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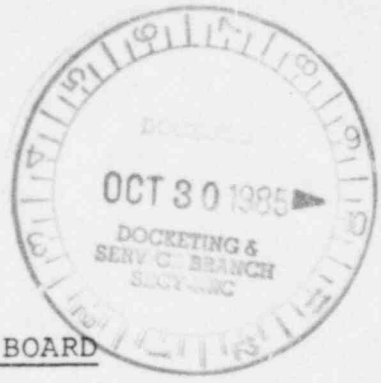

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

KERR-McGEE CHEMICAL CORPORATION'S
MOTION FOR SANCTIONS AND OPPOSITION TO
STATE'S MOTION TO STAY PROCEEDINGS

Intervenor State of Illinois' recent Motion to Stay Proceedings baldly proclaims that the State's manifest object in this case is to delay the proceedings until a state court judge decides, under state law, whether the radioactive wastes at issue should be moved from West Chicago to some unknown and unspecified distant site. The State has already succeeded in introducing numerous complex contentions into these proceedings that will delay its ultimate conclusion, and has already gained the benefit of voluminous discovery from Kerr-McGee. Now that the State has been ordered to live up to its own discovery obligations, it claims that it can no longer afford to continue

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in these proceedings and that the Board must therefore call them to a halt. To support its position, the State turns federal preemption law on its head, and argues that the financial and manpower demands imposed by the State Court case[1/] must be respected, but that the demands imposed by this Board's orders are of secondary importance. The State asserts that the "integrity of the legal system" and the "public interest" will be served if this Board temporarily abdicates its federal regulatory authority and defers to the State Court judge. Apparently due to a unilateral belief that its position is correct, the State has already begun its own withdrawal. The State has ignored this Board's Order to provide a timely explanation of State document production procedures and privilege claims,[2/] and has proclaimed that it will not be able to meet other discovery obligations imposed by the Board's Order.

For the reasons stated below, Kerr-McGee vigorously opposes the State's motion to stay these proceedings. Furthermore, because this motion and the State's refusal to meet its own discovery obligations are merely the latest examples of a pattern of State actions designed to prevent this Board from focusing on and expeditiously resolving the serious substantive

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1/ People of the State of Illinois v. Kerr-McGee Chemical Corporation, No. 80-CH-298 (Cir. Ct. Dupage County) (hereafter "State Court case")

2/ Memorandum and Order (Ruling on Discovery Disputes) at 29, 35, filed Sept. 26, 1985.

issues before it, Kerr-McGee respectfully requests that the Board impose appropriate sanctions on the State now, and that the Board warn the State that more serious sanctions will be imposed in the future if the State fails to live up to its obligations as an intervenor in this proceeding.

I. THIS PROCEEDING SHOULD NOT BE STAYED

The State argues that the Board should halt these proceedings until completion of the State Court case because the State cannot afford to participate as an intervenor and because resolution of the State Court action may moot these proceedings. The State thus rejects the Board's holding that disparate resources arguments are inappropriate,[3/] and advances the wholly unsupportable proposition that the Board must decline to exercise its comprehensive authority pursuant to the Atomic Energy Act until a state court determines the propriety of on-site disposal under state law.

The premise of the State's first argument is that this Board is somehow obligated to defer to the State's decision to spend its resources elsewhere. The simple answer to this argument is that the Board is not required to delay proceedings or to waive discovery obligations (over the licensee's objections) because an intervenor -- especially one with substantial resources that could be made available simply by

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3/ See Memorandum and Order (Ruling on Discovery Disputes) at 25, 42, filed Sept. 26, 1985.

reordering internal priorities -- claims that it cannot devote adequate staff and resources to the proceeding due to other commitments. See Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 n.33 (1983); Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338-39 (1980). A contrary holding would not only be inconsistent with NRC case law, but would wreak havoc with the Board's ability to manage its proceedings and the licensee's right to an expeditious hearing and decision.

The equally unsupportable theory of the State's second argument is that this Board, which has overarching responsibility to decide if on-site disposal is consistent with federal requirements imposed by the Atomic Energy Act and NEPA, is somehow obligated to abdicate this responsibility until a state court determines whether on-site disposal is permissible under state law. This argument is fundamentally inconsistent with Brown v. Kerr-McGee Chemical Corporation, No. 84-1294, slip op. (7th Cir. July 18, 1985),[4/] in which the Court held that it is state law governing the disposal of the West Chicago wastes that is preempted by federal law, and not, as the State

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4/ On October 24, 1985, the Seventh Circuit denied petitions for rehearing filed by the Brown plaintiff and the State of Illinois.

implies, the opposite.[5/] The State disingenuously fails to acknowledge the Brown decision in its Motion to Stay, even though Brown is directly on point and is the controlling federal precedent.[6/]

Because Brown fully disposes of the State's argument that this Board must stay its hand until resolution of the State Case, Kerr-McGee need not address the legal aspects of the State's position any further. We are compelled to comment, however, that the State's Motion to Stay and general approach to this litigation displays precisely the sort of provincial and nearsighted approach to the serious problem of mill tailings disposal that comprehensive federal law is designed to combat. Congress wisely charged the NRC, experts in the field of radiation management, with the responsibility to evaluate the propriety of tailings disposal plans, and, through NEPA, required that the NRC compare off-site disposal alternatives with any on-site plan proposed by the licensee. By refusing to identify specific alternative sites here, and by seeking to have the matter resolved solely in state court without any

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5/ See especially Brown, slip op. at 14-15 (Court rejects argument proferred here by State that state law injunction does not conflict with federal statutory scheme).

6/ Before Brown was decided by the Seventh Circuit, the State conceded that "the preemption question is a federal law question. Hence the Seventh Circuit's decision . . . would bind this Board regardless what the State appellate Court might ultimately decide . . . ." People of the State of Illinois' Motion to Reconsider, filed November 2, 1984 at 2, n.*, attached as Exhibit A.

NEPA-type analysis, the State reveals an "anywhere-but-my-backyard" approach that is counterproductive to a sensible ultimate resolution. As the State admits, even if a State Court injunction against disposal in West Chicago is granted and its validity upheld, the disposal problem will not be solved.[7/] To the contrary, Kerr-McGee would be forced to submit another (off-site) disposal plan to the NRC, and could face the never-ending possibility that "neighbors of other prospective sites [would rely] on state law to obtain injunctions preventing NRC consideration of those locations." Brown, slip op. at 14. It was to avoid precisely this possibility, which would involve substantial delays in the ultimate disposition of the West Chicago tailings, that the Brown court held that the NRC's authority to regulate disposal of mill tailings preempts state law. Id. Kerr-McGee is confident that this Board will exercise its authority fully and responsibly by denying the State's motion and by bringing this matter promptly to hearing and resolution. Kerr-McGee favors this approach and believes it to be in the public interest.

II. THE BOARD SHOULD IMPOSE APPROPRIATE SANCTIONS TO ENSURE THAT THE STATE MEETS ITS DISCOVERY OBLIGATIONS

A. Background

The State's right and responsibility to represent the interests of the People of the State of Illinois in this

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7/ See Transcript at 382 (Sept. 11, 1985).

proceeding is fully recognized by the intervention rules of the NRC, and this Board has properly taken the State's position in this litigation extremely seriously. But the State cannot be permitted to use this forum to divert the Board's attention by making unsubstantiated allegations, nor can it be permitted to manipulate discovery or other aspects of this proceeding merely to delay or to further its outside aims.

The timing of the State's Motion to Stay, and other State actions, raise the disturbing possibility that the State's participation in this proceeding is motivated by such improper considerations. For over two years, the State has aggressively participated in this case. It has introduced numerous contentions that have significantly increased the complexity of the proceeding. It has demanded extensive supplementation of the Staff's alternatives analysis, which may delay resolution of the Board's decision considerably. It has made several unfounded charges that have diverted the parties' and Board's attention from the serious substantive issues presented by Kerr-McGee's disposal plan.[8/] It has filed

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8/ For example, in December, 1984 the State filed a "Motion for Emergency Ruling" and a "Confidential Submittal" that contained unfounded attacks on the integrity of Kerr-McGee, its counsel and a former state official. The Board ordered an investigation of the former official, and, after substantial resources were expended by several federal agencies and by Kerr-McGee, no improprieties were discovered and the matter was closed. See letter from J.H. Frye, III, Administrative Judge, to S.H. Lewis dated July 22, 1985. In addition, the State has continually charged that Kerr-McGee impermissibly tainted the

(footnote continued)

numerous interrogatories and document requests and has received lengthy interrogatory responses and over one million pages of Kerr-McGee documents. The State found the resources to litigate simultaneously in both this and the State Court proceedings when its participation here permitted it to further its discovery and other interests. It thereby succeeded in drawing out this proceeding and in obtaining substantial discovery from Kerr-McGee.

Yet the State has refused to answer many of Kerr-McGee's interrogatories that were designed to discover the basis and meaning of the State's contentions, and has produced very few documents despite its representation that all responsive documents were previously produced.9/ In the Board's Memorandum and Order (Ruling on Discovery Disputes), filed September 26, 1985, the Board held that Kerr-McGee had met nearly all of its paper discovery obligations -- but that the State had failed to reciprocate. The State was ordered to

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(footnote continued)

alternatives assessment process despite its contemporaneous admission in an interrogatory response that "the People do not contend that Kerr-McGee has done so." See Transcript at 308-11 (Sept. 11, 1985). Judge Frye suggested that Kerr-McGee "might file an appropriate motion" in response, as we do here.

9/ See Transcript at 353-57 (Sept. 11, 1985). Deposition testimony in the State Court case has raised serious questions as to whether certain files were ever searched and whether all responsive documents were produced during the State's prior document productions. See, e.g., excerpts from Lash and Sasman deposition transcripts, Exhibit B.

answer over 45 interrogatories and subparts thereof responsively within 30 days, and to justify its privilege claims and explain its document search and production procedures within 10 days. Memorandum and Order (Ruling on Discovery Disputes) at 29, 35, 43-44. The Board also ruled that this proceeding was to go forward swiftly despite the pendancy of the State case. Id. at 41-42.

The State's reaction to the Board's discovery order can only be seen as a direct rebuff of the Board's authority, clearly intended to avoid discovery obligations and to further the State's desire to delay these proceedings. Having eaten the proverbial goose's sauce, the State suddenly proclaims to be too short on resources to continue in these proceedings effectively. The State already stands in violation of the Board's Order with respect to privilege justification and document search explanation,10/ and has stated that it cannot comply with the Board's Order with respect to interrogatory responses and further discovery.

10/ The Board ordered the State to provide these justifications and explanations within 10 days of service of the Order, which was served on September 30, 1985. Memorandum and Order (Ruling on Discovery Disputes) at 29, 35. Yet the State did not even file its Motion to Stay Proceedings (which in no way relieves the State of its discovery obligations) until October 15, 1985, in which it acknowledged that the Board's Order required State compliance on these matters by October 10, 1985. State's Motion to Stay Proceedings at 2. As of this date, the State still has not complied.

B. Sanctions Are Required To Ensure State Compliance With The Board's Order

When an intervenor fails to live up to its discovery obligations, sanctions are appropriate. As a Licensing Board has stated, "[t]o permit a party to make skeletal contentions, keep the bases for them secret, then to require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record." Northern States Power Company (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1301 (1977). Moreover, "a belief that a 'public interest' litigant may disregard key provisions of the Rules of Practice" is unfounded since "as a matter of fairness, a licensing board may not waive the discovery rules for one side and not the other." Susquehanna Steam, supra, ALAB-613, 12 NRC at 338-39.

The Board has the authority to "take appropriate action to avoid delay," 10 C.F.R. § 2.718, and to "make such orders in regard to [a party's failure to comply with any discovery order] as are just," 10 C.F.R. § 2.707. As explained in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928-29 (1982), a licensing board has the power to impose sanctions upon an intervenor for failure to comply with discovery orders. The Commission defined this power in Statement on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981):

> "When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from

> minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance."

Id. at 454. Licensing boards have frequently imposed sanctions against intervenors, such as the State, that failed to live up to their discovery obligations. Such sanctions have ranged from dismissing some or all of the intervenors' contentions, see e.g., Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983); Shoreham Nuclear Power Station, supra, LBP-82-115, 16 NRC 1123, to dismissal of the intervenor as a party to the proceeding. See, e.g., Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387 (1983); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LPB-83-20-A, 17 NRC 586

(1983); Tyrone Energy Park, supra, LBP-77-37, 5 NRC 1298.

Kerr-McGee hereby moves that the Board impose appropriate sanctions on the State for its failure to comply with the Board's order that the State submit substantiation for its privilege claims and explain its document production and search procedures. Consideration of the factors set forth in the Commission's Statement on Conduct of Licensing Proceedings compels this action: the State's failure to meet its discovery obligations is "important" and "harm[s] other parties or the orderly conduct of proceedings" because it perpetuates the unexplained concealment of an unknown number of potentially important documents. As discussed above, the State's action is "part of a pattern of behavior" designed to delay these proceedings and to prevent reciprocal discovery. Finally, requiring obedience to the Board's discovery order will not jeopardize any "safety or environmental concerns raised by the party." Kerr-McGee maintains that the following sanctions are fair and consistent with the nature of the State's noncompliance:

1) The State should be ordered to produce all documents for which a privilege claim was asserted within 5 days, because those claims have not been substantiated;

2) The State should be ordered to conduct a complete search for responsive documents in the possession or control of all State offices and agencies named in Kerr-McGee's motions to compel and in the possession or control of all potential State witnesses, and to produce all documents located within 5 days. Further, the State should be ordered to file an affidavit that describes precisely which files it has searched in response to Kerr-McGee's discovery requests, when they were searched, who conducted

the search, and what documents have been produced. The State should also be required to affirm, by affidavit, that all responsive documents have been produced; and

3) The State should be ordered to reimburse Kerr-McGee for the attorneys' fees and costs expended to prepare and argue Kerr-McGee's motion to compel and for this motion. 11/

In addition, Kerr-McGee respectfully requests that the Board formally warn the State that if it fails to answer Kerr-McGee's interrogatories as ordered or to comply with future discovery orders in this proceeding, further sanctions -- up to and including the dismissal of some or all of the State's contentions or of the State as a party -- will be imposed.

11/ As noted in Cincinnati Gas & Electric Company (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538 (1982), the Appeal Board has left open the question whether imposition of attorneys' fees is appropriate and within the Commission's power. The Board denied attorneys' fees in Zimmer Nuclear Power because the party against whom fees were sought had not violated any Board order and the Commission's failure to adopt the equivalent of Fed.R.Civ.P. 37(a) was deemed a bar to imposition of fees under such circumstances. The Board noted, however, that 10 C.F.R. § 2.707 "parallels Rule 37(b) which deals with sanctions imposed for failure to comply with a discovery order." Id., 15 NRC at 1548 n.7. Because the State has violated the Board's Order with respect to privilege justification and document search explanation, Rule 37(b), and by implication 10 C.F.R. § 2.707, justifies imposition of attorneys' fees and costs.

III. CONCLUSION

For all of the reasons stated herein, Kerr-McGee respectfully requests that the State's Motion to Stay Proceedings be denied and that the Board impose the sanctions and warning requested herein.

Respectfully submitted,

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Richard A. Meserve

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P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Kerr-McGee
Chemical Corporation

Dated: October 28, 1985

EXHIBIT A

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

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

PEOPLE OF THE STATE OF ILLINOIS'
MOTION TO RECONSIDER

The People respectfully move the Board to clarify or reconsider its October 19, 1984 Memorandum and Order with respect to the following:

Contention 1(g)

A) State groundwater standards

This contention alleges that the FES fails to consider applicable federal, state, and local policies, including Illinois' groundwater protection standards. In its ruling on this contention, the Board states:

> We admitted this contention in our February 24 Prehearing Conference Order (pp. 7-8) on condition that the People demonstrate that Kerr-McGee is subject to these requirements and on our finding that we are competent to enforce them. The applicability of these requirements is the subject of litigation in the courts of Illinois. Thus, the first condition has not yet been satisfied.

Board decision, pp. 48-9, n. 84. To the extent that the Board has held that applicability of State laws governing nonradiological hazards remains an open question, the People respectively disagree.

As Exhibit 2 to its May 2 Post-Prehearing Conference Brief the People forwarded the opinion of the presiding State court trial judge ruling that State law is applicable to the Kerr-McGee

matter. The People also discussed the May 1982 decision of the Seventh Circuit rejecting the arguments Kerr-McGee has advanced here concerning the applicability of State law. (See People's Post-Prehearing Conference Brief, pp.63-6 and People's Reply Brief, pp. 38-9.) Hence, this question is no longer an open one: the law of this Circuit is that State law applies to the nonradiological hazards of the Kerr-McGee site * The People have therefore satisfied the Board's first condition.

The statement of Contention 1(g) appended to the Board's decision does include the reference to State groundwater regulations, indicating that the issue has been admitted into the proceeding. Insofar as note 84 of the decision casts doubt on the Board's apparent admission of the groundwater standards portion of Contention 1(g), the People request clarification.

B) Part 61

10 CFR Part 61 reflects NRC policy disapproving of the establishment of low-level burial sites near population centers and of sites requiring active institutional controls for more than 100 years. Part 61 also makes clear that long-term performance should take precedence over short-term conveniences and considerations in the choice of sites. (See People's Memorandum on Contentions 2(u) and (w).) In Contention 1(g) the People argued

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*It should be kept in mind that the preemption question is a federal law question, not a state law question. Hence the Seventh Circuit's decision would bind this Board regardless what the State appellate court might ultimately decide in an appeal from the trial court's ruling. At this point, however, the federal and State courts have identically concluded that State law is applicable here.

PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn and under oath do state that I have this 2nd day of November, 1984 served a copy of the foregoing People Of The State Of Illinois' Motion To Reconsider, upon the persons listed on the attached Service List, by placing same in envelopes addressed to said persons, by first class mail, postage prepaid, and depositing same with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.

_____

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 2ND DAY
OF NOVEMBER, 1984.

_____
NOTARY PUBLIC

EXHIBIT B

STATE OF ILLINOIS)
) SS
COUNTY OF DuPAGE)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff	)	
	)	
-vs-	)	No. 80 CH 298
	)	
KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation,	)	
	)	
	)	
Defendant	)	

Discovery deposition of TERRY R. LASH, taken at the instance of the Defendant, on the 10th day of October, 1985, at the hour of 9:30 A.M., at Springfield Hilton Hotel, Springfield, Illinois, before Laura L. Boyd, CSR and Notary Public, pursuant to the stipulation attached hereto.

Q Have you ever prepared any document reflecting your evaluation of the Kerr-McGee stabilization plan?

A No.

Q Have you ever prepared any document reflecting your evaluation of the final environmental statement prepared by the NRC staff relating to the West Chicago facility?

A Let me back up and say that I am interpreting documents not to mean internal memoranda that may be used in decision-making within the Department. With that qualification, no to the second question as well.

Q You have prepared documents on those two subjects relating to internal decision-making within the Department?

A I believe that I have.

Q How many such documents?

A I don't know.

Q Would it be more than two?

A It might be.

Q Are all such documents, however many there may exist, currently in your office files?

A Not necessarily because some of them may

have been handwritten and destroyed by the Director.

Q Do you know of any such handwritten documents that may have been destroyed by the Director?

A Not specifically because I just know that my work habits were such that that was one way of communicating with the Director, and my secretary didn't see them, so I don't have any record of them personally, and I don't know what he did with them.

MS. RAPKIN: And I will state for the record that everything at DNS in the NRC proceeding has been produced. So if any such -- well, if any such documents exist, either they've been produced or if we believe they were privileged, you've got a privilege indicator sheet.

MR. VOORHEES: And would the same be true for any such documents in the files of the Governor?

MS. RAPKIN: No.

MR. VOORHEES: The Governor's files have not been searched?

MS. RAPKIN: No.

MR. VOORHEES: You are affirmatively saying that the Governor's files have not been searched for purposes of the NRC proceeding? Just trying to

understand your "no".

MS. RAPKIN: Well, how is that relevant to this proceeding?

MR. VOORHEES: I'm just asking the question.

MS. RAPKIN: Well, there's no relevance to that question to this proceeding.

MR. VOORHEES: Have the files of the Governor of the State of Illinois been searched for any purposes relevant to document production in this proceeding?

MS. RAPKIN: Well, let's put it this way. I haven't requested that they be searched.

MR. VOORHEES: And you choose not to answer my question relating to the NRC proceeding?

MS. RAPKIN: Well, it's not relevant to this proceeding. I mean that question isn't relevant to this proceeding.

MR. VOORHEES: So you choose not to answer that?

MS. RAPKIN: If you want to know whether or not any document -- what's relevant is whether or not this witness will rely on any such document that might be in the Governor's files in connection

with his expert testimony, and you can ask him that question, and if it turns out that the answer is yes, then we will see to it that, in this proceeding, they are searched. I mean those documents are retrieved and turned over to you or that a privilege indicator card is turned over to you to identify and describe their existence and scope. So if you want to ask him that question, you're entitled to ask him.

MR. VOORHEES: I will ask that question. I'm just wondering whether you are choosing not to answer my question whether the Governor's files have been searched for purpose of the NRC proceeding.

MS. RAPKIN: I've already made my answer. I would go on if I were you.

Q Do you plan to rely on any documents presently in the files of the Governor of the State of Illinois for purposes of offering testimony in this proceeding?

A I am unaware of any document that I would rely on that is only in a file in the Governor's office, but I have no way of knowing the extent of documentation in files in the Governor's office. They may have a complete set of NRC final

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 80 CH 298
KERR-MC GEE CHEMICAL CORPORATION,	)	
Defendant.	)	

THE DEPOSITION OF ROBERT T. SASMAN, taken by the Defendant herein, pursuant to the provisions of the Code of Civil Procedure of the State of Illinois and the Rules of the Supreme Court thereof, pertaining to the taking of depositions for the purpose of discovery, before NADA PERRY, C.S.R., Notary Public, at the Illinois State Water Supply, 101 N. Island, Batavia, Illinois, on Tuesday, the 20th day of August, A.D. 1985, at the hour of 1:30 o'clock P.M.

characteristics of the water quality in West Chicago. What did you do after learning of those unusual characteristics?

A. I don't recall a specific sequence of events. Somewhere in that time frame a student from the University of Northwestern got involved. And I don't know whether we went to the university and suggested it might be a topic for a thesis or whether he heard of it some other way and came to us. But there was a student from Northwestern University that did a thesis on the West Chicago area.

And with him, we collected a series of water samples from quite a number of wells over several months time. Most of those were collected by him, but through our office. And they were, as I recall, all analyzed by our laboratory in Champaign.

Then, subsequent to that, the County Health Department, DuPage County Health Department collected samples from more or less those same wells for again an extended period of time. And I believe those were all analyzed by our laboratory.

Q. Was that Northwestern University student Bill

Butler?

A. Yes.

Q. Do you have a copy of his thesis?

A. Just parts of it.

MR. HEALY: Again, counsel, that's something that I don't believe was produced in the documents from the water survey. At this time we request a copy of it.

MR. EGGERT: I don't know if it was or not, but we will certainly provide you with a copy.

MR. HEALY: Okay.

THE WITNESS: I am not sure where that is. I am not aware that I ever had the full thing.

MR. EGGERT: Let me amend that. We will provide you with a copy of whatever it is that we have.

MR. HEALY: Fine.

MR. EGGERT: I would imagine that at Northwestern they probably have a thesis bank in their library where the entire thing may be. But we will certainly turn over whatever it is that we have.

MR. HEALY: Very good.

Mr. Sasman, I don't think that's something we will have to spend a lot of time on now.

Let the record show that Mr. Sasman has pointed out to me a document contained in a binder. The name of the binder is American Potash and Chemical Company, Waste Disposal Project, West Chicago, DuPage County. And the name of the document contained in the binder is Northwestern University, study of the movement of chemical wastes into a ground water reservoir, a thesis submitted to the graduate school in partial fulfillment of requirements for a degree by William J. Butler, Evanston, Illinois, June 1965.

MR. EGGERT: Just so the record is clear, that's the cover page. The document itself as contained in this binder starts on page 39, so it's not the entire document.

MR. HEALY: That's correct.

The portion of the thesis in the binder appears to be from page 39 to 54, and there may be some attachments to the document.

THE WITNESS: Those might not have -- those might or might not have been part of his thesis. That was background for the thesis, but this was -- is my file. But whether he included that in his also, I am not

really sure.

MR. HEALY: I would like to make another observation on this document. I do recognize some of the pages in this document as ones which have been produced to us. I see other pages which are new to me.

And I also note for the record that the photocopies which we received of some of these documents were of very poor quality, probably owing to the age of the document and the fact that they are on onion skin and --

MR. EGGERT: They look to be multiple carbons on many of them.

MR. HEALY: Yes. We may attempt to get better copies, if that's possible.

MR. EGGERT: Let's go off the record just one second.

MR. HEALY: Sure.

(Whereupon, there was a discussion held off the record, after which the deposition was resumed as follows:)

MR. EGGERT: Back on the record.

Just to state for the record, the agreement that we have just reached, we will make Xerox copies of Mr. Sasman's binders, whatever is in them, and provide it to you within a matter of a few days.

MR. HEALY: Very good.

THE WITNESS: Let me ask a question. Does all of this from this A gonne hearing -- now, I don't know whether that's been transmitted. This is --

MR. EGGERT: Well, I suspect that there is a lot of duplicates that you have already received in there. I see, for example, the first letter is one on Argonne National Laboratory's stationery. You may well have received that from Argonne by this point.

But just in the interest of completeness, we will provide you with a copy of everything. It's easier to do it that way.

MR. HEALY: I agree with that.

BY MR. HEALY:

Q. Mr. Sasman, would you describe for me what the investigation of the quality of ground water in

as exhibits since the witness is referring to them.

MR. EGGERT: Fine. Let's go off the record for a moment and see if we can do that.

(Whereupon, there was a discussion held off the record, after which the deposition was resumed as follows:)

MR. HEALY: Let's go back on the record for a moment.

BY MR. HEALY:

Q. In reviewing the documents which Mr. Sasman has brought with him to the deposition today there is a memo dated February 12th, 1964 which appears to be from Mr. Sasman to Mr. Larson involving the, what is now the Kerr-McGee facility. It's a page and-a-half single-spaced and was not among the documents which were produced when we were told by the Attorney General's Office that all documents relating to West Chicago had been produced from the water survey.

And I would simply request of the Attorney General's Office that they very carefully

review the documents of the water survey to make sure all the documents will be produced. I am concerned that the photocopying appears to have been selective.

MR. EGGERT: Well, just in response to that, let me observe this appears to be a carbon copy. It's certainly not an original. And I don't know what may have happened to the original. We do know that the recipient of the original is now dead.

This copy was found apparently in the desk files of Mr. Sasman in one of the field offices. I have no way of knowing what may have happened with the original which is now nearly 22 years old; whether Mr. Larson may have had it in his desk files, and those may have just been discarded upon his death, who knows.

We will check to make sure, but I don't think there is any basis to assert that we were selective in the documents that we turned over. We did look. We turned over what we found.

MR. HEALY: Okay. The whereabouts of the original is really not the point. The fact is that there is a carbon here that is responsive to our request and has

not been produced.

MR. EGGERT: Again, we are going to produce it promptly. And we will look again, but to my knowledge we have produced what we have. We have produced everything we have found, and we have indeed looked.

MR. HEALY: Very good.

Why don't we photocopy the diagrams which Mr. Sasman has found in his volume. We will go off the record to do so, and then we will come back.

MR. EGGERT: Okay.

(Whereupon, there was a brief recess taken, after which the deposition was resumed as follows:)

MR. HEALY: Back on the record.

I will ask the Court Reporter to mark as D.X. Sasman No. 1, a memorandum or letter dated February 12th, '64 that has -- that consists of two pages with a four-page attachment.

(Whereupon, the document referred to was so marked

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Kerr-McGee Chemical Corporation's Motion For Sanctions and Opposition to State's Motion to Stay Proceedings have been served by first-class mail, postage pre-paid,* on this 28th day of October, 1985, as follows:

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