

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

KERR-McGEE CHEMICAL CORPORATION

(West Chicago Rare Earths Facility)

Docket No. 40-2061-ML
ASLBP No. 83-495-OI-ML

Location: Bethesda, Maryland

Date: Wednesday, September 11, 1985

Pages: 267 - 410

— ANN RILEY & ASSOCIATES —

Court Reporters

1625 I St., N.W.

Suite 921

ington, D.C. 20006

(202) 293-3950

TR-0701
8509130266 850911
PDR ADOCK 04002061
B PDR

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY & LICENSING BOARD

- - - - -x

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

- - - - -x

Fifth Floor Hearing Room

4350 East-West Towers

4350 East-West Highway

Bethesda, Maryland

Wednesday, September 11, 1985

The above-entitled proceeding came on for hearing
before the Atomic Safety & Licensing Board, pursuant to
notice, commencing at 9:30.

BEFORE:

John H. Frye III, Chairman

James H. Carpenter, Board Member

Peter A. Morris, Board Member

1 APPEARANCES:

2 FOR THE APPLICANT:

3 Richard A. Meserve, Esq.

4 Peter Nickles, Esq.

5 Sonya S. Winner, Esq.

6 David Paul King, Esq.

7 Covington & Burling

8 1201 Pennsylvania Avenue, N.W.

9 Washington, D.C. 20044

10

11 FOR THE NRC STAFF:

12 Stephen H. Lewis, Esq.

13 Ann P. Hodgdon, Esq.

14 Robert Fonner, Esq.

15 Office of Executive Legal Director

16 U.S. Nuclear Regulatory Commission

17 Washington, D.C. 20555

18

19 FOR INTERVENOR STATE OF ILLINOIS:

20 Russell Eggert, Esq.

21 Anne L. Rapkin, Esq.

22 Assistant Attorney Generals

23 Attorney General's Office

24 100 W. Randolph Street

25 Chicago, Illinois 60601

1 ALSO PRESENT:

2 Ivan L. Denny

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

JUDGE FRYE: On the record.

This is a prehearing conference in the matter of the Kerr McGee Chemical Corporation's application for a license amendment which would permit disposal of thorium mill tailings which are contained on its site in West Chicago, Illinois.

On my right is Dr. Peter Morris, who is a full-time member of the Atomic Safety and Licensing Board Panel, who is trained in nuclear physics. On my left is Dr. James Carpenter, an environmental scientist who specializes in chemistry. I am John H. Frye, a lawyer and a permanent member of the Atomic Safety and Licensing Board panel.

The purpose of the conference is to consider various discovery disputes which have arisen between the parties, and principally between Kerr McGee and the people of the State of Illinois.

At this point I would like to ask counsel if they would identify themselves for the record. We will begin with Mr. Lewis.

MR. LEWIS: My name is Stephen H. Lewis, counsel for the NRC Staff. On my right is Robert L. Fonner, and on my left is Ann P. Hodgdon, also counsel for Staff.

MS. RAPKIN: I am Anne Rapkin with the Illinois Attorney General's Office, representing the people from the State of Illinois, and with me is Russell Eggert, also from

1 the Illinois Attorney General's Office, Assistant Attorney
2 General and Administrative Assistant.

3 JUDGE FRYE: Thank you.

4 MR. NICKLES: My name is Peter Nickles, and with me
5 is Dick Meserve, Sonya Winner and David King, of the law firm
6 of Covington & Burling, representing Kerr McGee.

7 JUDGE FRYE: Thank you very much.

8 Before we get into the argument, let me say that we
9 have read the motions and responses and so we are thoroughly
10 familiar with the contents of them, so if you would restrict
11 your arguments to matters which are not contained therein, I
12 think we can move along a little faster. I don't believe
13 there is any need to rehash matters that you have already
14 argued in the papers.

15 With that, I see we have the first matter, the Kerr
16 McGee Motions to Quash.

17 MS. MESERVE: Thank you very much, Judge Frye.

18 As you know, this motion deals with subpoenas that
19 were served on James L. Grant and the custodian of records of
20 Catalytic, Inc. at their Oak Brook office in Oak Brook,
21 Illinois. Let me just make a capsule summary of the facts.
22 I realize you have read the papers.

23 The facts are that James Grant worked for a company
24 called Law Engineering until 1983, and he did do work on Kerr
25 McGee's stabilization plan that was submitted to the NRC. He

1 had left Law Engineering in 1983 and is now with his own
2 company, James L. Grant & Associates, in Denver, and he is
3 working with Kerr McGee and providing expert advice on many
4 of the same matters for which he had advised Kerr McGee in its
5 preparation of the stabilization plan.

6 Catalytic, Inc. was hired in 1980 also to provide
7 engineering services. Some of them relate to this proceeding.
8 Much of their work is related to the decontamination and
9 destruction of the buildings on the site, design of a surface
10 water flow system, the construction of an incinerator, and so
11 forth.

12 Catalytic, Inc., however, although it still exists
13 as a company, was replaced in 1984 by a different company,
14 Stearns Catalytic, which is a sister corporation. Catalytic
15 has no office in Oak Brook. Work is still being performed by
16 Stearns Catalytic elsewhere, not in Oak Brook.

17 It is our contention that the motion must be granted
18 and the subpoenas should be quashed for several reasons. It
19 is our contention that as to Catalytic, Inc. the motion must
20 be quashed because it's directed at an entity that no longer
21 exists. As to both to James Grant and, if somehow the Board
22 were to construe the subpoena as applying to something other
23 than Catalytic, Inc. -- namely, to Stearns Catalytic -- we
24 believe the law provides that the State is not entitled to
25 discovery.

1 JUDGE FRYE: Let me say that we are inclined to view
2 the subpoena as applying to Stearns Catalytic and reach the
3 merits of the matter. I think, too, we could, of course
4 reissue the subpoena to Stearns Catalytic, but that would just
5 present the same controversy all over again.

6 Is that acceptable to you?

7 MS. MESERVE: As a matter of fact, we have
8 voluntarily agreed -- and this is represented in our papers --

9 JUDGE FRYE: I thought so.

10 MS. MESERVE: -- that we were fully prepared to
11 comply with the subpoena to the extent it covers that work
12 which was performed by Catalytic, Inc. and Stearns Catalytic
13 that was not performed in preparation for or in anticipation
14 of litigation. So that the matters that preceded the
15 stabilization plan and the other documents, which are very
16 voluminous, which relate to the destruction of buildings and
17 these other matters that Catalytic performed for Kerr McGee,
18 that we are prepared to allow the inspection of those
19 documents.

20 What we are really dealing with here is the
21 documents as to both Dr. Grant and as to Stearns Catalytic, we
22 are really dealing here with the access to the papers which
23 they have generated in their role of providing Kerr McGee with
24 expert advice in anticipation of this litigation and
25 litigation in the State Court.

1 JUDGE FRYE: Now, Stearns Catalytic was retained, if
2 I am not mistaken, prior to any hearing being noticed in this
3 proceeding.

4 MS. MESERVE: Stearns Catalytic, I believe, was --
5 that's correct. Stearns Catalytic was hired in 1980, which
6 was after State Court litigation had commenced, however.

7 JUDGE FRYE: The purpose of the contract between
8 Kerr McGee and Stearns Catalytic, which we have looked at,
9 seems to us to go toward the proposition that Stearns
10 Catalytic would be providing advice with regard to your
11 application before the NRC. Is that correct?

12 MS. MESERVE: That is correct. The contract does
13 cover the fact that Stearns Catalytic will be available to be
14 a witness for us in proceedings before you and before the
15 State Court. What really is the essence of the issue that we
16 have before us is that Stearns Catalytic and James Grant
17 really as experts have worn two hats. On the one hand, they
18 have provided advice to Kerr McGee in the ordinary course of
19 business. It is those papers we have voluntarily agreed to
20 produce as to Stearns Catalytic and not as to Dr. Grant
21 because he doesn't have papers that he did in his ordinary
22 course of business.

23 We are really talking now about the work that they
24 have done in their role as an expert. You have seen the
25 contracts as to both Stearns Catalytic and Dr. Grant. What

1 has really happened here that really may not be adequately
2 reflected in the contracts is that as this proceeding has
3 evolved, their role has evolved.

4 Kerr McGee has not issued two contracts. There are
5 not contracts, for example, with us as Kerr McGee's
6 attorneys. The reason is that this is not a usual type of
7 litigation where you might have an expert who works directly
8 with the attorneys. This is a case which involves very
9 complicated technical matters, as I am sure the Board is
10 aware, requires the integration of large amounts of
11 information among Kerr McGee's in-house staff and a variety of
12 external experts that Kerr McGee has retained.

13 In sort of bringing this network of information
14 together, it has been most efficient to retain the same
15 relationships that existed before, but the purpose and
16 function of their activity has been pursuant to addressing the
17 issues which are raised in this proceeding in State Court
18 litigation.

19 JUDGE FRYE: How many times has your application
20 been amended since the commencement of this proceeding?

21 MR. NICKLES: Excuse me, Your Honor. How many,
22 Ivan? Mr. Denny is speaking and I would rather defer to him.

23

24 MR. DENNY: I believe there are ten amendments, with
25 one pending, to the license.

1 JUDGE FRYE: Your pending license amendment
2 application, your stabilization plan, I am curious to know
3 how many times you have amended that since the commencement of
4 this proceeding.

5 MS. MESERVE: It's on the order of ten times, I
6 understand from Mr. Denny.

7 MR. NIXON: I think we are getting confused about
8 amendments to their existing license and amendments --

9 MR. NICKLES: I think we are speaking about
10 amendments to the license as distinct from the stabilization
11 plan. I think that's what the Judge meant by --

12 JUDGE FRYE: Well, I'm curious. I may not have
13 phrased it as well as I should have, but I am curious as to
14 the number of amendments to the stabilization plan, the
15 matter that is at issue in this hearing.

16 MS. MESERVE: I believe there was --

17 [Discussion off the record.]

18 MS. MESERVE: I have conferred with Mr. Denny, and
19 he reminds me that there was one amendment. Initial
20 stabilization plan was filed with the NRC in 1979, mid-July
21 1979. Then there was a very major supplement to the
22 stabilization plan that was submitted in late 1981 that dealt
23 with a large number of matters and changed a large measure of
24 the original submission that Kerr McGee had filed.

25 JUDGE FRYE: And the notice of hearing, as I recall,

1 was in the summer of 1983, so all of that transpired before
2 the notice of hearing.

3 MS. MESERVE: Yes.

4 JUDGE FRYE: Now, since the summer of 1983, what
5 sort of interaction has there been between the Staff and Kerr
6 McGee with regard to the application on which Stearns
7 Catalytic might have been required to make some presentations
8 on behalf of Kerr McGee? You may need to refer to Mr. Denny.

9 MS. MESERVE: Between Staff and Kerr McGee?

10 JUDGE FRYE: Yes. Normally in a license amendment
11 proceeding or a license application, there will be a good deal
12 of interaction between the Staff of the Commission and the
13 license applicant. The Staff will pose questions, the license
14 applicant will answer the questions, and I'm curious to know
15 to what extent that has gone on.

16 [Discussion off the record.]

17 MS. MESERVE: I have conferred with Mr. Denny, and
18 he informs me to the best of his recollection that the only
19 question that has been directed solely at the matter raised in
20 the stabilization plan by the Staff was a request that Kerr
21 McGee provide information to the Staff with regard to the
22 volumes of material that might be brought on to the site from
23 some of the off-site areas in West Chicago.

24 There have been a number of amendments to the Kerr
25 McGee license that have taken place over this entire --

1 JUDGE FRYE: But those are not at issue.

2 MS. MESERVE: Those are not at issue here and they
3 have been granted on the basis that they would not have any
4 effect on this proceeding. And there have, of course, been
5 interactions between the Staff and Kerr McGee with regard to
6 those licenses.

7 MR. LEWIS: Mr. Chairman, there is one other
8 matter. In early 1984, at the request of the Staff, Kerr McGee
9 submitted an analysis of compliance of the disposal plan with
10 40 CFR 192. I don't know whether that is something that
11 relates to the work of Stearns Catalytic or not, but that was
12 also a report that was submitted to us which relates to the
13 stabilization plan.

14 JUDGE FRYE: Thank you. Is that Stearns Catalytic
15 work product?

16 MR. NICKLES: Your Honor, that was a memorandum, I
17 think. To what extent the Stearns Catalytic people were
18 helpful in the preparation of that memorandum, I don't think
19 we personally know. I don't think we were involved in this
20 proceeding at that time.

21 JUDGE FRYE: No, I know you weren't.

22 MS. MESERVE: That was submitted, of course, to the
23 Board as well.

24 JUDGE FRYE: We have it. But my question is whether
25 Stearns Catalytic prepared it. Maybe Mr. Denny knows that.

1 Do you know, Mr. Denny?

2 MR. DENNY: They may have supported us on a few
3 points, but primarily it was prepared by the company, or the
4 company counsel.

5 JUDGE FRYE: I see. All right.

6 So I think we can assume from that that Stearns
7 Catalytic since the commencement of this proceeding has not
8 done any work with regard or has done very little work with
9 regard to supporting the company in the Staff's processing of
10 the application.

11 MS. MESERVE: That's correct.

12 JUDGE FRYE: Okay.

13 MS. MESERVE: Largely because there has been very
14 little interaction on technical matters back and forth between
15 the Staff and Kerr McGee.

16 JUDGE FRYE: So their work with regard to the
17 application basically took place prior to the submission of
18 the application.

19 MS. MESERVE: There is a large amount of work they
20 have done since the commencement of this proceeding. In
21 connection with the contentions that have been raised in this
22 proceeding, we have a large number of engineering issues.

23 JUDGE FRYE: That's the point I was leading to.

24 MS. MESERVE: They have hardly -- it's been a very
25 major effort at Stearns Catalytic in assisting us in

1 responding to the issues that have been raised, particularly
2 by the State in this proceeding.

3 MR. NICKLES: Your Honor, I might add that I think
4 the bulk of what we are talking about falls under that
5 category. We are talking about a tremendous effort that they
6 have pursued under our direction in connection with the
7 upcoming hearing which we had hoped prior to receiving the
8 Staff's notice would have been rather soon. That is really
9 the issue. Those are the documents we are talking about,
10 essentially in connection with what we thought would be a
11 prompt hearing in this matter.

12 JUDGE FRYE: The West Chicago disposal matter?

13 MR. NICKLES: Yes. And also it would be available
14 for what is now scheduled to be a trial in Chicago State Court
15 in February.

16 JUDGE FRYE: Fine. Anything else, Mr. Meserve, on
17 this?

18 MS. MESERVE: Well, let me just quickly encapsulate
19 one element of our legal argument that perhaps had not been
20 adequately developed in our briefs. That is, not only has the
21 requirement of Rule 26(b)(4), which has been incorporated by
22 several Licensing Boards in the NRC's own operating procedures
23 required that there be exceptional circumstances before there
24 is discovery of an expert who has not been designated as a
25 witness, but even for those who are designated as witnesses,

1 that the rule provides for very limited discovery.

2 It is basically to respond to interrogatories as to
3 the testimony that that expert is going to give at the hearing
4 and as to the basis therefor, and anything else is at the
5 discretion or direction of the Judge. The rules don't provide
6 as a matter of right that one has access to, for example, all
7 the files of an expert who is going to be a witness. It is a
8 matter that really gets worked out among the parties.

9 I think there is one other factual matter that I
10 ought to bring to the Board's attention that has transpired
11 since the papers were filed in this case, that this really
12 isn't an abstract exercise. Our papers talk about the need
13 for reciprocity in the disclosure of experts and access to the
14 information of experts, and I would like to inform the Board
15 that exactly that is happening in the State Court litigation
16 now.

17 The State and Kerr McGee have exchanged lists of
18 people who they propose to call as witnesses in that
19 proceeding, and the parties are attempting to work out
20 arrangements with regard to what their testimony of each
21 witness is going to be and work out reciprocal arrangements as
22 to the documents that have been prepared in preparation for
23 that litigation by the various experts.

24 So that there is in state court litigation. Exactly
25 this kind of reciprocity is occurring.

1 JUDGE FRYE: Well, one of the things that we want to
2 take up in these two prehearing conferences was a schedule for
3 the exchange of expert witness lists.

4 MR. NICKLES: Might I note on that, your Honor, that
5 we have always been of the view and expressed it in the state
6 court that that state court proceeding is in effect a
7 duplicate of this one.

8 We have given to the state, and the state has given
9 to us, their list of witnesses, expert witnesses. I must say,
10 as we explained in our letter to Ms. Rapkin, those expert
11 witnesses are the same individuals basically that we had
12 contemplated using in this proceeding.

13 JUDGE FRYE: So in effect that exchange has already
14 taken place?

15 MR. NICKLES: In effect, that exchange has taken
16 place. The Staff has asked to be kept informed, and they have
17 been kept informed. But that also goes to a point that is
18 relevant to the question raised by the motion to quash, in
19 that this is not a situation where we have an ordinary citizen
20 who does not have access to potential expert resources. The
21 Staff has listed a whole group of experts who are going to
22 testify in support of the people's contentions, and we have
23 experts who will testify in support of our position.

24 I do not believe this is a situation where this
25 proceeding ought to be used to evade the proscriptions on

1 work prepared in anticipation of litigation.

2 JUDGE FRYE: In the state court proceeding?

3 MR. NICKLES: The state court proceeding is going
4 forward. We are hoping to meet with Ms. Rapkin even this
5 week, and Mr. Eggert, to talk about the exchange of documents
6 prior to deposition. The depositions of the experts are
7 scheduled to take place I think in October, and going through
8 mid-November.

9 We have listed eight or 10 experts -- I think the
10 state has six or so, but there is a large number of experts
11 who are testifying in a variety of areas that are peculiar,
12 not only to the state court, but to this case as well.

13 So that procedure has gone forward already, and
14 there is discovery cut-off in the state court proceeding,
15 which to some extent will be modified by agreement of the
16 parties, but all those experts presumably will be deposed and
17 the substance of their testimony will have been exchanged and
18 examined by the end of November.

19 So it is not as if anybody has been deprived of
20 anything. The Staff is willing to attend those depositions,
21 and we have committed to supply them with deposition
22 transcripts.

23 JUDGE FRYE: Anything further with regard to the
24 motions to quash?

25 MR. MESERVE: No, your Honor.

1 MR. LEWIS: Mr. Chairman, there was one matter.
2 Mr. Nickles said, I believe inadvertently, that the Staff had
3 provided a list of witnesses.

4 JUDGE FRYE: He meant the state staff, yes. I know.
5 Ms. Rapkin?

6 MR. EGGERT: Judge Frye, I think I will take these
7 motions.

8 So I can pick up where Mr. Meserve left off, we
9 think it is interesting that Dr. Grant is listed as one of the
10 witnesses in the State court proceeding. So to the extent
11 that their motions to quash or modify are based on his status
12 as a non-designated witness in this proceeding, they carry
13 considerably less force, since he is going to be a witness in
14 the State court, apparently.

15 JUDGE FRYE: Oh, you are going to depose him in the
16 State court proceeding, I take it?

17 MR. EGGERT: That's right. But let me point out
18 that I think we disagree very strongly that the issues are
19 identical in the State court proceeding to this proceeding
20 and, indeed, we argued that at some length, I think, both in
21 previous papers here and certainly papers we have filed in the
22 State court. And we have agreed, as a matter of fact, with
23 Kerr-McGee that to the extent that there are issues in this
24 proceeding which are not present in the State court
25 proceeding, that the discovery and depositions in the State

1 court proceeding will not go into those areas.

2 That is done purely for practical reasons, because
3 we have a lot of depositions to get done between now and
4 November, and we want to limit the issues to those that are
5 actually relevant to that.

6 So I don't think it is fair to say that a deposition
7 of J es Grant or of somebody from Catalytic in the context of
8 the State court litigation is going to be the same deposition
9 that we would have here.

10 There are additional issues here, a lot of them,
11 that will not be present in the State court proceeding. So
12 these are not duplicative proceedings, it is not duplicative
13 discovery. The issues involved in this proceeding are going
14 to be somewhat broader and more voluminous than will be
15 involved in the State court.

16 JUDGE FRYE: But there is a good deal of overlap,
17 anyway.

18 MR. EGGERT: There is some overlap, sure. That
19 said, for the most part, I think our position on these motions
20 is pretty clear in our papers, and I am not going to go into
21 the details on it.

22 A couple of basic points:

23 One is that Grant and Catalytic obviously were
24 instrumental in preparing the stabilization plan and the
25 technical sufficiency of the stabilization plan is obviously

1 at the heart of this proceeding.

2 If we are going to probe that, if the Board is going
3 to be able to make a fully informed decision on that, it is
4 critical that we be able to inquire into what went into the
5 preparation of that. It is not enough simply to present a
6 piece of paper and say, "Here, this proves that our plan is
7 good." We are entitled, and the Board is indeed required, to
8 go beyond that kind of conclusory statement. That is what we
9 are trying to do here.

10 I can't overemphasize the importance of our being
11 able to inquire into some of the assumptions and some of the
12 work that went into that stabilization plan and Grant and
13 Catalytic obviously were involved in it.

14 Most of that work apparently -- most, if not all, of
15 that work apparently was done long before this proceeding was
16 ever noticed.

17 JUDGE FRYE: Well, that's what I was going to come
18 to. If you have access to that work prior to the notice of
19 hearing in this proceeding, don't you have access to what you
20 are looking for?

21 MR. EGGERT: We have access to a lot of it, but the
22 point is that the fact that Catalytic were two hats, to use
23 Mr. Meserve's phrase, and that obviously causes him some
24 chagrin at that point, is not a basis to suppress otherwise
25 discoverable material.

1 The fact that their work was done pursuant to an
2 independent obligation under UMPTRCA to decommission West
3 Chicago means that it would ordinarily be discoverable. The
4 comments to Rule 26(b)(4)(B) state that an expert who has
5 knowledge and did work for some purpose other than the
6 litigation is treated as an ordinary witness and would
7 ordinarily be discoverable.

8 JUDGE FRYE: You wouldn't want to draw a distinction
9 between work that was done in support of the application prior
10 to the commencement of this proceeding and the work that was
11 done afterwards?

12 MR. EGGERT: No. We are entitled to all of it. Our
13 position is we are entitled to all of that. Beyond that, I
14 think the only other basic point that I would make is that
15 most of the cases -- and certainly the better cases -- treat
16 26(b)(4)(B) as they would treat any other evidentiary
17 privilege which is that it prohibits the factfinder -- in
18 other words, you three -- from having access to all the facts.

19 Any time exclude relevant evidence or prevent the
20 discovery of relevant evidence, we are limiting the amount of
21 facts we have before us, and we are getting something less
22 than the whole truth.

23 On that basis, I think you should come at these
24 motions to quash with a somewhat jaundiced eye, because they
25 are an attempt to suppress concedely relevant evidence that

1 ordinarily would be discoverable and ordinarily would be
2 presented to you.

3 So beyond that, unless you have some questions, we
4 will stand on our papers.

5 MS. RAPKIN: I would like to add one point. I think
6 Mr. Meserve said that the list of witnesses that the company
7 has provided to the State in the State court proceeding, that
8 it reflects expert witnesses who will be called by Kerr-McGee,
9 not only in the State proceeding, but in this licensing
10 proceeding, and as we have said, Dr. Grant is on that list.

11 Now, whether or not there are individuals from
12 Stearns Catalytic on that list, we don't know, because we
13 don't know the names of the present employees at Stearns
14 Catalytic. There may or may not be.

15 But to that extent, putting aside the question of
16 issues overlapping or being different, to the extent that
17 there has been a concession that Grant is going to be called
18 in this proceeding, I think that the argument that he has not
19 been designated in this proceeding has considerably less
20 weight.

21 The only other thing I'd like to clarify for the
22 record, just to take care of the factual matter, is that the
23 identification of witnesses by the company in the State court
24 proceeding is somewhere between 18 and 20 witnesses, not eight
25 to 10.

1 JUDGE FRYE: Any comments, Mr. Lewis?

2 MR. LEWIS: We have not filed --

3 JUDGE FRYE: You are not involved?

4 MR. LEWIS: We have not filed any response to these
5 motions.

6 JUDGE FRYE: I do have one question for you,
7 though. Do you have any thoughts or advice with regard to
8 whether we should adopt 26(b)(4)(B) for purposes of these
9 proceedings?

10 MR. LEWIS: We believe that the NRC case law, the
11 two cases I can think of, I think it is Shearon Harris and
12 Seabrook which are the more recent cases, would indicate that
13 the 26(b)(4)(B), the general theory of that should be applied
14 in this proceeding.

15 We believe you should apply it as any court would,
16 with some discretion.

17 JUDGE FRYE: Okay. Thank you.

18 Well, the next item --

19 MR. NICKLES: Could we respond for a moment?

20 JUDGE FRYE: Sure.

21 MR. MESERVE: I guess there were only two points
22 that I would like to make. The State has noted correctly, as
23 I intended to state, if I didn't state in my opening argument,
24 that Mr. Grant or Dr. Grant has been designated as a witness
25 in the State proceeding.

1 It may lead you to believe that that automatically
2 would give them the designated witness that they would
3 automatically have a right of access to all of his papers.

4 I would urge that the Board actually look at the
5 text of 26(b)(4)(A) which states that as to experts, you can
6 file an interrogatory and require him to state the subject
7 matter on which the expert is expected to testify, to state
8 the substance of the facts and opinions to which the expert is
9 expected to testify, and a summary of the grounds for each
10 opinion.

11 Upon motion, the Court may order further discovery
12 by other means, and it goes on.

13 But what I intended to state is even though he had
14 been designated as a witness, it does not mean that the State
15 automatically will have access to all of his papers. That is
16 a matter that we are working with the State on right now as to
17 a reciprocal exchange of information with regard to experts.

18 I would like to say further with regard to Dr. Grant
19 that there the State has had the opportunity to inspect over
20 1.5 million documents in Kerr-McGee's possession. All of the
21 prestabilization documents with which Dr. Grant was associated
22 are in those files.

23 He doesn't have documents that stem from the period
24 when he was with Law Engineering, and he left Law Engineering
25 in 1983.

1 JUDGE FRYE: That brings us to your motion to
2 compel.

3 MR. MESERVE: If I might, I would like to suggest
4 that it might be appropriate to step back for a moment and to
5 look at the discovery in the license amendment proceeding in a
6 somewhat broader context than perhaps the papers suggest.

7 As the State observes, we filed 125
8 interrogatories. The motion covers roughly 45 of those
9 interrogatories. The State deems this to be remarkable, that
10 we should be filing motions to compel with regard to 45
11 interrogatories, and those are the words that they use in
12 their answer.

13 I think it is important to look at the different
14 posture of the parties with regard to discovery in this case.

15 The State has had the benefit of access to 1.5,
16 roughly 1.5 million pages of our files, has had access to the
17 extensive licensing file of the Nuclear Regulatory
18 Commission. It has had the benefit of the stabilization plan
19 and the FES, all of which sets out our views and the Staff's
20 views of the issues that have been raised in this proceeding.

21 Look at Kerr-McGee's posture with regard to
22 discovery. The State has filed a large number of
23 contentions. Some of those contentions, in our view, are very
24 broad.

25 Consider, for example, Contention 1.B. The FES

1 fails to address long-range environmental, social and economic
2 significance of onsite burial.

3 For example -- and it gives a list. It states in
4 its briefs and has added to that list and suggests some other
5 issues which they think are relevant to that very broadly
6 stated position.

7 Now the State says in their answer that -- and I am
8 referring to page 26, note 16 of their answer in this case --
9 that a limited amount of paper has been generated at the
10 agency, especially IDNS, the agency that they have designated
11 as their client in this case.

12 So we don't have access to very much, by the State's
13 own admission. We don't have access to very much in the way
14 of documents.

15 We are confronted with very broadly worded and
16 expansive contentions in this proceeding, and the only way we
17 can understand what issues the State wishes to raise is by
18 asking in interrogatories, and it is our view of these 125
19 interrogatories, there are 45 that the State has not answered
20 that we really need to have answered to understand exactly
21 what issues the State intends to pursue in its proceeding.

22 Now I have prepared a list for you -- I realize
23 without a road map it is rather hard to understand all of the
24 interrogatories which we have filed in our Motion to Compel.
25 We attempted in our motion, in the interest of economy, to

1 sort of clump them into various areas, and it might be helpful
2 if I just gave you a one-sheet summary that sort of lists the
3 various areas in the interrogatories.

4 If I might approach the bench, I'd like to do that.

5 [Documents distributed.]

6 Obviously you have read the papers. I am not going
7 to attempt to cover anything like all of these interrogatories
8 here, but I think it might be helpful to the Board if I took
9 just a sampling of the interrogatories that we are dealing
10 with here. I believe that they are representative of the
11 issues that we are seeking to raise.

12 With regard to Item A, "State's Failure to Respond,"
13 I would like to refer the Board particularly to Interrogatory
14 8. I believe that that interrogatory and the answer is set
15 out at Tab 2 of our motion to compel in this procedure.

16 That interrogatory asks whether the State contends
17 that waste material from the West Chicago site can be disposed
18 of at any location within the State of Illinois that is more
19 suitable for the disposal of such waste than West Chicago. If
20 so, it asks the State to identify a variety -- identify such
21 sites. It goes on to ask a variety of factual questions with
22 regard to the State's efforts to locate sites within the State
23 of Illinois that are suitable alternatives for placing these
24 wastes.

25 The State's response is: "See response to

1 Interrogatory 7," which dealt with locations outside the
2 State, and the response is, in essence, they really claim not
3 to be sure what the interrogatory asks for. They go on to
4 say, "The People have not identified particular sites either
5 in Illinois or elsewhere which might be suitable, since the
6 identification of a suitable site is Kerr-McGee's
7 responsibility," and this is the sort of claim that we have
8 seen from the State in a variety of their filings in this
9 proceeding.

10 It is interesting to note, however, if you will look
11 to Tab 4 of our motion to compel, that one month before this
12 interrogatory was filed, Counsel for the State filed with the
13 NRC or lodged with Counsel for the NRC Staff a long letter,
14 talking about all the information that the State had available
15 for the evaluation of alternatives, talking about things that
16 the Illinois State Geological Survey, the Water Survey, and
17 others could provide to the State in the way of an analysis of
18 alternative sites in Illinois. Their reference is here to a
19 "variety" of documents, which the State saw as relevant to the
20 evaluation of alternatives.

21 Now all this information was given to the Staff, and
22 this letter was submitted to the Staff one month before our
23 interrogatory was filed -- our interrogatory was answered --
24 with regard to sites inside Illinois that deal with
25 alternatives. Not only did the State not identify this

1 particular letter, it didn't even copy us on the
2 correspondence. Only through the courtesy of Staff did we
3 realize that this communication with regard to inside
4 alternatives was made available to us.

5 We didn't get any of the documents until we went out
6 and conducted an inspection of documents at Argonne, and there
7 we found not only this letter, but all of the attachments, and
8 my recollection is, among those attachments is a study by the
9 Illinois State Geological Survey about areas of the State
10 which are suitable for the placement of hazardous waste
11 facilities.

12 Now I bring this to the Board's attention that this
13 is an interrogatory which asks whether there are sites that
14 are suitable in Illinois. It asks if the State can identify
15 such sites. What it has done to identify them is Part B.

16 The State says, "Oh, we can't help you. It's
17 Kerr-McGee's responsibility." Yet one month before the
18 interrogatory is answered, there is extensive correspondence
19 and effort by the State to do exactly what they say that is
20 our responsibility to do, and they haven't told us anything
21 about what work they have undertaken to evaluate alternative
22 sites in Illinois.

23 I would like to turn now to the second category,
24 "Inappropriate Objections." As a sample there, I would like
25 to point the Board to Interrogatory 12, which is at page 9 of

1 Tab 2 of our motion. That interrogatory asks: "Does the
2 State contend that Kerr-McGee was or is required to develop
3 specific or detailed disposal plans for alternative disposal
4 sites. If so," and it goes on to ask a number of facts about
5 the basis for that Contention -- they do contend it -- and a
6 variety of other information, documents and so forth, with
7 regard to our alleged obligation to identify specific and
8 detailed disposal plans.

9 Response: "Objection on the grounds that this
10 interrogatory is vague and calls for a legal conclusion."

11 As to both of those objections, vagueness and a
12 legal conclusion, I would like to refer the Board to
13 Contention 1.C in this case. That Contention is the
14 Contention that deals with alternative disposal sites, and it
15 states, and I quote: "Since alternative sites were not
16 studied and tested, the Applicant could not and did not
17 develop any specific alternative disposal plans. Further, the
18 NRC did not require the Applicant to develop any specific
19 alternative disposal plans, and the NRC did not itself develop
20 any specific alternative disposal plans."

21 Now the State says, "We don't have to answer any
22 questions on that matter; it calls for a legal conclusion."

23 We understand exactly what is at issue in this
24 proceeding. It is exactly the matters that are raised in the
25 State's Contention that it must be compelled to answer

1 interrogatories about it.

2 As to the next category, a whole series of
3 interrogatories that deal with communications. I would like
4 to direct the Board to the first of those, Interrogatory 13.
5 There the State says: "Identify each communication between
6 any agent or employee or representative of the State of
7 Illinois or any of its agencies or subdivisions and any agent,
8 employee, or other representative of Kerr-McGee concerning the
9 search for and evaluation of alternative disposal sites" and
10 asks information in regard to those communications.

11 "Objection. Kerr-McGee has within its own knowledge
12 information about communications between itself and other
13 persons. See also first objection to Interrogatory 14 below,"
14 and the objection there is that the interrogatory is vague.

15 Well, we have cited a variety of cases in our papers
16 before you. The parties routinely are entitled to ask
17 interrogatories about matters which are allegedly within our
18 own knowledge. We are entitled to probe the factual matters
19 that are not only within our own knowledge, but also the
20 matters that are within the knowledge of the other party.
21 Whether we know those facts or not is irrelevant in the
22 process of the proceeding, and I won't go over those matters
23 now, but we have cited a variety of cases that exactly such
24 interrogatories as communications are proper, routine, and the
25 fact that they cover matters that we know about is irrelevant

1 as an objection.

2 Let me turn to the next category, "State
3 Participation in Alternatives Analysis." There, why don't we
4 look at the first of the interrogatories which was listed,
5 which is No. 15?

6 There the question asks about meetings attended by
7 representatives of the State concerning the search for and
8 assessment of alternative disposal sites and asks for a
9 variety of information about these meetings.

10 Now as the Board recognizes, I am sure, from a
11 variety of filings by the State in this case, that allegations
12 have been made that Kerr-McGee made no effort to contact the
13 State and gain information about alternative sites in
14 Illinois.

15 We are entitled to probe what actions the State has
16 undertaken to try to assess alternatives, and among those
17 matters we are entitled to probe are meetings which we happen
18 to know took place between the State's employees and
19 Kerr-McGee and our efforts to get recommendations as to sites
20 that we might look at.

21 Now the objections to this, the People object that
22 the word "meeting" is vague. They also refer to objections in
23 Interrogatories 13 and 14, and again we have this stale
24 interrogatory, this stale response that this is knowledge
25 within our own -- that this is knowledge that we have

1 ourselves, and then there is an allegation that it is
2 burdensome for the State to identify meetings.

3 Now to my knowledge, it seems doubtful to me that
4 the State has had an extensive number of meetings about the
5 evaluation of alternative disposal sites for our facility.
6 The context of all these questions, it's a string of questions
7 about the evaluation of alternative disposal sites, all of
8 which deal with alternative disposal sites for the wastes
9 which are presently in West Chicago. It is hard for me to see
10 how it is burdensome for the State to identify such meetings,
11 for me to learn about the things that the State has done to
12 assist in identifying alternatives.

13 The next category concerns the affidavits which were
14 filed, as you may recall, in the State's reply brief.

15 JUDGE FRYE: The question with regard to those, if
16 we dismiss Contention 2.G, is there any need for an answer to
17 those interrogatories?

18 MR. MESERVE: Your Honor, we believe there is. The
19 reasons is that you have admitted in this proceeding
20 Contention 1.G.

21 JUDGE FRYE: Yes.

22 MR. MESERVE: Which states: "The FES fails to
23 consider applicable federal, state, and local policies," and
24 it goes on to list some policies, the last sentence of which
25 is, "The NRC has disregarded State regulations governing

1 groundwater quality and disposal of industrial waste and local
2 policies on land use."

3 You may recall that the State submitted these
4 affidavits in support of the admission of that Contention and
5 Contention 2.G, which also deals with a variety of State
6 policies, submitted them as items of fact in regard to how
7 state policies might apply to the Kerr-McGee site.

8 We are entitled to probe the matters which the State
9 has raised in this proceeding. We didn't bring in this issue.

10 Now the State has answered some of those -- some of
11 the specific questions that we asked about these
12 interrogatories. But as to some of them, the State claims
13 that the information is protected by executive privilege.
14 Well, there is case law that we have cited to you about what
15 needs to be done before that privilege can be invoked. It has
16 to be invoked by the head of an agency. There has to be a
17 specific description of the information that has been
18 withheld. There have to be precise and certain reasons why
19 the preservation of the privilege is important. And even
20 passing that point, by presenting this issue and presenting
21 these affidavits, the State has to have been seen to have
22 waived any privilege it might claim as to probing the
23 foundations and basis for the very affidavits they have
24 submitted.

25 Let me turn now to the "Miscellaneous" category.

1 JUDGE FRYE: Would you address Interrogatory 85
2 there?

3 MR. MESERVE: You would like to have me address 85?

4 JUDGE FRYE: 85 has to do -- we have asked the
5 People whether they would approve above-ground disposal at
6 some other site, or words to that effect.

7 MR. MESERVE: Yes. The interrogatory: "Does the
8 State agree that above-ground burial wastes is sometimes
9 appropriate," and asks a series of questions about that.

10 "Objection on the grounds of irrelevancy and
11 vagueness. What kind of wastes, and what form or design
12 above-grade burial are referred to?"

13 The question as to the second part of the alleged
14 incapacity to understand, I gather they are trying to explain
15 what the vagueness element of the objection is. The wastes,
16 in the context, are clearly the wastes that we are dealing
17 with at the site in West Chicago.

18 As to the form or design of above-grade burial, that
19 is exactly the kinds of things that we are asking for in the
20 interrogatory. Under what circumstances would you agree that
21 above-grade burial is appropriate?

22 As to the relevance, I would suggest that the Board
23 might look at Contention 2.S. It is admitted in this
24 proceeding, and that Contention says: "The Applicant did not
25 give serious consideration to below-grade disposal at some

1 other site and has not demonstrated that above-grade disposal
2 at West Chicago will provide reasonably equivalent isolation
3 of the tailings" and so on.

4 JUDGE FRYE: How is above-grade disposal elsewhere
5 relevant to that Contention? They seem to be arguing for
6 below-grade, wherever it might be.

7 MR. MESERVE: They are arguing for -- they have
8 raised the Contention as to below-grade. We are trying to
9 determine whether there are, by this interrogatory, whether
10 there are circumstances in which the State would concede that
11 above-grade disposal is appropriate. By knowing and
12 determining exactly what circumstances which the State
13 concedes as appropriate, we can develop a line of attack on
14 the State's evident position on this Contention. By probing
15 when they think it is appropriate, we can determine whether
16 those circumstances, for example, are met in West Chicago.

17 JUDGE FRYE: Aren't you asking them to speculate? I
18 mean, they've got an application for above-grade disposal in
19 Chicago. Aren't we asking them to speculate on what they
20 might approve is something else were represented?

21 MR. MESERVE: Well, the interrogatory really does
22 ask them to provide the basis for an assertion that
23 below-grade -- trying to get at the basis of why below-grade
24 is appropriate.

25 We believe that given the hydrological condition in

1 West Chicago, that below-grade disposal is not appropriate.
2 It may well be that the State, in responding to this
3 interrogatory, would find that this is quite an easy answer,
4 that below-grade disposal is not appropriate where it would
5 put the waste in the middle of a watertable. That would be
6 one circumstance, and that's one area where we would expect
7 that it would be almost inevitable that the State would deal
8 with in responding to this interrogatory.

9 There may be some other circumstances. This is a
10 matter where the State no doubt has experience with regard to
11 chemical waste sites, where it has had an obligation to deal
12 with permit requests for the various types of siting
13 operations, and the State has experience to bring to bear, I'm
14 sure, as to the circumstances in which above-grade or
15 below-grade disposal of wastes is something which should be
16 contemplated.

17 JUDGE FRYE: Interrogatory 35, I gather from reading
18 your roadmap here, that no supplementation has yet been
19 provided.

20 MR. MESERVE: That's correct.

21 JUDGE FRYE: Okay.

22 MR. MESERVE: That's the interrogatory that deals
23 with -- asks whether the State contends that there are social
24 and economic effects resulting from the presence of a disposal
25 cell in West Chicago, and ask for the State to specify exactly

1 what those effects are.

2 The State answers as to its social impacts, but
3 objects as to economic effects. As to that particular
4 interrogatory, I would refer the Board to Contention 1.B,
5 which it has admitted, which deals with the long-range
6 environmental, social, and economic significance of onsite
7 disposal. The State gives a variety of examples of what it is
8 talking about in that Contention, and among them, it asks us,
9 "What will be the social and economic effects?"

10 Now the State finds it vague for us to ask a
11 question as to economic effects. I can well understand how
12 they might find that statement vague. The fact of the matter
13 is, it's in their Contention. We are entitled to probe what
14 exactly they are dealing with.

15 I would like to discuss very briefly a large cluster
16 of contentions that are in this miscellaneous category. These
17 are Contentions 93 through 96, 98 through 102. These are
18 contentions where we walk through a chapter of the impacts
19 that are set out in the FES. We ask the State whether it
20 contends -- whether that assessment is accurate and
21 adequate. If they feel it is inaccurate or inadequate, we
22 would ask the State to identify the various ways in which they
23 think it is inadequate, describe the consequences, and then
24 basically probe all the ways in which the State believes that
25 the FES has some incapacity.

1 As to nearly all of this cluster of interrogatories
2 is an objection on grounds of vagueness and overbreadth. Kerr
3 McGee should specify which particular assertions in this
4 section it is referring to. In its answer the State flags in
5 particular Question 98, which deals with the assessment of
6 water resources, and I am referring now to pages 21 and 22 of
7 the State's Answer, where the State goes through the first
8 paragraph of the assessment of groundwater in that chapter,
9 and it finds, well, gee, that paragraph has got at least 16
10 different elements in it.

11 And it goes on to say -- and there are 18 more
12 paragraphs. I am quoting: "The People should not be required
13 to address the accuracy of inaccuracy of umpteen assertions
14 simply because Kerr McGee has not decided what it wants to
15 focus on."

16 Well, it is the People in Contention 1.B who
17 asserted that the FES was inadequate because it did not
18 provide adequate analysis of the impasse, give adequate
19 analysis of the environmental health impacts that -- the FES
20 did not cover these matters adequately. It is their
21 contention.

22 We have asked them, in a series of specific
23 interrogatories, let's walk through the FES, tell us
24 specifically where you find it inadequate. The State has
25 raised this as an issue in this proceeding.

1 Now, as to the point that, gee, maybe each one of
2 these sections is overbroad, well, they find 16 different
3 questions which should be asked as to the first paragraph. We
4 could go through the whole thing. We could turn the detection
5 of what the State's contentions are into a game of 20
6 questions or 20,000 questions or what have you.

7 The fact of the matter is it is far simpler for the
8 State to read the FES and to tell us precisely what it is that
9 it finds to be deficient. In fact, by clustering it in the
10 fashion that we have, that becomes quite simple for the State
11 to perform this task.

12 There is a section that deals, for example, with
13 hydrology, the water impacts question. It is a reasonably
14 discrete area. The State has experts on hydrology. There are
15 a variety of people that have been consulting on specifically
16 that question. There is a comparatively small group of people
17 that the State can get together, who presumably have been
18 evaluating the site, who can read a fairly short statement
19 that is in the FES and tell us where they disagree with it.

20 If we are to respond to the State's contentions, we
21 are entitled to precisely that information.

22 The next category deals with evasive answers. We
23 flag there Interrogatories No. 21 and 22. Perhaps we should
24 focus on Interrogatory 21. Interrogatory 21 asks: Does the
25 State contend that abandoned surface coal mines can be

1 rendered suitable for disposal of materials from the West
2 Chicago site? If so, the State is asked to identify a variety
3 of pieces of information that are relevant to that contention,
4 including the identification of documents and a variety of
5 other materials.

6 The State responds: "The People do not contend that
7 abandoned surface coal mines can be rendered suitable for
8 disposal of materials from the West Chicago site; the People
9 contend that surface coal mines may provide a suitable site
10 for disposal of the Kerr McGee wastes."

11 But having given that response, and "response" I
12 will put in quotes, they do not proceed to go on and answer
13 any of the questions in Sections A through E of that
14 interrogatory that ask the State to provide the basis for its
15 contention that surface coal mines can be rendered suitable,
16 our view of that contention.

17 Now, the State says, and we understand their answer:
18 well, gee, we think that's a silly way to phrase that
19 question. Perhaps Kerr McGee should phrase that question,
20 "Does the State contend that abandoned surface coal mines may
21 be suitable for disposal?" -- to which I suppose the answer
22 will be, well, no site is ever suitable as it is -- it's too
23 big, too small, you need to develop a road into it, you need
24 to do a variety of modifications -- it has to be rendered
25 suitable, and therefore we are not going to answer all these

1 subsections.

2 The thrust of this question is completely clear.
3 The State has contended, in an abundance of their filings in
4 this case, that there has been an inadequate evaluation of the
5 surface coal mines as an alternative. This question is
6 intended to probe the basis for the State's frequent
7 assertions on this point, and the State has not responded.

8 I would like to deal with one other matter with
9 regard to these interrogatories before I go on. In our Motion
10 to Compel, we identified a variety of interrogatories that we
11 were satisfied with the answers. We just wanted to put the
12 State on record that we were satisfied with the answers and
13 that we wanted to have them realize that we understood what
14 their assertion was or what their answer was and we weren't
15 going to move to compel with regard to the answer, but we were
16 entitled to rely on their answer and we wanted to put the
17 State on notice that we were.

18 One particular interrogatory I want to call to your
19 attention in that regard. It is Interrogatory 19. That
20 interrogatory says: "Does the State contend that the
21 assessment of alternative disposal sites was affected by any
22 intentional withholding of relevant information or other
23 alleged impropriety on the part of Kerr McGee? If so,
24 identify and describe each piece of information, identify each
25 fact, identify each respect in which the State contends this

1 withholding of information affected the assessment, identify
2 documents, identify people."

3 The State response to that interrogatory? "Kerr
4 McGee may have intentionally withheld relevant information or
5 engaged in other improprieties, although the People do not
6 contend that Kerr McGee has done so."

7 Now, that is a singularly important interrogatory
8 and answer to us. We have seen an abundance of filings by the
9 State in which it has alleged that Kerr McGee has somehow
10 intentionally withheld information, tampered with the
11 alternatives assessment process. In fact, the Board may
12 recall in its admission of the contention with regard to
13 alternatives analysis it was founded on the fact that there
14 was an evidentiary matter that had to be explored. It's a
15 factual question as to whether there had been this
16 alternatives analysis that Kerr McGee submitted had been
17 tainted by self interest.

18 The State has now had the opportunity to review over
19 1.5 million documents in our possession. It has reviewed all
20 the documents in the Staff's files that are not privileged. It
21 has reviewed documents in the possession of Argonne National
22 Laboratory, which conducted the alternatives analysis, and the
23 State has responded that they do not contend that Kerr
24 McGee has intentionally withheld relevant information or
25 engaged in other improprieties.

1 Now, I call this particular interrogatory and this
2 answer to your attention because the State's response to these
3 interrogatories were filed on May 20, 1985. Less than two
4 weeks after that interrogatory was filed, the State filed a
5 document entitled "Comments on Kerr McGee Memorandum
6 Concerning the Supplemental EIS." As I say, that's a document
7 dated June 3, less than two weeks after that interrogatory was
8 answered.

9 At page 3 of that memorandum, both -- here they are
10 referring to the Staff and Kerr McGee -- knew, and I will
11 quote: "Kerr McGee had deliberately chosen to identify
12 alternatives which are inferior to others in Illinois."

13 On page 4, "We believe the attached exhibit makes
14 manifest the fact that Kerr McGee deliberately conducted an
15 inadequate alternatives assessment and the Staff knowingly
16 condoned the Company's conduct."

17 Now, on the one hand we have an interrogatory which
18 asks precisely for the State to identify the facts that
19 underlie exactly that statement they have made frequently in
20 this proceeding, and the State says we don't contend that that
21 has happened; we have looked at all your documents and we
22 don't contend that that has happened.

23 The signatures on these interrogatories are barely
24 dry, and the State files a paper in which exactly that matter
25 is raised yet again. I bring this to the Board's attention

1 because there is a variety of other interrogatories of a
2 similar nature that are identified in our motion where we feel
3 we can rely on the State's answers to the interrogatories, and
4 we intend to do so, but we are very troubled with the fact
5 that they respond to interrogatories in a certain fashion and
6 thereby evade answering the series of questions that have to
7 do with the specifics as to a contention and then nonetheless
8 pursue these assertions, factual assertions which are directly
9 contradictory to the things they are saying to us.

10 JUDGE FRYE: It would seem to me, Mr. Meserve, if
11 you are really concerned about that sort of thing, that you
12 might file an appropriate motion.

13 MS. MESERVE: Your Honor, I think that may well be
14 appropriate, and I will consult with my colleagues about that
15 matter. We have a problem in this whole proceeding in that
16 there is a large number of assertions which have been made,
17 and as I indicated at the outset, we have to rely on
18 interrogatories to tell us precisely what is at issue. The
19 Staff has to rely on responses in interrogatories for exactly
20 the same reason, and so does the Board, and I don't think this
21 proceeding is being advanced by assertions in response to
22 interrogatories that say one thing and then filings
23 immediately on the heels that say something completely
24 different.

25 As to documents, I will be very brief. I indicated

1 at the outset that there are a variety of issues that we had
2 outstanding, and we are very troubled at the small amount of
3 documents that the State has produced in this round and the
4 haphazard way in which the document production occurred.

5 The State contends that the production is complete,
6 and we are prepared to accept that assertion, but we will note
7 that we have a large number of interrogatories that are
8 outstanding which this motion deals with that involve the
9 identification of documents. Once those documents are
10 identified, they have to be produced.

11 So, to the extent that this Board doesn't rule in
12 our favor with regard to a variety of the interrogatories, we
13 would ask that the Board also enter an appropriate motion to
14 compel the State to produce those documents in some reasonably
15 expeditious fashion, perhaps setting a deadline by which the
16 information should be submitted.

17 We got the filing from the State, I believe the last
18 of the document production matters that we have raised in this
19 proceeding and in the Kress Creek proceeding, on September
20 3rd. The State represented in its motion on its answer to
21 this interrogatory that it had received information in its
22 offices on July 29th with regard to the Sheffield site.

23 Now, I believe one of the tabs in our motion sets
24 out the letter. It is Tab 5. That letter lists a number of
25 specific documents that the State has offered to provide for

1 us, and we have checked off the documents we wanted. The
2 State indicated for some reason that it felt it necessary to
3 review the very documents that it said it was prepared to
4 provide to us, and it took evidently a month to verify that
5 the checked documents were the ones that --

6 JUDGE FRYE: I think at this point we are really
7 getting into a question that cuts across both proceedings and
8 also involves some other questions you have raised again in
9 the Kress Creek proceeding, and the question of who are the
10 parties in this case. The questions about searches for
11 documents and this question about supplementation or
12 substantiation of claims of privilege.

13 I wonder if it wouldn't be better to defer this
14 particular point -- I have got some questions with regard to
15 it -- and give the State an opportunity to respond to your
16 argument on the interrogatories and come back to this after we
17 break -- I would like to break in about 15 of 20 minutes or
18 so -- if that is enough time for you.

19 MS. RAPKIN: That would be more than enough time,
20 largely because we are not going to respond to most of what
21 has been said today. All of these arguments have been made
22 before and they have all been answered. I think that this
23 morning what Kerr McGee is doing basically is trying to
24 redraft interrogatories. The interrogatories are
25 objectionable largely because they are badly drafted, and that

1 is unfortunate but they cannot be redrafted on their face at a
2 prehearing conference, and that is what I think I am hearing,
3 to the extent that I understand the arguments being made.

4 It is hard for me to reply to a lot of the specifics
5 largely because, just as in the motion to compel, so in this
6 morning's presentation, as I understand it, there are a
7 variety of sometimes obvious, sometimes subtle misstatements
8 of the issues, and of course the nature of the issues is
9 germane to what kinds of questions are relevant and which are
10 not.

11 In responding to the motion to compel in writing, we
12 have tried to explain to the Board what our view of the
13 relevant issues is and why many of the questions asked, the
14 interrogatories asked, were irrelevant, and I really don't
15 want to go through that.

16 I also think that in a lot of the questions, the
17 Contentions said "apples," and the interrogatories asked for
18 "oranges." That's especially true of questions relating to
19 alternatives. There are a variety of questions relating to
20 alternatives in the interrogatories, and they simply are off
21 the mark in terms of what the narrow questions are that are
22 raised by Contention 1.C, which is the NEPA alternatives
23 issue, and to some extent Contention 2.F, which alleges that
24 the Licensee did not give adequate attention to sites at which
25 below-grade burial would be possible, given that the NRC --

1 not the People, but the NRC -- in Criterion 3 have said that
2 below-grade burial is the prime option.

3 I want to make just a few very limited responses to
4 a few of the items that Counsel has raised, just to keep the
5 record clear in case there is any confusion.

6 The first one was, I think, Interrogatory 8, that
7 was raised this morning. That is the Contention -- excuse me
8 -- that is the interrogatory which asks if the State contends
9 that waste material from the site can be disposed of at any
10 other site in Illinois which is more suitable. And in
11 answer, the People referred to their answer to Contention --
12 to Interrogatory 7.

13 This morning when Counsel read the answer to
14 Interrogatory 7, he left out a portion of it. The answer was
15 that it's our position that the waste can be disposed of at
16 any suitable site, "provided that all necessary federal or
17 state authorizations are granted." We went on to say in that
18 answer that we have not identified particular sites, and I am
19 going to say it again -- we've said it many, many times -- in
20 this morning's presentation, Counsel got into a discussion of
21 the State's offer to the Staff of technical guidance on the
22 question of alternative siting.

23 JUDGE FRYE: Before you go on, though, with regard
24 to Interrogatory 8, it seems to me that you do or you don't
25 contend that the waste material can be disposed of at any

1 location within the State that's more suitable. I mean, it is
2 yes or no, isn't it?

3 MS. RAPKIN: I'm not quite sure what you are asking.

4 JUDGE FRYE: Your answer is: "In any event, it is
5 our position that Kerr-McGee wastes can be disposed of at any
6 suitable site," but the question is, do you contend that they
7 can be disposed at any location within the State which is more
8 suitable? Do you or don't you?

9 MS. RAPKIN: In a location which, after appropriate
10 study, appeared or turned out to be more suitable. This
11 question, at least as we understand it --

12 JUDGE FRYE: You can say, "We contend that they can
13 be" -- I don't know if this is the case or not, but you could
14 say, "They can be disposed of at a location which is more
15 suitable, but we don't know of any such sites."

16 MS. RAPKIN: And I think that is precisely the
17 answer we made when we said, "It is our position" -- and this
18 is the response to 7, and this is the sentence that was not
19 read this morning -- "It is our position that they can be
20 disposed of at any suitable site, of which the West Chicago
21 site is not an example, provided all necessary authorizations
22 are granted."

23 So I think that is the answer. Whether it's
24 Illinois or outside of Illinois, the answer is the same. What
25 we want to make clear is that -- you see, the question goes on

1 to ask about identifications of sites.

2 MR. NICKLES: You know, this is very important, very
3 important, very important.

4 Ms. Rapkin left out the last sentence. They don't
5 know of any site. And that's what we wanted to know. We want
6 that on the record.

7 This is very crucial to this proceeding. We asked
8 it in our interrogatory, and I'd like to have her address
9 that.

10 MS. RAPKIN: Well, I just addressed it, Peter,
11 before you interrupted me. We have put it on the record. We
12 have said it in writing in response to this interrogatory. We
13 have said it in I don't know how many briefs.

14 MR. NICKLES: Is it true that you do not know of any
15 other site at this time, yes or no?

16 MS. RAPKIN: I think the question --

17 MR. EGGERT: If you want to call her as a witness,
18 we will do that an appropriate time.

19 JUDGE FRYE: All right, all right. Let's have
20 enough of this.

21 MR. NICKLES: Well, this is what I think we have
22 been trying to get at for months.

23 MS. RAPKIN: Judge Frye, I would like to continue
24 with my answer before we have a response from Mr. Nickles.

25 JUDGE FRYE: Yes. Let her respond.

1 MS. RAPKIN: As I said, we have said over and over
2 and over that we are not in the business of identifying sites,
3 and we have not done so, and that is the answer to that
4 question.

5 What I wanted to continue with was Mr. Meserve's
6 reference to our offer of help to the Staff, and, in fact, the
7 help that we did give the Staff or tried to give the Staff in
8 early June with respect to its NEPA duties to assess
9 alternatives.

10 The only reason that I want to refer to it this
11 morning is that there was an implication in what was said
12 that, contrary to the answer given to Interrogatory 7, the
13 State does, in fact, have knowledge about particular sites,
14 but is withholding it, and that is not --

15 JUDGE FRYE: Are you saying that the State does have
16 knowledge about particular sites, but is --

17 MS. RAPKIN: Absolutely not.

18 JUDGE FRYE: It does not have knowledge.

19 MS. RAPKIN: Absolutely not, because we have not
20 gone out and identified a site for this company, for this
21 entity, any more than we would do that for any other entity
22 that sought permission to dispose of wastes in some fashion in
23 Illinois. This company is no different than anyone else.

24 The Illinois EPA, for example, entertains dozens of
25 applications from natural and corporate persons which want to

1 dispose of waste or create waste landfills in Illinois, and
2 they accept applications that involve a siting proposal made
3 by the Applicant. They do not go out and find sites, and the
4 same is true here.

5 What the State agencies can do and have tried to
6 help the Staff do and could do for Kerr-McGee any time
7 Kerr-McGee walked in their doors is to provide materials which
8 could be used to screen the State for areas which are likely
9 to have suitable sites. But that's not finding a site. That
10 is screening out areas that are inappropriate for one reason
11 or another, either because of demography, because of the
12 presence of various natural resources, or because the
13 geo-hydrology of the area is, at least from the broad
14 perspective, inappropriate. And that is what we offered to do
15 for the Staff, and Kerr-McGee is welcome to take advantage of
16 that.

17 MS. RAPKIN: I also want to --

18 JUDGE FRYE: Let me move on to 21 and 22. Explain
19 your answer, would you? You are saying clearly that you don't
20 contend, quote, "that abandoned surface coal mines can be
21 rendered suitable for the disposal of materials from the West
22 Chicago site," close quote.

23 Okay, that's clear. "The People contend that
24 surface coal mine areas may provide a suitable site for
25 disposal of the Kerr-McGee waste."

1 MS. RAPKIN: All right. Well, the question asks
2 generically about abandoned surface coal mines, just as the
3 next question asks generically about limestone dolomite
4 quarries, and the People have never contended and couldn't
5 contend that all abandoned surface coal mines or all quarries
6 of any kind or sites of any kind would be appropriate.

7 All we have said is that because of features that
8 are frequently or generally found in such areas, they may
9 provide suitable sites.

10 We have also said in response to another
11 interrogatory -- I don't remember if it was in this set or the
12 first set of interrogatories -- that without site-specific
13 study, no decision can be made at all whether or not a
14 particular site is suitable, and that's what we are trying to
15 get across here.

16 JUDGE FRYE: So your point is that you have
17 information or State agencies have information that might
18 identify areas that would be profitable to explore and
19 investigate?

20 MS. RAPKIN: Yes. I think that's a good way of
21 putting it.

22 We said, in response to --

23 JUDGE FRYE: And that is what you have given the
24 Staff, basically, I take it?

25 MS. RAPKIN: That's correct. As we said in our DES

1 comments a few years ago -- in fact, Dr. Thomas Johnson from
2 the State Geological Survey said in those comments that he
3 feels that abandoned surface coal mines should have been
4 considered by the company. That's really all we are saying.

5 The first sentence of those two answers,
6 Interrogatory 21 and 22, is basically no to the answer. We
7 need not even have gone any further. We could have left it at
8 that. But we didn't want to leave it at that, because we
9 wanted to make it as clear as possible what our position
10 really is, since there seemed to be some confusion.

11 Judge Frye, your question about Interrogatories 21
12 and 22 brings up a point that I wanted to make more generally,
13 and that is that a lot of the problem with these
14 interrogatories, the second set of Kerr-McGee's
15 interrogatories, is that the phrasing of the question attempts
16 to put into the People's mouth a particular Contention or a
17 particular characterization of the Contention.

18 We feel that that is what these two interrogatories
19 did. As an example -- I am not suggesting that that is
20 intentional, but that is how they are worded, and a lot of the
21 difficulty with our answering them, and therefore the reason
22 why we could not answer many of them, was because they asked
23 the question in a way that characterized our position as
24 something it is not.

25 You have said you want to break in five minutes, so

1 I don't really want to spend too much time. I want to point
2 out that the two interrogatories that attempt to explore the
3 Eastep and Lash affidavits were answered to the extent that
4 the questions were appropriate -- that is to say, to the
5 extent that the questions went to the factual basis for the
6 policies or procedures which were articulated by the affiants.

7 What we have objected to is those portions of the
8 interrogatories that try to do thing that are inappropriate or
9 improper, to inquire into the legal propriety of those
10 policies or procedures, or to inquire the deliberations that
11 preceded the articulation of such policies or procedures.

12 Kerr-McGee has said this morning that we have not
13 provided the information that is required by a Vaughn
14 affidavit. That phrase wasn't used, but Vaughn affidavits are
15 required with respect to documents. Here, the questions
16 themselves ask for the very information which would be
17 protected, if it were stated in a Vaughn affidavit.

18 So the company -- to the extent that those
19 affidavits are relevant, then the company can inquire into
20 their factual bases, but not other matters.

21 Interrogatory 35, I just want to state for the
22 record --

23 JUDGE FRYE: With respect to Lash and Eastep, in
24 your response you say that you object because they ask for
25 legal conclusions.

1 MS. RAPKIN: Well, there were several objections.
2 Let me get it in front of me. One moment, please.

3 [Pause.]

4 MS. RAPKIN: I have page 45 in front of me. I
5 notice that one of the objections is on legal conclusion
6 grounds. Another is that the information requested is
7 protected by the executive privilege, including those covering
8 prosecutorial discretion and policy-making. It calls in part
9 for a legal conclusion and is in part irrelevant. So there
10 are a variety of objections that are made.

11 Interrogatory 35 is the one that asks about
12 socio-economic and economic impacts. I believe that we stated
13 in our interrogatory response that we felt that in large part
14 this interrogatory was answered, if the Board turns to the
15 question or the interrogatory that dealt with cost/benefit.
16 Our answer is very lengthy. It covers, I think, three pages.
17 So we think that has been answered.

18 We have, however, agreed to supplement that.

19 JUDGE FRYE: So you are going to do that?

20 MS. RAPKIN: Yes. We just have not had an
21 opportunity because of the enormous press of work. But we
22 will be doing that.

23 Finally, I want to say again that a lot of these
24 interrogatories are phrased in a way that attempts to have the
25 People characterize their Contentions, and the portion of the

1 motion to compel that sets out a series of assumptions the
2 company would like to make on the basis of what has been said
3 thus far by the People, we do feel is most inappropriate in a
4 motion to compel, not only because the assumptions that
5 Kerr-McGee states it would like to be able to make are
6 generally misstatements in one form or another of our position
7 or positions, but because that sort of activity is one that is
8 much more appropriately done at a conference that immediately
9 precedes the hearing or, you know, like a federal pretrial
10 conference to narrow the issues for trial.

11 One moment, please.

12 [Pause.]

13 [Counsel for the State confer.]

14 MS. RAPKIN: All right. I think that anything
15 further we would say would be repetitive of things we have
16 said in our response to the motion to compel, and we will stop
17 here.

18 JUDGE FRYE: Okay. Thank you. Why don't we take a
19 fifteen-minute break, and when we come back, I will come back
20 to you, Mr. Nickles, before we go on to the documents.

21 [Brief recess.]

22 Mr. Nickles, you want to respond?

23 MR. NICKLES: Yes, your Honor.

24 I have a comment. And I think it is critical to the
25 continued progress of this proceeding.

1 I think there is a misconception on the part of the
2 State as to where it is, so to speak.

3 Kerr-McGee has not applied to the State for a
4 license to either keep the material at West Chicago or to move
5 it. Kerr-McGee has applied to the agency entrusted by
6 Congress with authority to deal with that issue.

7 The State is in the case as an intervenor, opposed,
8 apparently, to onsite disposal. As an intervenor or as a
9 party, it has responsibilities. Among them, to identify
10 sites, if it opposes the site in question. That is West
11 Chicago.

12 I don't think one can say, either grammatically,
13 logically or within the parameters of the law, that it is our
14 view that there are more suitable sites. But we don't know of
15 any. And when I, perhaps inappropriately, stopped my
16 colleague, Ms. Rapkin, in the middle of a sentence, I did so
17 because I had been battling with my own frustration in this
18 matter since I have gotten into it. And if I were a federal
19 judge, I would be tempted to cut through it very quickly and
20 get it resolved, and I would hope that this Board will get it
21 resolved. Because we are in a proceeding that is ultimately
22 endless and nonsensical, if one of the principal parties
23 involved in a resolution of a difficult question is just
24 adamant in saying, "We don't like what you are doing, come
25 back with something different. We will let you have all of

1 our data, but don't ask us for an alternative and don't ask us
2 to indicate why another site is more suitable."

3 That just will not work in this proceeding because
4 what that kind of position means is that this Board should
5 first reject the site and then start a new proceeding, or a
6 new EIS as to other sites.

7 Once again, the State, I am sure, would take the
8 position, perhaps politically motivated, that, well, we can't
9 criticize or come up with other sites in lieu of Site X
10 because that is once again Kerr McGee's position. Kerr McGee
11 has to guess right. Kerr McGee has to pass muster pursuant to
12 our views or come back again and again. And the public
13 interest will not stand for that.

14 Moreover, Kerr McGee is somehow between all of these
15 government agencies being sued, being castigated, being
16 accused of various things, and with no ability to prove the
17 proceeding forward and have it resolved.

18 Now it seems to me to be -- and put aside this
19 unusual defense that somehow the lawyers inappropriately
20 drafted a contention and therefore we don't have to answer
21 what everyone can read in the words.

22 There is a responsibility if this proceeding is to
23 make any sense for the principal opposing party -- and I
24 respect the State, they have an important role to play -- for
25 the State to say, "This is not a suitable site in light of 1,

1 2, 3, 4, and X is more suitable because it takes care of 1, 2,
2 3, 4, and doesn't have 5, 6, 7 and 8." Otherwise, this is
3 meaningless.

4 Now this EIS process -- and we will get to that also
5 -- is driving me up the wall and it must drive you up the
6 wall. Law Review writers -- and they work in our firm in the
7 summer -- they look at the actions of administrative agencies
8 and I'm sure they work in Ms. Rapkin's and Mr. Eggert's office
9 in the summer, and they say, "What is going on?"

10 I sat down yesterday at 1717 H Street, where the NRC
11 was hearing a matter relating to mill tailings standards, and
12 one of the Commissioners appropriately said, "We have an
13 obligation to move forward, to protect the public health and
14 safety and do something."

15 Now what we are talking about here is a long-term
16 solution, and I don't believe that the State is fulfilling its
17 own mission as a public body, and fulfilling the directives in
18 and by Congress to this agency to move this proceeding
19 forward.

20 They have an obligation under the law, under the
21 NRC's cases and, moreover, as an agency which I hope is
22 determined to find a solution. We want a solution. We face
23 the prospect of litigation, people being unhappy with us,
24 municipalities being unhappy with us. We destroyed almost
25 everything on the site now. The buildings are about down.

1 We're ready to do something. And I am prepared, if the State
2 is not going to change its position and move to strike them as
3 a party, I will present that motion to this Board.

4 I am also prepared to move for sanctions on some of
5 the accusations that have been made by Kerr-McGee without
6 back-up. The Gustavson accusation, castigating that man's
7 character, Kerr McGee's character. The accusation about
8 tainting a study. You don't make those charges irresponsibly.

9 But fundamentally, I am concerned at what is a
10 critical issue in this case. You cannot say there are more
11 suitable sites and then say we don't know any. And I would
12 plead with the Board to take steps promptly to require that
13 there be some position, because if that position is ultimately
14 what they saw in the paper, I am going to move to strike them
15 as a party.

16 End of sermon. I am sorry, but I feel very strongly
17 about this as an interested citizen.

18 JUDGE FRYE: You get into scheduling to a certain
19 degree.

20 MR. EGGERT: May I just respond briefly to the
21 sermon? Which is, when it becomes a motion, as opposed to
22 pontification, we will respond.

23 For the record, we don't accept more than about 1
24 percent of what Mr. Nickles has just said.

25 JUDGE FRYE: Okay.

1 MS. RAPKIN: Judge Frye, if I might also just make a
2 few very narrow legal responses to some of those points. I
3 think that again there is some serious confusion of the
4 issues.

5 I think, first of all, Mr. Nickles is raising a
6 legal question which is not raised by the interrogatories by
7 motions to compel, and that is whether the intervenor in a
8 proceeding such as this one has a legal obligation to identify
9 specific sites, and I think we argued that in briefs, and it
10 looks like it is going to have to be argued again.

11 I am sure the question --

12 JUDGE FRYE: Have we argued that previously?

13 MS. RAPKIN: Yes, I think we did in the
14 post-prehearing conference briefs that were filed last summer,
15 in the spring or summer.

16 JUDGE FRYE: And we ruled?

17 MS. RAPKIN: I don't think there was a specific
18 ruling. I'm not sure --

19 JUDGE FRYE: Has this been briefed, this point?

20 MR. MESERVE: There have been some correspondence
21 back and forth with regard to the Staff's obligations to
22 supplement the FES. Those were, to my knowledge, never
23 approved in any Board directive with regard to alternatives,
24 nor has it ever been argued orally to the Board, to my
25 knowledge.

1 MR. NICKLES: The thing I meant most specifically
2 was Mr. Lewis' letter in which he cited a number of NRC cases,
3 a letter to Ms. Rapkin, after apparently a meeting in Chicago
4 that the Staff had with the state representatives in which
5 Mr. Lewis, I believe, there is an obligation attendant to
6 being a party, see these cases. I won't put words in his
7 mouth. Mr. Lewis can speak to that point.

8 MR. LEWIS: That is correct. It was raised in a
9 letter, a letter which addressed --

10 JUDGE FRYE: Oh, I think I recall that.

11 MR. LEWIS: -- a letter which addressed the question
12 of the obligation of an intervenor in a proceeding to specify
13 specific problems it had. In this case, that if there was a
14 contention about an infirmity of the alternative site analysis
15 --

16 JUDGE FRYE: Which is Staff's responsibility.

17 MR. LEWIS: Right, which would be the Staff's
18 responsibility under NEPA. Then at some point there would
19 have to be a specification of the intervenor's views as to
20 exactly what the problems were.

21 Now, in some cases that would mean a specification
22 of sites. Your Honor, we are not a party to this discovery.

23 JUDGE FRYE: I realize this goes quite beyond that,
24 I think.

25 MR. LEWIS: But perhaps there are a few things that

1 the Staff should say to reflect our view of the matter.

2 The State has said to us, on a number of occasions,
3 that they are not authorized under law to pick a site for any
4 private entity, and that therefore they have maintained
5 adamantly the position that they will not be put in the
6 position of selecting particular sites that they believe are
7 appropriate for disposal of the waste from the Rare Earths
8 Facility.

9 JUDGE FRYE: This is a question of state law, I take
10 it?

11 MR. LEWIS: It is a question of state law, which I
12 have not researched.

13 JUDGE FRYE: Well, we will certainly defer --

14 MS. RAPKIN: It is a question of state law, of state
15 policy, and thirdly of the resources of the various agencies.
16 They cannot engage in private consulting.

17 JUDGE FRYE: Okay.

18 MR. LEWIS: And the NRC also has not, at least in
19 terms of analyzing the appropriateness of the proposed
20 disposal at the West Chicago site, our mandate is to determine
21 whether or not there is an obviously superior site. We are
22 not in the business of choosing some other site in this
23 proceeding.

24 JUDGE FRYE: I understand that.

25 MR. LEWIS: So in a sense we are really not in that

1 different a posture than the State. But it has seemed to me,
2 accepting that that is the position of the State and the State
3 does not want to be put in a position of selecting particular
4 sites -- in fact, the Staff, as you may know, from what the
5 enclosure to the letter we sent you on August 16th said, we
6 are not thinking in terms of particular sites, as someone
7 might envision, just in the common meaning of the word. We
8 are talking about sites as being areas of 25 to 100 square
9 miles.

10 I mean we are approaching it as a question of
11 looking more broadly at the State of Illinois, are there other
12 areas out there that appear to be obviously superior. Many of
13 these sites are privately owned and we may not have access to
14 them.

15 It is not a matter of identifying a particular
16 parcel of land, in our view.

17 If the issue needs to be addressed at any point,
18 that would be our position, that we are not conducting an
19 identification of actual parcels. We would hope that -- we
20 believe that the type of alternative site analysis that we are
21 proposing to do as part of the Supplemental Environmental
22 Impact Statement is a type of analysis which will withstand
23 scrutiny by the Board and the parties in this proceeding, and
24 in any kind of review that may be had.

25 But I do agree with at least one of the underlying

1 concerns that Mr. Nickles expressed, and that is, that it is
2 not apparent to me that even after the NRC Staff goes through
3 this process under NEPA, that it will necessarily have
4 identified -- it won't have identified a particular site.

5 And to the extent that there is a concern with
6 actually identifying a particular site, that matter almost has
7 to be done, in my view, as a matter of negotiation.

8 I have been hopeful since the beginning that there
9 would be some basis for negotiation among the parties to in
10 fact see if there was a particular site that could be
11 identified.

12 Now I don't know exactly what the state law policies
13 are when it gets to this point, but it would not seem
14 inappropriate to me that the State might consider as a matter
15 of negotiation, not as a matter of whether they have or are
16 supposed to or not supposed to identify a site for a private
17 entity, but as a matter of negotiation, because they want to
18 effect a certain result, in fact come forward and lend all of
19 their resources not only to the identification of areas of the
20 State, which they have done and are doing for us -- and we
21 welcome it -- but to get as specific as their resources permit
22 them to do.

23 JUDGE FRYE: So if I undertand what you're saying,
24 it's at bottom all we can do in this proceeding is decide
25 whether West Chicago is or is not appropriate.

1 MR. LEWIS: Yes. Absolutely. If you were to reject
2 the West Chicago site --

3 JUDGE FRYE: We are back to go.

4 MR. LEWIS: That's correct. That would have to be
5 part of a separate proceeding.

6 MS. RAPKIN: If I might both continue the response I
7 wanted to make to Kerr-McGee and pick up on these remarks,
8 there is always room for negotiation, and we have never said
9 that there isn't, and we would welcome negotiation, we would
10 welcome a good faith attempt by this Licensee to find a more
11 appropriate burial site, more heartily than I can possibly
12 convey to you this morning.

13 We have always said that we will not specify a site,
14 but that our State agencies can help the company if it wants
15 to screen the State. The lead will have to be taken by this
16 Licensee.

17 We have explained, both in response to one of these
18 interrogatories early on in the second set of interrogatories,
19 and we have said it to the Staff, and we have said it numerous
20 times, that what the company always should have done, has not
21 yet done, but still can do, is hire a specialist in this area.

22 There are such people, consultants, who help
23 companies find siting for waste landfills or other waste
24 disposal facilities. Come down to Champaign, where our water
25 survey and our geo survey are located, look at the materials

1 that have been generated over years, the water logs and so
2 forth, the reports on water supplies and presence and location
3 of aquifers. Every county and state, as well as new materials
4 that have been generated over the last couple of years by the
5 surveys in connection with DNS's attempt to site a compact
6 facility.

7 The State Geological Survey has done an enormous
8 amount of work screening the state in terms of location of
9 aquifers, depth of aquifers, depth from the surface, whether
10 or not they are used, whether or not they have been used,
11 whether they will be used for potable supplies.

12 The company would then screen the State for some
13 large areas that are potentially suitable. I know that they
14 will not find DuPage County, or at least this portion of
15 DuPage County, to be among those potentially good candidate
16 areas.

17 It will then have to go out and take a look at
18 particular screened smaller areas, get available information.
19 There is information on drinking wells in some very small
20 areas, relatively small areas, come back to the surveys, sit
21 down with these people again, go over the information they
22 have found, and with that information, go back out, find some
23 specific sites that they would like to look at, enter into the
24 appropriate arrangements with private owners, if the sites are
25 privately owned, work with the surveys on what kinds of

1 site-specific studies would be the most appropriate to them,
2 and then make their choice and present that application.

3 The company has been defunct. It stopped operating
4 13 years ago. It was in 1973. To our knowledge, to the
5 knowledge of the people in the surveys, they have never done
6 this. They will get lots of support, lots of technical help,
7 but they will have to take the lead. They will have to make
8 the final choice.

9 But I think if the search for an alternative site
10 were conducted in that manner, one would be found.

11 MR. NICKLES: Your Honor, the way the issue has been
12 framed for you by the Staff is facile, but meaningless.
13 Because when you decide whether the West Chicago site is
14 appropriate or whether there is an obviously superior site,
15 which is the standard, it seems to me that you have to
16 consider, among other things, the cost of the environmental
17 impact in moving the material to alternative sites.

18 Otherwise, you may decide in two years or five years
19 that West Chicago is not appropriate, and then 10 years down
20 the road, decide that X city in Illinois is good, but we
21 haven't looked at the cost of moving material, which has now
22 been sitting in West Chicago for ten years, down to site X
23 and, therefore, we have to go back and compare West Chicago
24 with site X.

25 JUDGE FRYE: Well, as a practical matter, I think

1 you are right, but I think you also have to bear in mind that
2 all we have before us is the West Chicago site. That's what
3 is in the application.

4 MR. NICKLES: It seems to me, though, that is part
5 of a determination of whether West Chicago is appropriate or
6 not. Intervenors and the Staff have the obligation of showing
7 you that there is an obviously superior site. If they do not,
8 then unless there is something extraordinarily wrong --

9 JUDGE FRYE: Well, if they do not, then under NEPA,
10 your site would probably pass muster, at least on the
11 alternate site inquiry.

12 MR. NICKLES: Yes, but what you are having said by
13 the State is that they will not even address that issue. They
14 do not intend, by reason of policy or law or otherwise, they
15 do not intend, nor does the State intend, to offer a specific
16 site that would be, quote, "obviously superior."

17 JUDGE FRYE: Yes. I understand that they don't --

18 MR. NICKLES: We have, in fact, a stipulation on the
19 record, as far as I can hear other parties to this case,
20 saying there will be no evidence relating to a specific site
21 that is allegedly obviously superior.

22 Now if there is that stipulation, it narrows the
23 issue considerably.

24 JUDGE FRYE: Their Contention, as I recall, goes to
25 the proposition that the search for alternative sites has been

1 inadequate, and that, as I understand it, is what we are going
2 to be hearing on the alternative site issue.

3 Now it seems to me we have gotten very far afield at
4 this point from the specific matters here, which are
5 interrogatory answers.

6 MR. NICKLES: But sometimes your interrogatory
7 answers highlight what is at the heart of the proceeding.

8 JUDGE FRYE: Sure.

9 MR. NICKLES: And obviously the Board, in deciding
10 whether to order responses to interrogatories, has to consider
11 how important they are and how relevant they are to the issues
12 in the proceeding.

13 What I am suggesting to you is that you can
14 interpret your mandate so narrowly as to be meaningless, or
15 you can interpret your mandate in a way that makes sense.

16 Now there has been a lot of talk about inadequacy of
17 the alternative site analysis done by Kerr-McGee and that we
18 should hire a specialist and take advantage of this and that.

19 Well, we have sought to do an alternative site
20 analysis, and there has been no evidence thus far, which was
21 welcomed in your order, as to whether there was a factual
22 issue as to the taint or not. That analysis is correct.

23 I don't think myself that you can comply with NRC
24 case law by coming in with, quote, "areas," unquote, of 75 to
25 100 miles as potential sites.

1 Now I think we are getting off into --

2 JUDGE FRYE: Well, that is a substitute issue, but I
3 certainly don't want to comment on it at this point or try to
4 prejudge.

5 Let us move on, shall we?

6 I think the next item that we were going to come to
7 was the question of document production, and that, as I
8 indicated before the break, also gets into the question of who
9 the parties are intervening and questions of whether claims of
10 privilege have been substantiated. There seems to me to be
11 quite a lot of overlap.

12 Do you want to take that up now, or shall we take
13 that up with regard to Kress Creek?

14 Let me say also that you have raised the question of
15 who the Attorney General represents in connection with Kress
16 Creek, as, of course, you really were limited to do. I don't
17 view that question as being limited to that case. If we are
18 going to have it one way in one case, we're going to have it
19 the same way in the other case.

20 MS. RAPKIN: And I can answer the question, to the
21 extent that we have not answered it in the pleadings.

22 It is the Attorney General of Illinois' customary
23 procedure to consider itself as representing an agency which
24 has requested that the Attorney General take some specific
25 legal action, and it is for that reason that we use the phrase

1 "client agency, the Attorney General's client agency," and I
2 think we have used that many times in these pleadings. We
3 have referred to IDNS as the client agency, because it is at
4 their request that the various petitions were filed.

5 In the State Court proceeding, for example, IEPA
6 requested that we file certain of the counts that relate to
7 groundwater contamination and waste disposal practices and
8 alleged violations, and IDNS requested that we file other
9 counts that deal with radioactive air pollution and air
10 nuisance. So in that case, the Attorney General has two
11 client agencies.

12 The question came up in the context here of document
13 requests. The requester asked that the, quote, "State,"
14 unquote, produce all of the documents. And again, as a matter
15 of policy and procedure, we, the Attorney General's Office,
16 normally only produce the documents of the client agency, as
17 well as documents that we are aware of that are in the files
18 of other agencies, but we do not make a request of the -- what
19 is it? -- 274 boards, agencies, and commissions that comprise
20 the Administrative Branch of the State of Illinois.

21 What we did in this matter from Day One was to
22 produce documents from every agency, regardless of their,
23 quote, "client," unquote, status in these proceedings or the
24 State Court proceedings, which we believed had documents that
25 were relevant, and those agencies are, of course, IEPA and

1 IDNS, the Illinois State Geological Survey, the Illinois State
2 Water Survey, the Illinois Department of Public Health to the
3 extent that there are any existing documents, and those
4 documents relevant to this case are in the possession of IDNS,
5 which is the successor agency to IDPH with respect to matters
6 like that involved here.

7 In the Kress Creek proceeding, it came to my
8 personal attention not that long ago that the Illinois Natural
9 History Survey had conducted a study of Kress Creek, among
10 other sites. Kress Creek was part of it. And I voluntarily
11 and immediately inquired that I be sent the portion of the
12 study that covered Kress Creek and reviewed it. Some people
13 in our office reviewed it, and we sent it to Counsel for
14 Kerr-McGee.

15 So as far as we are concerned, every agency that we
16 believe has any relevant documents to this proceeding -- I
17 guess I should say the West Chicago Rare Earth proceeding, the
18 Kress Creek proceeding, or the State Court action -- has been
19 produced. And I also point out that Counsel has produced from
20 her own personal files relevant documents which are not
21 privileged.

22 JUDGE FRYE: I am somewhat troubled, I have to say,
23 Ms. Rapkin, because -- and this may be moving on a little bit
24 from the question of who the parties are -- but one of the
25 documents produced was clearly an index. Were all of the

1 documents that were reflected on that index produced as well?

2 MS. RAPKIN: I think what you're referring to, and
3 I'm not absolutely certain, is an index that was found in
4 IDNS' files. If documents listed on the index were not
5 produced, it is only because they weren't in the files -- that
6 is to say, the files are like the files of many agencies and
7 no doubt many individuals, not necessarily as complete as they
8 once were. But every single item that both I and Chief
9 Counsel for IDNS found in IDNS' files that were relevant and
10 non-privileged were produced.

11 If it's incomplete, it's not for lack of trying to
12 find the documents.

13 JUDGE FRYE: To come back to the other point with
14 regard to who the parties are, I understand, you know, that it
15 has been fairly clear -- at least it was fairly clear at the
16 beginning -- you filed a petition first on behalf of the
17 People and then subsequently amended it to reflect the fact
18 that it was also filed at the request of IDNS.

19 Now there appear to be -- or at least I am cited to
20 instances; I haven't looked at it -- where you have claimed
21 attorney/client privilege with regard to communications to
22 other agencies than IDNS.

23 I really have two questions. I suppose really the
24 primary question is that when the People of the State of
25 Illinois intervene in a proceeding, who are we dealing with?

1 MR. EGGERT: If I may answer that, the answer to
2 that question is fairly simple. It is the Attorney General.

3 As to the other question, which is what's our
4 relationship to other agencies, I suppose the easiest analogy
5 would be to point to Covington & Burling. In this particular
6 proceeding, their client is Kerr-McGee. That's not the only
7 corporation that they ever represent. And if we served, for
8 example, an interrogatory or a document request on them
9 saying, "Produce all of your documents related to any of your
10 clients concerning radioactive contamination anyplace," a lot
11 of it would be objectionable, because one of their other
12 clients may well have communicated information to them in
13 confidence, which would fall within the scope of that, but
14 would nevertheless be protected by attorney/client.

15 That privilege is not dependent upon the existence
16 of litigation to come into play, and that's been the basis of
17 a lot of our objections. For example, the State Water Survey
18 is part of the Illinois Department of Natural Resources, which
19 is a client of ours, along with the Prisoner Review Board and
20 the Department of Public Health and everybody else. If
21 communications from the Water Survey as a client agency are
22 protected by the attorney/client privilege or by work product
23 or by some other doctrine, that attaches, regardless of
24 whether or not they are litigant in this case.

25 So they are somewhat discrete inquiries.

1 JUDGE FRYE: Yes. But now a number of those
2 agencies -- when I say "a number," at least two, I would
3 think, the two Surveys -- clearly seem to have quite an
4 interest in this case.

5 MS. RAPKIN: Well, they have had a lot of
6 involvement. They are clients in the sense that Mr. Eggert
7 has described. They are not --

8 JUDGE FRYE: I understand that the Attorney General
9 is the sole legal representative for the state agencies.

10 MS. RAPKIN: Right. And they are not the, quote,
11 "clients," unquote -- litigants in this proceeding. They are
12 nonetheless, as Mr. Eggert says, clients, and that is why the
13 attorney/client privilege applies.

14 JUDGE FRYE: Why would they not want to be parties?

15 MS. RAPKIN: Well, they don't litigate. That's not
16 the function that they serve. They are primarily, number one,
17 academic; number two, research; number three, they have
18 statutory mandates in Illinois to provide consulting and
19 advisory services to other agencies.

20 And here is an example. The State Environmental
21 Protection Agency, every time it receives a waste disposal or
22 storage or treatment application, which involves the use of a
23 particular site, writes a letter to the Surveys and asks the
24 Surveys for, number one, what information they have on the
25 hydrology and geology of the site and so forth. So those are

1 the kinds of functions that they perform. They do not
2 generally get involved in litigation.

3 They will serve as witnesses, but they are not
4 litigants.

5 JUDGE FRYE: I see.

6 MR. MESERVE: Let me make a few comments.

7 JUDGE FRYE: Well, let me ask you, first of all,
8 when you make your comments, why does it make a difference? I
9 mean, we can give you subpoenas, if subpoenas are necessary,
10 directed to any one of these State agencies, requiring the
11 production of documents or testimony. Why does it make a
12 difference?

13 MR. MESERVE: Well, let me deal with that first.

14 We got to where we are in the License Amendment
15 proceeding for the Board's order that said IDNS was the party
16 on behalf of the State. Prior to the Board's order, the State
17 has represented in all of our discussions as to who they were
18 producing documents for, that they were representing IEPA and
19 IDNS and that they would voluntarily produce documents from
20 the Surveys.

21 And we questioned whether the production had been
22 complete, as you know, and filed a motion, and somewhat to our
23 surprise, the Board came back and interpreted the petition to
24 say that only IDNS was a party.

25 In the Kress Creek proceeding, where the issue has

1 still not yet been resolved, the State has not made a similar
2 offer. One looks at the response to interrogatories and
3 requests for documents -- it's on page 20 of our motion to
4 compel in the Kress Creek proceeding -- the State says only
5 that they will produce documents in the possession of the
6 Attorney General's Office and the Illinois Department of
7 Nuclear Safety. No mention about IEPA, no discussion about
8 voluntary production from the Surveys.

9 As has been represented to you, there is an index
10 here that shows that there are Kress Creek documents that have
11 been generated, in the possession of some State agency.
12 Presumably they are not in the files of IDNS, and they,
13 therefore, weren't submitted, because the IDNS files are,
14 quote, "not complete."

15 Now I suppose that we could file subpoenas directed
16 at, for example, IEPA. But consider the bind that that gets
17 us in. The State has represented to us today that IEPA is a
18 party in the State Court case. We could claim that IEPA is an
19 expert and make our arguments that we have made today -- and
20 they are forceful and effective arguments, I think, that we
21 have limited rights of discovery of them in this proceeding to
22 get at information, to the extent that there is an overlap
23 between the issues in the Kress Creek case and the License
24 Amendment case and the State case, and we believe there are
25 substantial overlaps.

1 So I think that we have a situation here where the
2 State may be in a position to exploit the parties' status in a
3 way that operates to our disadvantage, and in their own
4 filing, they have only told us that they are going to produce
5 documents from IDNS, and there is some internal evidence that
6 that is all they have done.

7 I guess I would like to also bring the Board's
8 attention, particularly in the Kress Creek case, to look at
9 Contention 1, which has been admitted in this proceeding.
10 Contention 1 says that there are chemical contaminants in
11 Kress Creek and that they are intermixed with the materials in
12 Kress Creek and that in any action, remedial action, in Kress
13 Creek that there has to be an evaluation of the impact of that
14 remedial action on other chemical contaminants in Kress Creek.

15 Now we have filed some interrogatories on that. The
16 State says, "Well, we're not talking about chemicals from
17 Kerr-McGee; we're talking about chemicals that are from other
18 industrial concerns that might release pollutants of some kind
19 into Kress Creek and that somehow have gotten into the
20 sediments there."

21 Well, I presume that that's a matter that is not
22 within the files or reflected in the knowledge of IDNS. I
23 suspect that that's a matter that is within the file of IEPA.

24 Now we have not seen a single document, despite our
25 request, with regard to that particular Contention, which has

1 been admitted in this proceeding. Why does the State believe
2 that there are chemical contaminants that are in the sediments
3 of Kress Creek? Where do they come from? What are we
4 worrying about? What are we dealing with here?

5 The State has raised it as an issue. We haven't
6 seen any document production with regard to that issue, and it
7 seems to me that it's very likely that there is information
8 within the State on that particular matter, which is one of
9 the two Contentions of the State which are clearly part of
10 this proceeding. The only way we are going to get at that
11 issue is to get at documents and the like that are in the
12 possession of IEPA.

13 There has been a facile analogy that's been made
14 here that the Attorney General in some fashion is equivalent
15 to Covington & Burling, that we don't produce from the files
16 of Covington & Burling with regard to the files that we may
17 have that relate to this matter, if there were any that bear
18 on the issues in dispute here.

19 Well, the fact of the matter is that this litigation
20 was commenced and named the People of the State of Illinois as
21 one of the parties, and there is an abundance of case law,
22 which we have provided to you, where an overarching
23 governmental entity is a party in a suit, discovery against
24 that party isn't limited to the self-designation by the
25 Attorney General as to who the clients are. It covers the

1 entirety of the government, and I presume that the State and
2 the Attorney General's Office is in a far better position than
3 we are to determine where relevant files might exist in the
4 State.

5 We hear talk about 274 agencies. Well, the State
6 knows which ones get involved in this matter far better than
7 we do and is better able to conduct a search.

8 The case law supports our position in this, and the
9 State has never responded to that case law.

10 JUDGE FRYE: So your problem, then, if I understand
11 you correctly, is that you don't want to be in the position of
12 having to identify which particular agencies might have
13 documents and then send them subpoenas.

14 MR. NICKLES: That's exactly right. We don't want
15 to issue 274 subpoenas. If we issue a document request for
16 Subject Matter X, for example, bearing on Contention 1, we
17 think it is incumbent upon the State to go to all of the
18 agencies of the State that may have relevant information
19 respecting Contention 1 and to provide it to us, regardless of
20 which agency it comes from.

21 JUDGE FRYE: I was confused, too, on another point
22 that I think you can probably respond to.

23 You have taken issue with this point that they
24 raised when they raised the point in the context of -- excuse
25 me -- when they raised the points separately from a specific

1 interrogatory or document request, but going through the
2 papers, I don't recall -- and correct me, if I'm wrong -- that
3 the objection has been raised by the State in the connection
4 with a specific document request or a specific interrogatory.

5 MS. RAPKIN: I'm not sure what they are asking me.

6 JUDGE FRYE: What I am wondering is how real is the
7 controversy.

8 MS. RAPKIN: There is no controversy whatsoever.
9 Mr. Eggert and I are sitting here racking our brains as to
10 what these people are asking us. They are not in a position
11 where they have to identify which of 274 commissions, boards
12 or agencies have documents. We have done that.

13 While it is true that we only have two client
14 agencies, IDNS before the NRC and IEPA and IDNS in the State
15 Court, we determined that there were other agencies that had
16 relevant documents, and they were ISWS, ISGS, INHS, and we
17 produced them all.

18 Mr. Meserve is talking about the chemical
19 contaminants that we have alleged may exist at Kress Creek in
20 the tailings that are there. Well, it's true we alleged
21 that. We answered the interrogatory in which the company asked
22 for the basis of our belief, and in connection with discovery
23 in the State Court case, they got every single document that
24 could be relevant from IEPA absent those which were
25 privileged, and they had been given privilege sheets to know

1 which ones were excluded.

2 If they have not found any documents in IEPA's files
3 which to them explain the basis for the State's contention
4 about chemical contaminants at Kress Creek, it's because there
5 aren't any documents there.

6 JUDGE FRYE: Mr. Meserve, do you take issue with
7 that?

8 MS. MESERVE: Of course, the State is in a far
9 better position than we are to judge where and where not there
10 are documents. I suppose that there are advantages to us in
11 terms of sanctions and what have you to have agencies
12 designated as parties. We are somewhat surprised, given the
13 response that the State has given here, because it doesn't, in
14 our eyes, square with the answer they filed in the Kress Creek
15 proceeding.

16 With regard to their survey of IEPA and IDNS and the
17 Illinois State Water Survey as to documents that relate to the
18 Kress Creek matter, their answer points to the efforts that
19 they made last year to produce documents from those agencies
20 in connection with the license amendment proceeding. It is
21 highly unlikely, given the scope of the license amendment
22 proceeding, that they ever were going to ask for or collect
23 documents that deal with contaminants that might have been put
24 in Kress Creek by other entities. That was just simply not an
25 issue at that time, and there was no representation in their

1 answer that they filed in this case that they have gone back
2 to IEPA and asked for documents on that specific issue.

3 JUDGE FRYE: Have you?

4 MS. RAPKIN: Now, what is the issue, whether or not
5 IEPA has in any of its files concerning any permittee or
6 regulated entity in the State of Illinois whether or not any
7 such permittee or entity has an NPDS permit to discharge into
8 Kress Creek or has discharged contaminants into Kress Creek?
9 Is that the question?

10 No, we certainly have not asked IEPA --

11 JUDGE FRYE: Now, wait a minute. You have got a
12 contention here that says that there is some problem, perhaps,
13 imposed by the fact that there are chemicals not originating
14 from Kerr McGee which had found their way into Kress Creek and
15 which need to be taken into account when you remove the mill
16 tailings if they are removed; isn't that correct?

17 MS. RAPKIN: Well, I don't have the contention in
18 front of me.

19 JUDGE FRYE: I don't either.

20 MS. RAPKIN: Okay. If I remember what it says, it
21 is that before materials are removed or disturbed by the
22 company in cleanup, the company should test the materials for
23 all chemicals because there may be additional contaminants
24 other than those associated with --

25 JUDGE FRYE: Okay, that's close enough.

1 MS. RAPKIN: And that is a very narrow question.

2 JUDGE FRYE: Okay. Now, they have asked for any
3 documents you have that might provide a basis for believing
4 that there are such chemicals present. The question is have
5 you searched IEPA's files for such documents?

6 MS. RAPKIN: Well, it may be that I misunderstood
7 what they were asking for. They asked for two things. One is
8 they asked in an interrogatory for the basis of the State's
9 beliefs that the tailings were contaminated with process
10 chemicals from the Kerr McGee site, and in response to that
11 interrogatory, we said we have laid out the basis in the
12 contention. The contention said that the Kerr McGee wastes
13 now in Kress Creek came from the Kerr McGee site.

14 We assume that it is conceivable that those wastes
15 are contaminated not only with thorium and related nuclides
16 but with the same chemicals that the on-site wastes are
17 contaminated with. That's just a matter of common sense.

18 JUDGE FRYE: But we are talking about document
19 production.

20 MS. RAPKIN: And the document request, I assumed
21 that that is what they were asking about, and so we produced
22 everything from IEPA's file on Kerr McGee, everything that
23 related to Kerr McGee. Now, I really had no idea that they
24 were asking us to have IEPA study every file in their entire
25 agency -- the files cover rooms and rooms and rooms and rooms

1 and rooms and rooms -- of anyone who could conceivably have
2 disposed of waste into Kress Creek.

3 First of all, I didn't understand that to be the
4 case. Number two, I can't imagine that IEPA could comply with
5 that in the next five years. Number three, I'm not sure that
6 that would be relevant to the narrow contention we have
7 raised.

8 All we have said in the contention is that, as a
9 matter of common sense, they should simply test the materials
10 that they are going to remove, assuming that removal is
11 ordered by the Board, to see what kinds of chemicals are in
12 there. They would have to do that anyhow before they could
13 dispose of it at any IEPA site. They would have to
14 characterize to IEPA what the chemical composition of the
15 waste is.

16 So that's my answer.

17 JUDGE FRYE: Let me suggest this to you. Over the
18 lunch break, Kerr McGee and the State get together with regard
19 to the specific requests with which you, Kerr McGee, are
20 unhappy. You, State, tell them which files you have searched.

21 MS. RAPKIN: Well, we have already told them. We
22 have searched every file that relates to Kerr McGee in every
23 state agency that has --

24 JUDGE FRYE: No, I'm talking about which state
25 agency. IEPA? IDNS? Whatever.

1 MS. RAPKIN: IDNS, ISWS, ISGS. And we have sworn to
2 that. We have sworn to that. And IDNS counsel went back to
3 IDNS' files first upon our receipt of the Motion to Compel in
4 Kress Creek, and then upon receipt of the Motion to Compel in
5 the Rare Earths proceeding, and he again searched. A handful
6 of documents were identified that had been missed the first
7 time around. Those were sent. And I filed an affidavit.

8 JUDGE FRYE: Where do I find your affidavit or
9 whatever that tells me what files were searched?

10 MS. RAPKIN: It is either appended to our Answer to
11 the Motion to Compel in Kress Creek -- I think that is the
12 one. I don't have that with me. Russ, do you?

13 MR. NICKLES: I think it would be helpful, Your
14 Honor, to see what files were searched and for what purpose.

15 JUDGE FRYE: That's what I'm waiting for.

16 MR. NICKLES: And when you match the for what
17 purpose with the broad request for the document, you are going
18 to find a great disparity, and it is impossible, I think, for
19 the Board to see who shot John here because Ms. Rapkin keeps
20 saying "we have produced everything." It may be necessary
21 that we depose Ms. Rapkin or whoever conducted the document
22 search and see exactly what they did because it is impossible
23 for us to get behind the assertion "we have produced
24 everything." I mean how do we deal with that?

25 MS. RAPKIN: Judge Frye, I really have to object to

1 this sort of conduct on counsel's part. We have stated that
2 we searched the files of the named agencies for documents that
3 are relevant to any material issue or any interrogatory
4 propounded in the West Chicago Rare Earths proceeding --

5 JUDGE FRYE: Now, can you give me a citation to that
6 now?

7 MS. RAPKIN: Yes. Let me finish and I will.
8 Relevant to the West Chicago proceeding, the Kress Creek
9 proceeding, or the State Court proceeding. And it would
10 appear to me that counsel is simply looking for something to
11 quibble about. There is nothing more than that that we can
12 do.

13 They have stated they searched Kerr McGee's files
14 for all relevant documents. We have to accept that
15 statement. We are not going to question it. They may have
16 overlooked documents inadvertently. We may have overlooked
17 documents inadvertently. Those that we have found that we
18 overlooked, we have sent, and I just see this as a useless
19 attempt to draw out a matter that has really been responded
20 to.

21 JUDGE FRYE: I have to say that I, in reading these
22 papers, was confused as to what had been searched and what
23 hadn't been searched, and if you after the lunch break would
24 cite me to where I can straighten myself out, I would
25 appreciate it.

1 MS. RAPKIN: Okay. And if it is still not clear on
2 the record after we provide that citation, then we will file
3 another affidavit. We will certainly do that during the lunch
4 hour.

5 JUDGE FRYE: Now, with regard to substantiation of
6 claims of privilege, your papers don't seem in both cases to
7 make any objection to doing that.

8 MS. RAPKIN: That's correct.

9 JUDGE FRYE: Okay. So you are going to do that.

10 MS. RAPKIN: If the Board orders us to do it, then
11 we will do it.

12 MS. RAPKIN: All right. Let's do that.

13 MR. NICKLES: I might note, Your Honor, that this
14 has been outstanding since March. Does the State understand
15 that you have ordered them to do that?

16 JUDGE FRYE: Yes. I am going to go over. Either at
17 the conclusion of this prehearing or very shortly thereafter,
18 there will be an order coming out.

19 MR. NICKLES: Because, you know, we have heard
20 already that we will be happy to supplement, certainly; but
21 this has going on now since March, and it doesn't seem to me
22 very responsive to say in September, well, we will supplement
23 this or that or we will provide substantiation. This has been
24 going on a long time.

25 JUDGE FRYE: All right.

1 Anything else with regard to documents?

2 [No response.]

3 JUDGE FRYE: Okay.

4 Now, that would bring us to the State's Motion to
5 Compel in West Chicago, and I wonder whether at this point,
6 since it is noon, rather than starting off on that, it would
7 be good to take our lunch break.

8 MS. RAPKIN: That's acceptable to us.

9 [Discussion off the record.]

10 JUDGE FRYE: All right. Let's come back at 1
11 o'clock. There are a couple of places in this complex where
12 you can get a sandwich.

13 [Whereupon, at 12:00 noon the prehearing conference
14 recessed, to reconvene at 1:00 p.m. the same day.]

15

16

17

18

19

20

21

22

23

24

25

AFTERNOON SESSION

[1:00 p.m.]

JUDGE FRYE: Back on the record, please.

The next item would be the People's Motion to Compel in West Chicago.

Ms. Rapkin or Mr. Eggert?

MS. RAPKIN: Yes. Just one thing before we start on that. Judge Frye, you asked us to confer with counsel for Kerr-McGee during lunch on the document issue in Kress Creek. May I report back to you on that?

JUDGE FRYE: Surely.

MS. RAPKIN: Okay. First of all, you asked -- well, first you asked us to find the citation in our pleading in which we summarized the manner in which documents were produced, and in which I then attested to the accuracy of those assertions.

That is included in our response to the company's Motion to Compel in the Kress Creek proceeding. Mr. Eggert and I inadvertently left in the office those Kress Creek motions and the Staff doesn't have a copy with them, and Mr. Meserve's copy is covered with work product, so I will send you a copy -- I will send you --

JUDGE FRYE: Do you know the page?

MS. RAPKIN: No. I just remember it was in there. And so tomorrow when I am back at the office, I will get the

1 citation.

2 Secondly, I think that the conference we had may
3 have clarified certain matters which I would like to state on
4 the record.

5 Kerr-McGee stated before lunch that in response to
6 the document request in Kress Creek, that people asserted that
7 they would produce documents solely from the files of IDNS and
8 the AG.

9 I seem to remember that I responded to that in the
10 response to the Motion to Compel. But in any event, I want it
11 clear on the record that we had already produced any Kress
12 Creek-related documents from the other agencies the previous
13 year, and we would note that Kress Creek is an issue in the
14 State court proceeding as well.

15 Therefore, all the production made in that
16 proceeding included anything on Kress Creek.

17 So that is why our document -- our response to the
18 document request in Kress Creek was phrased as it was. We
19 weren't making a statement about who was the client and who
20 was not the client. It was simply that the only agencies from
21 whom we had not yet produced Kress Creek-related documents
22 were IDNS and the AG's Office.

23 With respect to the People's contention that asserts
24 that before the materials are exhumed, assuming there is an
25 order for exhumation, that they be evaluated for chemical

1 composition.

2 As I said this morning, that contention was based
3 pretty much on common sense. In any event, to the extent that
4 Kerr McGee wants to find out whether or not IEPA has any
5 documents that would suggest that specific entities other than
6 Kerr McGee have illegally or legally disposed of chemical
7 contaminants into Kress Creek, we have agreed, the State has
8 agreed that we will ask IEPA if they can give us the names of
9 all NPDS permitholders.

10 That is to say, entities with authorization to
11 dispose of effluent into Kress Creek.

12 And if IEPA can do that, then we will provide that
13 information to the company.

14 Insofar as the company wants the State to search
15 every document in IEPA's files in order to determine whether
16 or not IEPA has any documents indicating that some entity
17 other than an NPDS discharger may have disposed of
18 contaminants in Kress Creek, we think that that is probably
19 impossible to do.

20 In any event, we have asked counsel to make that
21 request in writing. We don't think that that request was
22 clear from the document response, and we would like it in
23 writing, because we are going to want to object in writing to
24 that, but we will get the NPDS dischargers, to the extent that
25 we can do that.

1 JUDGE FRYE: Kress Creek is a small stream. I don't
2 know how far it goes beyond the point where the storm sewer
3 flows into it at the railroad bridge, but I don't imagine it's
4 very far.

5 MS. RAPKIN: Well, number one, I assume that we're
6 talking about Kress Creek and the west branch of the DuPage
7 River. Whatever its size, to our knowledge, IEPA's documents
8 are not organized by the name of a water of a state, and that
9 is the difficulty.

10 JUDGE FRYE: It's organized by company, I suspect?

11 MS. RAPKIN: It is organized by company, that is
12 correct. Or by permit number.

13 JUDGE FRYE: Well, my only point -- and this is a
14 purely practical one that I really shouldn't comment on at all
15 -- is that we toured Kress Creek and from the point of the
16 sewage outfall or the storm sewer outfall to where it joins
17 the West Branch, I don't recall seeing any commercial
18 establishments, although maybe there were one or two. And
19 it's a small stream. I wouldn't think it goes much farther
20 upstream.

21 I mean you could almost look on a map, I suppose,
22 and see who is there.

23 MS. RAPKIN: Well, I think what you are speaking to
24 is the issue of whether or not there are any NPDS permits, and
25 that we really will check for. But other than that --

1 JUDGE FRYE: Now, you understand what the Board
2 wants. What we would like for you to do -- if you have
3 already done it, fine, but if you haven't done it, we want it
4 done, and that is to indicate with regard to each document
5 request which files were searched.

6 MS. RAPKIN: Okay. We have done it and we will
7 provide you with that citation.

8 JUDGE FRYE: Okay. By document request. In other
9 words, if there's an interrogatory or a request pertaining to
10 Contention 1 in Kress Creek, which files were searched for
11 that particular request.

12 MS. RAPKIN: Mr. Eggert just pointed out to me that
13 by and large that will be the same answer.

14 JUDGE FRYE: In other words, all the same files were
15 searched for each request in each proceeding?

16 MS. RAPKIN: Yes. What we did with each agency was,
17 Kerr McGee, and that covered everything that involves the West
18 Chicago site. Anything in the Kerr McGee files in a
19 particular agency that involved Kress Creek will have been
20 produced.

21 We didn't search with a particular document request
22 in mind. We searched with -- it was broader than that,
23 really. But in any event --

24 JUDGE FRYE: All right. Well, describe what you did
25 and when you did it.

1 MS. RAPKIN: Okay.

2 MR. MESERVE: What we seek is a response to
3 Interrogatory 2, which concerns revised -- the State's revised
4 contention. It has to do with these other contaminants. The
5 State has not indicated in their answer that they had any
6 difficulty in understanding what we were asking for. They
7 make clear in their answer that it's other entities besides
8 Kerr McGee which may have discharged contaminants into Kress
9 Creek or West Branch of DuPage River that we are talking
10 about, and they -- in our request for responsive documents,
11 all they say is that they do not rely on documents. That's a
12 nonresponsive answer.

13 MR. NICKLES: I don't see that getting a list of
14 companies that have an NPDS permit is going to do anything
15 more than present us with a list of people that we have to
16 subpoena. That's not a response to our interrogatory.

17 If they have documents in their file that
18 substantiate that contention, they should produce them.

19 JUDGE FRYE: I agree.

20 MS. RAPKIN: And they will be produced if they
21 exist.

22 JUDGE FRYE: And what I am trying to get at right
23 now is what files have been searched, when were they searched,
24 in regard to what inquiries, and we'll see where we go from
25 there.

1 Now, if you are not interested in NPDS permits, then
2 I suppose there is no point in the State looking for them.

3 MR. NICKLES: Well, as your Honor said, getting a
4 list of NPDS permits, especially as you know the area and as
5 we know the area, with lack of commercial establishments, is
6 not going to be a response to the question that was posed in
7 March. But after we get whatever we are going to get, I think
8 we will request the Board for a deposition of the party that
9 did the inspection. And that's the only way that we can get
10 at this.

11 You just can't find the rabbit. The rabbit keeps
12 going down.

13 JUDGE FRYE: Well, let's see what we get.

14 Now are we ready to move on to the People's motion
15 in West Chicago?

16 MS. RAPKIN: I think we are.

17 The motion is a fairly short one, a fairly simple
18 one. We only move to compel in a handful of interrogatories,
19 and unless the Board has questions, I am not going to make
20 argument, except maybe just one point, and that is that with
21 respect to information that relates to the cost of
22 decommissioning, which may be in the company's possession,
23 just so that it is clear what our argument is, our argument is
24 that under the circumstances the privilege or the application
25 of privilege would be unfair. Whether because there is

1 technical waiver or for other reasons doesn't really matter,
2 but it would be fundamentally unfair.

3 And the reason is that the company has already
4 disclosed information that it chose to disclose on the cost of
5 decommissioning in its environmental report, which I believe
6 was a part of the stabilization plan. It selectively chose
7 information to disclose. That information was apparently
8 favorable to its position in the FES, and I recall the pages
9 are 1-6 and/or 1-8.

10 The Staff basically relied on the cost question to
11 justify the recommendation made. We feel that any further
12 information that the company has should also be disclosed,
13 because it may well be impeaching or inconsistent.

14 Indeed, one has to assume that it is impeaching or
15 inconsistent, given the fact that the company is resisting
16 disclosure.

17 Another way of looking at that material that is now
18 in the company's possession is that it is an update of
19 information on the cost of decommissioning that has already
20 been provided.

21 So our position on the application of the privilege
22 has to do with fairness.

23 And we would also emphasize, as my colleague did
24 this morning in connection with the motions to quash the
25 subpoenas, the case law is fairly consistent that the

1 privileges, because they suppress relevant evidence, are to be
2 construed strictly. And we think that the application of that
3 principle here would result in a requirement that this
4 information be disclosed.

5 JUDGE FRYE: But none of the cases, I believe, stand
6 for the proposition that you are arguing, because they have
7 disclosed information on a subject they lost the privilege as
8 to that subject.

9 MS. RAPKIN: Our position is not that the privilege
10 has been waived because there has been material disclosed on
11 the same subject matter, but that there has been disclosure of
12 information on the subject matter -- disclosure for the
13 company's own purposes which supported its position, and which
14 was relied upon by the Staff in supporting, effectively
15 supporting that position. That is what we are arguing. And
16 we feel --

17 JUDGE FRYE: Do you have any cases for that?

18 MS. RAPKIN: Well, I think that cases were cited, if
19 not in the motion then in the motion to quash. This issue has
20 been dealt with a couple of times.

21 JUDGE FRYE: I know.

22 MS. RAPKIN: And we do believe that those cases,
23 fairly construed, apply here and support us here.

24 JUDGE FRYE: Does Staff have any concern that it may
25 not have gotten full and complete information?

1 MR. LEWIS: We have no basis for believing that.

2 MS. RAPKIN: We are not saying here that the
3 information which the company now has was had at the time
4 prior information was disclosed. That is not the basis of our
5 argument, and I don't know if that was what was suggested by
6 your question just now to Mr. Lewis.

7 JUDGE FRYE: No. My question was broader than
8 that. I was concerned with whether Staff felt that
9 information might -- regardless of when it was generated --
10 might be being withheld.

11 MS. RAPKIN: All right. Other than that, I think
12 the motion stands for itself.

13 MR. NICKLES: Your Honor, Ms. Winner would like to
14 address that motion, if she could, for us.

15 JUDGE FRYE: Sure. Just a moment.

16 [Pause.]

17 JUDGE FRYE: Okay. Excuse me. Ms. Winner?

18 MS. WINNER: Thank you.

19 Since the State has only addressed one of the
20 interrogatories at issue here, I don't think it is really
21 necessary for me to discuss any of the others either, because
22 I think our arguments are pretty fully laid out in our papers.

23 The interrogatory that I believe is being discussed
24 is Interrogatory No. 17, which, if I may read it quickly, asks
25 Kerr McGee to identify all persons who participated in Kerr

1 McGee's analysis of costs associated with the disposal of Kerr
2 McGee wastes. Describe the work done by each such person and
3 describe each such person's educational background and field
4 of expertise, if any.

5 The first thing that I think needs to be noted here
6 is that Kerr McGee has answered that question. All the
7 information requested by that question has been provided.
8 Kerr McGee has identified the individuals who participated in
9 the analysis, it has described the work done by each of those
10 individuals, and given information about their educational
11 background and field of expertise.

12 The issue that is raised in the State's motion here
13 is really beside the point. The State has asked for the
14 disclosure of a document prepared by Kerr McGee employee,
15 Mr. Snow, that was mentioned in Kerr McGee's answer to this
16 interrogatory, but the interrogatory did not ask that that
17 document be provided in the first place.

18 Therefore, there really isn't any issue here, based
19 on what was asked for.

20 Leaving that aside, however, there is not much
21 question but that the attorney-client privilege protects this
22 document from discovery. It was prepared to assist Kerr
23 McGee's counsel in evaluating Kerr McGee's litigation posture,
24 and the risks associated with the case.

25 That is a classic context for the application of the

1 attorney-client privilege and, in fact, it does not appear
2 that the State contests that it is privileged.

3 Once the privilege applies, it applies absolutely,
4 unless it is waived.

5 I believe I just heard counsel for the State
6 represent that the State does not contend that the privilege
7 has been waived here. Certainly the type of waiver that
8 appeared to be discussed in the State's motion is not
9 applicable here. That is, the subject matter waiver rule,
10 which is a very narrow rule, that says that if a privileged
11 communication is disclosed, other privileged communications on
12 the same subject cannot be protected.

13 However, Kerr McGee has not disclosed any privilege
14 communications on the subject of costs. It has only responded
15 to discovery and produced information about nonprivileged
16 information, about costs.

17 JUDGE FRYE: Are you saying that if a document on
18 Subject A that is privileged is produced, then further
19 documents on Subject A that are also privileged have then lost
20 their privilege?

21 MS. WINNER: Well, that is the only situation in
22 which the subject matter privilege has ever been applied. It
23 isn't automatically applied in that case, but that is the only
24 situation in which it is applicable. It is not applicable to
25 a situation in which there is an issue in a case that a party

1 has made some discussion of.

2 And if it were applied in a situation like this, the
3 privilege would be essentially meaningless, because the party
4 would be essentially unable to make any confidential
5 disclosures to its counsel on anything that is an issue in the
6 case.

7 JUDGE FRYE: Going on to Interrogatory 21, this asks
8 what measures will be necessary and appropriate to maintain
9 the site after closure, and your answer is in terms of the
10 maintenance you intend or Kerr McGee intends to provide.

11 I get the sense there that you or Kerr McGee
12 believes that is all that is necessary, but it doesn't say so,
13 and as such it doesn't directly answer the question.

14 Is my interpretation correct, that Kerr McGee's
15 answer in fact states all of the measures that Kerr McGee
16 believes will be necessary and appropriate after closure?

17 MS. WINNER: I believe that is correct at the
18 present time.

19 JUDGE FRYE: Well, it has to be as of the present
20 time, obviously.

21 MS. WINNER: This is a matter that is being
22 considered still by Kerr McGee.

23 JUDGE FRYE: And it could be influenced by the
24 outcome of the proceeding, obviously. And as of this point in
25 time, does your answer to Interrogatory 21 accurately state

1 what Kerr McGee believes will be all of the measures that are
2 necessary and appropriate after closure?

3 MS. WINNER: Yes.

4 JUDGE FRYE: Interrogatory 75 asks for specific
5 interrogatory answers, and my curiosity there is, how did
6 these individuals that you have identified go about answering
7 the interrogatories?

8 MS. WINNER: Well, the way they went about doing it,
9 as I understand it, was that the interrogatories were
10 discussed, reviewed, answers drafted, reviewed, considered as
11 a group.

12 JUDGE FRYE: They all got together in one spot and
13 sat around the table?

14 MS. WINNER: I don't know that they all actually
15 physically got together in one spot and sat around a table,
16 but there were ongoing discussions among a group of people.
17 Some of them got together physically; some discussed them over
18 the telephone.

19 The point here is that this is not a situation in
20 which Kerr-McGee took the interrogatories, split them up, and
21 handed a bunch to each person to work on. It was much more of
22 a collective effort, and that's why the additional information
23 that the State has requested here is something that Kerr-McGee
24 simply is not in a position to supply with any accuracy.

25 JUDGE FRYE: You didn't have individuals who took

1 the lead in answering particular interrogatories?

2 MS. WINNER: No.

3 MR. MESERVE: But you would have had someone who
4 took the lead in drafting a response, I would think.

5 MS. WINNER: Well, certainly there may have been
6 some individuals who had more of a role in some of the
7 drafting, and of course there was some cooperation with
8 Kerr-McGee's Counsel as well.

9 MR. MESERVE: But somebody physically had to write
10 it out.

11 MS. WINNER: Certainly.

12 JUDGE FRYE: But after that happened -- well, let me
13 ask, before that happened, did the individual who had the
14 responsibility to draft the answer initially have input from
15 the others who were responsible for answering the
16 interrogatories?

17 MS. WINNER: Throughout the process, there was
18 input.

19 JUDGE FRYE: So they discussed them first, and then
20 they drafted the answers?

21 MS. WINNER: And then after answers were drafted,
22 they continued to discuss them.

23 JUDGE FRYE: I haven't any further questions on this
24 one.

25 MS. WINNER: Thank you.

1 MS. RAPKIN: If I can just briefly reply to three
2 points. I'm not going to make any further argument about the
3 privilege question.

4 I just want to point out that Interrogatory 1 does
5 indeed ask for certain information, which is to some extent
6 supplied. The issue is that there was a document request. I
7 do not have it in front of me, because I don't have those
8 materials today. But there was a document request that
9 requested production of documents identified in the
10 interrogatories.

11 JUDGE FRYE: Oh, okay. You needn't worry about
12 that.

13 MS. RAPKIN: Secondly, with respect to Interrogatory
14 21, that's right, the question is not directly answered. If a
15 direct answer has now been given in response to Judge Frye's
16 question, then I would request that the company supplement the
17 answer to Interrogatory 21 to have the answer reflect under
18 oath that that is indeed the answer.

19 With respect to Interrogatory 75, asking for the
20 names of everyone who answered the specific interrogatories, I
21 would like to say that -- while this is not legally relevant,
22 it may be factually relevant -- in the State Court, precisely
23 the same argument has gone on. We requested that Kerr-McGee
24 specify the individuals who answered all the interrogatories
25 in the State Court proceeding, and the company resisted doing

1 so on, if I remember correctly, precisely the same grounds.

2 When the State Court judge ordered that an answer be
3 provided, there was an answer provided, and there was a single
4 individual listed for each of the interrogatories. So that
5 may have been the individual who drafted them or whatever, but
6 it was not impossible in the State Court proceeding.

7 And, you know, I can't --

8 JUDGE FRYE: Did you take their depositions?

9 MS. RAPKIN: Excuse me?

10 JUDGE FRYE: Did you take their depositions?

11 MS. RAPKIN: We haven't taken them yet. They are
12 scheduled for deposition. A number of them are scheduled for
13 deposition.

14 The point is that it's a whole lot simpler when you
15 go into a deposition to know who answered what interrogatories
16 than to have to sit down with each of numerous deponents and
17 go through dozens of interrogatories -- here we've got 130 or
18 120 -- and try to get them to remember which ones they
19 answered.

20 JUDGE FRYE: Well, I can sympathize with your
21 concern. But, you know, you get to a question of whether it's
22 meaningful to have further identification. From what I've
23 heard from Kerr-McGee, it doesn't sound like it is, and maybe
24 your solution is to take the depositions of all -- what was
25 it? -- nine people --

1 MS. RAPKIN: Well, my response --

2 JUDGE FRYE: -- together.

3 MS. RAPKIN: Excuse me. My response to the
4 company's assertion that it is not meaningful is that that's
5 the company's view. We consider it very meaningful. And
6 unless there is some legal impediment to their answering this
7 question, the fact that they may not consider the meaningful
8 does not seem to me dispositive of the question.

9 If the interrogatories were relevant -- and if I
10 remember correctly, in no case has Kerr-McGee said that they
11 are not -- then the individuals who have knowledge with
12 respect to each of those interrogatory answers -- and that at
13 least includes the people who answered them -- that
14 information is also relevant, and we feel there is a definite
15 purpose, in terms of litigation management if nothing else, to
16 getting those answers, and we would like it.

17 JUDGE FRYE: Were the same individuals involved in
18 the State Court proceeding?

19 MS. RAPKIN: Well, let me say that in the State
20 Court proceeding, we've got a lot of different issues, so some
21 of those interrogatories in the State Court dealt with matters
22 that don't come up here at all and vice-versa. There are a
23 whole bunch of issues being raised here that we asked no
24 questions about whatsoever in the State Court proceeding --
25 notably the question of alternatives and how the search for

1 alternatives was conducted.

2 JUDGE FRYE: But are the individuals the same?

3 MS. RAPKIN: I don't know. I don't remember. I
4 don't have it in front of me. But that doesn't satisfy our
5 needs, because there are so many different issues.

6 And the other point is that the whole reason we are
7 having this problem right now is because at the time that the
8 company answered the interrogatories, with Interrogatory
9 No. 75 before them, they apparently did not intend to answer
10 it, and therefore didn't do what one would think would have
11 been simple, which was to keep track of everyone who was
12 involved in answering. And had that been done then, if there
13 had been a paper record made internally, who contributed and
14 who was the primary draftsman and the primary answerer or the
15 principle answerers, we wouldn't be facing this problem. It
16 is only because they did not intend to answer the
17 interrogatory that we have the problem now.

18 JUDGE FRYE: Why can't you depose them as a group?

19 MS. RAPKIN: Are you suggesting that we put twelve
20 people together in a room?

21 JUDGE FRYE: I had a proceeding in which I had a
22 witness box full, including the space for the alternates.
23 They were all witnesses. Counsel didn't like it, but it went
24 fairly well. They posed a question; a witness would answer
25 who had the most knowledge of the particular answer, and

1 others were free to chime in after he finished.

2 MS. RAPKIN: Well, that's a very interesting
3 suggestion. I can assure you that we will think about it. If
4 it seems appropriate and there can be an agreement, maybe
5 we'll do it.

6 However, whether or not we can do that does not
7 answer the question of whether or not Kerr-McGee is legally
8 justified in failing to answer this interrogatory.

9 MR. NICKLES: Let me just make two comments, Your
10 Honor. I think it shows the extent of responsiveness of the
11 various parties to this case to look at the issues that have
12 been raised on both sides of the table.

13 With regard to No. 21, we have stated, I think
14 clearly, both in the original answer and in the supplemental
15 response, what we know.

16 JUDGE FRYE: I disagree with you on that. I don't
17 think your answer was clear, although I got from it, the sense
18 of it was that you were stating all of the measures that
19 Kerr-McGee thought would be necessary and appropriate at this
20 time. But your answer was in terms of what Kerr-McGee planned
21 to do. So there's a little bit of a discrepancy there.

22 And Ms. Winner, I think, has cleared it up, that my
23 impression of it was correct, and I think if you will simply,
24 you know, confirm that, then that should be enough for that
25 one.

1 MS. RAPKIN: Yes, if there will be a supplementation
2 of the answer under oath, that is fine. That's fine with us.

3 MR. NICKLES: We can provide that. It's stated on
4 the record. At least I had read it to represent all the
5 information we had as of this time with regard to that issue,
6 and there are no limitations.

7 JUDGE FRYE: And all of the matters which Kerr-McGee
8 thought would be necessary and appropriate, not just the
9 matters that Kerr-McGee planned to undertake.

10 MR. NICKLES: As of this time.

11 JUDGE FRYE: Okay, fine, good.

12 All right. Then that brings to Contention 2.G. I'm
13 sure you probably have comments, Ms. Rapkin.

14 MS. RAPKIN: Yes, we do have some comments. But
15 before we answer the questions or attempt to answer the
16 questions put by the Board, that the Board essentially raised
17 in the latest memorandum that was issued, again we want to
18 point out, so it's absolutely clear, that Contention 2.G,
19 which alleges that the company has not demonstrated that its
20 plan will adequately protect the public health and safety
21 without a demonstration that the plan can meet the State
22 groundwater standards, is in the proceeding not in order to
23 get the Board to enforce State law, specifically State
24 groundwater standards, but because those State standards are,
25 in our opinion, a measure of the adequacy of their plan.

1 Some of the State groundwater standards are, if I
2 remember correctly, stricter than USEPA standards and/or there
3 are additional parameters covered by State law than those
4 covered by USEPA. So we feel that there is a real benefit to
5 the public by having the Board address that question and
6 having Staff and Kerr-McGee address that question.

7 That said, let me go on to the Brown decision. As
8 the Board no doubt realizes, the People of the State of
9 Illinois believe that the decision is completely wrong. It's
10 contrary --

11 JUDGE FRYE: There is a petition for reconsideration
12 and a rehearing, as I recall.

13 MS. RAPKIN: Has the Board seen that? Have you seen
14 the petition for rehearing?

15 JUDGE FRYE: I think you sent me a copy of it.
16 Somebody has sent me a copy of it.

17 MS. RAPKIN: Well, it certainly wasn't the People of
18 the State of Illinois.

19 JUDGE FRYE: It came only with your usual affidavit
20 of service.

21 MS. RAPKIN: Oh, oh, you know what happened? Our
22 secretary used the wrong service list. I wasn't in the office
23 the day that it was filed. Okay, well, then, you've seen it.

24 And you may also know that the Appellate Court has
25 ordered Kerr-McGee to respond.

1 JUDGE FRYE: To the petition. But have they yet
2 ruled as to whether they will rehear it?

3 MS. RAPKIN: I don't think a response has been filed
4 yet.

5 Am I correct on that?

6 MR. NICKLES: That's right.

7 MS. RAPKIN: Yes. It's due sometime next week, I
8 believe. That, of course, is not a ruling on the petition,
9 but it is an indication that the Appellate Court is
10 considering at this point granting a rehearing, because under
11 Appellate Rule 40, there can be no reconsideration without the
12 ordering of an answer from the other party.

13 In any event, our position, of course, is that Brown
14 is wrong for all of the reasons stated, in the petition as
15 well as a variety of other reasons, that there was no room.

16 JUDGE FRYE: Well, I don't want to get into the
17 merits of whether it's right or wrong.

18 MS. RAPKIN: Okay. All that I want to get to is
19 that we feel that the Board should continue to hold 2.G in
20 abeyance. We don't feel that there's a need to rule on it now
21 for a variety of reasons.

22 One is that the petition for rehearing is pending in
23 the Seventh Circuit, and it is to the Seventh Circuit that we
24 all will go on a review of the NRC's disposition of this
25 matter, if there is an appeal. It is the controlling Circuit,

1 so we do think that 2.G should be held in abeyance until there
2 is some indication from the Seventh Circuit as to whether or
3 not the petition is going to be granted.

4 We would also point out that holding 2.G in abeyance
5 is not going to prejudice anyone here, in that we are not
6 going to be going to hearing in this matter for an awfully
7 long time, in light of the time that is necessary to prepare
8 the EIS.

9 We also think it's really important to point out for
10 the record that if during the trial or as a result of the
11 trial in State Court that is going to begin in February and
12 will probably run for a couple of months, and if the People of
13 the State of Illinois prevail and an injunction is issued to
14 the company as the People have requested to remove the waste
15 from the site and to dispose of it in some manner and location
16 that complies with both federal and state law, then this
17 stabilization plan, this license amendment application that is
18 before you now will be moot, and the company will have to come
19 up with another method, another proposal for satisfying its
20 clean-up obligations under the Atomic Energy Act.

21 So for that reason, too we don't feel that there
22 would be any prejudice in holding 2.G in abeyance, and we
23 request that the Board continue to do so.

24 JUDGE FRYE: Mr. Lewis, did you have some comments?

25 MR. LEWIS: Mr. Chairman, we were concerned about

1 the Board's suggestion as to dismissing AG.2(g), but maybe for
2 somewhat different reasons.

3 Really the question of applicability of state law
4 in this proceeding and of compliance of the disposal plan of
5 Kerr-McGee with various state laws and standards is raised in
6 several Contentions.

7 Now as the Board recognizes, there was a somewhat
8 parallel Contention AG.1(g), which the Board has admitted, and
9 the distinction that the Board made was that that imposes an
10 obligation on the Staff to at least treat in the FES the
11 matter of the applicability of state groundwater standards to
12 the Kerr-McGee waste disposal plan.

13 It would seem to us that at that point, having
14 admitted that Contention -- I believe that Mr. Nickles may
15 have briefly alluded to this earlier -- what will happen is
16 that the Staff will address in the FES that matter, and
17 assuming that there are some Illinois standards that are not
18 already covered by the EPA standards and are not inconsistent
19 with the EPA standards, as a matter of law we would view those
20 standards as being applicable. We're talking about standards
21 basically going to non-radiological contamination and
22 standards that are not inconsistent with EPA standards.

23 Now the Final Environmental Statement, the
24 Supplemental Final Environmental Statement, would then be put
25 before this Board and the parties with some treatment in it of

1 the question of how the releases, to the extent that there are
2 going to be releases, into the groundwater from the disposal
3 plan would compare to state standards, applicable state
4 standards, as well as applicable EPA standards.

5 At that point, I am hardpressed to see how the Board
6 would cut off inquiry into the adequacy of the FES on that
7 subject.

8 JUDGE FRYE: I'm not talking about 1.G now.

9 MR. LEWIS: I know you are not, but 2.G would seem
10 to be taking -- your proposal with respect to 2.G would seem
11 to be saying that there does not have to be considered in this
12 proceeding compliance with state law and groundwater
13 standards. And the point has been made by the State that they
14 recognize that this proceeding is not an enforcement
15 proceeding with respect to state groundwater standards, and I
16 think that's an important concession.

17 JUDGE FRYE: But you have to remember, the
18 Contention says that the Applicant has not demonstrated that
19 contaminated leachate from the disposal cell will not cause
20 violations of groundwater standards.

21 MR. LEWIS: Yes.

22 JUDGE FRYE: And it is phrased in terms of the
23 proposition that Kerr-McGee has to demonstrate that it's going
24 to comply, in this proceeding.

25 MR. LEWIS: I take it, then, Your Honor is saying

1 that the distinction in your mind is that although the Staff
2 may have some independent obligation to at least touch upon
3 it, I believe was the term you used in your order, a relevant
4 state standard, that that does not mean that the Applicant has
5 an affirmative obligation to demonstrate to the NRC Staff that
6 it meets those standards, at least not before this Board.

7 JUDGE FRYE: That's precisely the way I was viewing
8 it. And I take it a step farther, in that, you know, there
9 was at some point in the pleadings that were going back and
10 forth or the papers that were going back and forth, Kerr-McGee
11 and the State agreed that it would be inappropriate for
12 Kerr-McGee or for this Board to require Kerr-McGee to
13 demonstrate compliance with state standards in this
14 proceeding, but that it would be appropriate to withhold
15 authorization of any license amendment until the state
16 standards were satisfied.

17 At that point, Staff suggested to us that we did not
18 need to withhold any license authorizations, pending
19 compliance with some state standard.

20 MR. LEWIS: Yes.

21 JUDGE FRYE: And it seems to me that almost any way
22 you look at it, at that point, 2.G is virtually meaningless.

23 MR. LEWIS: I am glad you brought me back to that
24 point because I do want to reemphasize that, the fact that
25 pursuant to the Board's order, we will treat in the FES

1 supplement the question of how waste streams associated with
2 the disposal cell would affect groundwater, and State
3 standards as well as EPA standards. We still stand by our
4 recitation of earlier case law to the effect that that does
5 not mean that you would as a Licensing Board have to withhold
6 your authorization to await any particular action by a State
7 agency or a State court. They could independently, as in the
8 State Court action, reach whatever determination they will,
9 and you would not necessarily have to await their ruling in
10 order to make yours.

11 JUDGE FRYE: No. If they determine that the
12 standards are applicable and Kerr McGee does not comply with
13 them and that remains as a final determination, it would
14 simply mean that any authorization we might give would be
15 probably meaningless. But that is no reason why we shouldn't
16 proceed.

17 MR. LEWIS: Well, the other point we wanted to raise
18 was that Mrs. Rapkin has talked in terms of the fact that
19 there is a reconsideration going on, but the Staff would not
20 view the Brown case as compelling the action that you are
21 suggesting you want to take in your memorandum to the parties.

22 We think the Brown case addresses the question of
23 whether or not an injunction could be issued based on State
24 law considerations and that that is distinguishable from the
25 question of whether or not State law is applicable.

1 Now, there may at some point become a fine line here
2 in that if State law is applicable but an injunction cannot be
3 sought, the question would be, then, of what weight is it that
4 State law is applicable. But nevertheless, we don't think
5 that the Seventh Circuit was addressing the question of
6 applicability of a state regime of standards. It was
7 confining itself to what we think was a narrower point having
8 to do with the fact that if an injunction were allowed to be
9 issued under State law, that that would then be in conflict
10 with --

11 JUDGE FRYE: Well, no. Well, there is no need for
12 getting into a long discussion about what the Seventh Circuit
13 did or didn't do. I, frankly, am not sure I really agree with
14 their decision, but nonetheless, there it is, and as I read
15 it, it simply said that if the State attempted to take some
16 action that could force or preclude an alternative that was
17 being considered by the NRC, that that action would be
18 preempted.

19 Now, whether that is right or wrong remains to be
20 seen, I guess, but since the Seventh Circuit has reached that
21 result and that remains the law until it is overturned, it
22 would seem to me that there would be no possibility that
23 contention 2.G could possibly have any bearing on this
24 proceeding.

25 If, on the other hand, the Seventh Circuit's

1 decision is overturned, it still seems to me that there is no
2 reason why we should consider Contention 2.G. That matter
3 will be worked out in the State Court proceeding. If the State
4 is successful in its actions and manages to get any decision
5 that it obtains to stick, it can then prevent Kerr McGee from
6 going ahead with its plan independent of whatever we might do.

7 MR. NICKLES: Your Honor, we, obviously, agree with
8 the Seventh Circuit in the Brown case, and I don't think it's
9 appropriate to speculate on what might happen in a petition
10 for rehearing, but the essence of the Brown case was that this
11 Board should not be precluded from considering all
12 alternatives, including the one that is before it right now,
13 which is the selection of West Chicago as a site for disposal.

14 I think when one hears the comments of counsel for
15 the State of Illinois, they intend to use the State of
16 Illinois litigation to achieve exactly what the Seventh
17 Circuit has said may not be achieved, and that is to obtain,
18 in effect, an injunction from the State Court in the State of
19 Illinois suit that would preclude us from pursuing our
20 application here.

21 We have moved for partial summary judgment in the
22 State of Illinois case based on Brown, and we think the
23 comments of Ms. Rapkin are very elucidating on exactly on what
24 she intends to do with this proceeding and with her State
25 Court litigation because we think that poses the conflict that

1 frustrates Federal law under the preemption cases. It's
2 exactly what the cases have in mind, and that is quite
3 narrowly and quite specifically what the State has in mind
4 through its litigation is to obtain something through the
5 State Court that prevents us and prevents this Board from
6 going forward with this case and this proceeding.

7 JUDGE FRYE: Any further comments on this?

8 [No response.]

9 JUDGE FRYE: Okay. Then I see other matters on the
10 schedule, and I think another matter certainly is scheduling,
11 although in light of the Staff's schedule, I am not sure that
12 there is very much that we can do in that regard. Do the
13 parties have anything under that topic for the West Chicago
14 proceeding?

15 MS. RAPKIN: Are you referring to scheduling of the
16 hearing?

17 JUDGE FRYE: No, no. I am looking at the proposed
18 agendas. Item 5 is other matters, and I'm suggesting that one
19 of the matters there is scheduling, and I'm asking whether
20 there are any others that we should consider.

21 MS. RAPKIN: Not from us.

22 MR. NICKLES: Well, we are very troubled by what is
23 happening here. This proceeding has been long under way. The
24 State has been pounding on the drum to do another study of
25 alternatives, and now the Staff, despite the fact that there

1 is no evidence of any "taint" with regard to the Kerr McGee
2 study, has launched onto another effort that will take a year
3 and a half, and in the meantime the State is pursuing its
4 objective of derailing this proceeding.

5 That's exactly what is happening -- we might as well
6 all recognize it -- that the State does not want this case to
7 go forward, and the way it has achieved it, apparently, is to
8 make allegations about the inadequacy of our alternatives
9 study without any factual support for it; to, in effect,
10 generate from the Staff a commitment to do that, to seek to
11 pursue in the State courts litigation to obtain an injunction
12 from the State Court Judge precluding this Board from going
13 forward so that this is all an empty exercise.

14 I submit that there is something wrong with that
15 when everybody in every court in the land has said you have
16 the preemptive authority to deal with this matter. I don't
17 believe that when this Court has said that Contention 1 would
18 come in as a contention in the case, that the Board had in
19 mind the kind of delay that we are talking about. Certainly
20 if you go back over the conferences we have had, we were
21 looking to commencing the hearing at about this time, or
22 certainly by early 1986, and I don't think that the study that
23 the Staff is going to do, in all of its good faith, is going
24 to satisfy the State of Illinois in any event.

25 JUDGE FRYE: Well, it may well not, but we will at

1 that point be able to get to a hearing.

2 MR. NICKLES: I just wonder if you have a situation
3 where, given the complaints that will be made about that, we
4 will have objections to the commencement of a hearing based on
5 that.

6 JUDGE FRYE: It depends on what it says.

7 MR. NICKLES: We can always say that, but this
8 proceeding, despite the statements that it wants to get it
9 resolved, has been ongoing now for what, six, seven, eight
10 years, and now we are told that we have another 15 to 18-month
11 delay. I don't think that the Board has to simply stand back
12 and say, okay, Staff, you say it's going to take that long, we
13 will accept that and everything will stay on hold.

14 I think the Board can say that is unacceptable. We
15 want that study to be done in three months.

16 JUDGE FRYE: Well, specifically, all we can do is to,
17 if we were to determine that the Staff's delay were
18 unreasonable, would be to certify the matter to the
19 Commission.

20 MR. NICKLES: Perhaps the matter needs to be
21 certified to the Commission because on its face, that seems to
22 be an awful long time, and I must say in the past our
23 experience has been that the estimates have always been a
24 little off.

25 JUDGE FRYE: Mr. Lewis, what is your thought on

1 that?

2 MR. LEWIS: Well, obviously the Staff believes that
3 the schedule it has given and the things that went into that
4 schedule, the scope of what we are undertaking in the
5 supplement to the FES is reasonable. We wouldn't have put it
6 forward if we didn't think it was reasonable. It really
7 reflects the Staff's best judgment as to what type of a
8 supplemental FES will withstand scrutiny. I said this before
9 but I think it bears reiteration in this proceeding. It is
10 not simply a matter of the question of whether or not the
11 contention about taint or bias on the part of Kerr McGee has
12 in our mind any basis. It is not based on that.

13 It is based on other considerations, a series of
14 considerations. It is based on the fact that in its two
15 orders in this proceeding, the Board has asked us to proceed
16 by way of a supplemental environmental statement, and in doing
17 that, we have had to scope it in such a way that we felt it
18 would be most likely to resolve the issues in this proceeding.

19 I have stated previously I don't know whether or
20 not it will resolve all the questions, such as the question --
21 I don't believe it will in and of itself resolve the question
22 of -- selecting another site. That is not a part of this
23 proceeding.

24 JUDGE FRYE: No, and I think it's safe to assume
25 that so long as the Staff is willing to approve the West

1 Chicago site, that the State is going to oppose it.

2 MR. LEWIS: That would appear to be correct from
3 everything we have seen.

4 MR. EGGERT: Just so there is no confusion, we
5 oppose permanent waste disposal in West Chicago.

6 JUDGE FRYE: I think that is clear.

7 MR. LEWIS: I wasn't confused; I was just
8 understating it. We are attempting to deal in the
9 supplemental FES as much as we can with the contentions that
10 are admitted in this proceeding. As Mr. Meserve has said,
11 they are lengthy and multifaceted and will have to be dealt
12 with either in a supplemental environmental statement or in
13 supplemental testimony, and in light of what the Board has
14 said in its various orders, I believe that it would assume
15 that we wouldn't attempt to be addressing it in the
16 environmental statement so that it can go through the process
17 of comment, a public comment process and agency comment
18 process.

19 But in any event, there are those contentions in the
20 proceeding, and from our point of view, they should be
21 addressed to the maximum extent possible in our supplemental
22 statement. That generally is the reason why the schedule does
23 provide for an expectation that there won't be a draft
24 statement until June of 1986.

25 We have, as you know, consulted with the State and

1 various agencies of the State of Illinois with expertise that
2 we believe would be useful with regard to our alternative site
3 analysis, and we have commenced our work in that regard.
4 Also, of course, as we have said, we will be including in the
5 supplemental report an analysis of compliance of the proposed
6 site with the 40 CFR 1.92 standards and Appendix A to Part 40,
7 so it is not a small effort on our part, and it does seem to
8 result in the estimated schedule we have.

9 I might say that once we get past the draft
10 environmental impact statement, the date that is given to you
11 in our report of August 16th for the final environmental
12 statement --

13 MR. NICKLES: It's March 1987.

14 MR. LEWIS: July '86 for the draft and March '87 for
15 the final. But that March '87 may be able to be improved
16 upon. It's very difficult to state what amount of time is
17 required between a draft and a final environmental statement.
18 A lot of it depends on the extent of comments that one gets
19 and things of that nature. So we have a greater degree of
20 certainty about the earlier date than we do about the later
21 date.

22 JUDGE FRYE: How would the parties react to going to
23 hearing on the draft statement and not waiting for the final?

24 MR. LEWIS: Well, of course, the regulations provide
25 that the Staff will not take a position upon the application

1 before the Board until the final environmental statement is
2 issued.

3 JUDGE FRYE: Well, I had not recalled that, but if
4 that's the way it is, that's the way it is, I suppose.

5 MR. LEWIS: It is in Part 51.

6 JUDGE FRYE: Assuming that we could get that
7 regulation waived, how would the parties feel about going to
8 hearing on the draft statement.

9 MR. NICKLES: I think we ought to go to hearing on
10 March 1, 1986.

11 MS. RAPKIN: I won't even respond to that comment.
12 We really aren't prepared to take a position one way or the
13 other. We really don't know what the draft is going to look
14 like right now.

15 JUDGE FRYE: Well, no, you don't, but the point is,
16 I think, that from your point of view, it seems to me, there
17 will be a draft issued in the normal process and you would get
18 copies of it. Various state agencies would get copies of it
19 and would comment on it, and the Staff would then take those
20 comments into account and then issue the final. We would then
21 go to hearing.

22 Why not going to hearing on the draft? You can make
23 your comments in your testimony, and the Staff can respond in
24 its testimony.

25 MS. RAPKIN: Well, Your Honor, I really don't think

1 we can respond to that. It's an idea that we haven't thought
2 about yet, particularly in light of the regulations. If the
3 Board is asking us for a response, we will put one in writing
4 as soon as we have had an opportunity to talk about it.

5 JUDGE FRYE: I would think it would be in the
6 State's interest to get this matter resolved as quickly as you
7 can, and I will be quite frank with you: we are somewhat
8 concerned, after we have read the Staff's letter and the
9 schedule, that we are letting the materials sit out there for
10 a fairly extended period of time, and I think it's in
11 everyone's interest to get this matter resolved as quickly as
12 we can.

13 MS. RAPKIN: I couldn't agree with you more. I do
14 think that the outcome of the State Court action may very well
15 affect the timing of the hearing here.

16 JUDGE FRYE: Why? I mean we would go ahead, and if
17 the State Court enjoins Kerr McGee in some way or another and
18 that injunction is upheld after all of the appeals and
19 whatnot, it may turn out that whatever we do is meaningless,
20 but nonetheless, we will go ahead.

21 MS. RAPKIN: What is passing between my colleague
22 and I is Mr. Nickles' remark about March 1st. None of us
23 takes that seriously. Mr. Nickles knows that. We are all
24 going to be in trial in State Court on March 1st because we
25 are starting on February 6th, and we believe the case will

1 take about eight weeks. Another lawyer for Kerr McGee
2 represented to the State Court Judge that he thought it would
3 go for at least 12 weeks.

4 We agree that the matter has to be taken care of as
5 soon as possible. I think that once we have a result in the
6 State Court trial, assuming that --

7 JUDGE FRYE: It's being tried to the Judge and not a
8 jury, isn't it?

9 MS. RAPKIN: That's correct.

10 JUDGE FRYE: So the Judge is going to have to sit
11 down, I would guess, after a 12-week trial and ponder his
12 decision somewhat. I would suspect he will also get proposed
13 findings from the parties, which will take a schedule, so it
14 is going to be two or three months, anyway, before he reaches
15 a decision, I would think.

16 MS. RAPKIN: He may well speedily give a broad
17 response and then --

18 JUDGE FRYE: He might rule immediately and then file
19 an opinion.

20 MS. RAPKIN: Right, and then request a specific
21 injunction, or if he goes with the State.

22 The question you are asking us requires an awful lot
23 of speculation, and to provide a rational answer to you, I
24 think we need a little time to think about it before we
25 provide any --

1 JUDGE FRYE: Aside from scheduling questions, which
2 I view your objection really as going to scheduling matters,
3 not substantive matters --

4 MS. RAPKIN: Yes.

5 JUDGE FRYE: And obviously, if counsel have a
6 conflict, we will have to somehow try to accommodate that.
7 But I am concerned that this matter not hang around any long
8 than need be. I think that is in the State's interest and
9 I think it's in everyone's interest, really.

10 MS. RAPKIN: Absolutely.

11 JUDGE FRYE: So I would suggest this, Mr. Lewis.
12 Why don't we send something up to the Commission and ask that
13 they waive that regulation and permit us to go to hearing on
14 your draft statement?

15 MR. LEWIS: Your Honor, we would very much support
16 that. Let me just make this point, that there is an obvious
17 attempt here to keep the Commission from issuing a decision
18 that would find it is in the public interest to have the
19 material buried on site, and we want to have that chance to
20 show to the Commission that that is appropriate.

21 JUDGE FRYE: I sympathize with you, and I frankly
22 have no interest in this one way or the other, but I think
23 whatever the outcome is, whether it's appropriate to bury it
24 on site or not appropriate to bury it on site, that decision
25 ought to be made as soon as possible.

1 MR. NICKLES: Absolutely, because what will happen
2 if the State Court proceeding should go forward, and we don't
3 think it should, and an adverse order to us should issue, that
4 will be appealed. It will fly smack in the face of the Brown
5 decision, which we think will be upheld, it will probably go
6 to the United States Supreme Court because effectively the
7 State has taken the position that a State Court Judge can
8 preclude the NRC from exercising its licensing authority. And
9 even if Kerr McGee were to be forced to move it somewhere
10 else, we would have to start all over again anyway to find a
11 new licensed spot to put it.

12 So we have got to get this thing going. What I would
13 ask the Board to do is to set a date which is in front of July
14 '86, to in effect tell the Staff to speed it up by 60 days,
15 and let's start this hearing in the spring of '86 on the
16 draft. There is no reason to delay this any more.

17 MR. LEWIS: I would certainly have to consult with
18 my office a good deal about whether or not we would support
19 the idea of seeking a waiver of the provisions of Part 51.

20 One thing that I think we have ignored is the fact
21 that this isn't -- you know, the circulation of a Draft
22 Environmental Statement is not a matter solely among parties
23 to a proceeding. There are agencies out there who are not
24 parties to this proceeding. There is a process that is
25 mandated.

1 JUDGE FRYE: Oh, I'm not suggesting that you not go
2 through the process. I think you statutorily must go through
3 the process.

4 All I'm suggesting is that I'm not sure that we need
5 to hold up a hearing while you go through it.

6 MR. LEWIS: Well, then you might have a situation
7 where -- I am not stating an opposition to it; I'm just
8 stating a consideration, which is that you then go to hearing
9 on a Draft Environmental Statement, maybe you make certain
10 findings. At some point along in that process, a Final
11 Environmental Statement issues.

12 What standing does that Final Environmental
13 Statement have in the proceeding? Does it have to meet --
14 does it somehow have to meet the concerns that were raised on
15 the hearing record? Is the hearing record used, in essence,
16 as the comment process?

17 I think there are a number of things here that would
18 have to be thought out before one would want to seek that kind
19 of waiver.

20 JUDGE FRYE: Okay. Well, I won't quarrel with
21 that. I think it would be very helpful to have Staff give the
22 matter some thought and let us know what your views are and
23 let all the others do the same.

24 So why don't we say September 20? Everybody file
25 their views by September 20.

1 MR. LEWIS: I'd like to ask a little more time than
2 that. I think it would be difficult for us to file by that
3 time. I would ask for very early October.

4 JUDGE FRYE: Well, you know, you don't think there's
5 that much to analyze, frankly. It would seem to me that the
6 Staff lawyers could sit down with the NMSS people and go
7 through the matter and decide what they think is good and bad
8 about it and advise us.

9 MR. LEWIS: Well, whatever Your Honor orders, we
10 will, of course, comply with.

11 MS. RAPKIN: But let me point out that I'm not sure
12 that the People could get in their response by the 20th for a
13 variety of reasons, number one being that I won't be in the
14 office for most of next week.

15 MR. NICKLES: I assume the parties will comply with
16 the order of the Board.

17 MS. RAPKIN: Well, of course, we will. But we are
18 pointing out that an order which can take into account our
19 needs would be a good thing.

20 JUDGE FRYE: I will make it the 27th, then.

21 All right. I question at this point -- well, let me
22 ask the parties a question.

23 Aside from any further discovery that may be
24 prompted by our rulings after this prehearing conference, I
25 take it you are all through at this point, with the exception

1 of depositions.

2 MS. RAPKIN: All through?

3 JUDGE FRYE: Discovery.

4 MS. RAPKIN: I would assume that we should be done
5 with interrogatories. I do think that in this matter, as in
6 any other matter, that's going to an evidentiary hearing, the
7 parties are going to want to do such things as request to
8 authenticate documents and request to admit facts. In other
9 words --

10 JUDGE FRYE: Admissions and things like that?

11 MS. RAPKIN: Yes. The kind of discovery that
12 narrows issues and so forth.

13 MR. NICKLES: Maybe I've been at this game too
14 long. When I hear that kind of remark, we should just set a
15 discovery cutoff, Your Honor.

16 JUDGE FRYE: That's what I'm leading up to.

17 MR. NICKLES: Let's set a discovery cutoff of
18 November 1.

19 MS. RAPKIN: I think we would have to oppose that
20 for a variety of reasons. The first, of course, as
21 Mr. Nickles knows only too well, both of the parties, I
22 assume, and at least one party, I know, and that is the People
23 of the State of Illinois, are utilizing all of their resources
24 in connection with the West Chicago matter in the State Court
25 case. We have a deposition cutoff date in that case of

1 essentially November 15th, between November 1 and November
2 15.

3 Any further discovery that would need to be done in
4 this case could not possibly be done before that time.
5 Moreover, it's hard to imagine that we could do it prior to
6 the completion of the State Court trial.

7 Hopefully, as I just mentioned a moment ago in
8 response to what I thought was the question, there shouldn't
9 be much more paper discovery, except of the type that is
10 useful, before the pretrial conference to narrow the issues
11 and try to get admissibility of documents taken care of.

12 But to think that we can do that work now and
13 requests to admit facts and requests to authenticate documents
14 before November 1 is perfectly absurd.

15 JUDGE FRYE: Does Staff have a position on this?

16 MR. LEWIS: I think that the deposition schedule,
17 which I think would be the next part of the discovery process,
18 it would be unreasonable for it to be completed by November
19 1st. Of course, the Staff is not involved in this other
20 proceeding, but we would believe that the parties should
21 proceed expeditiously with the discovery in this proceeding,
22 irrespective of whatever else may be going on. But November
23 1st, I think, would be an unrealistically early date.

24 MS. RAPKIN: And I would elaborate my prior remarks
25 by stating on the record that the People could not agree to a

1 discovery cutoff -- now I use the word "discovery" to include
2 depositions as well as requests to authenticate documents and
3 admit facts -- until after the State trial is over. We have
4 an enormous amount of work to do until then, as Counsel know
5 very well. We have depositions virtually every day from now
6 until the cutoff date, and we have pretrial motions,
7 preparation for trial, and trial.

8 So that if there is a discovery cutoff date in this
9 case prior to the conclusion of the State Court trial, then it
10 will be, for the record, over our objection. We will not be
11 able to comply with it.

12 MR. NICKLES: I have two points. When I was a very
13 young lawyer like Ms. Rapkin, I used to tell the Judge, "Your
14 Honor, I have all these cases and all these partners that are
15 pounding on my door to get these things done," and the judges
16 looked down and said, "Mr. Nickles, how many lawyers do you
17 have in your law firm?" And I'd say, "Well, we have about
18 150, but I'm the only one working on this case." And Your
19 Honor says, "Well, I think we can probably move this case,
20 because I have a mandate to move it. Get some of those other
21 lawyers working."

22 Secondly, we're going to have about 35 or so
23 depositions in the next two months in the State Court case,
24 all of which are going to duplicate what we're going to do
25 here.

1 The Staff is welcome to attend. We have all of our
2 experts that are going to be deposed --

3 JUDGE FRYE: Let me interrupt you. If we should ask
4 the Commission and the Commission should agree to let us go
5 forward on the Draft Environmental Impact Statement, the
6 discovery cutoff date in this case is going to be well before
7 the trial in the State Court case.

8 So that's simply the way it would have to be.

9 Now if the Commission does not go along with us and
10 says we need to wait for the Final Environmental Impact
11 Statement before we go to hearing, then I don't see that
12 there's any real problem. We'll just simply suspend discovery
13 in this case until after you are through with the State Court
14 case, and we will pick it up at that point.

15 I'm not trying to indicate that I have made a
16 decision with regard to going to the Commission. I want to
17 hear from the Staff and the State and Kerr-McGee, although I
18 think I know what Kerr-McGee's position is now.

19 MR. NICKLES: You sure do. We want to get this
20 resolved.

21 JUDGE FRYE: On that issue, we sometime ago -- and I
22 have forgotten now precisely in what connection -- we
23 indicated that we saw no problem about the wastes remaining
24 where they were while the Staff prepared a supplement to the
25 Final Environmental Impact Statement, and we based that

1 information on certain information in the present
2 Environmental Impact Statement.

3 We would like to get an update on that, and we would
4 like to know that that is still the situation, or if it is not
5 still the situation, we want to know about it.

6 I will have my secretary give your secretary a ring,
7 Mr. Lewis, and give her the citation to the place where we
8 pointed that out. I don't recall where it is now. But we
9 did rely on, I think, the Final Environmental Impact Statement
10 in existence for the proposition that the groundwater is not
11 being presently threatened and airborne emissions or something
12 to that effect were not a problem.

13 Anything else in West Chicago?

14 MR. MESERVE: I believe that's all, Your Honor.

15 MS. RAPKIN: That's all from us.

16 MR. LEWIS: Staff has nothing further.

17 JUDGE FRYE: All right. We will take a
18 fifteen-minute break and come back and pick up Kress Creek.

19 [Brief recess.]

20 JUDGE FRYE: I misspoke when we left. I want to
21 rule on the motions in the West Chicago proceeding, so we will
22 continue on that transcript for now.

23 Also, we reviewed our schedules for the end of
24 September and the first part of October, and it appears that
25 there would be nothing to be gained by having a report come in

1 on whether we should seek a waiver with regard to the Final
2 Environmental Impact Statement on the 27th. So why don't we
3 extend that to the 4th of October and give you another week.

4 Now with respect to the motions that we have before
5 us, because we have already ruled with regard to document
6 production, and the State is going to tell us which files it
7 searched and when they were searched, we will follow this up
8 with a written ruling probably next week.

9 With regard to the motions to quash, we will grant
10 the motion to quash as to -- who is the doctor; I have
11 forgotten his name? -- Dr. Grant.

12 We will grant the motion to quash in part and deny
13 it in part with regard to Stearns Catalytic. We will grant it
14 as to anything that Stearns Catalytic did after the notice of
15 hearing, which issued in 1983, with the exception, if they did
16 any work, as Mr. Denny thinks they may have, with regard to
17 that memorandum that was filed in the fall of '83 on
18 compliance with the Tailings Act. We think that should be
19 open to discovery.

20 With regard to Kerr-McGee's motion to compel and the
21 interrogatories with which Kerr-McGee complained that there
22 had been no answer or objection, we grant the motion, with the
23 exception of Interrogatories 9.C and D, 104.B and C, and those
24 as to which the motion was withdrawn.

25 MR. NICKLES: Your Honor, when does the compliance

1 have to take place?

2 JUDGE FRYE: We'll set a schedule. I would say --
3 do you have any suggestions on that?

4 MR. NICKLES: We'd like it within certainly 20
5 days. These have been outstanding since March.

6 JUDGE FRYE: Well, let's get all through, and then
7 we'll set a schedule for compliance.

8 With regard to the motion on the interrogatories to
9 which an objection had been raised that they asked for legal
10 conclusions, we grant the motion.

11 With regard to the interrogatories concerning
12 communications -- these are Interrogatories 13 and 14, 63 and
13 117 -- we grant the motion as to those.

14 With regard to 15 through 18 concerning alternate
15 sites and meetings concerning alternate sites, we grant the
16 motion.

17 We grant the motion with regard to the Lash and
18 Eastep affidavits.

19 And we grant it as to Interrogatory 44, which
20 inquired after studies of toxicity and mobility of materials.

21 The People are going to supplement on Interrogatory
22 35, so we need not rule on that one.

23 We will deny the motion as to Interrogatory 85,
24 which asked about above-grade disposal.

25 We will grant the motion as to 93 through 96 and 98

1 through 102. We think that those inquire after the FES, and
2 the portions with which the People disagree, I think to the
3 extent that the interrogatories raise matters that the People
4 view as outside the scope of their Contentions, a response to
5 that effect will be sufficient. If they are within the scope
6 of the Contentions, though, an answer should be given.

7 We will grant the motion as to Interrogatories 21
8 and 22.

9 As to the People's motion, we deny the motion as to
10 Interrogatory 17.

11 Kerr-McGee is to supplement as to Interrogatory 21
12 in accordance with our discussions today. That's the one
13 which asked about "necessary and appropriate measures to
14 maintain the site after closure."

15 We deny the motion as to 22.

16 We grant the motion as to 23 and 24.

17 We are simply asking Kerr-McGee to supply such cost
18 data as it has at this point on post-closure monitoring.

19 We deny the motion as to Interrogatories 28 and 29,
20 which have to do with uses of the site after closure.

21 We deny it as to Interrogatory 62, and we grant as
22 to Interrogatory 75. Do the best you can in identifying the
23 witnesses who prepared the answers.

24 Now that should close the West Chicago prehearing
25 conference, and let's commence the Kress Creek prehearing

1 conference.

2 [Whereupon, at 2:35 o'clock, p.m., the prehearing
3 conference in the above matter was concluded.]

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF OFFICIAL REPORTER

2
3
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: (West Chicago Rare Earths Facility)

10
11 Docket No.: 40-2061-ML/ASLBP No. 83-495-01-ML

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

20
21
22
23 Ann Riley & Associates, Ltd.
24
25