplemental response are attached as Exhibits 1 through 3.

litigation posture and the financial risks associated with it.[1/]

The State argues in its motion that Kerr-McGee should be required to produce the Snow memorandum. It is telling that the State's motion totally ignores the content of the interrogatory. Interrogatory No. 17 states:

> 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.

The information already provided by Kerr-McGee goes well beyond what is technically required to "describe the work done" by Mr. Snow. Contrary to the implication of the State's motion, Interrogatory 17 does not ask for either the identification or production of any documents. Thus, the arguments raised by the State as to the propriety of Kerr-McGee's claim of privilege are irrelevant; the Kerr-McGee response to Interrogatory 17 is fully adequate as it stands.

Even if Interrogatory 17 had asked for documents, Kerr-McGee should not be required to produce the Snow memorandum. It is well-established that information provided to a corporation's counsel by a corporate employee for the purpose of obtaining legal advice is protected by the attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383 (1981). The State does not appear to challenge the privileged status of

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1/ The memorandum was prepared long after the submission of the Stabilization Plan and was not used in preparing the Plan.

the Snow memorandum here. Instead, the State seems to argue that the privilege has been waived as a result of the fact that Kerr-McGee has disclosed earlier studies of costs.

The cases cited by the State in support of its position are not on point. Most are concerned with situations in which the communication at issue has been voluntarily released to a third party, thus waiving the privilege as to all persons.[1/] There is no allegation of such a release here. Kerr-McGee has not made the Snow memorandum available to any third party; the document has been used only for the limited internal purpose described above.

The State's argument that Kerr-McGee has waived its right to assert privilege as to the Snow memorandum by disclosing other cost information in other contexts proves too much. Ultimately, the State appears to be arguing that because Kerr-McGee has made available nonprivileged documents and information relevant to costs, it must now produce privileged

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1/ See, e.g., In re Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984); In re John Doe Corporation, 675 F.2d 482 (2d Cir. 1982); In re Grand Jury Proceedings, 604 F.2d 804 (3d Cir. 1979). The privilege may also be waived where the contents of the specific document have been put in issue by the party asserting the privilege. See In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1315 n.20 (7th Cir. 1984). The case does not apply because Kerr-McGee has never raised an issue concerning the Snow memorandum.

documents as well.[1/] If such an argument were accepted, then the entire concept of privilege would become meaningless, because a party is never entitled to withhold relevant nonprivileged information in discovery simply because its production would endanger the status of privileged materials.

The State's arguments concerning the work-product protection due the Snow memorandum are similarly unconvincing. The Commission's rules state that:

> A party may obtain discovery of documents... prepared in anticipation of or for the hearing, by or for another party's representative... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

10 C.F.R. § 2.740(b)(2) (emphasis added). The Snow memorandum was prepared for Kerr-McGee's counsel as part of their work in this and related litigation. It is thus clearly work product within the meaning of the above-quoted rule.

The State has made no showing of "substantial need" sufficient to overcome the work product protection for the Snow memorandum. Even more telling, it has not demonstrated that it

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1/ The only case cited by the State that even tangentially supports its argument is In re Sealed Case, 676 F.2d 793, 809 & n.54 (D.C. Cir. 1982). However, that case and the authorities cited therein, deal with situations in which the waiver is effected by the voluntary disclosure of privileged information. Here there is no claim that Kerr-McGee has disclosed any privileged attorney-client communication on the subject treated in the Snow memorandum.

cannot obtain the substantial equivalent of Mr. Snow's analysis by other means. The State points out that:

> "Kerr-McGee knows what it pays its laborers and supervisors, its source of raw materials, what equipment it owns and what it will have to purchase, what arrangements it can make to save money or effort, where land belonging to another Kerr-McGee division may be conveniently situated (for potential offsite disposal use), and so forth."

Kerr-McGee does indeed have much of this information, and some of it has already been made available to the State through discovery. The State has not to date even asked Kerr-McGee for information concerning some of the items it lists; it is therefore in no position to argue that it cannot obtain such information through the normal discovery process. Moreover, in light of the fact that the State is engaged in construction projects throughout the State, it is hard to believe that it does not have data on construction and land costs readily at hand.

The State's motive in seeking the Snow memorandum is clear: by obtaining the memorandum the State can avoid the work required to analyze the relevant cost data, while at the same time gaining an insight into the thought processes and opinions formed by Kerr-McGee and its counsel as they prepare for the hearing in this case. The attorney-client and work product privileges exist for the very purpose of protecting such materials from disclosure to opposing parties, and the State's request for an order compelling production of the document should be denied.

The State's request for an in camera review of the Snow memorandum to identify segregable facts is based upon a serious misinterpretation of the work product doctrine. "Ordinary" work product, which includes factual investigations performed by or on behalf of an attorney, does not enjoy the same absolute protection from discovery as pure "opinion" work product. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1162 (1982). But, even ordinary work product may be discovered only upon a showing of substantial need and undue hardship in obtaining the information by other means. Id.; see United States v. Nobles, 422 U.S. 225 (1975). Because the State has made no such showing here, no part of the Snow memorandum is properly subject to discovery at this time, regardless of whether it is possible to separate factual discussion from opinion.

In addition to seeking disclosure of the Snow memorandum, the State asserts that Kerr-McGee should be required to provide further information about consultants who have performed work on costs for Kerr-McGee. These consultants have been retained in anticipation of litigation, but they have not been designated as expert witnesses for the hearing. All information concerning such consultants and their work, including their identities, is protected from discovery absent a showing of exceptional circumstances. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971 (1983); Public Service Co. of New Hampshire (Seabrook

Station, Units 1 and 2), LBP-83-17, 17 NRC 490 (1983); see Fed. R. Civ. P. 26(b)(4)(B); Ager v. Jane C. Stormont Hospital, 622 F.2d 496 (10th Cir. 1980). The State has made no such showing here, and Kerr-McGee's answer is more than adequate.[1/]

Interrogatory Nos. 21, 22, 23, 24, 28, and 29.

These interrogatories ask a series of questions concerning measures to be taken at the disposal site after closure, including those necessary for monitoring, maintenance, and regulation of human use.[2/] Although the State requests an order compelling further responses, Kerr-McGee has already answered the questions to the best of its ability. Moreover, detailed information on these matters has been set out in the Stabilization Plan, in the FES, and in documents Kerr-McGee has produced during discovery. In short, the State has received all the information it is entitled to receive.

The State seems to attach significance to the fact that not all the specifics it desires on certain matters have been provided. But this does not make Kerr-McGee's answers

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1/ The State's motion also complains about Kerr-McGee's failure to provide information about Mr. Hennigan's background. This oversight was not called to Kerr-McGee's attention in the State's letter concerning these interrogatories. If it had been Mr. Hennigan's background would have been addressed in Kerr-McGee's supplemental answers. After it became aware of the problem, Kerr-McGee provided the requested information.

2/ Again, the State has quoted in its motion only portions of Kerr-McGee's answers to the interrogatories without indicating that it is only quoting excerpts. For example, the State does not quote Kerr-McGee's answer to Interrogatory No. 21(a) or its supplemental answer to Interrogatory No. 28. The supplemental answer to Interrogatory No. 28 is particularly important, and its omission from the State's motion presents a misleading picture of Kerr-McGee's response to that interrogatory.

inadequate. Further work is still being performed by Kerr-McGee's experts. Moreover, final resolution of some details must await substantive decisions from the Board and from the Commission.[1/] Kerr-McGee has stated that it will comply with such decisions and standards, but it cannot be required to speculate about what they will be. Nor is Kerr-McGee at this time able to provide the detailed cost figures demanded by the State for such measures.

The State's concerns with the responses to Interrogatory Nos. 22, 28, and 29, which address restrictions to be imposed on use of the site after closure, may be traced primarily to the very different views of the parties of the security measures that will be required at the site after closure and the purposes of such measures. As Kerr-McGee has noted (Response to Interrogatory No. 22), Kerr-McGee does not anticipate that the disposal cell will pose any health risks to humans on the site. Thus, Kerr-McGee responded to Interrogatory 22, which asked whether measures must be taken to exclude humans, by explaining that no exclusion is required. In contrast, the State appears to have very different restrictions in mind when it suggested in its own interrogatory answers that "armed guards and/or barbed wire or electric fencing" may be required. State's Answers to Kerr-McGee's [Second] Set of Interrogatories and Document Request, Response to Interrogatory No. 35. Kerr-McGee did not

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1/ For example, the NRC's criteria under UMTRCA, 10 C.F.R. Part 40, Appendix A, are currently in the process of being amended. 49 Fed.Reg. 46418 (Nov. 26, 1984).

list such measures in its own answer to Interrogatory No. 22, because it does not believe that they will be necessary.

The State's motion seizes on Kerr-McGee's passing reference to the term "additional" in its answer to Interrogatory No. 22 and argues that Kerr-McGee has willfully failed to disclose the "additional" measures that will be required to exclude human beings from the site. That is not the case. The use of the term "additional" merely recognizes that the disposal cell itself will act to exclude human beings from the material in the cell. Kerr-McGee's answer also recognizes that other entities, such as this Board, have yet to determine what, if any, measures may be required. Because Kerr-McGee cannot predict the final conclusions of the Board on this issue, it has taken a flexible position, acknowledging that in the future recommendations of the Staff, the State, Kerr-McGee's own experts, and the Board may identify specific additional measures that should be taken.

The State's argument with Kerr-McGee's answer to Interrogatory No. 28 is particularly frivolous. The interrogatory asks whether the site could ever be released for "unrestricted use." The term "unrestricted" has a special meaning in NRC practice, where it refers to an area that is not controlled for purposes of protection from radiation. See, e.g., 10 C.F.R. § 20.3(17). Because there will be no radiation

hazard from the site after closure, "unrestricted use" in the sense of open public access to the site will be possible. If the term "unrestricted use" is used in a broader sense, however, then some limitations exist. Kerr-McGee's supplemental answer to Interrogatory No. 28 (which is completely ignored in the State's motion) observes that use of the site is limited after closure as a result of the requirement in Section 83 of the Atomic Energy Act of perpetual government ownership. Apart from that, however, the only limitation on use of the site will be the need to protect the vegetative and soil cover over the disposal cell. All of these matters are explained in the Kerr-McGee response[1/]

The State's arguments concerning Interrogatory Nos. 23 and 24, which ask about the cost of post-closure groundwater and radiological monitoring, are similarly baseless. Because Kerr-McGee does not know the specific monitoring measures that will be required by the Board, it cannot predict what the cost of those measures will be. To be sure, Kerr-McGee has put forth certain proposals concerning post-closure monitoring at the site. But since it has always been clear (1) that the costs of such monitoring measures are a relatively small part of the cost of the entire project and (2) that the measures actually required by the Commission may differ from Kerr-McGee's pro-

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1/ Kerr-McGee's answer to Interrogatory 28 serves as well as a fully adequate response to Interrogatory 29, which asks about the uses for which the site could be "released." Of course, Section 83 of the AEA bars the release of the site in any event.

posals, Kerr-McGee has understandably not put substantial effort into developing specific cost figures for these items. Kerr-McGee's experts are continuing to consider these issues and it may be that more detailed cost data will be available in the future. In the interim, however, Kerr-McGee's answers are both truthful and complete.[1/]

Finally, the State challenges Kerr-McGee's answer to Interrogatory No. 21, which asks about the maintenance measures to be required after closure. Again, Kerr-McGee has answered this interrogatory based on its present knowledge, i.e., in the absence of concrete information about the final conclusions of its experts, the Staff's views, and the Board's final decision on the subject. As it has stated over and over again in its answers to these interrogatories, in the Stabilization Plan, and in other documents, Kerr-McGee believes that post-closure maintenance will focus primarily on establishment (in the first few years) of a strong self-sustaining vegetative cover and then the maintenance of that cover. As stated in Kerr-McGee's supplemental answer to Interrogatory No. 21, Kerr-McGee believes that the measures needed to maintain the vegetative cover after the first few years will be minimal and that the costs associated with such measures will also be minimal. Again, however,

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1/ Such answers are perfectly acceptable when a party is not able to provide the information requested. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 334 (1980); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 N.R.C. 1937, 1945 n.3 (1982). The discovery rules do not require a party to conduct research to obtain information not already available to it.

Kerr-McGee's experts have not yet completed their consideration of this issue and some details remain to be worked out. The answer provided by Kerr-McGee was both truthful and complete on the basis of the available information.

It is noteworthy that much of the State's motion is a thinly guised argument by the State concerning substantive issues in this proceeding, rather than an analysis of Kerr-McGee's compliance with the State's discovery requests. See, e.g., Motion at 11, 14. Kerr-McGee does not find it appropriate to address the merits at this time; the adequacy of post-closure measures to fulfill the Commission's regulatory goals is a matter that will be considered at the hearing. Kerr-McGee has answered the State's interrogatories to the best of its current ability, and the fact that the State does not agree with the answers does not render them inadequate.

Interrogatory No. 62

The State's complaint about Kerr-McGee's answer to Interrogatory No. 62 focuses on Kerr-McGee's claim of Rule 26(b)(4)(B) protection for studies done on the subject of property values by expert consultants who have not been designated to testify at the hearing.[1/] The protections afforded by Rule 26(b)(4)(B) are recognized in NRC proceedings. Carolina

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1/ Contrary to the implication of the State's motion, studies have not been performed by in-house personnel or by consultants who have not been specially employed for this and related litigation. The memorandum from I.L. Denny to V.E. Doyle (Dec. 21, 1983), which is attached in the State's motion, relates to the changes in the real estate assessments for property owned by Kerr-McGee.

Power & Light Co., supra; Public Service Co. of New Hampshire, supra. Moreover, unlike claims of privilege, Rule 26(b)(4)(B) protection need not be supported by information about the material being protected. Even the names of the consultants who did the work need not be disclosed absent "exceptional circumstances." Id.

The State's claim that Kerr-McGee has a sizeable staff and is thus better able to conduct a study of property values[1/] falls far short of meeting the "exceptional circumstances" test set by Rule 26(b)(4)(B).[2/] Indeed, the State's apparent desire to benefit at low cost from the work done by Kerr-McGee's consultants is precisely the type of behavior that Rule 26(b)(4)(B) is designed to prevent. See Rule 26, Advisory Committee Note. Kerr-McGee's response to this interrogatory was proper.

Interrogatory No. 75

The State's final challenge is to Kerr-McGee's answer to Interrogatory No. 75, which asks Kerr-McGee to identify the person who answered each interrogatory. Kerr-McGee provided the names of individuals who contributed to the answers, but

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1/ This claim is itself somewhat lacking in credibility; the State has available to it (and in several instances has used) the resources of the Illinois state government and its constituent agencies.

2/ For a discussion of contexts in which "exceptional circumstances" may be found to exist, see Ager v. Jane C. Stormont Hospital, supra, 622 F.2d at 503 n.8. See also Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 996-97 (D.C. Cir. 1980).

declined to correlate them with specific interrogatories.

The problem with this interrogatory is that it does not take into account the method used by Kerr-McGee in responding to the State. The answers were developed by consultation among a group of Kerr-McGee employees who are involved generally in the West Chicago project. All of those individuals have been identified. In light of the fact that the answers reflect a collective effort, a further response to Interrogatory No. 76 might be meaningless, or perhaps even misleading.

The Kerr-McGee response does not impose a severe burden on the State. Kerr-McGee has produced extensive documents reflecting the involvement of those individuals in West Chicago matters, has provided information about their background, and will also make them available for deposition. The State therefore has many alternative ways of determining the role that each of these individuals have played in this proceeding.

Conclusion

For the reasons stated above, Kerr-McGee's answers to the State's interrogatories were both complete and appropriate. The State's motion should therefore be denied in its entirety.

Respectfully submitted,

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