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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

KERR-McGEE CHEMICAL CORPORATION

(Kress Creek Decontamination)

Docket No. 40-2061-SC

Source Material

License No. STA-583

ASLBP No. 84-502-01 SC

Location: Bethesda, Maryland

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket No. 40-2061-SC

KERR MCGEE CHEMICAL CORPORATION : Source Material

(Kress Creek Decontamination) : License No. STA-583

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Wednesday, September 11, 1985

4350 East West Towers

Fifth Floor Hearing Room

Bethesda, Maryland

The Oral Argument in the above-entitled matter was
convened, pursuant to Notice, at 2:35 p.m.

BEFORE:

JOHN H. FRYE, III, Chairman of the Board

JAMES H. CARPENTER, Member

PETER A. MORRIS, Member

1 APPEARANCES:

2 On behalf of the Applicant:

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4 PETER NICKLES, Esq.

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18 On behalf of the NRC Staff:

19 STEPHEN H. LEWIS, Esq.

20 Deputy Assistant Chief Hearing Counsel

21 LILLIAN CUOCO, Esq.

22 Office of the Executive Legal Director

23 U.S. Nuclear Regulatory Commission

24 Washington, D.C. 20555

25 ALSO PRESENT: Ivan L. Denny, Manager, West Chicago Proj.

P R O C E E D I N G S

JUDGE FRYE: This is a prehearing conference in the matter of the Staff's Order to Show Cause which has been issued to Kerr McGee Chemical Corporation, seeking to force the corporation to clean up certain mill tailings which allegedly have found their way from their site into Kress Creek in the West Branch of the DuPage River.

I will, at this point, ask counsel if they would, beginning with Mr. Lewis, identify themselves for the record.

MR. LEWIS: I am Stephen H. Lewis, Counsel for the NRC Staff. On my right is Lillian Cuoco, co-counsel.

JUDGE FRYE: Thank you.

MS. RAPKIN: I am Anne Rapkin, Assistant Attorney General on behalf of the People and with me is Russell Eggert, also Assistant Attorney General in the Office of the Attorney General, State of Illinois.

MR. NICKLES: Your Honor, my name is Peter Nickles. With me is Mr. Richard Meserve, Sonya Winner and David King with Covington and Burling, on behalf of Kerr McGee.

JUDGE FRYE: Thank you.

All right. Mr. Meserve, you were about to begin.

MS. RAPKIN: Before Mr. Meserve proceeds, he is proceeding on an agenda that Kerr McGee submitted this morning, which begins with Kerr McGee's Motion to Compel and the State's Motion to Compel and then Other Matters.

1 I think there is an extremely important other
2 matter, or at least one extremely important other matter which
3 is pending before the Board, which in our opinion, together
4 with another important matter that we will raise, may very
5 much affect the necessity of going forward on motions to
6 compel, at least at this time.

7 It is up to the Staff whether or not they would like
8 to raise the motion that they have filed to hold the
9 proceeding in abeyance before Kerr McGee proceeds. If they
10 don't want to do it at the beginning of this prehearing
11 conference, then I think that we would like to refer to it
12 briefly and also make a motion ourselves.

13 JUDGE FRYE: All right. I take it you are ready to
14 make at least a preliminary response to the Staff's motion at
15 this time.

16 MS. RAPKIN: Well, yes, we are going to support the
17 motion. We think that it makes a lot of sense for a variety
18 of reasons, not the least of them being that if there is
19 reason to think that this matter may be expeditiously
20 addressed by U.S. EPA, pursuant to its CRCLA responsibilities,
21 then it is probably not a wise use of the parties' resources
22 which are already spread very thin for us to proceed.

23 And in any event, it appears that there will be some
24 kind of response from U.S. EPA by February 1986, according to
25 the Staff's motion. And I think it is very unlikely that this

1 matter could be resolved in this forum any earlier than that
2 anyway.

3 So the State of Illinois supports the Staff's
4 motion.

5 JUDGE FRYE: Is Kerr McGee in a position to respond
6 at this time, or do you want more time?

7 MR. NICKLES: Well, Your Honor, we just got it
8 yesterday, but my recollection spends enough time -- although
9 that time gets shorter all the time -- to recall that there
10 was a point in time in this case when everyone thought this
11 proceeding had to be coordinated, if not consolidated, with
12 the license amendment proceeding because of the potential
13 interrelationship of certain of the issues. In fact, I
14 believe the State took that position very forcefully; that
15 these two proceedings should go hand in hand.

16 For some reason now, the hands are no longer
17 clenched and they're waving good-bye to each other. I find
18 it a startling development, so to speak. We have been
19 involved in discovery, we have sought to move forward
20 expeditiously. We provided all the documents that we had on a
21 number of occasions at great expense to the State and to the
22 Staff, and believe that the motion is ill-timed and
23 inappropriate.

24 It puts in the hands of another agency, which has
25 not yet decided the question of whether it will be on the

1 list, a matter in which the Commission has invested a lot of
2 time and energy. As far as I can see, the Board was ordered
3 by the Commission to move forward on this matter. And I
4 believe, Judge Frye, I remember you saying that while we will
5 not consolidate at this time, certainly the matters ought to
6 be coordinated. And I think there was a loud "hurrah," or at
7 least a "hear, hear" on behalf of the English derivative
8 individuals in the room that that was appropriate. Now
9 there's no longer a "hear, hear." Let's send it over to EPA
10 because apparently we're too busy or too uninterested or
11 something.

12 So I think our Motion to Compel ought to be heard.
13 I think it's well taken. I think we've had the same kind of
14 response in this proceeding as we've had in the other one.
15 We've asked these questions a long time ago; we get no
16 answers. And we think the Board ought to rule today that the
17 State ought to comply with our outstanding discovery request,
18 and we ought to move forward.

19 JUDGE FRYE: So you anticipate opposing the Staff's
20 Motion to hold this proceeding in abeyance.

21 MR. NICKLES: Yes, I believe fundamentally, as we
22 have all agreed, that this proceeding should be coordinated if
23 not, at some point, consolidated with the main proceeding
24 because there is potential interrelationship.

25 JUDGE FRYE: So Kerr McGee wants to --

1 MR. NICKLES: We want to get the whole problem
2 resolved quickly and at one time rather than having ourselves
3 in another forum which we cannot -- it's tough enough to keep
4 all the different proceedings separate. Now we're going to
5 have another agency come in to deal with apparently this
6 matter, potentially in February of 1986. But certainly, the
7 EPA's track record on meeting statutory deadlines, let alone
8 self-imposed deadlines, is not very great.

9 JUDGE FRYE: Well, we have some questions, too, so
10 since this matter has come up this would be a good time, I
11 suppose, to take them up.

12 Frankly, we were surprised that the Staff viewed the
13 hope of an early resolution of this proceeding as having
14 dimmed. That took us a bit by surprise and we were curious as
15 to why the Staff holds that view.

16 MR. LEWIS: Well, I would say that one of the
17 principal factors in that regard was the Board's order of
18 March 22nd, 1985, which set out the various things that would
19 have to be demonstrated in the proceeding. I think the Staff,
20 at the time it issued its order in 1984, in early 1984, was
21 proceeding on the basis that the EPA standards would be
22 applicable in the proceeding as a matter of law. Of course,
23 on motion for reconsideration we did not prevail upon that
24 point.

25 I also think that there has been an ongoing

1 consideration in the NRC Staff of what the proper relationship
2 should be between the independent authority of EPA under
3 Superfund and the authority of the NRC Staff as articulated in
4 its Order to Show Cause.

5 In 1984, we struck that balance in favor of urging
6 that EPA not take all the actions it could at that time under
7 Superfund, and that we would proceed with our proceeding.

8 Now, EPA did, however, continue certain actions it
9 had commenced -- I am using "actions" very broadly; I am
10 thinking of the letters of March 27th, 1984 -- with respect to
11 the other sites in West Chicago, and those have gone a
12 separate route, a route that as we note in our motion has
13 resulted in a consent decree now.

14 Now, I'm not trying to match up and assign to what
15 degree the fact that Kerr McGee and West Chicago have agreed
16 to undertake certain activities with respect to those sites
17 was attributable to EPA's actions under Superfund. The Staff
18 does believe that the fact that EPA did proceed with certain
19 preliminary activities under Superfund was an influence in
20 achieving certain agreements to undertake remedial activities
21 at sites in the City of West Chicago, and does believe that
22 there may well be an ability on the part of the
23 U.S. Environmental Protection Agency to proceed in a similarly
24 effective manner with respect to the Kress Creek site.

25 JUDGE FRYE: As a catalyst, in other words, to a

1 voluntary solution?

2 MR. LEWIS: That is how I understand the situation.
3 We have not put on the record of this proceeding the various
4 matters that have taken place before EPA, and I know that
5 Mr. Nickles is very familiar with them because he has
6 exchanged quite a few letters with EPA Region V on the
7 subject.

8 But generally speaking, to describe to you the
9 reason why the Staff has some hope that it will be fruitful to
10 have EPA proceed in all appropriate ways under Superfund, we
11 do believe that that is a statute that can be very effective
12 and has been very effective in these other situations in
13 effecting some remedial action.

14 JUDGE FRYE: But realistically speaking, is this
15 particular problem likely to receive much priority at EPA,
16 given their other sites that they need to worry about?

17 MR. LEWIS: Well, that would be one of the things
18 that we would want to be discussing with EPA. As I state in
19 our motion, these matters are under discussion with EPA, and
20 there are various things that EPA can do under Superfund, not
21 all of which, as I understand it, are dependent upon being
22 listed on the National Priorities List.

23 And then also, of course, EPA never did put a hold
24 on its activity of proposing that Kress Creek be listed on the
25 National Priorities List; that went forward and it is a

1 candidate for final listing. So that portion of the activity
2 with respect to Kress Creek was not held in abeyance.

3 JUDGE FRYE: Well, be that as it may, it seems to us
4 that we are virtually through with the discovery in this
5 case. We have obviously got the matter of designating
6 witnesses and preparing testimony and taking whatever
7 depositions need to be taken. We can see no reason why this
8 thing couldn't go to trial this fall and have a decision out
9 by winter or early spring.

10 Wouldn't that resolve Staff's problem about hope of
11 an early resolution?

12 MR. LEWIS: Well, I think it would resolve that.
13 The Staff did state in our motion that we believe that
14 proceeding as we have suggested would conserve the parties'
15 resources. Of course, we could really only speak for
16 ourselves.

17 Our Office of Nuclear Material Safety and Safeguards
18 has advised our Staff that because of resource considerations
19 in their office, they wish us to file a motion that would
20 allow the opportunity to determine to what extent EPA could
21 pick up a lead role in this matter and to determine whether or
22 not EPA's further actions might, as we state in our motion,
23 obviate the need for the Staff to pursue the Order to Show
24 Cause. And that is reflected in our motion. There are
25 resource considerations that also influenced the filing of

1 this motion.

2 I might say, Your Honor, that -- Mr. Nickles
3 mentioned the untimeliness -- I'm not quite sure whether that
4 is with respect to the fact that we are well down the road in
5 this proceeding, but as you, I hope, could tell from our
6 motion, we did file this motion as promptly as we could, as
7 soon as our client had made its determination as to course
8 which it should follow.

9 JUDGE FRYE: I understand that.

10 MR. LEWIS: And by putting it before you in advance
11 of this prehearing conference, we were not in any way trying
12 to take unfair advantage of the other parties, did not even
13 necessarily expect that they would be in a position to respond
14 today. But we did want to put it on the record in advance of
15 the prehearing conference so that -- rather than come before
16 you and not disclose any of this even though it was actively
17 under consideration.

18 JUDGE FRYE: Sure. We appreciate that.

19 MR. NICKLES: Could I make a comment, Your Honor?
20 The EPA started its action in March of 1984, as you will see
21 in Enclosure 2, and probably in Enclosure 1, which are the
22 letters EPA first sent to the City of West Chicago and Kerr
23 McGee. So they've been -- that's been going on a long time.

24 I could tell the Board that the consent decree with
25 the City of West Chicago was negotiated directly with the City

1 of West Chicago and not with the EPA, and was entered into to
2 settle litigation that had been ongoing with the City of West
3 Chicago.

4 I guess the concern I have is the dissipation of
5 resources in terms of having another agency which is going to
6 call upon us in a different context which may have different
7 issues which may be at variance with what's happening here
8 with regard to the fundamental question, and that is: where
9 is whatever material may be involved going to go? Is it going
10 to go to the site in West Chicago, or is it going to go
11 elsewhere, or what's going to happen?

12 It seems to me it does not make a lot of sense to
13 have a lot of different potential decisionmakers making that
14 decision because there's a chance they'll make different
15 decisions.

16 And at the heart of what I think the Brown court was
17 talking about, the Seventh Circuit, is the need to have the
18 federal agency which allegedly has the expertise in this area,
19 the Nuclear Regulatory Commission, deal with as many of those
20 issues as possible.

21 Now pursuant to that consent decree which the Board
22 has, we have reached an understanding with the City of West
23 Chicago where we've picked up -- I think by the end of the
24 fall we will have picked up all of the alleged hot spots in
25 the West Chicago area and brought them to the site. So that

1 will have been a tremendous accomplishment over the last two,
2 summer and spring, periods in which we've worked with the City
3 of West Chicago. We're also surveying other areas. We'll be
4 moving into the Reed Keplar Park and sewage treatment plant.

5 So I think to sort of jar what is at least starting
6 to gel really is very disruptive. And I don't really hear any
7 compelling justification from the Staff.

8 JUDGE FRYE: Well, I don't know that -- I think we
9 should give you an opportunity to respond in writing if you
10 want it. Do you want it?

11 MR. NICKLES: We'd be happy to respond in writing,
12 and we'd like at the moment, since the proceeding is ongoing,
13 to have our Motion to Compel heard and ruled on.

14 JUDGE FRYE: Yes. Do you want to respond in
15 writing, Ms. Rapkin, to the Staff's motion?

16 MS. RAPKIN: Yes, I do.

17 JUDGE FRYE: Well, we will get responses in
18 accordance with the Rules, and then we will rule.

19 Now, Ms. Rapkin, did I understand that you were
20 going to make a motion?

21 MS. RAPKIN: We are not going to make a motion.

22 JUDGE FRYE: All right. Well, let's proceed, then,
23 on the motions to compel that are pending.

24 MR. MESERVE: With regard to the Kerr-McGee motion
25 to compel, I really only want to make one point. We are very

1 happy to rest with the briefs, which I think set out the
2 dispute between the parties fairly and accurately.

3 The only point that I would like to flesh out that
4 was not really developed adequately, in my view, in the brief
5 concerns the State's efforts to respond to certain of the
6 interrogatories by announcing that they would produce certain
7 non-privileged documents, and those are Interrogatories 19,
8 20, and 24.

9 In Interrogatory 19, for example, we ask about
10 sampling in Kress Creek and ask whether samplings have been
11 taken. We go on in the remainder of that interrogatory to ask
12 a series of questions about the sampling process, as to where
13 the samples were taken and who did it, and describe the method
14 and so forth -- in other words, to give us all the information
15 that's necessary of samples that were taken to be able to
16 assess their reliability and what weight we should give to the
17 results -- in other words, give us the information we need to
18 be able to evaluate the sampling data.

19 The State announces that it would produce
20 non-privileged documents, and scattered through the materials
21 they have submitted to us is what is clearly sampling data.
22 The problem is that the documents, based on our review, don't
23 answer most of the subparts of the interrogatory with regard
24 to who did the sampling, what methods did they use, what
25 protocol. That material just isn't present in the documents

1 that have been produced.

2 The State suggests in their answer to that
3 interrogatory that our remedy is, quote, "to take a
4 deposition." Well, that's no remedy at all, especially when
5 you look at the fact that they haven't indicated even the
6 people who took the samples or the people who did the testing
7 and analysis. They haven't even identified the people that we
8 should go take a deposition -- of whom we should take a
9 deposition.

10 That really is the only point I want to make. I
11 think that we've argued already with regard to the impact of
12 Rule 33(c) on their State's efforts here, in any event, even
13 if the documents had answered the interrogatories, but even
14 beyond that, there is a strong and compelling reason to grant
15 the motion as to these interrogatories for the fact that they
16 really don't answer the interrogatories. That's really the
17 only point I wanted to make, to supplement the papers.

18 JUDGE FRYE: Ms. Rapkin?

19 MS. RAPKIN: Well, my only response on the issue
20 that is raised is that we stood on our right, under the
21 Federal Rules of Civil Procedure, to answer with documents.
22 To the extent that the documents are not as complete as
23 Kerr-McGee would understandably like, the same work would be
24 required and the same organizational effort by Counsel of the
25 People of the State of Illinois to gather all the information

1 on protocols and split samples and all the very, very detailed
2 information that was asked for, as it will be for Kerr-McGee.

3 Now if I remember correctly, the sampling data that
4 I saw from DNS shows who the individuals are who took the
5 samples. I know that every IEPA sampling report shows who
6 takes the samples. If there are samples which do not have
7 those names, then I will commit here to, if the company
8 provides me with copies of those, then I will try to find out
9 who took the samples. But as for providing all the
10 information on protocols and split samples and the rest of it,
11 it seems to me that the case law under the Federal Rules makes
12 clear that insofar as it would be as burdensome for us to put
13 that information together as for the Licensee here, then their
14 remedy really is to depose the people who took the samples.

15 JUDGE FRYE: Is there any possibility that you all
16 can resolve that, based on her comments?

17 MR. MESERVE: I don't think so.

18 JUDGE FRYE: Okay.

19 MR. MESERVE: I don't think so.

20 MR. NICKLES: The problem is, Your Honor, that you
21 can't look at the information and get the information, and the
22 Federal Rule was not set up to say, "Go depose somebody."

23 JUDGE FRYE: That's it for the Kerr-McGee motion to
24 compel?

25 MR. MESERVE: Yes, sir.

1 JUDGE FRYE: Then let's move to the People's motion
2 to compel.

3 MR. EGGERT: Judge Frye, I just have really one
4 observation to make on our motion to compel, and that is, I
5 think for the most part everything we've got to say has been
6 said in writing, but as to one of the interrogatories,
7 Interrogatory No. 4, which goes to the question of cleanup
8 criteria and costs -- and I guess the point I want to make on
9 this is that Kerr-McGee's answer, which is since they don't
10 think any cleanup is required, they don't know what the
11 criteria would be, and they don't have any idea what the costs
12 would be -- that's inconsistent with one of their central
13 defenses to this whole show-cause order, which is that it
14 would cost too much to cleanup.

15 They can't have it both ways. Either they don't
16 know what it would cost to clean up, because they don't know
17 what cleanup means, in which case it doesn't make any sense to
18 say it would be too costly, or they do know, in which case
19 they should answer the interrogatory. It seems to me that
20 their answer here is inconsistent with one of their central
21 defenses for the whole show-cause order.

22 JUDGE FRYE: Well, as I understand their position,
23 it is that no cleanup is required. And if that's their
24 position, it would seem to me that any cleanup would be too
25 costly.

1 MR. NICKLES: Absolutely.

2 MR. EGGERT: I don't read that in their answer. If
3 that is indeed their answer, and they are willing to commit on
4 that to the record, then that's somewhat different from what
5 I've seen in writing.

6 Be that as it may --

7 JUDGE FRYE: Is that your answer?

8 MR. NICKLES: Yes.

9 JUDGE FRYE: I think that answers that, then.

10 MR. EGGERT: Fine. Well, then the cost defense is
11 easily dealt with on the merits.

12 So be that as it may, as for the rest of our motion,
13 I think I'm prepared to stand on our paper.

14 JUDGE FRYE: Okay. And that takes care of all the
15 matters that we had?

16 I'm sorry?

17 MR. NICKLES: I don't know if we have anything to
18 add to that. Mr. King was going to answer.

19 Do you have anything to add?

20 MR. KING: I think, as Mr. Nickles has said, the
21 answer to No. 4 specifically says, Kerr-McGee does not believe
22 that cleanup is required, period.

23 JUDGE FRYE: Yes, that was my recollection, too.

24 MR. KING: Therefore no further answer is required,
25 and we are content to rest on our papers as well.

1 JUDGE FRYE: Let us take about fifteen minutes and
2 look at this, and we'll be back and give you the rulings.

3 MR. NICKLES: Do you want to deal now, Your Honor,
4 with the question of the compliance period, or do that after
5 the break -- on the other case?

6 JUDGE FRYE: Let's do that after the break, and I
7 would think it would probably be the same for both cases. And
8 I was going to suggest and let you all comment on it, why
9 don't we make -- let's see, today is the 11th -- I would
10 suggest October 11, and we will get your comments on that.

11 MS. RAPKIN: October 11th for what?

12 JUDGE FRYE: Compliance with the rulings that have
13 been issued today on discovery matters. We will get your
14 comments when we come back.

15 MS. RAPKIN: Okay. And as Mr. Eggert just said,
16 before you enter an order on that, we do have a statement to
17 make.

18 MR. EGGERT: We would like to be heard before you
19 make an order.

20 JUDGE FRYE: Sure.

21 MR. NICKLES: Are we going to reargue this again,
22 Your Honor?

23 JUDGE FRYE: This is just on the compliance date?
24 Oh, sure, right. I'm just throwing this out, and when we come
25 back, anybody who wants to make a comment on it is free to do

1 so.

2 [Brief recess.]

3 JUDGE FRYE: Let's go back on the record.

4 Any comments on October the 11th?

5 MS. RAPKIN: Yes. We are going to have to ask the
6 Board to set any date relating to compliance with the
7 discovery orders or any kind of discovery orders as May 1 of
8 1986, and we do this because of the pending State Court trial,
9 which is in the midst -- we're in the midst of depositions
10 right now. We have numerous pretrial motions and other
11 matters to deal with before February 6th, and then on February
12 6th the trial begins, and we assume that it will run for eight
13 to twelve weeks.

14 Number one, let me say that even if there is a
15 waiver of the Part 51 rule concerning the relationship of
16 hearing date to the completion of DES and FES, supplemental
17 DES and FES, we wouldn't be going to hearing in this matter
18 until at least next summer anyway. So we don't feel --

19 JUDGE FRYE: In West Chicago.

20 MS. RAPKIN: In West Chicago. I assumed that that
21 was --

22 JUDGE FRYE: I was thinking of both really. You're
23 speaking to West Chicago.

24 MS. RAPKIN: Yes, I'm speaking to West Chicago.

25 So we don't feel that there would be any serious

1 prejudice to postponing to May 1 the date for compliance with
2 discovery orders.

3 Moreover, there have been a number of remarks this
4 morning by Kerr-McGee to the effect that this matter -- and
5 I'm referring to the Rare Earths matter -- is two years old,
6 that the intervention petitions were filed -- the notice of
7 opportunity for hearing and the intervention petitions were
8 issued and filed respectively two years ago. I want to point
9 out that the State Court trial has been pending for five and
10 a half years. In April of 1980, it was filed. And we finally
11 at long last, after years of haggling over jurisdictional
12 questions and preemption questions, we are finally going to
13 trial in that case starting on February the 6th.

14 We, the Assistant Attorneys General sitting here
15 today, have an obligation to our client, the People of the
16 State of Illinois, and to Circuit Judge Hensey in DuPage
17 County not only to be ready for trial on February the 6th, but
18 to be properly prepared for trial on February the 6th, and we
19 cannot be ready for trial on February the 6th or properly
20 prepared if we have a lot of work to do with discovery and so
21 forth in another matter.

22 There has also been a lot of -- there have been many
23 suggestions made this morning that the People of the State of
24 Illinois are utilizing their rights under state law and
25 utilizing the pendency of the State Court action as a way of

1 delaying a hearing in the NRC Rare Earths matter and as a way
2 of avoiding a decision by this forum.

3 I want to state for the record that it is our
4 position that Kerr-McGee may well be using the discovery
5 process available in the NRC to delay the State Court
6 proceeding. Whether they are or they are not -- that is to
7 say, whether or not that is their intention -- is really
8 irrelevant to our request for a May 1 date, because the
9 effect, the practical effect, of having to engage in extensive
10 discovery in this proceeding, or in the Kress Creek proceeding
11 for that matter, prior to the completion of the State Court
12 trial, will result in very poor preparation for that trial.

13 And so for those reasons, we must ask for a May 1
14 date.

15 JUDGE FRYE: How about Kress Creek?

16 MS. RAPKIN: I think that we will probably have to
17 say the same thing there. In Kress Creek, as in this
18 proceeding, the Rare Earths proceeding, I would assume that
19 most of the paper discovery is done. If we do not move to
20 reconsider and the Board does, in fact, not reconsider its
21 ruling on the interrogatory responses in the Rare Earths
22 proceeding, there will be a lot of work there to do.

23 That won't be the case for Kress Creek, but
24 depositions have not begun in either Kress Creek or Rare
25 Earths. And people certainly cannot engage in depositions in

1 the Kress Creek matter until after the State Court trial is
2 over.

3 MR. NICKLES: Your Honor, when a party intervenes in
4 a case, I think it is either implicit or explicit, and
5 certainly it is part of the case law, as I recall it, that the
6 intervention will not unduly delay the proceeding. It is the
7 responsibility of the party that seeks to intervene in a case.

8 I think it's an affront to the Board to have this
9 hearing called on matters that have been outstanding for many
10 months, since March of '85, to have full argument, full
11 briefing, in which we've invested tremendous resources, and
12 then to have, upon careful reflection, an order issue, and
13 then in effect have the State say that that order will be
14 frustrated by delaying compliance to May, when you've already
15 heard the State say that by the State Court proceeding, we
16 hope, in effect, to derail this proceeding altogether.

17 We don't believe that we are going through empty
18 gestures here in attending this pretrial. We take these
19 matters seriously. We have taken the discovery process
20 seriously and expended tremendous resources to be in
21 compliance with this Board's orders. And I think it's
22 outrageous to tell the Board, "We cannot comply until May 1,
23 1985 in either proceeding."

24 And I would have thought that 20 days was well
25 beyond the realm, given the outstanding nature of these

1 matters, and certainly October 11, which is 30 days, is
2 plenty, and we would hope that the Board would not deviate
3 from that position.

4 JUDGE FRYE: I think we will give you a ruling on
5 this when we have the papers on the certification matter in
6 West Chicago before us and when we have the answers to the
7 Staff's motion to hold Kress Creek in abeyance.

8 But I want to caution you. We are not at all
9 sympathetic to delaying until next year.

10 MS. RAPKIN: We understand that, Your Honor, but we
11 need to make our position clear on the record.

12 JUDGE FRYE: I understand that, and you certainly
13 have every opportunity to do that.

14 MR. EGGERT: And just so the record is clear, Your
15 Honor -- and I say this with all respect to this forum and to
16 the parties -- if we're in a position where we're being
17 forced, where we're being squeezed -- and I think that's the
18 attempt that is going on -- and where I think there's an
19 attempt to derail a trial date that was set last February in a
20 case that's five and a half years old, we may have to move
21 against Kerr-McGee for an injunction against them proceeding
22 in this forum in the State Court. The State Judge does have
23 that authority. I hope it doesn't come to that, but I don't
24 want anybody here to walk out of here today and say that I
25 didn't put them on notice.

1 MR. NICKLES: I think that's a threat that should
2 not be made to an agency that has the mandate it has.

3 JUDGE FRYE: I didn't take it as a threat to the
4 agency. I took it as a threat to Kerr-McGee.

5 [Laughter.]

6 MR. EGGERT: That's exactly right.

7 MR. NICKLES: Well, it is the agency that is hearing
8 our application. The Board has ruled on the merits of our
9 motion, and what is being said is that if the Board seeks to
10 enforce its order in a way that is not agreeable to the State,
11 the State will seek to pursue Kerr-McGee. That's a threat not
12 only to Kerr-McGee; it's a threat to the Board and to the
13 Commission.

14 JUDGE FRYE: Well, we'll worry about that when and
15 if it happens.

16 Now as to rulings, on Kerr-McGee's motion to compel,
17 we grant the motion as to Interrogatories 1.C, 3.B, 4.C, 5.D
18 and 15.D.

19 MS. RAPKIN: Could you repeat that, please?

20 JUDGE FRYE: 1.C, 3.B, 4.C, 5.D, and 15.D. These
21 were interrogatories seeking factual underpinning for the
22 Contentions in the case.

23 As to Interrogatories 19, 20 and 24 on the sampling,
24 we grant the motion.

25 As to Interrogatory 11, we grant the motion. That

1 was the "significant" matter.

2 As to Interrogatory 18, which sought information on
3 all private and public meetings which State officials have
4 participated in, we deny the motion.

5 Now as to the People's motion to compel, we deny it
6 as to Interrogatory 1. We deny it as to Interrogatory 12. We
7 deny it as to Interrogatory 20, and grant it as to
8 Interrogatory 36.

9 JUDGE FRYE: Anything further?

10 MR. MESERVE: I believe there are two minor matters
11 that I think we ought to clear up, Your Honor.

12 I hate to go back to the License Amendment
13 proceeding, but none of us on this side, at least, heard the
14 order that you had issued with regard to our Interrogatories
15 54 and 55. Those were interrogatories that dealt with
16 communications.

17 JUDGE FRYE: Granted -- wait a minute; I'm sorry --
18 wait a minute, 54. I have 54 listed in your group that
19 concerned the objection that they called for legal
20 conclusions.

21 MR. MESERVE: That objection was made in that
22 interrogatory. It dealt with communications. We listed it
23 twice. 55 is only listed under the communications subset.
24 That had to do with, as I recall it, documents relating to
25 communications that were described in Interrogatory 54.

1 JUDGE FRYE: I'm sorry. I don't have that one
2 listed separately, 55.

3 Oh, here we are.

4 [Pause.]

5 Yes, we granted the motion as to that.

6 MR. MESERVE: There was one other matter that bears
7 on both cases. I believe the State indicated this morning
8 that it would only substantiate its privilege claims if the
9 Board would issue an order to that effect, and you indicated
10 this morning you would do that, and I just wanted to make that
11 --

12 JUDGE FRYE: Yes, we will. That will be
13 incorporated in the order.

14 MR. MESERVE: With regard to the Kress Creek matter,
15 we have this matter as to who are the parties in that
16 proceeding.

17 JUDGE FRYE: I think that really is covered by the
18 argument that we had in the West Chicago, and I am going to
19 withhold ruling on that one and cover that in our written
20 ruling which should be out next week.

21 MR. MESERVE: I would also like to make one other --
22 or mention one other matter. We have this issue as to when
23 the compliance deadline that will be before the Board, that we
24 would urge that whatever date is set, that the Board make it
25 clear that that is the date for supplementation of

1 interrogatories, substantiation of privilege claims, and for
2 the actual production of documents on that date.

3 And I bring up the document production because a
4 large number of our interrogatories, which you have now
5 granted that need to be supplemented, deal with the
6 identification of documents, and our document production
7 request now comes back into being, where we anticipate that
8 there may be some other documents that the State will be
9 producing, and we've had some problems with regard to when we
10 see things, and we'd like to make it clear or urge that the
11 Board set a compliance date by which the document production
12 is to be accomplished.

13 JUDGE FRYE: Yes.

14 MR. MESERVE: Thank you.

15 JUDGE FRYE: Anything further?

16 MR. LEWIS: One minor item, Your Honor. The
17 Certificate of Service which we attached to our motion in
18 Kress Creek to hold the proceeding in abeyance states that we
19 made service by regular mail on Ms. Rapkin. In fact, we did
20 make in-hand service on her yesterday, and I believe you
21 earlier said that the parties would have the time allowed by
22 the Rules to respond.

23 This was brought to my attention, and I believe that
24 the People have no objection to proceeding under the ten-day
25 time period without the benefit of five additional days for

1 service.

2 MS. RAPKIN: That's correct.

3 JUDGE FRYE: You have no objection, I'm sure.

4 MR. MESERVE: Certainly no objection. We were
5 served by hand, and we will be complying by the deadline as
6 well.

7 JUDGE FRYE: Okay. So that will be the 20th.
8 Anything further?

9 [No response.]

10 JUDGE FRYE: Thank you very much. This prehearing
11 is adjourned.

12 [Whereupon, at 3:35 o'clock, p.m., the prehearing
13 conference in the above matter was concluded.]

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1 CERTIFICATE OF OFFICIAL REPORTER

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4
5 This is to certify that the attached proceedings
6 before the United States Nuclear Regulatory Commission in the
7 matter of: KERR-MCGEE CHEMICAL CORPORATION

8
9 Name of Proceeding: (Kress Creek Decontamination)

10
11 Docket No.: 40-2061-SC/ License No. STA-583/ASLBP No.
84-502-01 SC

12 Place: Bethesda, Maryland

13 Date: Wednesday, September 11, 1985

14
15 were held as herein appears and that this is the original
16 transcript thereof for the file of the United States Nuclear
17 Regulatory Commission.

18
19 (Signature)

(Typed Name of Reporter) Suzanne B. Young

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21
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23 Ann Riley & Associates, Ltd.
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