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-SC
	)	
(Kress Creek Decontamination)	)	

PEOPLE'S REPLY ON THE MOTION
TO COMPEL CERTAIN DISCOVERY RESPONSES

In its response to our motion to compel certain interrogatory answers and documents,* Kerr-McGee falls over itself trying to avoid disclosure of the information in its hands concerning costs and benefits of clean-up. Indeed, the energy with which Kerr-McGee resists production truly whets the appetite for those materials! In any event, for lack of time we must stand on our motion and offer only the following short reply.

1. The question of "nonwitness experts" (Kerr-McGee response, pp. 8-11, 14)

Kerr-McGee persists in its refusal to decide who it will call as expert witnesses in this case, and, based on its refusal,

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* Kerr-McGee expresses some confusion about our purpose in moving for an answer to Interrogatory 1 (Kerr-McGee response, p. 4). Interrogatory 1 asks for identification of certain documents, and Document Request 1 requests production of all identified documents; a proper response to the interrogatory would result in production of the documents. It is the documents, of course, that we seek.

asserts that certain of its documents are shielded from discovery. Kerr-McGee's arguments are inconsistent with itsstated desire to have this case go to hearing at an early date, and appear to be part of an effort either (1) to delay hearing by its actions, while protesting the need for an early hearing with its words, or (2) to force its opponents to go to hearing without an opportunity --guarranteed by the NRC's practice rules--to prepare adequately.

Both the Board and counsel for Kerr-McGee stated their eagerness, during the July 9, 1985 conference call, to schedule the hearing in this matter as soon as possible, perhaps even before the state court trial in DuPage County begins in early February 1986. Yet Kerr-McGee's conduct on discovery seems designed to guarantee that the state court trial will have to proceed first.*

In short, Kerr-McGee's continued refusal to decide who it will call as expert witnesses, and to allow full document discovery on those witnesses, guarantees delay in this proceeding, and belies the company's statements that it wants an early hearing.

2. Waiver by disclosing subject matter (Kerr-McGee response, pp. 4-6)

In its response on this issue, Kerr-McGee argues that it need not produce documents assertedly covered by the work-product privilege (R. 26(b)(3)) or non-witness expert discovery rule (R.

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* For the record, the People do not object to a schedule that would allow completion of the state court trial, followed by a reasonable period for additional preparation, before this matter goes to hearing. Indeed, as we stated during the July 9 conference call, we have thought all along that such a schedule was the only one that accommodated the needs of all concerned. If does, however, seem ironic--and not a little inconsistent--for Kerr-McGee to be the party that ensures that this will in fact be the case by its continued stone-walling in discovery.

26(b)(4)(B)) merely because it has already produced materials addressing the same subject matter the withheld documents address. What Kerr-McGee does not discuss is the fact that the material already disclosed was favorable to Kerr-McGee's position. Kerr-McGee deliberately chose to waive its privileges under the Federal Rules to produce those favorable materials; now it seeks to avail itself of the privileges and withhold other documents relating to the same subject matter. One can only rationally conclude that the withheld documents do not reflect so favorably on the company's position. For that reason nondisclosure would be unfair and contrary to the letter and spirit of the Rules.

3. Disclosure of facts under the work-product privilege (Kerr-McGee response, pp. 7-8)

In an attempt to worm around the well-established principle that the work-product privilege (R. 26(b)(3)) does not authorize the withholding of relevant facts in a party's possession, Kerr-McGee mischaracterizes our argument. Kerr-McGee contends that the People think the privilege runs only to an attorney, not the party he represents. Since the Still memoranda (and their attachments) were prepared by the party they are--so Kerr-McGee implies--absolutely protected by the work-product privilege.

Whether the documents in dispute were prepared by the party or by its lawyer is immaterial to the point we are making. Even if the Still memoranda are within the protection of the privilege (and we argue they are not--not because the the party wrote them but because of a waiver), only those portions reflecting

litigation strategy or legal conclusions are protected. Under Hickman and its progeny, facts cannot be concealed by application of the privilege. Since Kerr-McGee does not claim that the Still documents contain no facts, those documents should be subjected to in camera review by the Board for separation of privileged from nonprivileged material.

4. Persons with knowledge of costs and risks (Kerr-McGee response, pp. 14-15)

Interrogatory 20 seeks the identify of all persons with knowledge of monetary costs and environmental or health impacts or risks "associated with remedial action at Kress Creek and West Branch DuPage River." Kerr-McGee seeks to avoid answering this by characterizing it as a demand for cost and risk data on a specific remedial plan, and then stating that because no "specific remedial action" has yet been ordered, no one has relevant knowledge. Kerr-McGee's response does not fairly address the interrogatory.

Interrogatory 20 asks for the identity of anyone who has knowledge of costs and risks of remedial action generally. It was prompted by Kerr-McGee's defenses to this proceeding, which have been and apparently still are that remedial action generally--not any specific action (since none has yet been ordered), but any remedial action--would be unreasonably costly, financially and environmentally. If, as Kerr-McGee now asserts in its interrogatory answers and its response to the pending motion, no one has any knowledge about the general costs and risks of remedial action, then Kerr-McGee's defenses obviously have no factual basis and summary disposition is appropriate. On the other hand, if Kerr-McGee

does know of persons with knowledge--i.e., if its defenses have any substance at all--then it should say so and disclose the identify of all such persons.

5. The meaning of "significant risk" (Kerr-McGee response, pp. 13-14)

Interrogatory 12 seeks a definition of "significant risk" as that term is used in the pleading in which Kerr-McGee first introduced the concept to this proceeding. We emphasize that it was Kerr-McGee that raised the significance of the risk at Kress Creek as an issue in this proceeding.

In response, Kerr-McGee asserts that it has already stated that the significance of a risk must be determined by comparison to other risks. That much is true, i.e., Kerr-McGee has already said that; but that does not respond to the interrogatory. What we have sought, and still seek, is some plain statement from the company that indicates the point at which it considers a risk significant. In other words, what would Kerr-McGee consider an appropriate comparison? Absent such a response --and there has been none thus far from Kerr-McGee--we cannot know what to expect from Kerr-McGee at hearing.

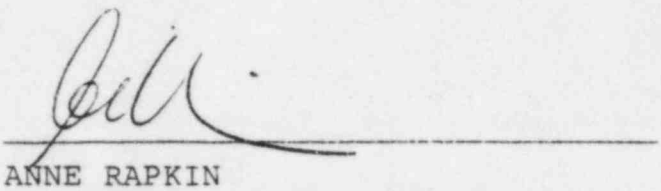
Conclusion

For the reasons set forth in our initial motion, as well as the reasons set forth above, we ask that the Board require Kerr-McGee to provide the requested information and documents.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS



ANNE RAPKIN
Assistant Attorney General

ANNE RAPKIN
Assistant Attorney General
Environmental Control Division
RUSSELL R. EGGERT
Assistant Attorney General
Administrative Assistant
100 West Randolph
13th Floor
Chicago, Illinois 60601

PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn and on oath do state that I have this 8th day of August, 1985 served copies of the foregoing Motion For Leave To File Instanter and People's Reply On The Motion To Compel Certain Discovery Responses upon the persons listed on the attached Service List by placing same in envelopes addressed to said persons, by first class mail, postage prepaid, and depositing same with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.

Elaine C. Thomas
ELAINE C. THOMAS

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 8TH DAY
OF AUGUST, 1985.

Cheryl Dunton
NOTARY PUBLIC

SERVICE LIST

Chief, Docketing and Service
Section (3)
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John H. Frye, III, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Steven Seiple
Illinois Department of
Nuclear Safety
1035 Outer Park Drive
Springfield, Illinois 62704

Peter J. Nickles
Richard A. Meserve
Covington & Burling
P.O. Box 7566
Washington, D.C. 20044

Lillian M. Cuoco
Stephen G. Burns
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Thomas J. McDaniel
Mead Hedglon
Kerr-McGee Corporation
Kerr-McGee Center
Oklahoma City, Oklahoma 73215

Neil T. Proto, Esq.
Kelley, Drye and Warren
One Landmark Square
Stamford, Connecticut 06901

John C. Berghoff, Jr.
Chadwell & Kayser, Ltd.
8500 Sears Tower
Chicago, Illinois 60606