

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of)

KERR-MCGEE CHEMICAL CORPORATION)
(West Chicago Rare Earths Facility))

DOCKETED
USNRC
Docket No. 40-2061-ML

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PEOPLE'S MOTION TO RECONSIDER

The People hereby move the Board to reconsider portions of its September 26 order compelling the People to make further answers to dozens of interrogatories propounded by Kerr-McGee. The People respectfully submit that the Board has granted Kerr-McGee's abusive, needless, and largely unargued Motion To Compel virtually in its entirety without requiring Kerr-McGee to justify the motion, without addressing the People's arguments in opposition, and, frequently, without providing any explanation why further answers should be made. The Board's action not only puts an unwarranted burden on the People but functions as a signal to Kerr-McGee that it has unbridled discretion to utilize the Commission's discovery rules as an instrument of oppression and harassment.¹

The People state more specifically as follows:

1. Kerr-McGee charged the People with "failure to respond" to 42 subparts of various interrogatories, where responses would have been called for only if the People's answers to the opening portions of the interrogatories had been different. In no instance did Kerr-McGee explain why--much less demonstrate

¹The Board's order also signals Kerr-McGee that, contrary to the basic thrust of the federal civil discovery rules, it need make no effort to resolve discovery disputes with its opponents before filing a motion to compel.

that--the People's answers to the opening portions of the subject interrogatories were legally inadequate, thus entitling the company to answers to the subparts. Unless Kerr-McGee demonstrates that the People's answers to the opening portions of these interrogatories were legally inadequate, there can be no basis for requiring answers to the subparts.

The Board has granted Kerr-McGee's motion with respect to all these interrogatory subparts without any discussion of particular interrogatories and without suggesting why Kerr-McGee's motion should be granted. (Board Order, pp. 29-30) We can only assume that the Board did not read the subject interrogatories and answers or that the Board wants us to change our answers to the opening portions of the interrogatories. Because we believe our answers were legally adequate, we ask the Board to reconsider its order and at the very least to provide some guidance about what it expects from us.²

2. Kerr-McGee challenged as improper the People's objections to 14 interrogatories on the ground that they call for legal conclusions. Although Kerr-McGee argued with particularity

²For example, Kerr-McGee's Interrogatory 7 asks whether the People contend that there are sites outside Illinois which are more suitable than the West Chicago site for disposing of the Kerr-McGee wastes. If their answer is yes, the People are instructed to "describe all actions taken by the State to identify such sites" (subpart (c)), "identify each document that refers to or relates to each such site" (subpart (e)), and so forth. In response to the opening portion of the interrogatory we stated that we "have not identified particular sites, in Illinois or elsewhere, which might be suitable ...". Nonetheless, Kerr-McGee demanded and the Board ordered that we answer the subparts to the interrogatories. How can we be expected to describe actions taken to identify sites we have not identified? The need for some guidance by the Board should be apparent.

about only five of these 14 challenged objections, and although 10 CFR §7.30(b) and F.R. Civ. P. 7(b) clearly require that motions "state with particularity the grounds therefor", the Board granted Kerr-McGee's motion as to all 14 interrogatories. Moreover, the Board acknowledged the distinction (4A Moore's Federal Practice §33.17[2]) between permissible interrogatories applying law to the facts of the case (i.e., asking what law the party contends applies to the facts) and impermissible interrogatories going to the law of the case (i.e., asking for presentation of legal argument about why or how the law applies to the case). Having acknowledged this distinction, however, the Board did not consider the challenged objections in its light.

The People were ordered to answer Kerr-McGee Interrogatory 27, which asks for the identity of each state law or authority we contend should have been considered in the FES. Insofar as Kerr-McGee is asking what law we contend applies to the facts of the case, we have answered in a pleading accompanying this motion. Interrogatory 28, however, asks the People to provide detailed legal argument about how and why such law applies. What Kerr-McGee thus demands is a legal brief. We therefore ask the Board to reconsider whether Kerr-McGee is entitled by the discovery rules to an answer--and what must necessarily be an extremely burdensome one--to Interrogatory 28.

Like Interrogatory 28, the second clause of Interrogatory 52 asks how the law applies to the facts of the case. Specifically, Kerr-McGee asks the People to "describe the basis" for their contentions that the Stabilization Plan does not comply with UMTRCA and its implementing regulations. This interrogatory

is plainly improper for the same reason that Interrogatory 28 is improper.³

Interrogatories 64(1) and 65(j) ask whether the State contends it has authority to enforce the state policies and procedures described in Dr. Lash's and Mr. Eastep's affidavits. While we continue to object on relevance grounds⁴ (an objection Kerr-McGee has not challenged), we submit that, once again, Kerr-McGee is impermissibly using the discovery process to obtain its opponent's legal theories underlying particular allegations.

Interrogatories 64(i) and 65(h) ask about "legal mechanisms currently available" for enforcing the policies described in Dr. Lash's and Mr. Eastep's affidavits. These interrogatories are plainly unconcerned with the law applicable to the facts. Instead they seek an elaboration of the basis for the legal position asserted in Contention 1(g). Thus, like Interrogatories 64(1) and 65(j), Interrogatories 64(i) and 65(h) are not only irrelevant but also call for impermissible legal conclusions.

Interrogatories 64(o) and 65(l) ask the People to "[d]escribe the basis for [Dr. Lash's and Mr. Eastep's] authority" to state or determine that the company's Stabilization Plan is inconsistent with state law or policy. These interrogatories

³In our response to Kerr-McGee's Motion To Compel, we also pointed out that the People's Contention 2 states precisely why the company's Stabilization Plan does not comply with UMTRCA (and the Atomic Energy Act generally) and regulations thereunder.

⁴I.e., the People's Contention 1(g) asserts that the Staff has ignored applicable state policies, not that the State has authority to enforce such policies.

do not ask what law is the basis for allegations of wrongdoing or deficiency; instead, they ask whether the State has legal authority to allege that certain laws or policies--which laws and policies have been specified--apply to the facts of the case. Like the other portions of Interrogatories 64 and 65 discussed above, these portions are improper under even the most liberal interpretation of Moore's Federal Practice, and we ask the Board to reconsider whether they must be answered.

3. In its Motion To Compel Kerr-McGee challenged the People's relevancy objections to Interrogatories 16-18. These interrogatories ask the People about "meetings" to which Kerr-McGee "invited" the People but which the People did not attend (#16), State policies concerning "cooperation" in "the search for and evaluation of alternative sites" (#17), and whether and to whom the State will "provide assistance in the future" concerning "the search for and evaluation of alternative sites" (#18). As the People argued in opposition to Kerr-McGee's Motion To Compel, these interrogatories are irrelevant to the issues raised in the People's alternatives Contentions. The issues there raised are whether the Staff conducted an adequate assessment of alternatives under NEPA and implementing regulations, whether the company made a good faith alternatives assessment in accordance with 10 CFR Part 40, and whether in fact more suitable sites could be found for disposal of the West Chicago wastes. Whether or not the People went to "meetings" Kerr-McGee organized to sell its point of view, and whether the People can or will help Kerr-McGee find a disposal site, are legally irrelevant to these issues. In

response to the People's argument the Board stated, "We disagree." (Board Order, p. 31) However, the basis for the Board's disagreement is not provided. We request the Board to address our arguments and explain why Kerr-McGee's interrogatories are relevant to some material issue in this proceeding.

4. The Board has rejected the People's claim of executive privilege with respect to Interrogatories 64(k) and 65(i) for the reason that these interrogatories "clearly call for factual information." (Board Order, p. 32) That they may call for factual information does not mean they are not privileged. Both interrogatories ask the People to "[i]dentify any exceptions to the [state policies at issue] and/or any circumstances under which exceptions may be made." The company is thus inquiring into how the IDNS' or IEPA's prosecutorial or regulatory discretion may be exercised in the future. This information is privileged under a wealth of applicable case law (much of which was recently presented to the State court in response to Kerr-McGee's motion to compel answers to deposition questions inquiring into the State's exercise of prosecutorial discretion). We therefore ask the Board to reconsider whether Interrogatories 64(k) and 65(i) seek information protected by the executive deliberative processes privilege.⁵

⁵Interestingly, during oral argument in the State court on Kerr-McGee's motion to compel, counsel conceded that the deliberative processes privilege applies to the development of regulatory policy--a rule of law Kerr-McGee vigorously denied in this forum--but argued that the privilege does not apply to governmental decisions concerning enforcement. Judge Henzi rejected the argument and denied the company's motion. If the Board would like to see the People's brief on the question, or a transcript of the oral argument, the People will provide copies.

5. The Board has ordered the People to answer nine interrogatories (#93-96 and 98-102) asking whether the People disagree with any of the scores of assertions made by the Staff in §§5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 5.9, 6.1, 6.2, and 6.3 of the FES. We objected to these interrogatories on grounds of vagueness and overbreadth, pointing out in our response to Kerr-McGee's Motion To Compel that, first, several of these sections involve subjects about which the People have made no Contentions and, second, the relevant sections contain an enormous number of assertions. The Board appears to concur in our first point but as to the second says, without explanation, that the interrogatories are "reasonable". (Board Order, p. 36) It is our position that the interrogatories are entirely unreasonable, and Kerr-McGee has not explained why it cannot specify the particular assertions it is interested in. Before the People are required to answer such burdensome interrogatories, it would be helpful if the Board responded to our arguments in opposition or provided guidance as to how we should go about answering interrogatories like these.

6. The Board has ordered the People to answer Kerr-McGee's Interrogatory 44, which asks:

Have the People conducted, caused to be conducted, participated in, or received any studies concerning the toxicity or mobility of any materials of the type, or chemically similar to the type, expected to be buried in the proposed containment cell? If so, ...

The People objected on overbreadth grounds, pointing out in their response to the company's Motion To Compel that this interrogatory could cover a multitude of "studies" (e.g., research articles or textbooks) "received" at State offices (e.g., by purchase or other acquisition for individuals or office libraries) involving not only mill tailings but all other kinds of low-level radioactive waste and all other kinds of demolition waste or industrial process wastes containing any of the chemical constituents (e.g., sulfates, sodium, metals, chlorides, fluorides, etc.) contained in the Kerr-McGee waste. Dozens of "studies" on the shelves of most of the staff at IDNS, IEPA, and the Attorney General's Environmental Control Division could be included in a comprehensive answer to this interrogatory. What is needed is specification by Kerr-McGee of the particular kinds of studies and particular kinds of waste materials it is interested in.

The Board stated that:

The interrogatory is indeed broad, but less so than the People's Interrogatory 35 on the same subject. What's sauce for the goose is delectable diet for the gander; motion granted.

(Board Order, p. 35; emphasis added) To the contrary, the People's Interrogatory 35 is far narrower than Kerr-McGee Interrogatory 44: the People's interrogatory asks whether Kerr-McGee or any other person has conducted studies of the toxicity or mobility "of rare earth compounds of the type, or chemically similar to the type," expected to be buried in the cell. Since there are a limited number of rare earths, since the company knows precisely which rare compounds it needs to dispose of, and since there have

been, at best, a handful of research studies conducted and articles published on the toxicity or mobility of rare earths, the burden imposed on Kerr-McGee by the People's Interrogatory 35 is negligible. And, in fact, Kerr-McGee had no difficulty answering it.

Thus, given that nothing in the People's own interrogatories justifies Kerr-McGee's Interrogatory 44, we ask the Board to reconsider whether it should be answered in its present form.

Respectfully submitted,

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