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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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BRANCH

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

KERR-McGEE'S REPLY TO STATE'S
ANSWER TO MOTION TO COMPEL

The State's response to Kerr-McGee's Motion to Compel Answers to Interrogatories and Production of Documents raises few new arguments not fully covered in Kerr-McGee's motion, and none that provides a basis for denial of any part of Kerr-McGee's motion. We will try to avoid repeating points previously made in Kerr-McGee's motion.

1. Failure to respond

Kerr-McGee's motion listed a large number of interrogatories to which the State had simply failed to provide any response in the form of either an answer or an objection. In most instances, the State's Answer seeks to justify this failure merely by arguing that answers to portions of those interrogatories were complete as to other unanswered portions. Answer at 3-4. This is simply incorrect.

Footnotes to the State's Answer provide brief additional explanations in some instances, and Kerr-McGee will not press for answers in the few instances in which its differences with the State appear to be minor or technical in nature.^{1/} However, the State should be compelled to answer Interrogatory Nos. 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), 103(b), 103(c), 103(d), 103(e), 104(b), 104(c), 109(b), 109(d), 113(a), 113(b), 113(c), 113(d), 114(a), 114(b), and 114(c), which the State has simply ignored.^{2/}

2. Interrogatories concerning contentions

The State declined to answer fifteen interrogatories^{3/} that ask about various aspects of the State's contentions on the

^{1/} Thus, Kerr-McGee no longer presses its motion to compel answers to Interrogatory Nos. 24(e), 29(d), 35(b), 37(b), 38, and 39(b).

^{2/} The State claims to have actually provided answers to a few of these interrogatories, but even a cursory glance at the State's answers shows that assertion to be incorrect.

^{3/} Nos. 4, 12(a)-(e), 10(b), 27, 28(a)-(c), 50(a)-(e), 52, 54(d), 56(a)-(e), 64(c), 64(e)-(l), 64(o)-(q), 65(e), 65(g)-(j), 65(l)-(m), 105(a)-(d), 106(a)-(d), 107(a)-(d), and 114(a)-(c). Interrogatory Nos. 64 and 65 are discussed further below.

ground that they seek legal conclusions.^{1/} As stated in Kerr-McGee's motion, it is well established that a party may appropriately ask another party, through interrogatories, to state and describe its contentions. Motion at 5-6.

The State's other objections to contention interrogatories, Answer at 5-7, are without merit. For example, the State's assertion that the reference in Interrogatory No. 12 to the development of specific or detailed disposal plans for alternative disposal sites is vague makes no sense in light of the State's reference to the same subject in Contention 1(c). The State's assertion that it has described some of its contentions in briefs or other filings is similarly beside the point; a party cannot refuse to answer an interrogatory merely because the information requested has previously been written down "somewhere" in the record.

3. Interrogatories about communications

The State's arguments concerning the six interrogatories which seek information about communications between the

^{1/} Kerr-McGee's motion listed the pertinent interrogatories at page 4 n.1, and then discussed five examples in more detail. The State's Answer presents the novel theory that the Board may now consider Kerr-McGee's challenge to its objection only as to those five interrogatories. Answer at 4. In fact, as is plain from Kerr-McGee's motion, the arguments presented applied to all of the listed interrogatories and not just to the examples.

State and various other parties^{1/} add little to the State's original objections to those interrogatories. The State makes no attempt to deny the established rule that interrogatories concerning communications of parties must be answered absent a particularly strong showing of burden. See In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299 (S.D.N.Y. 1982); Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551 (1964). Nor does the State deny the plain fact, noted in Kerr-McGee's motion, that it is able to answer at least portions of these interrogatories with very little burden at all. See Motion at 8 n.1. Instead, the State relies heavily on its assertion that it need not answer Interrogatory No. 13 because Kerr-McGee already has the information requested or can obtain the information by other means, and because the subject matter of the interrogatories is, in the State's view, of "peripheral concern." Answer at 10.^{2/}

Interrogatory No. 13 requests information concerning certain communications between State representatives and Kerr-McGee employees. The State refused to answer this

1/ There are six such interrogatories, Nos. 13, 14, 54, 55, 63, 117. See Motion at 6 n.2. Kerr-McGee discussed two examples, Nos. 13 and 14, in its motion, but its arguments again applied to all interrogatories in the group.

2/ The State also asserts that Kerr-McGee has not challenged its objection that Interrogatory No. 14 is vague. Kerr-McGee does in fact challenge that objection in its motion at 7 n.1.

interrogatory on the ground that the answer is already known to Kerr-McGee. That is not the case. Kerr-McGee is a large corporation and does not have a complete listing of all contacts between its employees and others. Even if it did have such information, however, that fact would not relieve the State of its duty to answer the interrogatory. As one court has stated:

[I]t is immaterial whether matters are as much within the knowledge of the interrogating party as of the adverse party. . . . If he has the information or it is available to him, he must answer the interrogatory.

Cohn v. Dart Industries, Inc., 21 Fed. R. Serv. 2d 792, 793 (D. Mass. 1976). Similarly, to the extent that the State is able to answer Kerr-McGee's interrogatories, it must do so, regardless of whether or not some part of the information requested may already be available to Kerr-McGee.^{1/}

The State's self-serving argument that the

1/ The State's Answer attempts to distinguish two cases cited by Kerr-McGee in support of this proposition on the basis that they deal with information that is actually in the hands of a third party and to which both sides have equal access. However, the Cohn case does not appear to be open to such a distinction, and there are a number of other judicial precedents that have held that a party must respond to interrogatories even if the propounding party already has the information in its possession. See, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570, 573 (E.D. Ill. 1975); United States v. Beatrice Foods Co., 52 F.R.D. 14 (D. Minn. 1971); see also Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977).

interrogatories are of "peripheral concern" in this case provides no justification for the State's failure to answer. There is no claim that the interrogatories are irrelevant within the meaning of 10 C.F.R. § 2.740.

4. Interrogatories about the State's participation in the evaluation of alternatives

The State's objection that these interrogatories are vague is disingenuous at best,^{1/} and requires no further response here. The relevance objection is equally groundless. The scope of permissible discovery is broad, see 10 C.F.R. § 2.740, and the State's contentions as to Kerr-McGee's evaluation of alternatives clearly provide a basis for these interrogatories.

5. Interrogatories directed to the Lash and Eastep affidavits

The State objects to certain portions of Interrogatory Nos. 64 and 65, which explore the basis for statements made in the Lash and Eastep affidavits. All of those objections are addressed in Kerr-McGee's motion. Motion at 9-11. The State's Answer focuses primarily on its claim of executive privilege.

The statements in the Lash and Eastep affidavits were presented as sworn assertions of fact, not as legal argumentation. The affidavits were offered as evidence of the existence

^{1/} For example, the State asserts an inability to understand the meaning of the term "meeting."

of certain state policies which the State argues should have been given greater consideration in the FES. Since the assertions in the Lash and Eastep affidavits were offered to the Board as factual evidence, Kerr-McGee is entitled to explore their accuracy and reliability, just as it would any other evidence offered in this proceeding. Thus, the interrogatories seek information about the affiants' authority to make official statements of this kind on the State's behalf, the degree to which the "policies" were developed in accordance with procedures applicable to such matters, and the extent to which the affiants' assertions concerning the application of those policies to Kerr-McGee are correct.

Kerr-McGee's Motion to Compel in the Kress Creek proceeding discussed some of the procedural requirements required for assertion of executive privilege.^{1/} Those requirements not having been met here, the State has not effectively asserted the privilege in this case. Even if a privilege claim had been properly asserted, however, the underlying privilege was waived by the State when it put the

1/ Kress Creek Motion at 9 n.6. The requirements include direct assertion of the privilege by the head of the agency, a specific description of the information withheld, and a demonstration of "precise and certain" reasons for preservation of the privilege. Id.; see Mobil Oil Corp. v. Dept. of Energy, 520 F. Supp. 414 (N.D.N.Y. 1981); Smith v. F.T.C., 403 F. Supp. 1000 (D. Del. 1975).

matters covered by the privilege in issue through the filing of the affidavits. Federal Deposit Insurance Corp. v. St. Paul Fire & Marine Ins. Co., 53 F.R.D. 260 (W.D. Okla. 1971); United States v. Gates, 35 F.R.D. 524 (D. Cal. 1964).

Finally, even if the State had properly asserted executive privilege here, and even if that privilege had not been waived, it would still be appropriate to require answers to these interrogatories. The executive privilege is a qualified one and may be overcome by a showing of need. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984). The State's action in placing the Lash and Eastep affidavits in the record as evidence in support of its contentions exposes these affidavits, and the sworn statements contained therein, to discovery.

6. Other Interrogatories

Interrogatory No. 44

The State objects to Interrogatory No. 44 on the ground of overbreadth. Yet this interrogatory is similar to the State's own Interrogatory No. 35, even to the use of the term "studies." This interrogatory is highly relevant to the myriad health, safety, and environmental issues raised by the State in this proceeding and should be answered.

Interrogatory No. 85

The State has declined to answer Interrogatory No. 85, purportedly on the ground that it does not understand it. The

State's Answer to Kerr-McGee's motion asks, "What kind of 'wastes' and what form or design of 'above-grade burial' are referred to?" Answer at 18. This objection, which was also stated in the State's original response, makes little sense in context. As Kerr-McGee stated in its letter of May 31, 1985,

The kind of "wastes" referred to is plain from the context: the wastes at the Kerr-McGee site in West Chicago. We do not know what form or design of above-grade burial would be acceptable to the State -- that is what we are asking.

The State understands the interrogatory perfectly well, but merely does not want to answer the question. Given the issues raised by the State in this proceeding concerning not only the design of Kerr-McGee's proposed cell for the West Chicago site, but the methodology used for the identification and evaluation of alternative sites, the meaning and relevance of this interrogatory are obvious.

Interrogatories 93-96 and 98-102

The State argues that it should not be required to answer these interrogatories, which seek to identify the specific assertions in the FES that the State challenges, on the ground that a large amount of detail is involved. The State's contentions in this proceeding, including those directly attacking the FES, are phrased in general terms. In order to prepare for the hearing, Kerr-McGee is entitled to know which specific aspects of the FES the State is challenging. Complete

answers to this interrogatory will fulfill this goal and will help both the parties and the Board to narrow the issues in this proceeding.

Document Production

The State's Answer does not address directly most of Kerr-McGee's points concerning the inadequacy of the State's document production. Instead, the State refers in general terms to its response to Kerr-McGee's motion in the Kress Creek proceeding. Kerr-McGee has already replied to that response and will not repeat its arguments here. However, two points require further limited discussion.

First, in two footnotes on page 26 of its Answer, the State suggests that Kerr-McGee should rely on other sources, such as the NRC Staff, for the documents it has requested from the State. The State does not deny its own responsibility to produce such documents, many of which originated in State files; it merely suggests that there may be other sources for the documents. As noted above, the availability of documents or information from other sources does not excuse the State from its responsibility to respond in a complete and timely manner to Kerr-McGee's discovery requests.^{1/}

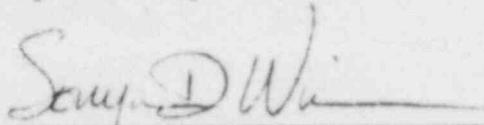
^{1/} The State also asserts in its Answer at 26 n.16 that it was not required to produce to Kerr-McGee certain documents the State has transmitted to the Staff, because those documents were provided "voluntarily" and not in response to discovery requests. The State misses the point here: If the documents were covered by Kerr-McGee's requests (which they appear to have been), and the State had them, it should have produced them.

Finally, Kerr-McGee's motion in this proceeding asks the Board to direct the State to provide further information to substantiate its privilege claims. The State's Answer does not appear to object to that request, and the information should accordingly be provided.

Conclusion

For the reasons stated above, Kerr-McGee respectfully requests that its Motion to Compel be granted.

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing
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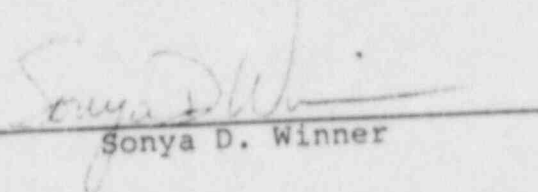
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