

ORIGINAL

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Agency: Nuclear Regulatory Commission
Atomic Safety & Licensing Appeal Board

Title: Kerr-McGee Chemical Corporation (West
Chicago Rare Earths Facility)

Docket No. 40-2061-ML

LOCATION: Bethesda, Maryland

DATE: Wednesday, January 16, 1991

PAGES: 1 - 208

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY & LICENSING APPEAL BOARD
4

5 In re: :
6 KERR-McGEE CHEMICAL :
7 CORPORATION : DKT. NO. 40-2061-ML
8 (West Chicago Rare Earths :
9 Facility) :

10
11 Fifth Floor Hearing Room
12 East-West Towers
13 4350 East-West highway
14 Bethesda, Maryland
15 Wednesday, January 16, 1991
16

17 The above-entitled proceeding came on for oral
18 argument before the Appeal Board at 9:30 a.m., pursuant to
19 notice.

20 BEFORE:
21 THOMAS S. MOORE, Chairman
22 CHRISTINE N. KOHL, Member
23 HOWARD A. WILSEP, Member
24
25

1 APPEARANCES:

2 For the Applicant:

3 COVINGTON & BURLING

4 By: Richard Meserve, Esq.

5 Peter Nickles, Esq.

6 Herb Estreicher, Esq.

7 1201 Pennsylvania Ave. NW

8 Washington, D.C. 20044

9

10 For the Intervenor State of Illinois:

11 William Seith, Esq.

12 Douglas Rathe, Esq.

13 Assistant State Attorneys General

14 Babette P. Salus, Esq.

15 Senior Staff Attorney, Department of

16 Nuclear Safety

17 1035 Outer Park Drive

18 Springfield, Illinois 62704

19

20 For the Intervenor City of West Chicago:

21 KARAGINIS & WHITE

22 By: Joseph V. Karaganis, Esq.

23 James D. Brusslan, Esq.

24 414 North Orleans Street, Suite 810

25 Chicago, Illinois 60610

1 For the NRC Staff:

2 Ann Hodgdon, Esq.

3 Patricia Jehle, Esq.

4 U.S. Nuclear Regulatory Commission

5 Washington, D.C. 20555

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P R O C E E D I N G S

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2 JUDGE MOORE: Good morning. This morning we are
3 to hear oral argument on the appeals of the State of
4 Illinois and the City of West Chicago from the Licensing
5 Board's initial decision authorizing license amendment for
6 Kerr McGee Chemical Corporation's West Chicago Rare Earths
7 Facility.

8 We are also hearing argument this morning on the
9 Intervenors' motions to vacate and to terminate this
10 proceeding.

11 The argument will be governed by the terms of our
12 November 28th order. As stated in that order, each side is
13 allowed 90 minutes for argument, and the Appellants may
14 reserve a portion of their time for rebuttal.

15 I would hasten to add, however, that neither side
16 should feel compelled to use all of their time.

17 If the parties will now please identify themselves
18 for the record, we will then proceed, and start with the
19 Staff.

20 MS. HODGDON: I am Ann Hodgdon for the NRC Staff,
21 and this is Patricia Jehle.

22 MR. NICKLES: Your Honor, my name is Peter
23 Nickles, with Covington & Burling, appearing on behalf of
24 Kerr McGee, and my colleague, Dick Meserve, is on the Metro
25 heading up here. He should be here shortly.

1 MR. SEITH: William Seith, Assistant Attorney
2 General on behalf of the State of Illinois. With me today
3 is Douglas Rathe, Assistant Attorney General, and Babette
4 Salus, an attorney with the Department of Nuclear Safety.

5 MR. KARAGANIS: Joseph Karaganis, for the City of
6 West Chicago. With me is James Brusslan of my office.

7 JUDGE MOORE: Have the Appellants reached some
8 accommodation for splitting their time?

9 MR. SEITH: The Appellants have agreed to split
10 their time as follows:

11 Initially I will be making a presentation for 15
12 minutes on the motion to terminate that was filed in
13 October.

14 Then Mr. Karaganis will speak briefly on the
15 motion to terminate, and then move to the motion to remand.
16 He will have a total of 20 minutes.

17 Then following that, I will again make a
18 presentation --

19 JUDGE MOORE: You said motion to remand. I assume
20 you meant motion to vacate?

21 MR. SEITH: Motion to vacate or remand the first
22 filed motion that was filed in late August.

23 Then 25 minutes is reserved to discuss the merits
24 of the appeal.

25 I will make a presentation for 15 minutes, and Mr.

1 Karaganis will make a presentation for 10 minutes. ¶

2 We are reserving the balance of our time for
3 rebuttal.

4 JUDGE MOORE: I didn't do my math. What is that?

5 MR. SEITH: It works out to an hour for the
6 initial presentation.

7 JUDGE MOORE: With 30 minutes for rebuttal?

8 MR. SEITH: Correct.

9 JUDGE MOORE: Isn't that a bit much for rebuttal?
10 I think it would be more reasonable to plan on something
11 like no more than 15 minutes for rebuttal.

12 MR. SEITH: I don't anticipate that we will need
13 100 percent of our time, but we could --

14 JUDGE MOORE: Are we prepared to proceed? I think
15 from our perspective, we would much prefer not to have it
16 broken up like this; that you would just present your
17 arguments on the motion to terminate and proceed to the
18 merits, and the City of West Chicago can do the same thing.
19 But if you have prepared it and are not comfortable with
20 switching, we will permit you to proceed; but our preference
21 would be that you just not continue to run and back to the
22 microphone.

23 MR. SEITH: Could you give me just a moment,
24 please?

25 MR. KARAGANIS: Your Honor, if I might, just as a

1 preliminary matter, Mr. Richard Meserve has signed up as the
2 person who will be arguing for Kerr McGee. I realize that
3 there must be some goof-up on the Metro, and we would
4 respectfully request that he be given an opportunity to get
5 here, so that he hears our argument. I think it would be
6 unfair for him to come in halfway through our argument, and
7 then try and be in a position of making his argument in
8 response.

9 MR. NICKLES: We have no problem with going
10 forward, Your Honor. Mr. Meserve will get here. He's on
11 the Metro.

12 JUDGE MOORE: That's fine.

13 MR. NICKLES: I'm perfectly able to listen to
14 these very interesting arguments.

15 JUDGE MOORE: That's fine.

16 Mr. Nickles, could you tell me what your split
17 with the Staff is on your time?

18 MR. NICKLES: May it please the Court, generally
19 speaking, Your Honor, we've agreed to 60 minutes for the
20 Applicant Kerr-McGee and 30 minutes for the NRC Staff, Ms.
21 Hodgdon.

22 JUDGE MOORE: Thank you. The Appellants may
23 proceed.

24 MR. SEITH: After discussing with Mr. Karaganis,
25 we would prefer to proceed as I originally outlined.

1 As the panel is no doubt aware, this appeal today,
2 and the attendant motions concern Kerr-McGee's proposal to
3 dispose of 500,000 tons of radioactive material in the
4 center of the densely-populated City of West Chicago.

5 Excuse me just a moment. I'm setting my watch, to
6 make sure I don't run over.

7 Kerr-McGee's proposal was approved by the Staff,
8 and then ultimately by the Atomic Safety and Licensing
9 Board, and Kerr-McGee's proposal is, in the opinion of the
10 State of Illinois, nothing short of fantastic. And I say
11 that because, only in the world of fantasy could Kerr-
12 McGee's proposed disposal cell hope to succeed as planned.

13 I have outlined the order of presentation. I
14 would like to move initially to the Illinois motion to
15 vacate that was filed, I believe, in November of this year.
16 Correction. October 22, 1990.

17 There is, in the opinion of the people of the
18 State of Illinois and the City of West Chicago, a very
19 fundamental jurisdictional issue that has arisen as a result
20 of the transfer of jurisdiction under Section 274 of the
21 Atomic Energy Act over 11(e)(2) byproduct material to the
22 State of Illinois. That transfer of process was initiated
23 by the State in July of 1988 with a draft proposal, and
24 discussions ensued with the NRC that ultimately resulted in
25 an order by the Commission on October 17, 1990 officially

1 transferring jurisdiction over 11(e)(2) byproduct material
2 to the State of Illinois, effective November 1, 1990.

3 The transfer of jurisdiction over that material
4 necessarily means that the NRC no longer has jurisdiction to
5 hear any of the matters that are pending before this Panel.

6 JUDGE KOHL: What's your basis for making that
7 statement? Is there anything in the agreement that the NRC
8 signed and approved on your Governor's side, or anything in
9 any Commission issuance that indicates that a pending
10 adjudicatory proceeding, which is part of the processing of
11 a still pending application is to stop immediately?

12 MR. SEITH: Absolutely. There is nothing in the
13 Commission order authorizing transfer of the jurisdiction,
14 and nothing specifically in the agreement. The agreement is
15 more generalized than that. It is not site-specific. So it
16 is not intended to address that particular issue in this
17 case.

18 JUDGE KOHL: Are you familiar with the
19 Commission's policy statement on the state agreement
20 process? I think 1981 is the operative date.

21 MR. SEITH: I have not reviewed that recently. I
22 am relying upon --

23 JUDGE KOHL: Let me read you that, a portion of
24 that. It does take note of proceedings that might be
25 pending at the time a state agreement is negotiated and

1 signed.

2 The policy statement says: in effecting the
3 discontinuance of jurisdiction, appropriate arrangements
4 will be made by NRC and the state to ensure that there will
5 be no interference with or interruption of licensed
6 activities, or the processing of license application, by
7 reason of the transfer.

8 Does that language alter your position in any
9 respect?

10 MR. SEITH: It does not. I believe that it is
11 also well-established Commission policy that where there is
12 a transfer of jurisdiction, all pending proceedings before
13 the Commission, or its lower bodies, in the case of the
14 instant Board --

15 JUDGE KOHL: And your authority for that is what?

16 MR. SEITH: My authority for that is several-fold.
17 Initially, it is the "U.S. Ecology" case, which was decided
18 in 1987.

19 JUDGE KOHL: That's the Appeal Board "Sheffield"
20 decision, correct?

21 MR. SEITH: Correct. Correct. In particular, I
22 rely upon the NRC Staff motion to terminate and vacate the
23 Licensing Board's decision that was filed in that case on
24 May 28, 1987 by Ms. Hodgdon, and the subsequent decision.

25 In that motion, the Staff indicated, on Page 6 of

1 the motion: accordingly, consistent with Commission policy,
2 calling for vacation of unreviewed Licensing Board decisions
3 that have become moot while on appeal, the vacation of the
4 Licensing Board's memoranda and orders of February 20 and
5 March 10, 1987 is appropriate.

6 JUDGE KOHL: Of course, that was just a pleading
7 filed by the Staff as a party in that case. That's not the
8 Staff's position here, is it?

9 MR. SEITH: The Staff's position is different in
10 the instant case. I don't see a basis for the difference,
11 but, based upon their explanation of what the Commission
12 policy is, this Appeal Board did ultimately issue a decision
13 on June 16, 1987, that followed that recommendation and that
14 Commission policy.

15 JUDGE KOHL: Is it your view that the transfer of
16 jurisdiction from one entity to another in this case renders
17 this case moot? Is that your argument? As I understand
18 "Sheffield," as I read "Sheffield," that is the implicit
19 assumption there, because of the citation to "Munsingware"
20 and the fact that that was an enforcement case that the
21 Staff decided not to pursue, so the Staff withdrew as a
22 party.

23 Does that same analysis pertain in this case?

24 MR. SEITH: Absolutely.

25 JUDGE KOHL: So you're saying there's no longer a

1 live controversy, no longer parties with a continuing,
2 genuine interest in this matter?

3 MR. SEITH: There is no longer a live controversy
4 under the rules and regulations of the Nuclear Regulatory
5 Commission. There may well be a live controversy with
6 respect to IDNS rules and regulations, and the application
7 of those rules and regulations to the Kerr-McGee site.

8 JUDGE KOHL: What you're saying is there is no
9 longer a controversy in the eyes of that entity that is the
10 decision-maker?

11 MR. SEITH: Correct.

12 JUDGE KOHL: Namely, the NRC.

13 MR. SEITH: Correct.

14 JUDGE KOHL: But I thought the definition of
15 mootness focused on whether or not there was a live
16 controversy between and among the litigants.

17 MR. SEITH: Certainly the focus in the "U.S.
18 Ecology" case as I read it was on the fact that there was
19 now a transfer of jurisdiction to the State of Illinois, and
20 that the litigation there pending could continue within that
21 forum, within the forum before the State of Illinois.
22 Likewise, the litigation could continue here, albeit it in a
23 different forum, before the State of Illinois.

24 In the sense of continuing the litigation under
25 the rules and regulations of the NRC, these issues are now

1 moot, because the NRC no longer has jurisdiction, and the
2 applicable rules and regulations and the appropriate body to
3 hear those issues is the Illinois Department of Nuclear
4 Safety.

5 JUDGE KOHL: If the answer is that simple, why
6 don't you think the Commission, then, in the many
7 opportunities it's had over the last few months, hasn't
8 essentially made a statement to that effect, indicated, you
9 know, we've signed the agreement; p.s., this case is over;
10 go forth and litigate in Illinois, or whatever?

11 MR. SEITH: I think they are indicating,
12 appropriately, a deference to this body to make that
13 determination.

14 Initially there is, obviously, an NRC process
15 which provides for hearings initially at the Board level,
16 then to this Board, and then upon the discretion and
17 acceptance by the Commission, to the Commission. And they
18 were -- obviously this matter was already pending before
19 this Board -- giving appropriate due deference to this Panel
20 to make that determination initially.

21 JUDGE KOHL: While we're on the subject of
22 process, does the State of Illinois have a statute
23 comparable to the Federal APA?

24 MR. SEITH: Yes.

25 JUDGE KOHL: Could you give me the site for it,

1 please?

2 MR. SEITH: I'm not sure if I know if offhand.
3 Illinois Administrative Procedure Act. I do not know, I
4 believe it's in Title V?

5 [Pause.]

6 MR. SEITH: Chapter 127.1000, I'm advised.

7 JUDGE MOORE: Could the Commission, in the
8 agreement amendment with Illinois, have reserved for itself
9 a continuation of the appeal process that was ongoing when
10 the agreement was executed and then became effective?

11 I apologize for interrupting.

12 MR. SEITH: Not as I read "U.S. vs. Munsingware,"
13 no. I don't believe that there is any room within the
14 language of that case there on Page, starting on Page 106 --

15 JUDGE MOORE: My question was, couldn't the
16 Commission itself in the agreement, as far as put forth a
17 term of the agreement, that the Commission, the agency would
18 go ahead and finish the appeal, that was the grounds, the
19 only grounds on which it is willing to transfer authority
20 over byproduct material to Illinois?

21 Now, there's another question whether Illinois
22 would have accepted that term. But could they not have done
23 that?

24 MR. SEITH: There is no basis for that type of
25 condition that I'm aware of under Section 274. Section 274

1 is pretty straightforward and gives a nondiscretionary --
2 there are certain rules that Illinois has to follow under
3 Section 274 in order to obtain Agreement State status. And
4 if they essentially jump through those hoops, the NRC is
5 obligated to transfer jurisdiction. And there is nothing,
6 as I read that section, which allows for that type of
7 conditional transfer of jurisdiction.

8 JUDGE KOHL: Is there anything that precludes it?
9 I don't see anything in 274 that addresses pending
10 proceedings, with the possible exception of some language
11 that talks about the state not being required to duplicate
12 what has been done before the NRC.

13 Other than that, is there anything that says, thou
14 shalt not have any savings clauses that protect pending
15 adjudicatory proceedings?

16 MR. SEITH: I'm certain there are a lot of things
17 that Section 274 does not say. I don't think you can infer
18 by the absence of that kind of prohibition that the
19 Commission has some implied authority to impose that type of
20 condition.

21 JUDGE KOHL: And you infer that they're precluded
22 from wrapping up what was done? I mean, after all this is
23 an agreement that the Commission enters into freely. They
24 need not transfer jurisdiction, do they?

25 MR. SEITH: The answer to the question, again is,

1 I believe, there are, again, as I read the section, a number
2 of requirements Illinois has to meet in order to obtain
3 jurisdiction. They have met all those requirements. The
4 Commission has seen to that. And, despite our theoretical
5 debate about what the Commission could or could not have
6 done, the fact is that they did not, in their transfer of
7 jurisdiction, impose any such condition.

8 In the "Munsingware" case, as you have made
9 reference to already, there the Court clearly states that
10 the established practice of the Court in dealing with the
11 civil case from a court in the Federal system, which has
12 become moot while on its way here or pending our decision on
13 the merits, is to reverse and vacate the judgment below, and
14 remand with the direction to dismiss. And they go on to
15 reason that it is the duty of the appellate court to so
16 order, because the procedure clears the path for future
17 relitigation of the issues between the parties and
18 eliminates a judgment, review of which was prevented through
19 happenstance.

20 JUDGE KOHL: Do you know of any Federal Court
21 cases that say that a transfer of jurisdiction from one
22 decision-making entity to another moots and otherwise live
23 case?

24 You would agree that "Munsingware" doesn't apply
25 unless a case is moot, correct?

1 MR. SEITH: Correct.

2 JUDGE KOHL: So do you know of any Federal Court
3 cases that characterize that type of transfer of
4 jurisdiction as an action that moots a case?

5 MR. SEITH: I confess that I am not -- I don't
6 know whether Mr. Karaganis has some reference. Also, in the
7 "Northwest Pipeline" case, this is a D.C. Circuit case, in
8 1988, there the Court indicated that it is guided by the
9 principles of "Munsingware," and noted that there the
10 Supreme Court was confronted with an effort to employ a
11 District Court decision for collateral estoppel purposes by
12 virtue of the supervening of mootness. The decision had not
13 been reviewed on appeal, and the Court found itself duty-
14 bound to vacate the lower court's opinion.

15 And so again, I would indicate that I believe the
16 caselaw clearly indicates that there is a duty on behalf of
17 an appellate body that, where a case becomes moot due to a
18 loss of jurisdiction, or what have you, it is appropriate to
19 not only dismiss the pending appeal but also to vacate the
20 underlying decisions.

21 JUDGE MOORE: You would agree, would you not, that
22 even though the case, "Munsingware," does not apply unless
23 the case is moot, which was your previous answer, but that
24 nevertheless, the principles underlying "Munsingware" would
25 seem to be appropriately applied here.

1 Let me explain. When a case becomes moot in an
2 Article III court, the court loses subject-matter
3 jurisdiction. And the theory behind what happens then is
4 basically that the court has inherent power to do justice
5 and decide what the outstanding decision that's on review
6 should be vacated or left standing.

7 Here, by transfer of jurisdiction, it certainly
8 appears that we are without subject-matter jurisdiction.
9 So, from that point hence, it would seem that the principles
10 of why you vacate or why you don't vacate would be
11 appropriately applied here, regardless of whether the case
12 is technically moot.

13 Is that an appropriate analysis?

14 MR. SEITH: I would agree with you that there is
15 in the line of cases that have been cited to this panel a
16 relatively narrow exception to the general rule that
17 requires an appellate body to vacate the underlying trial
18 court order.

19 That relatively narrow exception has been outlined
20 by the appellees. They make reference to what they perceive
21 to be Illinois' attempt to bring this, the muteness or loss
22 of jurisdiction issue, upon itself when in reality what has
23 occurred is that Illinois has followed the directive of
24 Congress in applying for, seeking an application for and
25 ultimately obtaining agreement state status over the

1 11(e)(2) byproduct material and at the same time has
2 followed the direction imposed by the Illinois constitution
3 upon it to protect the public health and welfare by
4 participating in this proceeding.

5 Essentially what Kerr-McGee is suggesting is that
6 by not vacating the underlying order Illinois should be
7 required to choose. It should either apply for and obtain
8 agreement state status or it should seek to participate in
9 an application type proceeding such as the one before the
10 panel but it can't do both. Clearly that was not the intent
11 of Congress.

12 Clearly Congress envisioned the states who have an
13 interest and have the capability and the technical expertise
14 to become agreement states to exercise those rights and
15 duties to the fullest.

16 I submit to the panel that -- I'm running a little
17 bit overtime here, but I submit to the panel that there are
18 a number of prejudices that can and will result to the state
19 of Illinois if the underlying decisions is not vacated.

20 For one, Illinois will be saddled with an
21 unreviewed, non-final agency decision that can be used
22 ultimately by Kerr-McGee in any subsequent 274(O) hearing
23 that may proceed as a result of the transfer of
24 jurisdiction.

25 The Commission has indicated in its order

1 transferring jurisdiction that it may be appropriate at some
2 point to have a hearing pursuant to 274(O) on the
3 application of Illinois standards and Illinois would
4 essentially be fighting a decision which it would no longer
5 have an opportunity to review.

6 As I indicated --

7 JUDGE KOHL: Counsel, I'm sorry to interrupt, but
8 wouldn't that potential 274(O) proceeding follow some type
9 of proceeding before a state agency where the state would
10 clearly be in the driver's seat?

11 MR. SEITH: I agree 100 percent. I simply am
12 suggesting that --

13 JUDGE KOHL: I am trying to understand what the
14 detriments are to having a decision not be vacated vis-a-vis
15 limited the state's options in future proceedings that it
16 will conduct itself.

17 MR. SEITH: Well, the transfer of jurisdiction
18 under 274 envisions that the state will under its program
19 make an independent decision as to the merits of the
20 licensee's proposal, disposal proposal in this case.

21 JUDGE KOHL: And I assume that that will be some
22 kind of licensing proceeding not dramatically unlike that
23 which occurs at the NRC?

24 MR. SEITH: Agreed.

25 JUDGE KOHL: And it would be under your

1 Administrative Procedure Act?

2 MR. SEITH: Agreed.

3 What I am suggesting is that Kerr-McGee following
4 the course of this litigation it's certainly predictable
5 that Kerr-McGee would attempt to use an unreviewed licensing
6 board decision for its collateral estoppel effects, if any,
7 before or in that proceeding before the Illinois Department
8 of Nuclear Safety. That is what I am suggesting is a
9 prejudice that may result as a result of not vacating that
10 underlying decision.

11 Kerr-McGee has indicated that the prejudice to
12 them would be or is the time and money and effort that they
13 have spent in proceeding on their licensing application
14 before this panel, but I would submit that that time and
15 money and expense is not as a result of anything that
16 Illinois has done but is the result of the requirements of
17 the regulations of the NRC.

18 Certainly it would seem to me that having spent
19 the time preparing the engineering report the other efforts
20 that Kerr-McGee has made in this licensing proceeding they
21 are certainly one step ahead in making their application to
22 the state of Illinois and will probably simply reuse many of
23 the materials they have already spent so much time
24 developing.

25 I would like to turn it over now to Mr. Karaganis.

1 MR. KARAGANIS: May it please the Court, I think
2 Judge Moore is focused on the central question here.

3 This is not an issue of what is moot and what
4 isn't moot.

5 Mootness is simply one form of loss of
6 jurisdiction. There are other forms of loss of
7 jurisdiction.

8 There is no question --

9 JUDGE KOHL: So, is it your position that the case
10 isn't moot?

11 MR. KARAGANIS: There is no question there is an
12 ongoing controversy over what should be done with respect to
13 the West Chicago disposal cell, without a doubt.

14 The question here is when a court or a judicial
15 body loses jurisdiction.

16 In its order transferring 11(e)(2) jurisdiction to
17 the State of Illinois, the Commission -- and I quote --
18 says, "The Commission shall discontinue, as of the effective
19 date of this agreement, the regulatory authority of the
20 Commission in the State with respect to byproduct material,
21 as defined in Section 11(e)(1) of the Act, 55 Federal
22 Register at 48592."

23 This is not saying we have reserved some
24 jurisdiction. This is saying the jurisdiction of 11(e)(2)
25 material, which we all agree this is -- the D.C. Circuit has

1 told us to that effect -- is now with the State of Illinois
2 and is no longer with the Commission.

3 So, it's not a question of mootness. It's a
4 question of loss of jurisdiction. The case is as Judge
5 Moore indicated.

6 The case law is very clear that, when there is a
7 loss of jurisdiction, for whatever reason -- Congress passes
8 an act taking away the court's jurisdiction or there is a
9 transfer of jurisdiction, as the case took place here, or
10 there is mootness --

11 JUDGE KOHL: I don't know of any cases that
12 involve a transfer of jurisdiction.

13 I'll ask you, then, the question that I asked Mr.
14 Seith.

15 Are there any cases that involve a transfer of
16 jurisdiction?

17 I think the ones you're talking about involve
18 decontrol or deregulation of a particular commodity item,
19 industry, whatever.

20 MR. KARAGANIS: The cases I'm talking about are as
21 Judge Moore indicated: loss of Article 3 jurisdiction.

22 For whatever reason, the jurisdiction is lost.

23 JUDGE KOHL: Well, we're not bound by that. We're
24 not an Article 3 court. That is irrelevant.

25 MR. KARAGANIS: It is not if there is a loss of

1 statutory jurisdiction.

2 If Congress has said once there is a 274(o)
3 agreement transferring jurisdiction, the Commission no
4 longer has jurisdiction, Congress has spoken, and with all
5 due respect to this Court and to the Commission and, indeed,
6 to the courts that have held in similar instances, when
7 jurisdiction is lost, it's lost, and the court must -- and
8 this panel has ruled -- first things first.

9 You've got to examine your jurisdiction. If you
10 examine your jurisdiction and find it lacking, you must
11 terminate.

12 By the way, just to clarify the record, the State
13 agrees with that.

14 JUDGE KOHL: If you find that it is not lacking,
15 then you can proceed.

16 MR. KARAGANIS: Oh, without question. Without
17 question.

18 If you have jurisdiction, you may proceed. If you
19 don't have it, you can't.

20 The staff has indicated, just so the record is
21 clear -- the staff position here is you must terminate, and
22 that's in their brief.

23 The staff position is, then, having decided to
24 terminate, what then do you do, the second step of the
25 analysis.

1 So, first things, we want to make clear, you must
2 terminate.

3 Second question is what do you do with respect to
4 the initial decision in license below?

5 The fact is that the rule is -- the rule now of
6 law, which has been repeated time and time again by the
7 Supreme Court, in Duke Power and in Great Western Sugar, you
8 must vacate.

9 That is the black-letter rule.

10 There is a narrow exception to that rule where, as
11 a result of the culpability of the parties who were below --
12 in the court below, they have brought upon the loss of
13 jurisdiction.

14 Number one, as Mr. Seith has said, Illinois has
15 not brought this on itself in any culpable manner. It's
16 followed Congress' dictates. It's followed the exact
17 procedure that Congress dictated in 274.

18 JUDGE KOHL: Congress mandated that the State of
19 Illinois --

20 MR. KARAGANIS: Congress mandated --

21 JUDGE KOHL: Excuse me. May I finish?

22 MR. KARAGANIS: Yes. I'm sorry.

23 JUDGE KOHL: Congress mandated that the State of
24 Illinois apply for 274 authority?

25 MR. KARAGANIS: Congress mandated that the states

1 are allowed to apply for 274.

2 JUDGE KOHL: Then it's permissive. It's not
3 mandatory.

4 MR. KARAGANIS: Well, they gave it away.

5 JUDGE KOHL: Is that correct? But that's a big
6 difference in the law, permissive actions versus mandatory.

7 MR. KARAGANIS: Well, I think it would be a new
8 concept of Federalism if Congress gave the states a right
9 and they said no, you're going to be penalized for
10 exercising that right.

11 There is nothing in the statute that says the
12 states should be penalized for exercising a right Congress
13 has given them.

14 So, that's number one.

15 Number two is that the City of West Chicago didn't
16 apply for any transfer of jurisdiction.

17 The City of West Chicago here is ready, full-
18 blown, to seek the appellate reversal of the decision below,
19 because it's grossly in error.

20 JUDGE KOHL: Was the City of West Chicago a fully-
21 participating party and intervenor in this proceeding?

22 MR. KARAGANIS: We were -- again, I come to the
23 proceeding late, as special counsel.

24 I will tell you that the City of West Chicago did
25 intervene and was granted intervenor status.

1 JUDGE KOHL: I thought it was participating -- I
2 thought it took the proceeding as it found it late in the
3 day and is participating only as 2.715(c) interested
4 governmental --

5 MR. KARAGANIS: We are taking the proceeding,
6 because we've got a fundamental interest in protecting the
7 health, safety, and welfare of our citizens.

8 JUDGE KOHL: But you're not a full-fledged
9 intervenor.

10 MR. KARAGANIS: We did not bring in evidence.
11 We're not seeking to introduce new evidence.

12 We are seeking to overturn the decision on appeal,
13 and we are proceeding forward with this appeal, and no one
14 has said that we didn't have a right to proceed with a brief
15 on the merits, and we have done so.

16 So, we're here live, in person, ready to pursue
17 the appeal if this board determines it has jurisdiction.
18 We're not in a situation where we're saying drop the appeal,
19 but you don't have jurisdiction, and that's the central
20 thrust of the question.

21 JUDGE MOORE: Wasn't one of the main thrusts
22 behind the mill tailings act's original enactment in '78 to
23 empower the states to be able to regulate byproduct
24 material?

25 Prior to that time, there was no clearcut Federal

1 authority or certainly no adequate Federal authority to
2 regulate tailings, and many states were, in fact, regulating
3 under, presumably, state law, western states, and wasn't one
4 of the purposes of that Act to empower the states because of
5 this void?

6 MR. KARAGANIS: Yes.

7 Assuming that they followed -- as Mr. Seith said,
8 assuming you went through the hoops required by the statute,
9 and then it is mandatory on the Commission, under the
10 statute, to transfer jurisdiction.

11 So, Congress set forth this series of hoops that
12 must be followed. The State of Illinois followed them.
13 Jurisdiction is transferred.

14 I'd like to, if I can turn -- because this -- this
15 --

16 JUDGE KOHL: Yes. I thought you were supposed to
17 address the other motion.

18 MR. KARAGANIS: I'm switching to the motion now to
19 vacate on the grounds of newly-introduced evidence, and I
20 love the way these things get twisted around.

21 We haven't introduced on iota of new evidence.

22 What we've seen here --

23 JUDGE KOHL: But you have filed a motion to
24 reopen, as an alternative.

25 MR. KARAGANIS: Yes.

1 We have filed a motion to reopen the proceeding,
2 because number one, as of August 10, 1990, the Commission is
3 asking this Board to consider new evidence -- the staff is.

4 JUDGE KOHL: I was going to say I don't think the
5 Commission is asking.

6 MR. KARAGANIS: Excuse me.

7 The staff is asking this board to amend the
8 license on the basis of new evidence and to take into the
9 submittals by Kerr-McGee and staff during the period of the
10 summer, after the decision of the licensing board below.

11 That is requested in the NRC brief; it's also
12 requested in Mr. Swift's affidavit, so what we've got here
13 is a staff request that new evidence be considered and amend
14 the license. Why? Because the old license is inadequate.

15 The old license doesn't protect the public health,
16 for a variety of reasons I will get into. The normal
17 procedure in such a circumstance is, when new license is
18 sought to be adduced -- and what you have here is a
19 Commission Staff brief which basically says there were
20 errors below. We can cure these errors. We can cure these
21 errors with this new material, but there were errors below.

22 JUDGE KOHL: Does the staff say that the errors
23 were committed by the Licensing Board or were the errors in
24 the position that the staff itself --

25 MR. KARAGANIS: I think it was a combination of

1 all three sources of error. The Licensing Board accepted
2 the arguments of Kerr McGee and the staff, among other
3 things, that what they were proposing wasn't active
4 maintenance; that you didn't have to do a PMP event and you
5 didn't have to consider other things such as intrusion.

6 What you now have is the staff coming in and
7 saying, several things were wrong below but we can fix it on
8 appeal with new evidence. If you'll consider the new
9 evidence and amend the license -- remember, one of the
10 things that you've got jurisdiction here on is not simply a
11 request by the staff to affirm the decision below; you have
12 a request by staff to amend the license.

13 JUDGE KOHL: But the staff is willing to let
14 Illinois and the city address that evidence.

15 MR. KARAGANIS: But you have -- again, assuming,
16 for the sake of argument, that you have jurisdiction,
17 assuming, arguendo, that the Board has jurisdiction, you
18 have a situation on appeal where a litigant below has come
19 in and said, we and our side was in error.

20 We think the error is curable, but it must be
21 cured. The cure is a request to this Board to amend the
22 license. Assuming you have jurisdiction -- which is a big
23 "if," -- they're saying, amend the license, and do it on the
24 basis of a whole series of evidence. If you look at the --

25 JUDGE KOHL: But they are willing; are they not,

1 to give you your opportunity to address the asserted changes
2 in the staff's position?

3 MR. KARAGANIS: Presumably --

4 JUDGE KOHL: So you're getting your due process,
5 right?

6 MR. KARAGANIS: Well, not quite. One of the
7 things I wanted to make clear is, if this board says it has
8 jurisdiction, and if the Board accepts the staff's position
9 that this Board should conduct de novo evidentiary
10 proceedings, which is extremely unusual, we want some
11 discovery.

12 I've got a whole list of affidavits and technical
13 reports that will knock your socks off in terms of the size
14 of these proceedings. I haven't had any discovery on them.
15 They're brand new.

16 JUDGE KOHL: What happens to the underlying
17 Licensing Board decision in that scenario?

18 MR. KARAGANIS: I suggest to you that what has
19 been done here is all the more evidence suggesting that the
20 condition of this record with the pile of new material,
21 mitigates additionally in vacating the Licensing Board
22 decision below. You've got no party here -- I shouldn't say
23 that.

24 Certainly the staff is not defending the record
25 below, sans, this new material. They're saying the new

1 material must be introduced in order to have a good,
2 definitive determination of the proceeding.

3 JUDGE MOORE: Hasn't what's happened, at least as
4 to a number of the contentions that Intervenors -- that were
5 admitted to the proceeding, and the Licensing Board's
6 decision on those; that is, all those touching upon what you
7 would call erosion, intrusion and active maintenance --
8 haven't all of those issues now had the Licensing Board's
9 rationale removed?

10 MR. KARAGANIS: Absolutely.

11 JUDGE MOORE: Even if the result were to remain
12 the same, there's no rationale from the Licensing Board to
13 support it?

14 MR. KARAGANIS: Absolutely.

15 JUDGE MOORE: On all of those issues that touch --

16 MR. KARAGANIS: Erosion, intrusion -- absolutely.
17 Now, again, what we've requested is that if you're going to
18 retain jurisdiction which, in all good faith, we don't think
19 you have --

20 JUDGE KOHL: We understand that argument. You
21 need not repeat that again.

22 MR. KARAGANIS: If you do --

23 JUDGE MOORE: We will henceforth assume we have
24 jurisdiction through all of your presentation.

25 MR. KARAGANIS: There's no way you can defend the

1 Licensing Board decision -- and we'll get into the merits of
2 the appeal -- given the changed circumstances that the staff
3 has brought to bear. What should happen is that it should
4 go back to the SLB.

5 JUDGE KOHL: Give me your top three changed
6 circumstances and explain why they're material or
7 significant?

8 MR. KARAGANIS: Active maintenance; active
9 maintenance changes, among other things, -- active
10 maintenance and the technical assumptions that go with it;
11 namely, that the soil erosion barrier -- the soil barrier -
12 - is going to remain in place. The fact is that now you
13 have to assume that the soil barrier won't remain in place.
14 Indeed, the staff alludes to the hypothesis of the soil
15 barrier not remaining in place.

16 Number one -- and Dr. George Levin who submitted
17 an affidavit on our behalf, points out very clearly that all
18 of the emission, the radiation projections, were predicated
19 on a soil barrier being in place. So, you've got to go back
20 and reexamine what the emissions would be with the soil
21 barrier not in place, to the local community.

22 JUDGE KOHL: So that renders invalid, the analyses
23 that were done as to the existing cobble that's always been
24 there.

25 MR. KARAGANIS: Exactly, and not of the existing

1 cell because the existing cell's emissions to the external
2 environment were predicated on a 2-foot barrier being in
3 place.

4 JUDGE MOORE: Whether or not it invalidates them,
5 you have a right to challenge whether or not, as a factual
6 matter --

7 MR. KARAGANIS: Absolutely.

8 JUDGE MOORE: -- they are, so these are factual
9 issues in which you haven't been given an opportunity to
10 challenge because the rules of the game have been changed?

11 MR. KARAGANIS: They changed on appeal, exactly.
12 Again, I say, if Board decides to move forward with this and
13 doesn't want to send it to SLB and wants to hear the merits
14 on all of this, these are the issues that we're going to
15 come in with.

16 Let me finish answering Board Member Kohl's
17 questions. You asked about the maintenance rule. The
18 maintenance rule also affects intrusion. The change in the
19 maintenance rule also affects the whole question of the
20 integrity of the cell.

21 Once you're beyond the question of active
22 maintenance for the soil, then you now have to start looking
23 at the clay-cobble barrier in an entirely different light.
24 You've got new affidavits by both Their and Levin that raise
25 serious factual questions about the clay-cobble barrier;

1 indeed, the technical analysis by the staff says the clay-
2 cobble barrier has to serve different functions.

3 It is now the primary barrier. You get into, if
4 you look at Their's affidavit and get into the question of
5 the mix of larger rocks with small grain materials, you get
6 into Levin's testimony with respect to freeze-thaw cycles;
7 all of these are issues, given the fact that they've now
8 changed their position, that need exploration factually. We
9 intend to do it by both discovery and by way of factual
10 presentation on the merits in whatever forum we're in,
11 whether it be the Licensing Board below of before this body.

12 JUDGE WILBER: You indicate that active
13 maintenance is a new issue.

14 MR. KARAGANIS: It's a new position. The --

15 JUDGE WILBER: I'm sorry, new position. All
16 right. Now, is there anything in the record before the
17 Licensing Board that would have indicated that their
18 approach was incorrect?

19 MR. KARAGANIS: Well, the Licensing Board said,
20 We're going to take Part 61 definition of active
21 maintenance; therefore, we're not going to examine the
22 issue. They took it as a legal issue. They said that the
23 question of maintenance of the grass land, of the grassy
24 materials --

25 JUDGE WILBER: Well, I understand that. I'm just

1 saying, was there any challenge to this definition?

2 MR. KARAGANIS: Yes, there was a challenge to the
3 use of the definition by the state of Illinois.

4 JUDGE WILBER: Okay. And you can cite that?

5 MR. KARAGANIS: The active maintenance? Yes, I
6 think I can find that for the Board. I can't find it
7 immediately in front of me.

8 With respect to the motion, then, let me suggest
9 that it's active maintenance. With respect to a motion to
10 vacate, it is the whole issue of the rocks. You've got a
11 very detailed affidavit. The staff technical position --
12 Dr. Levin studied the staff technical position as to two key
13 characteristics of the rocks, which again changed things
14 dramatically.

15 One, the core as used by Kerr McGee, apparently on
16 the data that is available to us in the short window of time
17 of July, violate the standards. Those rocks do. So you're
18 going to have to likely get rocks out West.

19 Number two, there is not, and this is one of the
20 things that's made very, very important in the technical
21 analysis by both the NRC technical people and the DOE
22 people, you have to do this smectite analysis to determine
23 the characteristics of the rock, and that hasn't been done.
24 So that's another aspect of --

25 JUDGE MOORE: How do you respond to Kerr-McGee's

1 position that, in spite of this, they, not the staff, but
2 they still hold to their vegetative cover as being a
3 sufficient erosion intrusion barrier?

4 MR. KARAGANIS: If I may, Judge, Kerr-McGee, in
5 the transfer letter on the July 23rd -- it's dated July
6 20th, but it says July 23rd -- report says, We're going to
7 go to forest succession.

8 JUDGE MOORE: I'm sorry?

9 MR. KARAGANIS: We're going to go to forest
10 succession. In other words, their active maintenance for
11 grasslands is premised on, indeed, active maintenance --
12 somebody out there with a mower making sure that we don't go
13 to a change in succession of vegetation.

14 Once the Commission definition changes, the
15 prohibition is against active maintenance, and active
16 maintenance includes mowing, then you're in a situation
17 where you're going to go fourth succession, and Kerr-McGee
18 says that.

19 Once you're in fourth succession, there is a
20 debate. Kerr-McGee says, So? We have mature trees, and
21 they won't erode. They won't cause erosion. You have other
22 people, including the staff, that say, What trees are going
23 to go are going, and that's again a factual issue that needs
24 further exploration.

25 JUDGE WILBER: Your Footnote 3 -- I hope I'm in

1 the right brief this time -- speaks of the change in the
2 cell design, and you only mention one thing, the increase of
3 rock size. Are there other changes? Are there any other
4 changes?

5 MR. KARAGANIS: Yes. Again, the thickness of the
6 cell barrier was used as a means of emission measurement.
7 So there's been a change in that. Without active
8 maintenance, you're going to see a thinner cell, according
9 to the facts; so you're going to have different radiation
10 emissions.

11 Number two, you've got rocks coming in that are
12 prone to rock -- I'm sorry --

13 JUDGE WILBER: No, no. I'm saying, were there any
14 changes in the design? You're saying what's wrong with the
15 design; I'm saying, was that the only change that was made
16 in the design?

17 MR. KARAGANIS: Well, again, we got these things
18 by way of overnight courier without opportunity to do any
19 examination. We think, as Dr. Their points out and Mr.
20 Levin points out, that the rock selected by Kerr-McGee to
21 meet the PMP and other erosional forces are not going to be
22 adequate, and they are serving a role they cannot serve
23 because, among other things, of their grain size and the
24 grain mix distribution that exists there.

25 That's pointed out by Dr. Their as to the grain

1 mix distribution, saying that Kerr-McGee's projections are
2 based on a much different grain mix distribution.

3 Again, these are things that shouldn't be --

4 JUDGE MOORE: Now, Kerr-McGee argues, as I
5 understand it, that these are mere details. These are mere
6 specifics on how they will execute this design, and the
7 design hasn't changed.

8 MR. KARAGANIS: Let me --

9 JUDGE MOORE: Is there any answer you've given?
10 Is that how you respond to Kerr-McGee?

11 MR. KARAGANIS: We think, and we've submitted to
12 the effect, that use of this kind of rock in this kind of
13 design circumstances causes major problems. Now, I'm going
14 to say to you that I think Kerr-McGee ought to have the
15 opportunity, when materials are put on appeal -- indeed,
16 they say it. They say it's totally inappropriate for new
17 evidence to come in on appeal. That's Kerr-McGee's
18 position. It's also ours.

19 What we suggest is, is that if we have to play the
20 game -- and they did, too -- they submitted extra record
21 material, and we submitted extra record material in response
22 -- we think discovery is going to show that there are major
23 flaws. This is too important an issue to the public health
24 of thousands of people for counsel to be making glib factual
25 conclusions here on a summary record that's been put

1 together by way of rush affidavits. We're entitled to
2 discovery, we're entitled to a hearing on the merits, we're
3 entitled to the formal procedure, again -- the Board retains
4 jurisdiction. That's where we are with respect to the
5 motion to vacate.

6 Again, we think it should go back to the Board,
7 the Licensing Board, if you're going to do it. Actually,
8 since the staff is requesting an amendment to the license,
9 it more properly goes back to the director of the -- the
10 staff itself first for proper noticing, but it should go
11 back to the Licensing Board. Then, if you want to have
12 hearings on the merits on it, let's put in a discovery
13 schedule and a hearing schedule so that we can get to the
14 merits of these issues.

15 JUDGE KOHL: Getting back to Judge Wilber's
16 question a few minutes ago about design changes, are there
17 any changes in the diversion ditches or the slope of the
18 cell, the slope of the ditches?

19 MR. KARAGANIS: Well, there appear to be. Again,
20 we were faced with the situation of suddenly we're
21 observers. You can sit in on the benches and watch what
22 goes on, and then maybe we'll let you in on a conference
23 call, but don't participate.

24 Our technical --

25 JUDGE KOHL: Well, but you eventually were

1 provided with the information.

2 MR. KARAGANIS: Oh, no.

3 JUDGE KOHL: You got the Board notifications.

4 MR. KARAGANIS: We got Board notifications, but
5 there are a lot of questions about those Board
6 notifications, tremendous questions.

7 JUDGE KOHL: But there was a lot of material
8 attached to those Board notifications.

9 MR. KARAGANIS: But a lot of materials with a lot
10 of new holes. With respect to things like -- we have
11 statements with respect to changes in design. The
12 sedimentation basin has had a change in design.

13 JUDGE KOHL: Kerr-McGee disputes that, as I recall
14 --

15 MR. KARAGANIS: Well, again, we have Dr. Their's
16 affidavit. Again, what we need to do to explore that
17 situation is discovery. We have a lawyer saying that it has
18 changed and a lawyer saying it hasn't changed.

19 JUDGE KOHL: Okay. Let's get back to the second
20 part of the question I asked about ten minutes ago. I asked
21 you to identify what you thought the changes were, and then
22 I asked you to explain why they are material or significant.

23 MR. KARAGANIS: All right. I have indicated that
24 the loss of the grass barrier changes emissions.

25 JUDGE KOHL: Okay. Right. Talk about your

1 changes to the sedimentation pond. Why is that a material
2 change, assuming that there was a change?

3 MR. KARAGANIS: Well, with respect to it -- again,
4 I don't profess to be up on all the engineering nuances of
5 it right now -- the question is, is whether the design can
6 handle the PMP event. What you've got is suggestions that
7 they have not designed it to handle the appropriate PMP
8 event. Again, on cold affidavits, I can't explore that. I
9 need to have some discovery with respect to it.

10 I want to get back to something that the staff
11 says in its primary brief on the merits after looking at the
12 EPA brief. What Dr. Levin says is that you've got a number
13 of conditions now with loss of the earth and cover which can
14 lead to a breach of the clay-cobble cover.

15 Now, this is not a catastrophic breach. We're not
16 talking about the whole top blowing off. But you get a small
17 breach in there, and you can have catastrophic consequences.
18 If you get a small breach in the material, and you've got
19 radioactive material blowing all over the west Chicago
20 community.

21 You've got a nude record here. With respect to
22 that problem, you've got a nude record because the
23 definition of active maintenance was different as it was
24 used below. It is incumbent --

25 JUDGE MOORE: Does forestation not require active

1 maintenance? How do you keep the trees from being cut down?

2 MR. KARAGANIS: Well, one of the things about
3 forestation, and the record below is very mixed on this, how
4 do you keep the trees from root projections --

5 JUDGE MOORE: If you put something in the middle
6 of the city, I'm more concerned about them being cut down.

7 MR. KARAGANIS: Well, now you've come out with a
8 nuance, Judge, about intruders, because you've got people
9 making trees. This is going to be here for 1,000 years.
10 Somebody could say, It might make a spot for a nice hotel
11 with the view it might have.

12 You have questions of active maintenance in a
13 forest situation which is going to cause, in a forest
14 situation, the destruction of the soil cover. The staff
15 agrees with that; Dr. Levin agrees with that; Dr. Theirs has
16 agreed with it before. So loss of cover is a major thing
17 which would lead to loss of clay-cobble layer. That is an
18 important issue.

19 With respect to the other issues, and I might add
20 one of the things that is very very important -- this board
21 directed the NRC staff to respond to the EPA brief. Now,
22 we'll get to the merits of the brief in a minute -- merits
23 of our brief. Please look the July 29, 1989 letter of the
24 EPA. One of the things that you'll --

25 JUDGE KOHL: Is that in the record of this case?

1 MR. KARAGANIS: I don't know the answer to that
2 question.

3 JUDGE MOORE: Well, if it's not in the record, you
4 just told us a little while ago that we can't look at
5 material if it's not in the record, if I might finish
6 please.

7 MR. KARAGANIS: That's right.

8 JUDGE KOHL: So, we need to know. If you're
9 standing here asking us to look at a particular document --

10 MR. KARAGANIS: Yes, it is attached --

11 JUDGE KOHL: -- and you can't tell me where it is
12 --

13 MR. KARAGANIS: I can tell you where it is. It's
14 attached to the EPA brief.

15 JUDGE KOHL: That doesn't make it in the record
16 for evidentiary purposes, does it, such that we could rely
17 on it.

18 JUDGE WILBER: Could you describe it a little more
19 clearly, which letter you're talking about?

20 MR. KARAGANIS: Yes, it is the July 29th letter
21 and attachment 1989 letter, it's attachment 1 to the EPA
22 brief -- this brief filed --

23 JUDGE WILBER: Is this the one where the EPA is
24 taken a -- it's a letter to the NRC --

25 MR. KARAGANIS: That's correct.

1 JUDGE WILBER: -- for their position on the SFES?

2 MR. KARAGANIS: That's correct.

3 JUDGE WILBER: All right. Thank you.

4 MR. KARAGANIS: That's correct. And you might
5 note that there's a whole dispute that exists, and this
6 relates to the July 31st commission staff thing on
7 groundwater. There's a dispute that exists as to what the
8 groundwater standards are and whether or not this staff has
9 shown that RCRA standards will be met with respect to the
10 groundwater contamination. Now, what we have --

11 JUDGE KOHL: Who raised that as a contention? Did
12 -- well, there's only one party that raised contentions here
13 and that's Illinois. Did they raise or attempt to raise the
14 contention that deals with groundwater and RCRA and other
15 issues?

16 MR. KARAGANIS: Ms. Kohl, I don't know what
17 contentions were allowed or not allowed. In other words, I
18 don't whether -- I know that those contentions were not
19 dealt with by the licensing board.

20 JUDGE KOHL: Isn't that rather critical to the
21 presentation of your case, knowing what the litigable issues
22 are or the issues that were attempted to be raised? Doesn't
23 that define the scope of this proceeding?

24 MR. KARAGANIS: It was not in the allowed
25 contentions. Under normal circumstances, one might say it

1 does define the scope of the proceeding, except, as by
2 invitation of the Board, the EPA was asked, all right,
3 you've filed this letter, now do you have anything to tell
4 us? They proceeded to tell you.

5 JUDGE KOHL: They were asked to file a brief on
6 the record that was compiled and the decision issued by the
7 Licensing Board.

8 MR. KARAGANIS: I understand.

9 JUDGE KOHL: They were not invited to submit new
10 material.

11 MR. KARAGANIS: When they did submit new material,
12 the staff stood up and said, my gosh, what the EPA says here
13 has merit to it and we want to submit new material as well.

14 All I'm saying is that the RCRA compliance issues
15 that the staff disagreed with are not addressed -- staff
16 disagreed with in a letter, they are not addressed in the
17 brief here. One of the questions you've got with --

18 JUDGE KOHL: What I'm trying to get a handle on
19 are those issues -- were they ever -- did Illinois ever seek
20 to put them into controversy? Because, as I believe you're
21 aware, adjudicatory boards at the NRC, are only supposed to
22 look at the issues put into contest by the party.

23 MR. KARAGANIS: All right. I would say that
24 groundwater compliance issues were put into issue. Whether
25 or not there is a -- a term known as alternative

1 concentration limits, which EPA alludes to, which are
2 premised on the fact that staff gave EPA average numbers on
3 the EP tests, the extraction procedure test. Instead of
4 giving EPA max number, instead of giving EPA the range of
5 data.

6 EPA says in their letter, you didn't give us the
7 numbers. If the numbers are high, you've got a whole
8 different set of regulatory requirements here, both under, I
9 might add, both under EPA RCRA requirements and under
10 Appendix A requirements. None of this has been done.

11 Again, if you look at the groundwater analysis,
12 the whole question of corrective action, the design changes,
13 deal with the whole corrective action issue as well, and
14 what's going to be done with respect to distinguishing
15 between the existing contamination and the past
16 contamination.

17 I want to let Mr. Seith address the merits of the
18 brief.

19 JUDGE KOHL: Before you go, you keep mentioning
20 EPA. Just out of curiosity, does -- is EPA taking any
21 regulatory action, with respect to this entire matter?

22 MR. KARAGANIS: Yes. Yes.

23 JUDGE KOHL: What is that?

24 MR. KARAGANIS: EPA has put on the NPL list all of
25 the ancillary sites, and indeed alluded to that, so that all

1 sites, but the factory site are on the EPA circle of
2 jurisdiction at this point.

3 EPA has alluded to the fact that there will be
4 RCRA jurisdiction questions that have come up and with the
5 transfer of jurisdiction, EPA may be considering putting the
6 factory site on the on the Superfund list as well.

7 The logic would be that if the smaller sites are
8 on the Superfund list, logic would indicate that the -- that
9 the larger the factory site would probably also be on the
10 superfund. They have not done that at this time, with the
11 other sites that have been on the list.

12 JUDGE WILBER: One more question please. On page
13 11 of your brief, you speak of a water detention pond that
14 Kerr-McGee intends to construct. I look at the layout of
15 that and there are 2 of those. Do you know which one you
16 are referring to? I don't know if one of these is not yet
17 constructed and is to be constructed.

18 MR. KARAGANIS: [Consults document.]

19 JUDGE WILBER: My next question is, is that a
20 temporary pond or is it a permanent structure or what is it?

21 MR. KARAGANIS: I don't know the answer to that
22 question.

23 JUDGE WILBER: All right.

24 MR. SEITH: I am going to try to hold as close to
25 our original division of time as possible. I'll take about

1 ten minutes to address the merits of the appeal and then
2 allow Mr. Karaganis to address the merits as well.

3 I will not beat to death the issue of
4 jurisdiction.

5 JUDGE KOHL: Thank you.

6 [Laughter.]

7 MR. SEITH: Let me just point out a couple of
8 things.

9 First of all, I think the underlying point, the
10 central point that we are making in the brief on the merits
11 is this site, both the Staff and the Atomic Safety and
12 Licensing Board went to great lengths to, again in our
13 opinion, completely ignore Criterion 1 under the Appendix A
14 criteria in Part 40 of the Federal Regulations.

15 I think the most significant ones are set forth in
16 our brief.

17 JUDGE KOHL: I'd like you to, for purposes of the
18 argument, tell me now which do you think are the most
19 important of the ones you've discussed in your brief?

20 MR. SEITH: For example --

21 JUDGE KOHL: Human intrusion, is that one of your
22 top three?

23 MR. SEITH: Absolutely. I don't have that.

24 Human intrusion, calculated dose, and erosion, I
25 would say, are the top three of the ones considered.

1 JUDGE WILBER: Erosion relates to active
2 maintenance?

3 MR. SEITH: Active maintenance and the failure to
4 consider probable maximum precipitation event.

5 JUDGE WILBER: All right.

6 MR. SEITH: I think that the staff's reversal on
7 these issues, following a submission of the EPA brief,
8 further bolsters and validates the claims that we made on
9 appeal before the filing of the EPA brief.

10 The staff now is no longer relying on vegetation
11 as a primary barrier.

12 They now insist that the PMP event does need to
13 considered.

14 They now insist that it is essential to analyze
15 parameters of rock size.

16 They now confirm that the original cell design is
17 going to require some active maintenance, as we maintained.

18 JUDGE KOHL: You raised human intrusion as an
19 active maintenance type issue. Correct?

20 MR. SEITH: Yes.

21 Two things with human intrusion: One of the key
22 points there is that we submitted an affidavit indicating
23 that there were past occurrences, actual occurrences --
24 we're not just talking about pure speculation here but past
25 actual occurrences of intrusion on the site during a period

1 of time when Kerr-McGee is out there actively protecting the
2 site, and that what they are proposing is that, once the
3 cell is built, is to walk away from the site.

4 The Board all but ignored that testimonial
5 evidence by way of affidavit and said it's our conclusion
6 that human intrusion is not going to be a probable
7 occurrence, without any reference.

8 JUDGE MOORE: And they reached that conclusion by
9 saying that this mound, monument, hill was not an attractive
10 nuisance.

11 Where did that concept work its way into this
12 proceeding?

13 MR. SEITH: I'm as baffled as you are. I have
14 absolutely no idea.

15 JUDGE MOORE: That wasn't suggested in anyone's
16 affidavits, on summary disposition of cross motion, or in
17 response to a motion for summary disposition?

18 MR. SEITH: Not that I am aware of, and even if it
19 was, again it would be inappropriate for the Board, on a
20 motion for summary disposition, to make that sort of
21 determination without an evidentiary hearing.

22 JUDGE MOORE: Well, isn't that term a word of art?

23 MR. SEITH: Attractive nuisance?

24 JUDGE MOORE: Yes.

25 MR. SEITH: Yes.

1 JUDGE MOORE: And it has one meaning and one
2 meaning only?

3 MR. SEITH: Tort negligence law, absolutely.

4 So, I don't know. I don't know the answer to how
5 that came to be.

6 Those are the central points that I wish to make.
7 I'd like to yield the balance of my time to Mr. Karaganis.

8 Thank you.

9 MR. KARAGANIS: If I may, just as a followup on
10 something Mr. Seith said on the radiation issue, when the
11 Board originally gave the staff the continuance it requested
12 back in June, at the tail-end of the Board's order, they
13 said that they expected the parties to address all the
14 issues, and they made specific reference to confusion that
15 existed over whether or not the radiation requirements of
16 Section 192 of the EPA regulations had been met.

17 Again, discovery can find many things, but the
18 best we can read, in looking at the EPA correspondence in
19 Bennetti's affidavit, comparing it with Swift's affidavit,
20 Swift is apparently saying that, yes, because we didn't
21 calculate it in a certain way, if it were recalculated
22 according to the 50-year limit, which NRC staff now uses,
23 that the emissions here would violate 192.

24 JUDGE MOORE: In this question, precision in terms
25 is paramount.

1 You're talking about a 50-year committed dose?

2 MR. KARAGANIS: Right. I'm sorry. I apologize.

3 JUDGE MOORE: Isn't this whole problem because
4 there is no -- that the term that appears in 192, annualized
5 dose -- I'm sorry, I can't recall it at the moment -- that's
6 not a term of art?

7 MR. KARAGANIS: Right.

8 As I understand it, EPA and NRC staff are now in
9 agreement.

10 They use a shorthand of the term you used, the 50-
11 year committed dose, and they now are in agreement that
12 that's what should be used, and I read Mr. Swift's affidavit
13 as saying that if you redid the calculations to use that,
14 the limits of 192 would not be met, and then he goes on to
15 enter into several qualifications, saying we could get a
16 grant variance, we could recompute things.

17 But at the present state of the data, 192 appears
18 not to be met, if you use that 50-year committed dose.

19 I just raise that as a fairly important point,
20 given the State's position.

21 Our central point -- we've got several, and I
22 direct you to Dr. Levin's affidavit, direct you to the whole
23 question of the various mechanisms of failure that weren't
24 addressed.

25 You've got two competing philosophies working

1 here.

2 You've got the philosophy of citing to avoid
3 engineering failure, and then you seem to have an add-on
4 layer, as Judge Kohl has indicated, but Congress was clearly
5 saying cost does enter into it.

6 The question is do you ignore citing and make cost
7 paramount? And one of the things we have seen here -- and
8 many of us have worked on major engineering projects around
9 the country -- EPA's brief and the City's brief emphasize
10 that there is a refusal to address these alternatives under
11 the hypothesis of potential failure, not catastrophic
12 failure, not the whole thing is going to fall down, but
13 failure mechanisms that will impose costs on the surrounding
14 community.

15 The premise that seems to infect Kerr-McGee
16 position and the staff's position is whatever engineering
17 bells and whistles we put onto any of these sites, we must
18 assume, for the entire life of the site, that they will
19 work.

20 If that's the case, I guarantee you, just by
21 simple arithmetic, that the least-cost site will always win,
22 because the assumption -- the bedrock assumption is that
23 there will never be any failure.

24 So, therefore, a fortiori, the least-cost site
25 must win, and citing considerations become irrelevant.

1 We talk about it in the brief. Dr. Levin talks
2 about it in his affidavit.

3 Using the logic of the staff, with the appropriate
4 engineering bells and whistles, you could put one in
5 Lafayette Park, you could put one in downtown Manhattan or
6 downtown Chicago, because there is an assumption that it
7 will never fail.

8 Since it will never fail and since the design
9 considerations are similar to all the sites, the dosages are
10 roughly the same, and the sites all compare equally in terms
11 of their potential health effect, and therefore, you simply
12 look at the bottom-line dollar.

13 This ought to go again into your questions about
14 precedential effect. We think it is centrally important
15 that siting considerations be put in their proper and
16 fundamental perspective; that is to say, costs are not
17 irrelevant, but costs must be looked at from the context of
18 what happens if there is a breach?

19 What happens to the costs in the surrounding
20 community? What happens, for example, in Super Fund cleanup
21 costs? What happens with property values with contaminated
22 property?

23 Those are legitimate costs to be considered in the
24 event of a failure mechanism taking place. Similarly, the
2 whole question of cleanup costs with respect to the various

1 contamination that already has taken place there and the
2 difficulties with respect to delineating between the two.

3 JUDGE WILBER: You mentioned that it didn't have
4 to be a catastrophic failure of the engineering design
5 features?

6 MR. KARAGANIS: Right.

7 JUDGE WILBER: Where does it stop? What would you
8 offer? A single failure? Multiple failures? What would
9 you look at? I can see infinity here.

10 MR. KARAGANIS: Judge, there are a number of
11 things and a number of ranges, but one of the things that
12 has been posited is a failure of the clay-cobble barrier.
13 Let's say there's a five foot breach in it.

14 Now, the term, "catastrophic," is used by the
15 staff to suggest that the whole cell fails and you must do
16 some kind of worst-case analysis. We're not talking about
17 that. We are talking about a range of alternative scenarios
18 of various failure modes that might occur and what the
19 consequences of those might be.

20 If you had a breach of the containment structure
21 in West Chicago versus a breach of the containment structure
22 in one of the mines, for example, that exists at the other
23 sites, the consequences are dramatically different to the
24 human population, to the costs of cleanup, to the questions
25 of environmental impact.

1 That's why we think failure has got to come in in
2 looking at siting alternatives. It's got to be a mechanism.
3 If you follow the basic premise that all sites will always
4 work, you're always going to pick the site that's right in
5 the center of town and that's got the least cost.

6 Then you might just as well, as Kerr McGee would
7 suggest, rubber stamp every one of these site proposals, and
8 you can't do that.

9 JUDGE MOORE: Here, in the SFES, the staff's
10 conclusion is that the health effects from the proposed
11 cell, as well as the alternatives, are all negligible,
12 across the board.

13 MR. KARAGANIS: As a matter of fact, there's a
14 moderate advantage to the existing site and the health
15 effects are virtually flat line. There's no real
16 substantial difference, exactly.

17 JUDGE MOORE: Then by transporting things, even
18 though we're dealing with negligible effects, we suddenly
19 get effects that are not negligible because we have not, in
20 shipping we have not used essentially closed containers to
21 reduce the number to zero.

22 If the health effects of all sites are negligible,
23 one, why then do you need to consider transportation at all?
24 Two, if you do consider transportation, is it fair to use
25 DOT regulations that will give you an enormous number, when

1 it's possible to make that number zero by just using closed
2 containers to ship?

3 MR. KARAGANIS: Judge, EPA makes that exact point.
4 Again, whether it's extra-record or not extra-record, they
5 make that point in their letter to the agency. They say
6 there are ways to make the transportation hazard irrelevant.

7 The bottom line then becomes -- again, because the
8 assumption is that this site will never fail and all the
9 widgets will always work -- is that you've got to go to the
10 lowest cost alternative automatically. That means that
11 there's never going to be a remote site picked.

12 There's never going to be a site that's away from
13 groundwater because the presumption is that with the right
14 amount of engineering, we can always fix it and we can
15 always prevent it. Therefore, let's always go in the center
16 of town.

17 That's not what Appendix A talks about. Dr. Levin
18 talks about how to bring costs into this questions. Look at
19 the failure modes. There may be -- and if you took the
20 alternative sites between the center of West Chicago, mines
21 in Illinois and places out in Utah, it may be that failure
22 scenarios in the mines would not present any significant
23 costs in terms of public health and community impact and
24 therefore you might say, well, you only need to go short
25 distances as opposed to long distances.

1 That's the only way to examine what the true
2 environmental and health costs of some of these sites are
3 going to be, and that's the only way to implement Appendix
4 A. I might add, given the state of this record and given
5 the state of the proceedings at this point, whatever you do
6 on the merits of this thing is going to be an enormously
7 precedential decision, if you get to the merits.

8 I think, given the status of this record; number
9 one -- repeating like a broken record -- you ought to
10 reexamine the jurisdiction; number two, before you get to
11 the merits of the appeal, we've got to have adjudicatory
12 hearings on the various issues that have been raised post-
13 ALB decisionmaking. Thanks very much.

14 JUDGE MOORE: Before we hear for the Appellees,
15 we'll take a 10 minute recess and we'll reconvene at 11:00.

16 [Brief recess.]

17 JUDGE MOORE: Mr. Meserve?

18 MR. MESERVE: I must apologize for my late arrival
19 this morning. I had been reading and believing the NRC
20 statements about consolidation at another building, and I
21 found myself at the White Flint building at 9:15. I dashed
22 over here. I apologize. I hope I didn't delay your start.

23 What I'd like to do is to try to touch on many of
24 the points that have been raised by the appellants in this
25 case. I'll deal first with jurisdiction; secondly, I'd like

1 to deal with the application of Munsingware.

2 I'd like to turn to a variety of the erosion
3 issues which have been raised which arise in both the
4 context of the motion to reopen and on the merits. I'd then
5 like to turn to Criterion 1, and then there's a scatter shot
6 selection of other issues which I will then turn to.

7 The Board will find in front of you on the bench
8 a booklet which we prepared, which was really for the
9 convenience of the Board, which is a set of exhibit
10 materials that are from the record which I think bear on a
11 variety of issues which are pending today, and I will be
12 making references to at least some of these materials as we
13 proceed.

14 Let me turn first to jurisdiction. As the Board
15 is well aware, the state applied for the authority to assume
16 jurisdiction over byproduct material, Section 11(e)(2)
17 byproduct material, and the Commission, on November 1, 1990,
18 authoriz'd the state to assume at least some power over the
19 material of the type that is at the west Chicago site. That
20 decision of the Commission is currently under review in the
21 DC Circuit. The city and the state, with support from the
22 staff, suggested that this appeal must be terminated as a
23 result of the Commission's action.

24 I don't think that, and I'm sure the Board
25 appreciates that the effect of the transfer is not one that

1 is going to be easy to resolve. The jurisdictional issue is
2 not clear. Kerr-McGee submitted a petition for rehearing
3 before the Commission at the occasion of its transfer of
4 some jurisdiction to the state, and the Commission
5 explicitly stated that it was expressing no opinion as to
6 how the motion to terminate this proceeding should be
7 resolved. It left the matter to this appeal board, and this
8 appeal board has the right and obligation to decide the
9 issue.

10 It is clear, I believe, that the Commission does
11 retain certain important jurisdiction of the site even
12 today. The NRC remains inextricably involved in what
13 happens with regard to the materials that are out there.
14 One source of that evidence I think is shown on Tab 5 of the
15 materials I've submitted to you, which is a section from the
16 NRC's regulations which indicates that prior to the
17 termination of any agreement state license -- and I'm
18 reading from Part A -- the Commission shall have made a
19 determination that all applicable standards and requirements
20 pertaining to such material have been met.

21 It goes under subpart B to define a variety of
22 areas in which the Commission has reserved power, including
23 the authority to establish terms and conditions having to do
24 with the termination of license and decontamination and the
25 like.

1 There is -- this is one clear indication, which is
2 consistent with the Atomic Energy Act, of the Commission's
3 continuing obligations with regard to how these materials at
4 the site are disposed of.

5 JUDGE KOHL: Mr. Meserve, I'm not sure what all of
6 this has to do with answering a question as to whether or
7 not we have jurisdiction over this particular proceeding
8 given that the subject matter of this proceeding -- i.e.,
9 11(e)(2) byproduct material -- has been transferred, the
10 jurisdiction over that has been transferred to Illinois.

11 MR. MESERVE: Well, let me get into that. What I
12 am going to first establish is to try to define the meets
13 and bounds of the Commission's residual authority, and then
14 I'm going to turn to the fact that the resolution of this
15 appeal is within the matters in which the Commission has
16 retained its authority. One of the sources of this
17 authority is the regulation I've cited, and another is found
18 in 274(o) and in the Commission's decisions in the exact
19 context of the transfer of certain powers to the state.

20 JUDGE KOHL: Well, shouldn't we look to the
21 November agreement or the amendment to the agreement first?
22 I mean, in Article 2 of that agreement, it specifies the
23 area in which the Commission shall retain authority and
24 responsibility. It doesn't -- and it lists four items. It
25 doesn't list there this particular adjudicatory proceeding.

1 Is that omission significant here?

2 MR. MESERVE: I don't believe that it's at all
3 significant, and the reason is, is that the Commission now,
4 in addition to the agreement, has spoken twice on the
5 specific issues of -- issues that remain before it and will
6 be before it shortly with regard to this site. I'm
7 referring specifically to the Commission's decisions with
8 regard to the hearing obligation under Section 274(o).

9 I mean, as this Board is aware, 274(o) requires
10 basically a comparison, an examination of the state's
11 actions, and a determination with whatever the state chooses
12 to do is equivalent to the extent practicable or more
13 stringent than what the Commission would do.

14 The Commission has discussed that requirement in
15 the context of the transfer of jurisdiction, and in Tab 7, I
16 have listed or set out the Commission's initial memorandum
17 and order with regard to the transfer.

18 I'd like to suggest that the Board might turn to
19 page eight in which the Commission discussed specifically
20 the hearing obligation that was before it, and it states:
21 In addition to its obligation to assess the state's general
22 standards, the Commission also has the very important
23 obligation to assure that a state's applications of
24 standards that differ from those established by the
25 Commission meet the various requirements of Section 274(o).

1 It concluded that this site-specific determination
2 -- you'll look at the next page -- will arise later when the
3 state attempts to exercise its authority.

4 JUDGE KOHL: So then this Commission decision
5 presumes that the state will have some opportunity to
6 exercise its jurisdiction over this case?

7 MR. MESERVE: It will have some opportunity to
8 propose various actions in the next half.

9 JUDGE KOHL: But doesn't this contemplate, though,
10 a procedure whereby this case is terminated. The
11 proceeding, the license amendment proceeding begins anew
12 before the state agency's. At some point during that
13 process, then, if Kerr-McGee believes there is non-
14 compliance by the state with what the Commission had in
15 mind, at that point, Kerr-McGee returns to the NRC under
16 this proviso and asks the Commission to step in at that
17 point. Isn't that the scheme that is envisioned by this
18 Commission decision?

19 MR. MESERVE: It is correct that the Commission
20 envisions a scheme in which it is going to conduct a
21 comparison of the application of the State requirements with
22 those of the Commission.

23 In Tab 8, it said some discussion about what
24 exactly that was going to deal with. And Tab 8 was on the
25 motion for reconsideration of that decision.

1 JUDGE KOHL: But doesn't all of that presume that
2 we terminate this case, and just tie up those loose ends?

3 MR. MESERVE: I don't think it does that at all.
4 Because the Commission has stated that it expects -- and
5 this is referring to page 2 of Tab 8 -- that the future
6 hearing will involve a comparison of the outcome of an NRC
7 disposal plan with one that has been formulated under the
8 State procedures.

9 So, the Commission retains jurisdiction. It has
10 to make this comparison. It expects to perform this
11 evaluation in the specific and context, a specific way in
12 connection with the Kerr-McGee plan.

13 It anticipates that it is going to compare the
14 application of the State requirements with that which would
15 arise from the application of the NRC's requirements.

16 JUDGE KOHL: So, in other words, we have to finish
17 the proceeding that was begun before the Licensing Board.
18 We go through the various steps of administrative appellate
19 review that now exist within the NRC, however long that may
20 take. Is that correct?

21 MR. MESERVE: I think that's exactly what is
22 contemplated. Because the Commission clearly envisions that
23 it's going to have a benchmark, an NRC benchmark against
24 which to measure that which the State seeks to impose.

25 JUDGE MOORE: Mr. Meserve, assume for the moment

1 that we agree with you that we would have jurisdiction to
2 hear the appeal. Or we would reverse and, hence, remand the
3 Licensing Board for further or additional or a new hearing.

4 Then, does this proceeding go on ad nauseam until
5 another conclusion is reached below, before the State
6 exercises any jurisdiction?

7 MR. MESERVE: Of course, we, as the Appellees here
8 are hopeful that one would not reach that state of affair.
9 But I would think that the logic of the Commission's
10 position is that it intends to make a specific, site
11 specific, comparison of what would be required under the NRC
12 rules with whatever the State needs to do.

13 The logic of that position does envision that, in
14 some fashion, the NRC has to take a stand as to what its
15 requirements establish. Now, I could --

16 JUDGE MOORE: Aren't they set forth in Appendix A,
17 Part 40?

18 MR. MESERVE: Well, the comparison which the
19 Commission has envisioned -- this is in their discussion of
20 the hearing request under Section 274(o) -- is to, not only
21 look at them in a generic basis which has been done, but
22 also to look at them in the site specific basis as they are
23 applied.

24 It is our contention that the proposal which has
25 now been advanced before the NRC for all these years sets

1 out we submit what the NRC requirements would establish, and
2 whatever the State does should be compared to that plan.

3 The Commission clearly envisions that sort of a
4 concrete comparison, and that the completion of this
5 proceeding, therefore, falls within the residual
6 jurisdiction that is retained to the Commission to this day.

7 Of course, as has been indicated by Ms. Kohl,
8 there is as well the Commission Statement of Policy which
9 contemplates that on-going proceedings are going to be
10 completed and won't be disrupted. So that there --

11 JUDGE MOORE: Well, doesn't that Policy Statement
12 specifically say that arrangements will be made between the
13 NRC and the applicant?

14 Now here, there were no explicit arrangements
15 made, as I understand it. At least none that we've been
16 informed of.

17 MR. MESERVE: We submit that there was no need to
18 do that. Commission clearly did not want to intrude on this
19 Board's authority to resolve the appeal.

20 We submit that it fully intended that this
21 proceeding should be completed. For the reason that there
22 would then be a foundation for undertaking this comparison.

23 JUDGE MOORE: If the Commission had intended that,
24 I mean, we're talking about a very few words that it would
25 have taken to say that.

1 Isn't it reaching to formulate the conclusion you
2 reach from what they say on page 8, and the paragraph at the
3 top of page 9, in their order saying that they were going to
4 sign the State agreement?

5 They could have said, Peer Board you're to
6 continue.

7 MR. MESERVE: Well, they were silent on that
8 issue. And I think that is regrettable. The fact of the
9 matter is what they did say was that it wasn't an open
10 issue. It wasn't a clear cut issue. It was something in
11 which they expressed no opinion. It was a matter that was
12 before you.

13 JUDGE MOORE: Didn't you argue in front of them,
14 both originally and in your motion for reconsideration, the
15 exact position that you should let this continue? And they
16 didn't say anything. Didn't you argue --

17 MR. MESERVE: Yes. We did argue that.

18 JUDGE MOORE: Then, you should tell them.

19 MR. MESERVE: We argued that we were entitled to a
20 site specific determination. They told us that will come
21 later. There will be a hearing. There will be a hearing.
22 And this is reflected both in their original order and on
23 their order in reconsideration.

24 There will be a hearing at which all of the site
25 specific issues are going to be resolved. That --

1 JUDGE MOORE: And that hearing is the 274(o)
2 hearing.

3 MR. MESERVE: Well, it was the general hearing
4 that has taken place, and then the site specific hearing
5 under 274 that will take place.

6 JUDGE MOORE: Later.

7 MR. MESERVE: That will take place later, on which
8 there is a necessity for a specific comparison of what might
9 come out of the NRC's requirements with whatever the State
10 could do.

11 JUDGE MOORE: What's the --

12 MR. MESERVE: To see if they meet the 274(o)
13 requirements.

14 JUDGE MOORE: What's the 274(o) requirement?

15 MR. MESERVE: What is the 274(o) requirement?

16 JUDGE MOORE: Correct. If you're positing that,
17 on page 8, that's what the Commission means, what does the
18 Statute say? Isn't that the source that we should really be
19 looking at?

20 MR. MESERVE: Yes. You will find the Statute at
21 Tab 6 of the materials that I've submitted to you.

22 If you will look at -- unfortunately, this is a
23 very long section. I've given you the entirety of Section
24 274. If you will look at the very last page of the tab.

25 It does define what the State may do. I'm reading

1 from the end of the very last paragraph. It says, "In
2 adopting requirements pursuant to paragraph 2 of this
3 subsection, with the respect to sites which orders a process
4 primarily for their source material content."

5 They're talking about our kind of site.

6 "The State may adopt alternatives, including where
7 appropriate site specific alternatives, to the requirements
8 adopted and enforced by the Commission for the same purpose.
9 If, after notice and opportunity for public hearing, the
10 Commission determines that such alternatives will achieve a
11 level of stabilization and containment of the sites
12 concerned... and a level of protection of public health and
13 safety, and environment from radiological and non-
14 radiological hazards associated with such sites which is
15 equivalent to, to the extent practical, a more stringent
16 than requirements adopted by the Commission or by EPA."

17 JUDGE MOORE: Now, where does the legislative
18 history say the purpose of that section lies?

19 MR. MESERVE: Well, we discussed this a little bit
20 earlier, that Section -- that UMTRCA was enacted in 1978 for
21 the purpose of establishing a Federal regulatory regime to
22 control these materials. That they, in Grand Junction and
23 some other cities in the west, had perceived a problem that
24 there wasn't regulatory control and that they, therefore,
25 wanted to establish NRC jurisdiction in order to assure that

1 the public would be protected.

2 They took some --

3 JUDGE MOORE: But, wasn't it in the context that
4 the Federal Government, that the States were then regulated,
5 and if the Federal Government with a club, with a bludgeon,
6 that the State would suddenly be essentially ousted of all
7 continual regulatory authority, without so much as a bye or
8 leave. And that, if they didn't apply the NRC requirements,
9 it was inappropriate.

10 Wasn't this section specifically intended -- and,
11 indeed, isn't it essentially copied in the right of a
12 licensee to propose alternatives to a regulatory, an NRC
13 Regulatory standard?

14 Wasn't it for the same purpose, to permit the
15 States to have leeway in how they would regulate, because
16 they're not marionettes of the Commission?

17 MR. MESERVE: I don't believe that is a fair
18 reading of Section 274. Section 274 is a general provision
19 that gives the states authority to assume jurisdiction over
20 a wide range of nuclear materials. When it gets to Section
21 11(e)(2) materials, there are a whole series of restrictions
22 that are imposed on state authority that are not applied to
23 other kinds of byproduct materials, for example. There are
24 requirements as the hearings, there are requirements for
25 activities as to analyses that are akin to the final

1 environmental statements. There is this obligation, that
2 the Commission is sitting on the shoulder of the states to
3 make sure that their actions are appropriate. And the
4 reason that they did this I think is that the states were
5 not taking a role in regulation. That's why the Federal
6 Government stepped in. And it was so concerned about it
7 that it wanted to make sure that the state actions that were
8 taken were ones that were consistent with Federal policy.

9 JUDGE MOORE: Wasn't it that there was no
10 uniformity, that each state was left to its own devices?
11 The AEC had authority marginally. Under source materials,
12 there was an active license. And if it was an orphan site,
13 it was solely up to the state. And so in Colorado, you
14 could have one situation, and in Mexico another. And yet it
15 was the same mining company, if you will -- well, but many
16 of these were abandoned sites. But even for active sites,
17 the same company could find itself faced with conflicting,
18 if you will, standards in essentially the same situation.

19 Isn't that what the legislative history shows?

20 MR. MESERVE: That's not my understanding of the
21 legislative history. And, on the specific point with regard
22 to this section, as the Commission has already said, they
23 envision a site-specific hearing that's going to be taken,
24 in which they are going to be comparing activities by the
25 NRC with those by the state.

1 JUDGE KOHL: I wanted to ask you what your
2 interpretation was of the sentence that immediately precedes
3 the portion that you just quoted from, Section 274,
4 specifically, the sentence that says: no state shall be
5 required under Paragraph 3 to conduct proceedings concerning
6 any license or regulation which would duplicate proceedings
7 conducted by the Commission.

8 What do you think that means, and does it have any
9 relevance here with respect to the issues of termination and
10 vacation of what was done below, and collateral estoppel,
11 and mootness, all that good stuff? Does this have anything
12 to do with that?

13 MR. MESERVE: Well, as I'm looking at the section,
14 it's not something that we have argued. And I don't think
15 that there is a very clear --

16 JUDGE KOHL: No, nobody has mentioned it, but it
17 does --

18 MR. MESERVE: -- there's a very clear statement,
19 but it does, in addition --

20 JUDGE KOHL: -- it does seem to have, on its face,
21 some pertinence to what is involved here.

22 MR. MESERVE: It seems to envision that, if there
23 were a transfer, and there were activities that were
24 undertaken by the NRC, the state would not be obliged to
25 repeat them.

1 JUDGE KOHL: But they wouldn't be prohibited,
2 either.

3 MR. MESERVE: But unfortunately, that shall not be
4 required; it's the prohibitive aspect of it that would be
5 most helpful to us in this context. And it doesn't say
6 that, unfortunately.

7 JUDGE KOHL: We could get the statute amended, I
8 guess.

9 MR. MESERVE: Let me suggest -- I'd like to move
10 on very quickly -- but let me suggest that we submit that it
11 would be intolerable to reach any other result but that you
12 continue to have jurisdiction, from the viewpoint, I think,
13 that there is a legal foundation for it. But I think you
14 ought to bear in mind some of the history of this case.

15 We were brought into this action by an order by
16 the NRC in 1977 that we submit a plan. That plan has
17 undergone exhaustive scrutiny, including two different
18 environmental assessments, the second one conducted at the
19 request of the state. It has undergone examination by the
20 Licensing Board. It has undergone all the time that the
21 parties and this Board has put into the case. We've
22 expended huge resources in this case, after a decade. I
23 submit that it is simply intolerable that this kind of a
24 case could just be washed out after all this time, all this
25 money, and all this effort. And particularly, I believe

1 that the law here provides a foundation for this Board to
2 continue to retain jurisdiction over this matter and to
3 resolve it.

4 Let me turn now, however, to the second matter,
5 which is that, if this Board were to conclude that it has
6 lost jurisdiction. We submit, and the Staff, on this point,
7 agrees with us, that the license and the Licensing Board's
8 decisions should remain intact. The foundations for the
9 analysis that the Commission will have to undertake later
10 with regard to any site-specific matters is under 274, or
11 will be the Licensing Board's decisions, or they should be,
12 and they should be retained for that purpose.

13 But I submit that there was abundant precedent for
14 the proposition that in analogous circumstances, appellate
15 courts have refused to vacate a lower court judgment on
16 appeal in circumstances like this.

17 JUDGE KOHL: Why shouldn't we vacate because there
18 have been significant changed circumstances? Put to one
19 side this transfer of jurisdiction and the state agreement,
20 all of that business. Why shouldn't we vacate for the
21 reason that we're basically looking at a design, a proposal,
22 staff analyses, a situation that has changed dramatically
23 during the Summer months, changed from that which the
24 Licensing Board received evidence, testimony, and rendered
25 its decision. We've got a different case.

1 Usually, the function of appellate bodies is to
2 review something that is frozen in time, a record on which
3 another entity has issued a decision, the issues are refined
4 for appeal, you decide it. Here, we've got all these
5 changed circumstances. Why should we consume any more time
6 and effort in reviewing something that isn't what the
7 Licensing Board had before it? Maybe its decision would
8 have been different.

9 MR. MESERVE: Well, we submit, Your Honor, that in
10 fact things haven't changed that much, and there has been
11 one consistent theme on this case, that there has been a
12 never-ending set of catastrophes that are supposed to happen
13 with regard to the cell, and, one by one, as the Staff or
14 the Licensing Board has analyzed them, they've been shown
15 not to be the catastrophes that they are alleged to be.

16 JUDGE KOHL: But they haven't been shown most
17 recently in the context of an adjudicatory proceeding. The
18 Staff may have performed its review and analysis following
19 its change of position and reached the same conclusion that
20 it reached before the Licensing Board, but there's one key
21 difference. Those new analyses have not been subjected yet
22 to the scrutiny of the public participants.

23 MR. MESERVE: Well, I think they have been
24 subjected to scrutiny in the sense that this Board has
25 allowed full briefing on the matter. But the fact of the

1 matter is, and I'm referring, I'm sure, specifically, to
2 these issues of the PMP, whether the cell can stand erosion.

3 JUDGE KOHL: Well, and also the Staff's change of
4 position on the active maintenance question, the Staff's
5 refusal to consider now the vegetative cover as the primary
6 intrusion barrier, which was contrary to the Staff's
7 position earlier; the Staff's statement in its brief that a
8 new license amendment is now required. Those are pretty
9 significant changes, aren't they?

10 MR. MESERVE: Well, I think that the context in
11 which this Board should consider these matters is whether
12 they meet the criteria for reopening the record, meet your
13 own rules under Section --

14 JUDGE KOHL: Well, isn't that clear? Once the
15 Staff says that Kerr-McGee needs a new license amendment,
16 that triggers Section 189 and the hearing requirements
17 there. That basically says notice in the Federal Register,
18 new conditions, we start over.

19 MR. MESERVE: Excuse me. Ms. Hodgdon can address
20 the context of the hearing requirements for materials
21 licenses. But my understanding is that very frequently the
22 Staff issues amendments to materials licenses and does not
23 go through the full adjudicatory hearing process.

24 JUDGE KOHL: That goes to the process.

25 JUDGE MOORE: Correct, but didn't the Commission,

1 for reasons that only the Commission knows, in this case
2 order full Subsection -- what is it -- G, Part 2, Part 2,
3 Subpart G hearing, adjudicatory hearing?

4 MR. MESERVE: It did. And I believe that that
5 really has been completed and that we have a nit that has
6 been --

7 JUDGE KOHL: That also only goes to the type of
8 hearing. What I'm talking about under 189 is the right to
9 some hearing. Let's put to one side whether it's a so-
10 called informal adjudication or whether it's a Subpart G.
11 Once the Staff says this requires a license amendment,
12 whether that amendment is issued before or after a hearing
13 is really beside the point. We're talking about isn't there
14 some hearing requirement that interested parties are
15 entitled to.

16 MR. MESERVE: Well, Your Honor, I think that the
17 context of this proceeding is not the proceeding in which to
18 address those issues.

19 Let me explain something. We submitted an
20 application. We said we'd have an intrusion barrier. We
21 said it would have clay and cobble in the intrusion layer,
22 but did not specify what the size of the cobbles were.
23 We've had some interactions with the Staff, and they have,
24 in the context of our discussions this Summer, have asked
25 Kerr-McGee to specify the size of the cobbles. They've done

1 it, and they've concluded that the cobbles, the particular
2 size are adequate to meet all of their concerns.

3 JUDGE WILBER: Was that size changed in their PMP
4 analysis, erosion analysis?

5 MR. MESERVE: Kerr-McGee's engineering report did
6 not specify the size of the cobbles that would be in the
7 intrusion barrier. It stated that there would be a clay and
8 cobble layer, and it stated that one of the functions of the
9 intrusion barrier was to provide protection against erosion.
10 But it did not specify, did not go into the specificity of
11 exactly what the size would be to meet that requirement.

12 JUDGE MOORE: Is that challenged by Illinois with
13 the contention that it should have been specified and it
14 wasn't adequate?

15 MR. MESERVE: Illinois did challenged that
16 contention. The Licensing Board resolved that on the basis
17 --

18 JUDGE MOORE: On summary disposition.

19 MR. MESERVE: -- on summary disposition.

20 JUDGE MOORE: That it wasn't necessary to get into
21 it.

22 MR. MESERVE: It wasn't necessary to get into it
23 because there had been no showing that the intrusion barrier
24 bore any function that was relevant to a requirement.

25 JUDGE MOORE: Right. Why? Because you were

1 relying on a cell that had a vegetation cover as an erosion
2 barrier and weren't relying on the so-called intrusion
3 barrier. Isn't that correct?

4 MR. MESERVE: We were relying on the primary
5 resistance to erosion was going to be the vegetation layer.
6 And the fact of the matter is that we have demonstrated, in
7 our submission in July, that the vegetation area will
8 withstand even a PMP.

9 JUDGE WILBER: Would they with your definition of
10 maintenance?

11 MR. MESERVE: No. We document -- prairies will
12 occur naturally. And a prairie would require a periodic
13 mowing to be maintained. But if the prairie was not to be
14 mowed, then the natural progression would take place and it
15 would move to trees. And there hasn't been a question
16 raised in this case all along that trees increase the
17 erosion protection.

18 JUDGE MOORE: But how could there be? Because you
19 were relying on a grass cover.

20 MR. MESERVE: And we indicated that we're going to
21 rely on a grass cover. We did conduct an analysis of what a
22 tree-line cover would do, and it was data submitted in the
23 engineering report. It was analyzed in SFES.

24 JUDGE MOORE: But the challenge is to what you
25 were primarily relying on. That challenged was upheld by

1 the, or dismissed, rather, by the Licensing Board. Now,
2 you're relying on something else.

3 If you go back and look at your primary erosion
4 barrier, the grass cover, and look at the contentions that
5 were dismissed by the Licensing Board, they were all
6 dismissed, revolved around active maintenance. Now, you
7 suggested to the Licensing Board, I believe, that the
8 definition from Part 61, active maintenance, should be used.

9 Several questions in that regard. When you look
10 at Part 61, Point 2 I believe are the regulations dealing
11 with the definition of active maintenance.

12 If you look at 61.1, it specifically says that the
13 regulations, the Part 61 regulations do not apply to uranium
14 and thorium mill tailings in excess of 10,000 kilograms.

15 Now, did you point that out to the Licensing
16 Board, that it was applying a definition that the regulation
17 specifically said, don't apply?

18 MR. MESERVE: We informed the Licensing Board very
19 early in the hearing, when in fact the State had suggested
20 that Part 61 regulations should apply, that Part 61 was not
21 legally applicable. What we had here was a term, "active
22 maintenance," and we had to find out what that meant.

23 And we looked elsewhere in the NRC regulations,
24 and we found a definition for that term under a section
25 which admittedly does not apply to this site, but which we

1 believed provided some illumination when the NRC uses the
2 term "active maintenance," to what it contemplates by that
3 term.

4 Now, we have heard, basically we have heard some
5 suggestions about maintenance, that the word "active"
6 somehow was irrelevant, that anything, anything one does at
7 the site, any maintenance whatsoever, is excluded, despite -

8 -

9 JUDGE MOORE: That's the position the Staff has
10 now come to, isn't it?

11 MR. MESERVE: Well, that's the position the Staff
12 seems to be taking with regard to erosion analysis. I'm not
13 sure what their position is with regard to matters of human
14 intrusion and the like. But with regard to erosion, the
15 Staff, in their Staff Technical Position, has stated that
16 any maintenance that's required to maintain the cell
17 integrity from erosion, is something that they don't want to
18 consider as part of the process.

19 That was not a position they took in the Licensing
20 Board. We took the position that this definition should
21 apply as a term of art. The State had the opportunity to
22 submit evidence on that issue.

23 JUDGE MOORE: Well, didn't they? Didn't their
24 expert point out that passive measures are what should
25 apply, not active measures, and because of the length of

1 time that mill tailings are required to be preserved and
2 protected, that it's inappropriate to have active as opposed
3 to passive steps? And doesn't that just tie in with 6159,
4 which points out, under "institutional controls," that
5 you're dealing with low-level waste and active maintenance
6 with 100-year time frame, not 1,000-year time frame; and
7 since it's a 100-year time frame, isn't it obvious that the
8 Part 61 definitions are inappropriate?

9 MR. MESERVE: Well, I guess I have some difficulty
10 with that conclusion. There is a definition for active
11 maintenance.

12 JUDGE WILBER: But with certain conditions.

13 MR. MESERVE: With certain conditions.

14 JUDGE WILBER: Which is the quantity of the
15 material and the length of time that this might be pursued,
16 neither of which fit the situation we have here.

17 MR. MESERVE: Part 61 admittedly does not fit this
18 situation.

19 JUDGE KOHL: But you're asking us to apply some
20 parts of Part 61 that are favorable, but to ignore other
21 portions of it, aren't you?

22 MR. MESERVE: I am trying to, I'm looking for a
23 definition of active maintenance. I find that, quite
24 frankly, I have a hard time understanding what passive
25 maintenance could mean. Passive maintenance seems to mean

1 doing nothing. Yet, if that means doing nothing, then
2 that's not maintenance, it's not maintenance at all.

3 So if there's a distinction between active
4 maintenance and something else, active maintenance has to
5 mean some particular kinds of acts. That phrase of art is
6 one that's been defined in our regulations, in your
7 regulations. We brought it to the attention of the
8 Licensing Board. The state had the opportunity to contest
9 it. They have made assertions active maintenance doesn't
10 apply, but they didn't provide an alternative definition.
11 The Licensing Board concluded that --

12 JUDGE MOORE: Didn't their expert say that passive
13 means are all that can be done, not active means, that the
14 things you were proposing for your grass cover required
15 active steps, mowing, et cetera, et cetera, et cetera, and
16 that was inappropriate because of the length of time in
17 which mill tailings piles had to be preserved, 1,000 years,
18 and that that was inappropriate?

19 MR. MESERVE: Basically, the assertion, as the
20 state was presenting it, was that any maintenance was
21 prohibited.

22 JUDGE MOORE: Which is now the position the Staff
23 has come to.

24 MR. MESERVE: With regard to erosion, that's
25 correct. But the word, the term of art that's used in the

1 regulation is active maintenance. And that word has to be
2 given some meaning. The word "active" has to be given some
3 meaning.

4 JUDGE MOORE: So what you're suggesting now is
5 that if we were to affirm the Licensing Board's decision, we
6 now have a precedent that the Part 61 definitions are
7 appropriate to apply to mill tailings piles, even though the
8 Staff of this agency says no, that's not right?

9 MR. MESERVE: You would have a precedent, if
10 that's the case. The Staff took the position before the
11 Licensing Board that this was the term, "active maintenance"
12 would be construed in that fashion. It has contrary
13 guidance that it has now issued. I am sure that a future
14 hearing board would reconsider the matter, and it might well
15 conclude that the Licensing Board was wrong, although I'm
16 not sure it would.

17 JUDGE WILBER: Did the Staff support this Part 61
18 or did they just say nothing? I got the impression from the
19 Licensing Board's statement that they said nothing, as
20 opposed to a positive.

21 MR. MESERVE: I believe that the Staff supported
22 Kerr-McGee's motion for summary disposition on this, on the
23 basis on which we had argued it, which was that our
24 definition of active maintenance that we set forth was
25 correct.

1 But let me submit that all of this is irrelevant
2 to this proceeding, because your own criteria for reopening,
3 for considering these matters, requires that this relate to
4 some significant safety or environmental issue. And the
5 fact is that the unrebutted analyses that have been
6 submitted show that the vegetative layer, by itself, is
7 sufficient to withstand PMP by a factor of 10.

8 JUDGE MOORE: With active maintenance.

9 MR. MESERVE: No. Let me be clear. It shows that
10 a prairie, which is what one would have to maintain, will
11 protect the PMP with a factor of 10. If there were no
12 maintenance, you would go to a forest. And if you go to a
13 forest, the protections increase.

14 JUDGE MOORE: Do prairies and prairie grasses have
15 the slopes which you're dealing with here?

16 MR. MESERVE: Prairie grass, the analysis was for
17 prairie grass growing on a slope, and that was specifically
18 what was analyzed. And the analysis, and this is in Kerr-
19 McGee's July submittal, the analysis was that the prairie
20 would survive it by a factor of 10, and if you went to
21 trees, it would be even better.

22 JUDGE WILBER: And what was the runoff coefficient
23 used there? Isn't there a little bit of disagreement on
24 what that should be?

25 MR. MESERVE: Kerr-McGee's best estimate of the

1 runoff coefficient was, I believe, somewhere between .2 and
2 .4.

3 JUDGE WILBER: .4 I recall.

4 MR. MESERVE: But it did the further analysis, and
5 it is set out in the July 23 submittal, with a runoff
6 coefficient of 1, which means that all of the water was
7 flowing down the slope, none of it was going into the cell.
8 And even on that assumption, which is an unreasonable and a
9 conservative assumption for the analysis, the vegetative
10 slope was still sufficient to withstand --

11 JUDGE WILBER: In your experts' view, there may be
12 a difference of opinion on that, is that correct? I mean,
13 no one has had a chance to rebut that.

14 MR. MESERVE: We've seen some affidavits, but the
15 issue is whether we reopen the record. And there isn't any
16 information before you that would suggest that that analysis
17 is wrong.

18 JUDGE MOORE: Aren't we dealing with changed
19 circumstances? You're talking about changed circumstances
20 here. The rationale which was before us, the Licensing
21 Board's decision, is no valid. That rationale has been
22 undercut.

23 The outcome may be the same, in your view, but the
24 rationale on which the Licensing Board reached its decision
25 -- and that is what is in front of us, the Licensing Board's

1 decision -- is no longer there.

2 MR. MESERVE: I submit that the Licensing Board's
3 rationale -- and we have argued the rationale for the
4 Licensing Board's decision -- is still valid; but even if it
5 were not, it doesn't make any difference, in your own
6 requirements for reopening.

7 JUDGE MOORE: Okay. Take the last situation.
8 Even if the Licensing Board's rationale is no longer extant,
9 and so there is no rationale to support the conclusion of
10 the Licensing Board, isn't it an elementary and fundamental
11 principle of administrative law that there has to be a
12 rationale to support the conclusion of the Licensing Board
13 of an administrative agency, an administrative trial
14 tribunal?

15 MR. MESERVE: We submit that the record that has
16 been filed in this case is abundantly adequate and that --

17 JUDGE MOORE: But your premise was assuming the
18 rationale is no longer extant.

19 MR. MESERVE: I cannot assume that. We have
20 submissions in 1986, we have analyses by the Staff in 1989,
21 we go through oral hearing; the conclusion is the vegetation
22 layer is by itself sufficient, is an additional protection
23 from erosion layer, there's a question raised by the Staff,
24 we show that the vegetation will withstand the PMP, which is
25 not a regulatory requirement, with abundant factors. We

1 show that even if it were to fail, there's an intrusion
2 barrier which is adequately sized in order to protect the
3 cell.

4 If there's going to be an end to a proceeding, at
5 some point you say enough is enough. Your own criteria for
6 reopening require that there must be some materially
7 different result that would come as a result of considering
8 the new material.

9 When you look at the facts of this case, what we
10 have shown is the cell is even better than the Licensing
11 Board thought. We have gone above and beyond the
12 requirements that they believed would be necessary. The
13 cell withstands the PMP, something larger in terms of a
14 flood, without that being a regulatory requirement. It has
15 two layers of protection in order to deal with that now.

16 JUDGE WILBER: You mentioned that 80 percent of
17 this water would go into the cell; is that correct? With a
18 runoff coefficient of .2.

19 MR. MESERVE: Not -- well, you have to understand
20 the structure of the cell, that there is a clay and gravel
21 layer which is buried in the cell, so it won't go to the
22 wastes, it will go to a clay and gravel layer which is tied
23 into the E stratum, which is the aquifer stratum under the
24 cell. And so that anything that gets through the cover gets
25 channeled away from the cell and will not get to the

1 tailings. And the design of the cover has been -- that's
2 the function of the multi-layer cover, was intentionally
3 designed in order to provide basically a channel, so
4 anything that gets through that surface layer is channeled
5 away.

6 JUDGE WILBER: Then it goes into this -- for lack
7 of a word -- canal that you have there, and then it goes
8 over to that sump?

9 MR. MESERVE: Well, no, it goes to a clay and
10 gravel layer which around the whole cell is connected to the
11 E stratum, which is the aquifer underneath the cell.

12 JUDGE WILBER: All right.

13 MR. MESERVE: Only the surface runoff goes to the
14 sedimentation, that is the case.

15 There have been some assertions that in this most
16 recent information, we submit that -- all of this new
17 information -- we, contrary to the assertions by the City,
18 have never submitted any new information for the record. We
19 think that all of it should be excluded. It doesn't meet
20 the criteria for reopening the record.

21 There have been assertions in some of the most
22 recent filings about some sort of a catastrophe would occur
23 and they premised that, contrary to the showings, that
24 somehow there might be a gulley in the cell, and they posit
25 that somehow as a result of the gulley, there would be

1 releases to the site.

2 I don't think that is something that you should
3 really take seriously. You have got to remember that this
4 site has been in existence in the City of West Chicago since
5 1930. Those materials are there today, sitting in piles
6 with the thin soil veneer over them. The groundwater was
7 cleaning up under the site, and it's contaminated now as a
8 result of site operations, where massive amounts of water
9 were pumped into the groundwater as part of the practices at
10 the time.

11 JUDGE MOORE: Well, but by the same token, wasn't
12 the Kress Creek case about contamination from this site?
13 Isn't the Reed-Keppler Park from this site? Isn't the stuff
14 that was used inappropriately in, I guess, construction and
15 carried offsite, from this site? And aren't those the very
16 things that are supposed to be stopped under the Uranium
17 Mill Tailings Act for a thousand years?

18 MR. MESERVE: They will be, but --

19 JUDGE MOORE: Those things only happened in 30
20 years.

21 MR. MESERVE: They will be. Of course, none of
22 those are the kind of things you're dealing with in erosion
23 that we are talking about. But the theory is we have a 27-
24 acre site --

25 JUDGE MOORE: Your offsite contamination was not

1 erosion?

2 MR. MESERVE: No.

3 JUDGE WILBER: The Kress Creek was --

4 MR. MESERVE: Kress Creek was actually -- I
5 believe there are some findings in that original decision
6 that had to do with a sewer that may have caused some of the
7 problems.

8 But here we have a situation, we've got a 27-acre
9 site. We have an eight-foot thick cover over it, with
10 massive rock in the intrusion barrier, and somehow we are
11 supposed to speculate that we have a gulley through one part
12 of this cell. It's impossible, we haven't found a mechanism
13 to create it. We suppose a gulley, and now we have to
14 imagine that there are huge radiation hazards that are
15 created in the City of West Chicago.

16 Well, if that creates a huge radiation hazard,
17 what is the circumstance of that? Nobody has alleged at any
18 time that there is any imminent and substantial hazard that
19 necessitates immediate action at the site. The wastes will
20 be neutralized, all these improvements will take place. The
21 situation can only be better if the cell is constructed.

22 JUDGE KOHL: Well, Mr. Karaganis argues that he
23 needs discovery, though. He doesn't know whether that's
24 true or not, whether there are health effects, because of
25 the asserted change in circumstances and the change in the

1 cobble layer and the Staff's change in position on the
2 vegetative layer, he needs discovery because the analyses
3 that were performed assumed the vegetative cover, and --

4 MR. MESERVE: I suppose that every litigant who
5 loses the case is going to find 10 new issues that he would
6 want to raise if he were given the opportunity to do so, to
7 find all sorts of new discovery that he would discover,
8 because he now understands that his first arguments weren't
9 successful, and he will come up with others.

10 I mean there has to be some point where you come
11 to closure. Your regulations specify exactly what you are
12 supposed to consider when you consider such matters, and
13 those criteria, I submit, are not satisfied here.

14 JUDGE KOHL: But the Staff's suggestion that a new
15 license amendment is necessary in this case would seem to
16 preclude closure, would it not? A new amendment gives rise
17 to Section 189 hearing rights and opportunity to challenge
18 the claims that there are no health effects.

19 MR. MESERVE: There is a Seventh Circuit decision,
20 of which I am sure you are aware, having to do with what
21 exactly the hearing requirement that was required by that
22 section --

23 JUDGE KOHL: Sure. That goes to the issue of the
24 type of hearing --

25 MR. MESERVE: That's right.

1 JUDGE KOHL: That's not what I'm talking about.
2 I'm talking about a hearing at all.

3 MR. MESERVE: It may well be --

4 JUDGE KOHL: Hearing vel non.

5 MR. MESERVE: It may well be if this Appeal Board
6 rules that it should consider these matters, that the
7 hearing that's taken place, where you've had all these
8 affidavits, is itself sufficient. That there was a hearing
9 does not necessarily mean starting a new process before the
10 Licensing Board.

11 But I submit that that is something that is ahead
12 of us. When there are license amendments to materials
13 licenses all the time, the Staff would like to make another
14 materials license change. We are here on the license that
15 was issued --

16 JUDGE MOORE: Can I ask a more generic question?
17 I am troubled by the fact that as I see the Staff's
18 position, the Staff has flip-flopped, if you will, on the
19 question of maintenance, on the question of their -- and
20 they are the first line of defense in the public health and
21 safety as to the adequacy of your cell design. They have
22 discounted the vegetative cover and the soil cover, because
23 they now believe that a PMP event is necessary for the
24 proper analysis, to provide reasonable assurance, and had
25 the Staff taken that position in front of the Licensing

1 Board, who knows what the outcome would have been?

2 But, nevertheless, the Staff has flip-flopped, 180
3 degrees, from the positions they took in front of the
4 Licensing Board, a party in front of the Licensing Board, in
5 support of the application. And now as soon as the
6 Licensing Board's authorization comes down, they change
7 their position and say, well, let's do it again with a new
8 license amendment; never mind that we have changed
9 positions, without touching the license amendment that
10 preceded.

11 That strikes me as being a very strange way of
12 proceeding in an administrative hearing and, indeed, one
13 that if you adopted it as a rule of law, would be certainly
14 open to abuse, in an attempt to avoid the unpleasantness
15 that you find yourself in, in a hearing.

16 MR. MESERVE: Well, I think that would all have
17 been well served if the Staff had taken a consistent
18 position on this issue. The fact of the matter is, is that
19 this matter was litigated and we met the requirements as the
20 Licensing Board understood them and that the Staff supported
21 us.

22 The Staff has changed its position and we still
23 have shown that we meet the requirements. What the Staff
24 was completing was a matter of we had said we would have a
25 clay and a cobble layer and they asked us to specify it.

1 It's not a radical change in the design.

2 It's a layer in the cell that we have said would
3 be there all along. This is not a matter on which there
4 has been a significant modification of the issues that have
5 been litigated.

6 JUDGE MOORE: Doesn't the footprint of the cell
7 change with the modification, the matters you claim are
8 modifications?

9 MR. MESERVE: There was a 2 foot intrusion barrier
10 that went down the whole side of the cell and we have merely
11 specified the size of the rock that would be in that; so
12 there's no change.

13 JUDGE MOORE: Doesn't it change the slope?

14 MR. MESERVE: No, no.

15 JUDGE MOORE: Does it change the thickness of the
16 barrier?

17 MR. MESERVE: No, no change other than the change
18 in the size of the rock.

19 JUDGE MOORE: Does it change the analyses that
20 must be done on radiation control?

21 MR. MESERVE: No.

22 JUDGE MOORE: Radon might leave the cell?

23 MR. MESERVE: Well, let me mention that it's 20
24 picocuries per second standard which is satisfied by a
25 factor of about 50 for this cell. We're down around 0.5 for

1 a radon flux and as it turns out, if there is in the
2 engineering report, an analysis that shows the effectiveness
3 of the various layers -- in fact, it's the first two feet
4 clay layer which is the predominant factor in attenuating
5 radon.

6 We're dealing with radon from the wastes
7 themselves which is roughly equivalent to that from normal
8 soil itself, so it's not a significant change in radon.

9 JUDGE MOORE: The mix, as claimed by West Chicago
10 of size of particle is not a relevant factor?

11 MR. MESERVE: Well, I'm not going to suggest that
12 there might not be a change from .5 to .6 or from .5 to .4,
13 but in the data that was submitted to the Licensing Board as
14 part of the engineering report analyzed the effect of each
15 of these layers, and the radon attenuation is by a different
16 layer and a lower layer, the clay layer that's immediately
17 on top of the waste.

18 JUDGE MOORE: I have a number of questions that I
19 now are questions which kept you off subjects you might have
20 wanted to touch upon, but quickly; as to whether or not this
21 matter should be vacated, the Licensing Board's
22 authorization decision should be vacated, it's your position
23 that it should not be vacated because the cause, if you
24 will, of the transfer of jurisdiction, because you can see
25 that it's not -- the cause of the transfer of jurisdiction,

1 assuming we no longer have jurisdiction, is something that
2 can be laid at the doorstep of the state of Illinois.

3 In that regard, why isn't the Commission who
4 controls the process and the timing of the process
5 completely as to whether to approve the agreement and when
6 to approve it, not really the cause? Why is not the Staff,
7 who provides the analyses and the recommendations to the
8 Commission and thus influences the timing of the
9 Commission's decision, the cause of this, if you will?

10 Thirdly, how, by taking the stance you would have
11 us take, does that not frustrate, if you will, the
12 Congressional policy to encourage states to take control of
13 byproduct material under the Uranium Mill Tailings Act?

14 MR. MESERVE: I think that the premise of your
15 question, which is an excellent one, is the acknowledgement
16 that there is an exception, basically, to the Munsingware
17 Doctrine which is the Supreme Court case in Karcher and in
18 every court of appeals that where an appellant has taken
19 actions that have resulted in the -- basically the appeal
20 becoming moot, that it is inappropriate to vacate the lower
21 court decisions.

22 Now, what happened here -- and there has been a
23 suggestion that there was something mandatory about the
24 state applying for this Section 274 agreement. Well, it was
25 asked, in fact, to do it several years ago. It waited till

1 after it lost the case and then it undertook what was a
2 permissive action to then -- it was not required to seek
3 jurisdiction.

4 JUDGE MOORE: You said they waited till after they
5 lost the case. They have applied --

6 MR. MESERVE: Excuse me, I misspoke. The fact
7 that the timing was one where they were asked several years
8 ago to undertake it, and the timing for their interest in
9 applying for the application -- and this is in our brief --
10 was after the Staff's submission of the draft supplemental
11 environmental statement. That indicated that the Staff was
12 taking the position that onsite disposal should be allowed.

13 The State then became very interested in taking
14 jurisdiction. You will see in one of the tabs in our
15 handout here -- something that's in the record -- where an
16 official of the ID&S said that if they didn't want to
17 control long term disposal in West Chicago, they wouldn't be
18 interested in jurisdiction.

19 Their interest became heightened as soon as they
20 learned which direction the Staff was heading. They didn't
21 have to file when they did. They started the process in
22 motion.

23 I'm sure that the Staff has procedures that
24 they're required to follow and that they felt that they were
25 obliged to deal with an application that had been filed by

1 the state and that they couldn't sit on it. We have a
2 process and then we have a strategy that has been -- quite
3 frankly, there are abundant materials, some of which are in
4 the record, about rather intense Congressional pressure
5 being placed on the Commission and the Staff to get this
6 matter resolved and down to the agreement.

7 So, we have a situation where there is a strategy
8 that the state was following to -- a horse race, in the
9 words of the press by one of the counsel for the state, to
10 try to get that agreement authority for the purpose of
11 expunging their loss. We think that's unfair. A whole
12 series of cases that we cited said that in such
13 circumstances where the appellant takes actions that will
14 result in mootness, that the tribunal should --

15 JUDGE MOORE: How about the Commission as a player
16 and the Staff as a player? You mentioned the Staff having
17 theoretical time schedules having to be met. The Commission
18 certainly could have said it's inappropriate to rule on this
19 until the proceeding is over or said that we're not prepared
20 to rule at this time.

21 Isn't the real cause the Commission and weren't
22 they in control completely?

23 MR. MESERVE: Section 274 does require the
24 Commission to act in the matter, but I think that -- as we
25 discussed initially, the Commission doesn't contemplate that

1 this matter is going to be, in our view --

2 JUDGE MOORE: With regard to the latter, one of
3 the principles underlying the theories of Munsingware is
4 that when there's a statutory right for appeal, and that
5 statutory right is cut off, that that's a reason to vacate
6 what happened below. Well, here, there's a regulatory right
7 to appeal that was exercised and that statutory right is
8 being lost if we fail to vacate, leaving an unreviewed
9 decision and a decision, just for the sake of argument, is
10 of questionable validity.

11 I say that only for the sake of argument. Is it
12 appropriate administrative policy in a loss-of-jurisdiction
13 situation, to leave standing as a precedent, indeed -- well,
14 we'll get to collateral estoppel and res judicata in a
15 moment -- such a decision?

16 MR. MESERVE: This, I believe, is exactly the
17 process that occurs in the courts, and the conclude that
18 balancing the equities, it is appropriate to leave the
19 decision standing.

20 After all, it's the State that took the --
21 initiated the steps that resulted in the loss of
22 jurisdiction.

23 This Appeal Board, in fact, in an unpublished
24 order in the Cross Creek case, issued the suggestion that it
25 would find, in that case, while an appeal was pending and

1 there was a transfer of jurisdiction, that it would be
2 appropriate to leave the opinion in that case standing.

3 Now, ultimately, it was concluded that NRC had
4 jurisdiction.

5 JUDGE KOHL: That was suggested as a discussion
6 point, though, to --

7 MR. MESERVE: It was dictum.

8 JUDGE KOHL: -- provoke comments from the parties
9 as to what they thought about that. It was nothing more
10 than that.

11 MR. MESERVE: But this is certainly something -- I
12 want to suggest that this is not something that often
13 contemplated, that, in fact, in the Cross Creek case, this
14 was something that the Appeal Board suggested, and there is
15 abundant precedent in the courts for exactly this posture.

16 JUDGE KOHL: I'm not sure where leaving the
17 decision below just to stand, hang there, for whatever
18 reason, gets anyone very far.

19 We have said, on a number of occasions, that un-
20 reviewed Licensing Board decisions have no precedential
21 value.

22 So, what good would it be? Why not vacate it
23 then?

24 MR. MESERVE: I think that the usual rule is the
25 precedential value of a decision is not determined by the

1 body that is making the decision as to whether to vacate or
2 not, but the subsequent courts have analyzed that decision,
3 and although it may not be the practice in the NRC in its
4 appellate tribunals to provide precedential impact for
5 Licensing Board's decisions, we would believe that the State
6 -- it's only fair that the State be bound by this decision.

7 We will be arguing in other tribunals that this is
8 a matter which, after many, many years of litigation, in
9 which they had opportunities, on several occasions, to file
10 contentions, in which there was a full briefing and airing
11 of the issues, that their assertions were found to be
12 without support.

13 JUDGE MOORE: I understand your position, Mr.
14 Meserve.

15 You're painting West Chicago, who is an Appellant
16 here and who was admitted to the proceeding and has
17 Appellant rights -- I assume you're painting them with the
18 sins of the brother far long gone.

19 MR. MESERVE: Well --

20 JUDGE MOORE: They didn't apply for anything.

21 MR. MESERVE: Well, it is, of course, that the
22 City, long ago, chose to have only a minimal role in this
23 proceeding, that they first attempted to intervene in this
24 proceeding in 1989.

25 They were admitted on the representation that they

1 would not take a position in the proceeding and that they
2 were appearing as an interested municipality and that they
3 had a minimal -- a minimal role in this whole proceeding,
4 that they are certainly a small player in connection with
5 this hearing.

6 JUDGE MOORE: Under our procedures, they have
7 Appellant rights. They are an Appellant. They could appeal
8 the issues below. They have done that.

9 Now, I understand your position about fairness to
10 Illinois, because in your view, they caused, if you will,
11 the transfer of jurisdiction.

12 West Chicago had not caused anything in that
13 context. They're only being painted for the sins, as I see
14 it, then, of the State.

15 MR. MESERVE: Well, I think it was only reasonable
16 for this Board to perceive that there is an alliance,
17 commonality of interest between the State and the City.

18 MR. MESERVE: Should we find an alliance or
19 commonality between you and the staff?

20 MR. MESERVE: On some issues, it would be
21 appropriate to find that we share common approaches and
22 concerns, and on some issues, we don't. But the reality is
23 that the City has been only a recent participant in this
24 proceeding, and its involvement and stake in the proceeding
25 is considerably less.

1 In fact, many of the reasons why this argument is
2 occurring so late is because of actions by the City on
3 various requests for postponement and that this whole matter
4 has been deferred. The Board has chosen to do that, but
5 it's been on motion of the City.

6 Now, if this -- Kerr-McGee has never asked for a
7 delay in the resolution of this matter. We've been pushing
8 this matter forward vigorously, hoping to get this appeal
9 resolved.

10 So, the City has joined with the State in
11 preventing us from getting a decision from this Appeal
12 Board, if you are to conclude that you don't have
13 jurisdiction.

14 So, I don't think it's unfair for them to have to
15 bear the consequences of their actions, because they are
16 part of the reason why this appeal wasn't resolved, if you
17 conclude you don't have jurisdiction.

18 I've gone over my time slightly.

19 JUDGE KOHL: Yes.

20 MR. MESERVE: I'd be happy to answer questions.

21 JUDGE MOORE: It's because of our questioning.

22 Feel free to continue.

23 JUDGE KOHL: Yes.

24 I would like to move on to one of the more
25 significant and substantive issues, if you could address it

1 briefly, and that is this existing site versus new site
2 dichotomy and criterion 1 and the role of consideration of
3 economic cost in light of the statutory amendments and so
4 forth.

5 We had some earlier discussion about that.

6 Something that I find curiously missing from both
7 your brief, as well as the Licensing Board's decision on
8 this matter, there is no reference whatsoever to the
9 statement in Appendix A, under criterion 1, that says "while
10 isolation of tailings will be a function of both site and
11 engineering design, overriding consideration must be given
12 to siting features, given the long-term nature of the
13 tailings hazards."

14 What does "overriding consideration" mean here?
15 It's under criterion 1, the next-to-the-last sentence, right
16 above no active maintenance.

17 The Licensing Board never mentions -- it talks
18 about the legislative history on consideration of cost and
19 the amendment of the Mill Tailings Act to include that
20 directive to the Commission.

21 The Commission implemented that directive by
22 including the new material under the introductory material,
23 but the Commission did not amend, however, that portion of
24 criterion 1, and the words "overriding consideration,"
25 that's pretty strong language, isn't it?

1 MR. MESERVE: Well, I think --

2 JUDGE KOHL: That must mean something. That means
3 you put your thumb on the scale on the siting features side,
4 not the economic side. Right? Is there any other reading
5 to that?

6 MR. MESERVE: Well, I think it has to be read. I
7 think it's inappropriate to take any one sentence of this
8 criterion and to not look at it in light of everything else
9 that the Commission has said.

10 JUDGE KOHL: I agree. And that's why I would also
11 --

12 MR. MESERVE: This does suggest, it does state
13 that one should look very carefully, very diligently at
14 siting features.

15 JUDGE KOHL: No. It doesn't say just look at it
16 diligently or conscientiously. It says "overriding
17 considerations." It does so also in the context of
18 criterion 1, a little earlier in the same provision.

19 The Commission says that the following site
20 features, which will contribute to such a goal or objective,
21 must be considered in selecting among alternative tailings
22 disposal sites or judging the adequacy of existing tailing
23 sites.

24 That suggests, doesn't it, that the same standard
25 must apply -- criterion 1 should be applied equally to both

1 existing and new sites? Isn't that what that says?

2 MR. MESERVE: That is not what the NRC asserted
3 for the Tenth Circuit when these criteria were subject to
4 judicial review.

5 JUDGE KOHL: That was in a Commission brief, and
6 I'm not aware of any requirement that Commission briefs to
7 the Court are somehow binding or would override a
8 regulation.

9 MR. MESERVE: The Commission's representation to
10 the Tenth Circuit was that they would make -- that they
11 would draw this distinction, and they said it three
12 different times in three different Federal Register notices,
13 which we cite.

14 If one looks at, actually, each of these features,
15 it says that the three factors are remoteness from populated
16 areas.

17 Now, admittedly, the Kerr-McGee site is not remote
18 from populated areas, but it isn't today.

19 JUDGE MOORE: May I just interrupt a moment?

20 Judge Kohl asked you "overriding." I just
21 happened to go look it up, and it only has two definitions,
22 one which could not possibly apply here and the second --
23 from Webster's Third International Dictionary, it is the
24 second definition, "subordinating all others to itself."

25 Now, when the Commission added the -- in response

1 to the '82 amendments to the Mill Tailings Act -- added the
2 -- I guess it's the fourth paragraph to the introduction of
3 the section, it found -- and, indeed, the Tenth Circuit has
4 now upheld these regulations on the basis that the
5 Commission, in fact, did consider economic cost
6 appropriately in promulgating them, and the Commission found
7 it didn't need to change the word "overriding," that its
8 fourth paragraph would suffice.

9 So, no change was made to the word "overriding,"
10 and that word means subordinating all others to itself.

11 I tried to read all of these criterion, all the
12 other criterion, as closely as I could. I cannot find a
13 word like that anywhere else in these regulations.

14 I find the word "primary," which is subject to any
15 number of definitions, as you well know from you recent
16 litigation in the CADC byproduct material; "principle,"
17 which is subject to a number of different meanings; but no
18 word like "overriding" anywhere.

19 Doesn't your reading of these regulations, as
20 Judge Kohl has suggested, just read that out -- as did the
21 Licensing Board, out of existence?

22 MR. MESERVE: Well, I'm sure we could find -- I
23 don't have the benefit of a dictionary to see if I can find
24 some other uses, and your usage of the word "overriding" is
25 certainly one that's possible. But, in fact, one looks at

1 these technical criteria, and there's another sense, which
2 says that the site selection process must be an optimization
3 to the maximum extent reasonably achievable in terms of
4 these features. That's another sense from Criterion 1. The
5 words "reasonably achievable" are defined in the
6 introduction, and they are the usual kind of language that
7 it specifically involves, the kind of cost benefit
8 consideration that the Licensing Board deemed appropriate.

9 We have words in this criterion that may be
10 conflicting. The NRC, on three different Federal Register
11 notices, has explained exactly how it's going to apply this
12 criterion in the context of existing sites. It has said
13 that to the 10th Circuit. I mean, there is a lot of
14 legislative history in this.

15 JUDGE MOORE: I've read it all, because your
16 argument fascinates me, and I can find no -- there's, first
17 of all, no statutory language at all about new and existing
18 site differential. As I read Qui *ra*, the recent 10th
19 Circuit decision in which you raised this very point and
20 gave a parade of horrors of what would happen, the court
21 gave you the back of the hand and said that they don't find
22 any statutory language making a distinction between new and
23 existing site, and merely presume that if there is such a
24 requirement, that it nevertheless is met by being just one
25 of the factors that must be considered.

1 Now, if you start with the Quivira case and accept
2 that, then if cost is merely one of the factors that must be
3 considered, when you then come across something that says
4 overriding consideration must be given, that suddenly takes
5 on a heightened importance over something like cost, does it
6 not?

7 You can certainly consider cost, but it doesn't
8 say cost is to be given overriding consideration, or
9 economics, rather; it says that overriding consideration
10 must be given to the deciding features -- three specifically
11 -- given the long-term natures of the tailing hazard. The
12 reason for that is because it says that both site and
13 engineering design, while important, it seems to be saying
14 that site's most important because engineering features will
15 fail because we're dealing with 1,000 years.

16 MR. MESERVE: Let me suggest that if one wants to
17 construe this word, the appropriate place to start is with
18 the statute. What does the statute require with regard to
19 these matters, and that is a matter in which there is
20 extensive history as a result of multiple litigation that's
21 occurred in the 10th Circuit in which the 10th Circuit has
22 found on two occasions, once with regard to the EPA
23 standards for Mill Tailings, and the second time with regard
24 to the NRC's requirements, that there was an obligation for
25 both the EPA and the NRC to establish a reasonable

1 relationship between cost and benefits. There's extensive
2 legislative history behind what they meant by that.

3 JUDGE MOORE: And you claimed that these
4 regulations didn't do it in the 10th Circuit in both cases,
5 so that on behalf of the EPA and then behalf of the NRC that
6 these regulations did take those things into account
7 appropriately under the Act?

8 MR. MESERVE: But it also -- it made the decision
9 -- and I don't have the benefit of the decision with me, but
10 at the very beginning of the discussion, it started out its
11 analysis in the context of the NRC's assertion to the 10th
12 Circuit that it will fulfill and intended to make site-
13 specific decisions. It intended to fulfill its cost benefit
14 balancing requirement as in its site-specific
15 decisionmaking.

16 So with that as the starting point, they then
17 said, All right. Let's -- they're going to achieve it when
18 they apply these rules. Now, let's look and see whether
19 there's been an adequate analysis for us to uphold these
20 rules. But it was in a specific context --

21 JUDGE MOORE: So it's your central position that
22 economic factors are to be given overriding concern to all
23 others?

24 MR. MESERVE: My contention is that the Licensing
25 Board correctly analyzed this criterion in light of the

1 statute and the legislative history, which was to ensure
2 that there was a reasonable relationship between cost and
3 benefits, which is exactly what the 10th Circuit on two
4 occasions has said is the obligation of the EPA and the NRC
5 with regard to Mill Tailings.

6 JUDGE KOHL: Don't you think it a rather
7 significant omission, though, from the Licensing Board
8 decision that they don't even mention the language? I mean,
9 it's one thing to mention language and then discuss it,
10 discount it, you know, based on legislative history,
11 statutory language, etcetera; but the fact that the
12 overriding consideration language doesn't appear in the
13 opinion, you know, I find that somewhat troubling.

14 MR. MESERVE: Well, quite frankly, they may not
15 have focused on it because it was not an issue that the
16 state -- the state didn't direct your attention to it. I
17 believe that we cited the entirety of Criterion 1 and
18 discussed the legislative history in which Congress, in
19 1983, found it necessary to amend UMTRCA to impose this
20 requirement for a reasonable relationship.

21 I think that the Licensing Board focused on the
22 issues that were presented to it. I think it correctly
23 decided that the balancing requirement is their's.

24 JUDGE MOORE: At this point, if we're to apply the
25 Commission's regulation and determine whether the Licensing

1 Board, assuming we have jurisdiction, properly interpreted
2 the regulation, now that that the regulations have been
3 found to be valid, is it appropriate for us to be looking at
4 the legislative history of the Act? And when the
5 regulations speak for themselves, the statutory language,
6 the legislative history of that Act, when the Commission has
7 said its regulations fully meet the legislation, fully
8 comply with Congress' wishes, and that position has now been
9 upheld, aren't we obliged, as an administrative tribunal, to
10 essentially just be looking at these regulations at this
11 point?

12 MR. MESERVE: I think you should, and I think that
13 you should be looking at the language that says the site
14 selection process must be an optimization to the maximum
15 extent reasonably achievable. You should look at the
16 language which is in the introduction, which says that all
17 site-specific licensing decisions based on the criteria in
18 this appendix will take into account the risk to the public
19 health and safety and the environment with due consideration
20 to the economic cost involved and any other factors the
21 Commission determines to be appropriate.

22 Now, there is guidance her --

23 JUDGE MOORE: That introductory language is
24 general; the criterion are specific. Isn't it basic that
25 the specific controls over the general when you're looking

1 at regulations?

2 MR. MESERVE: The language is that all site-
3 specific licensing decisions.

4 JUDGE MOORE: Okay. Now, secondly, there are some
5 requirements in these criterion that are black and white.
6 For instance, there's a Criterion 4, I believe, that says
7 you can't -- period -- site a tailings pile over an active
8 fault, existing new whatever.

9 If you found an existing pile over an active
10 fault, is it your contention, then, that all site-specific
11 licensing decisions language would mean that you have to
12 consider the cost, and even if the cost of moving a tailings
13 pile that sits over an active fault is exorbitant, you can't
14 do it, you shouldn't do it?

15 MR. MESERVE: I think that the direction that the
16 Congress has made is that you should evaluate cost. A
17 circumstance that you have posited might be one, where a
18 licensing board could well conclude that the benefits of
19 moving the materials was sufficiently great that they are
20 justified.

21 JUDGE MOORE: Okay. If you accept your reading of
22 this criterion, Criterion 1 -- presumably, it applies, then,
23 across the board to all the other twelve -- what is the
24 purpose of the -- these criterion are not, in your view, I
25 take it, are not to be read as being any kind of a standard,

1 but a very flexible situation that economics plays a very
2 dominant role in. What, then, is the purpose of the other
3 paragraph in the introduction as well as the section in the
4 Mill Tailings Act that permits a licensee to propose
5 alternatives to the agency, and the alternatives, if they
6 provide to the extent practicable equivalent protection,
7 will be deemed fine?

8 It seems to me that if you were to propose your
9 side as an alternative to these requirements, and that it
10 would meet and claim that it met to the extent practicable
11 these criterion, that would be one matter, but you haven't
12 done that. You said you meet these criterion, and I have
13 hard time, under your interpretation, of having any meaning
14 left for the alternative section.

15 MR. MESERVE: I think that one has to look at
16 these criteria and examine the context in which they're
17 presented.

18 The NRC has explained that Criterion 1 is intended
19 to be sort of a general and aspirational goal.

20 It has set some factors that are to be considered
21 and that criterion specifically has the language about
22 reasonably achievable.

23 JUDGE MOORE: Isn't the Criterion 1 goal though
24 only the first sentence, isolation without active
25 maintenance. That's what the 10th Circuit tells us the goal

1 is.

2 MR. MESERVE: I believe that the NRC has
3 represented in the rulemaking arising with this criterion,
4 arising in this criterion that Criterion 1 itself was
5 expressing a general rule.

6 JUDGE MOORE: I don't think so but I think you'll
7 find that the goal is merely the first sentence and the very
8 last sentence about active maintenance that isolation of
9 mill tailings without active maintenance is the goal.

10 MR. MESERVE: It is hard for me to understand the
11 sentence about the site selection process must be an
12 optimization to the maximum extent reasonably achievable,
13 why that specific language was there unless the Commission
14 clearly envisioned in this rule that in the siting
15 consideration that these were goals. These were to be
16 factors, that they have been very important but that you
17 were to consider them in the context of what is reasonably
18 achievable which clearly involves the consideration of
19 economic factors.

20 There are a whole series of other criteria that do
21 set out specific requirements. We submit that we comply
22 with all of them. If we didn't, we would have the right, as
23 you've indicated, to submit an alternative.

24 The Congress amended UMTRCA in '83 to put that
25 option in.

1 JUDGE MOORL: This is what troubles me. Under
2 your view of the Act, there is never a need for alternatives
3 because you just construe the criterion in a manner to be so
4 broad and so flexible that it encompasses just about
5 anything.

6 MR. MESERVE: Criterion 1 is written that way. It
7 is written to be flexible. It is written to require economic
8 balance.

9 The other criteria are specific and don't have
10 that same sort of language for these other criterias.

11 For example, you shouldn't have a slope greater
12 than 5 to 1 -- that is something that where if you were
13 going to come in with a --

14 JUDGE WILBUR: You mean if it is reasonably
15 achievable you don't have one greater or you don't have one
16 greater.

17 MR. MESERVE: If you were to have a slope greater
18 than 5 to 1 it would seem to me that that -- you had an
19 alternative that you'd be required to meet the requirements
20 of an alternative. That is a specific requirement which is
21 not, doesn't have this language about optimization to the
22 maximum extent feasible. It's language where it is a black
23 letter rule.

24 If you are going to depart from that, that one
25 would then propose an alternative and seek to make the

1 demonstrations that the Commission has -- Congress has
2 indicated should be made in order to make sure that these
3 rules are applied flexibly.

4 That is how I understand these rules and I think
5 that is consistent with what the legislative history in the
6 Congress, is consistent with the language, consistent with
7 the long history of Federal Register notices on the point by
8 the NRC.

9 JUDGE MOORE: When you point out that there are a
10 number of factors from the legislation, the legislative
11 history, that have to be guiding principles in interpreting
12 these regulations, you point to flexibility and you point to
13 the alternative section, but isn't it clear that the
14 alternative section has nothing to do with these criteria,
15 that the alternative section was to provide flexibility but
16 that flexibility was to permit you, if you don't like these
17 regulations, to provide for something else?

18 MR. MESERVE: We are not in this case seeking to
19 apply the specific statutory provisions for alternatives.

20 That provision was added to the statute in 1983 to
21 reflect however a general Congressional concern that the
22 initial NRC regulations were not sufficiently flexible.

23 It wanted to make sure that there would be
24 flexibility.

25 To the extent that that -- we're not applying the

1 specific provision but Congress has we believe manifested a
2 philosophy that is supposed to be used in examining how
3 these things that should be approached but we are not
4 seeking an alternative.

5 JUDGE MOORE: In your view could a tailings pile
6 in the middle of a highly-populated area ever be required to
7 be moved under these regulations?

8 MR. MESERVE: Well, I can imagine situations in
9 which the risks associated with keeping the tailings pile in
10 the highly populated area were such that the cost of moving
11 it would be seen to be justified.

12 JUDGE MOORE: I can't think of one.

13 MR. MESERVE: Well, I think that that is a matter
14 that would have to be analyzed I would suppose in a
15 particular circumstance.

16 JUDGE MOORE: You can't offer me one?

17 MR. MESERVE: I can't offer one where the cost-
18 benefit balancing has taken place, but --

19 JUDGE MOORE: I am intrigued by the notion that in
20 the legislative history of the Act they point to the Vitro
21 site in Salt Lake City, 30 blocks from the state capital and
22 that in the legislative history is described as a site of
23 2.3 million tons sitting on some considerable number of
24 acres.

25 In that instance that tailings pile was moved.

1 Now that was an orphan pile. It was moved but I am struck
2 by the fact that if it was reasonable to move a pile such as
3 that, why is it unreasonable just in a larger sense to take
4 something a quarter of the size or a third of the size of it
5 to move?

6 I am struck I guess and then I'm deeply troubled
7 by the fact that under your reading of the regulations I
8 don't ever seen any way to require that a pile would ever be
9 moved, and yet the Commission's regulations clearly
10 contemplated by stating this business about transportation
11 costs that, one, they might have to be moved; two, the
12 statement of consideration specifically says they might have
13 to be moved; and the legislative history is very clear that
14 in proposing the regulations and especially the amendment
15 that Senator Simpson was of the view that -- and he used the
16 term "all" -- or most if not all of such tailing piles are
17 in remote areas, so that certainly Congress was not
18 contemplating piles that might be in Downtown, USA, so to
19 speak.

20 MR. MESERVE: I can't speak to the Vitro pile.
21 That of course was something that was under Title I of
22 UMTRCA. It's Federal dollars, ten percent state dollars to
23 pay for the movement and there was apparently an agreement
24 between the Federal Government and the State that the
25 appropriate action to take in that instance was to move the

1 pile.

2 With regard to a private licensee you have a set
3 of regulations that govern. It requires an evaluation of
4 the risks and benefit.

5 It seems to me in a situation without -- I can't
6 speculate but you might well have situations where it's a
7 downtown pile where either the licensee might propose to
8 move it or you might find a situation in which the risks of
9 its continued presence in the downtown area were such as to
10 require movement.

11 JUDGE MOORE: I have just one final question. It
12 involves the paragraph added to the introduction, same
13 paragraph you previously spoke to and quoted from, the last
14 sentence in that paragraph where it says "Decisions involved
15 in" -- and it means "involving" -- "these terms will take
16 into account the state of technology and the economics of
17 improvements in relation to benefits to the public health
18 and safety and other societal and socio-economic
19 considerations and in relation to the utilization of atomic
20 energy in the public interest."

21 My question is, I understand what socio-economic
22 considerations are because they are set out in the SFES as
23 property values in the immediate area and the site, et
24 cetera, et cetera.

25 Can you tell me what societal values are and what

1 the inter-relation to the utilization of atomic energy in
2 the public interest mean?

3 In that context, are societal values such things
4 as the societal wisdom of placing mill tailings that must be
5 isolated from the human environment for a thousand years in
6 a highly populated situation in the middle of a city? Is
7 that something that must be taken into consideration?

8 Secondly, is the utilization of atomic energy in
9 the public interest much the same -- how does it further the
10 public interest of the utilization of atomic energy to place
11 waste products that must be preserved and isolated for a
12 thousand years in the middle of a populated area?

13 MR. MESERVE: I am not aware of any. This is
14 language which has not been focused on to my knowledge by
15 anyone in this litigation. I am not aware of any definition
16 that the Commission has given in its Federal Register
17 notices or the like with regard to how this language is to
18 be applied.

19 Let me say though that there is -- I'll make a
20 couple comments as you've raised an issue about whether --
21 when it is ever appropriate to place waste in an area that
22 is populated because it has to be -- the waste that might be
23 there is supposed to be protected for at least thousands of
24 years.

25 It is interesting on that particular point that

1 the difference between the NRC and EPA standards and that
2 the EPA does not include remoteness from population as a
3 factor at all in their decisions. The reason is that in the
4 EPA's point of view population distribution today is not a
5 good or reliable indicator of where people are going to be
6 in a thousand years let alone much shorter term, so
7 prognostications over a long, long term as to whether
8 populations might be is not something that one could do, I
9 believe, submit with any degree of reliability.

10 JUDGE MOORE: Are the EPA regulations applicable
11 to what? The orphan tailings piles?

12 MR. MESERVE: No, no. The EPA has standards which
13 it has set which are the general standards that the NRC then
14 has the detailed implementation obligations for.

15 The EPA has not considered remoteness from
16 populations as a factor.

17 You are obliged to because your standards do have
18 it but I think it is interesting that another expert agency
19 in looking at exactly the same issue has concluded that we
20 don't know enough about where people are going to be living
21 over a thousand years in order to give that factor any
22 particular weight in the calculus.

23 Now, there are very grave concerns about nuclear
24 materials, concerns about reactors, concerns about all kinds
25 of things. And I submit that it is appropriate, when we're

1 considering these matters, to deal with the facts, and not
2 with the emotions. The risks from this site have been
3 evaluated. If one looks at, I believe it's Tab 2 of my
4 handout, it's a summation of what the risks are from this
5 site. The SFES, if one looks at it, keeping the materials
6 in West Chicago, was shown to be the least risky alternative
7 of all of the options. And it is important to note that it
8 shows that there are .05 health effects over the entire
9 thousand-year term, cumulative health effects over the whole
10 Greater Chicago area, population of 8 million people.
11 There's one chance in 20 over 1,000 years that anyone will
12 have any health effects on this site. All the other
13 alternatives have greater health effects.

14 Now, there's a risk factor that is not included in
15 this table that is discussed at Pages 6-2 of the SFES, where
16 they have considered transportation risks. And I don't mean
17 radiological risks. I mean the statistical probability,
18 based on real data, not assumptions, as to what is the
19 likelihood that somebody is going to die as a result of
20 moving this material. And if one moves this material by
21 truck, which is probably the most likely way it can be
22 moved, the risks of accidents -- and those people, if this
23 pile were moved today, people who are alive today -- the
24 risks of accidents in moving this material are far greater
25 than any of these risks that have been evaluated from the

1 radiological terms.

2 So if one looks at the total risk calculus here,
3 not only is this the best site in radiological terms, but if
4 one considers the ordinary hazards of transportation, these
5 risks understate what the real facts are.

6 When we look at costs and benefits, there is
7 significantly less cost to keep it where it is.

8 I submit, in considering this matter, that you
9 should consider the facts of the case, and not public
10 emotions on the matter. And the facts support on-site
11 disposal.

12 Thank you.

13 JUDGE WILBER: I have, hopefully, short questions
14 and quick answers here.

15 Contention 2-R, it appears that the Board rejected
16 that because the clay liner was not necessary. Is this
17 correct? Is this the proper basis, or am I reading it
18 correctly?

19 MR. MESERVE: That's correct. Read it in the
20 context of a contention, the Contention 2-R asserted that
21 the clay liner will fail over the long term, and in fact the
22 clay liner serves no function over the long term.

23 JUDGE WILBER: What is the barrier between the
24 material and the aquifer, then?

25 MR. MESERVE: The whole premise of this design is

1 to have a highly impermeable cover that prevents water from
2 infiltrating into the cell. But in fact, once it's into the
3 waste, one would like to have it move quickly, so that is
4 would not dissolve.

5 JUDGE WILBER: Then let me ask another question.

6 I then assume there's nothing on the bottom to
7 prevent any communication between the material and the
8 aquifer; is this correct?

9 MR. MESERVE: No, that is wrong. In fact, the
10 site is, the cell basement, so to speak, is, I can't
11 remember the distance, but I think it's 10 feet above the,
12 the waste is placed, I believe it's 10 feet above the
13 highest-known elevation of that aquifer.

14 JUDGE WILBER: That's what I'm interested in.

15 MR. MESERVE: And there is to be a clay gravel,
16 continuous clay gravel area that's unsaturated in that area,
17 so there will not be any capillary movement.

18 JUDGE WILBER: In the SFES, they speak of the E
19 stratum would be cut and filled to grade. This is in
20 preparation for the site. Isn't the E stratum the aquifer
21 as well?

22 MR. MESERVE: The E stratum is, I think it's a
23 large stratum, and the aquifer is within that and there is
24 an unsaturated zone. And when they say cut and filled to
25 grade, it's that over the years there have been ponds that

1 have been built into the site that go into the E stratum,
2 and it is in the design of the cell to have a continuous
3 clay, excuse me, continuous gravel layer underneath the cell
4 so that you have a capillary break.

5 JUDGE WILBER: But the base of the pile is sitting
6 in the E stratum. Is this correct?

7 MR. MESERVE: No. I think that there is, I can't
8 recall the details, but I believe that there is a soil layer
9 --

10 JUDGE WILBER: Something that you have, that, in
11 the process of construction, you've introduced?

12 MR. MESERVE: I believe that there is naturally
13 something above the E stratum on the site.

14 JUDGE WILBER: I don't get that from the drawings,
15 but I'm not sure. All right.

16 One other question is, who owns this property
17 after 100 or 200 years?

18 MR. MESERVE: There are UMTRICA provisions that, I
19 believe, allow, that require a transfer of the property to
20 the state, if they want it, subject to an NRC license, or to
21 the Federal Government. And that's a matter of statute, as
22 to how that is to proceed. And it would be the state's
23 option; it's not under our control.

24 [Discussion among Judges off the record.]

25 JUDGE WILBER: If I'm looking at this diagram

1 correctly, it looks like it's sitting down into the E
2 stratum. In fact, it looks like you've got pits, eight-foot
3 pits dug down into it. I'm wondering what the isolation
4 between the material and the stratum is. This is Page 3-6
5 of the SFES.

6 MR. MESERVE: Yes. And that same figure is behind
7 Tab 1.

8 If you look under the waste, which is way over at
9 the far left hand of the bottom of that figure, you will see
10 that there is a one-foot minimum capillary barrier, which is
11 the in-situ E stratum of gravel, and then a two-foot clay
12 liner.

13 JUDGE WILBER: The clay liner doesn't exist.

14 MR. MESERVE: No, the clay liner doesn't, that
15 will be placed. I stand corrected. It must be that they
16 had planned to take the soil off the site and to build from
17 the E stratum.

18 JUDGE WILBER: But from 2-R, you don't take any
19 credit for that. That's gone.

20 MR. MESERVE: No, the analysis includes that we're
21 not taking any credit for the clay liner, that's correct.

22 JUDGE WILBER: Okay. So we know that. Now,
23 what's stopping the --

24 MR. MESERVE: It's going to be there; it's just
25 that it's not --

1 JUDGE WILBER: But as far as Contention 2-R is
2 concerned, it is not going to be there. It's either there
3 or it isn't.

4 MR. MESERVE: It's there, but it's not to serve
5 the function that -- Contention 2-R assumed that the clay
6 liner was there to have an active leachate collection system
7 over the life of the cell -- and that is not its function.
8 It's there merely as something so that you can control water
9 while you're putting in place, putting the waste down. And
10 it's designed to have a permeability such that its
11 permeability is greater than that of the cover, so that the
12 water flow into the cell will be governed by the cover and
13 not by the liner.

14 JUDGE MOORE: In view of the fact that we have
15 kept you over your appointed time, and since this argument
16 is not for benefit but for ours in trying to wrestle with
17 all of this, I hope you will forgive all of the questions.

18 MR. MESERVE: I very much appreciate it.

19 JUDGE MOORE: It would probably be prudent to
20 break for lunch and then resume in an hour, or in an hour
21 and 15 minutes, or whatever. Do schedules permit that,
22 since we have run over? Is there a problem with that?

23 [No response.]

24 JUDGE MOORE: Then, because Bethesda is not
25 probably the best place to try to find something to eat, why

1 don't we resume at 2:00 o'clock.

2 Thank you very much.

3 [Whereupon, at 12:40 p.m., the hearing was
4 recessed for lunch, to reconvene the same day, Wednesday,
5 January 16, 1991, at 2:00 p.m.]

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AFTERNOON SESSION

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[2:00 p.m.]

JUDGE MOORE: Mr. Meserve, if you have anything further to wrap up with.

MR. MESERVE: Your Honor, I will try to be very brief. I know we very much appreciated the opportunity to answer your questions earlier.

JUDGE WILBER: Before you go on to your summary, I have a few more questions. The Licensing Board considered this an existing site and I guess you agreed with that. What's the basis for that?

MR. MESERVE: When the licensing -- the words "existing site" and the whole context of that issue really comes out of the legislative history and the Congress and the three different times that the Commission has had the opportunity to discuss how the UMTRCA criteria should be applied to existing sites and to new sites.

The context in which the issue has arisen is an existing site is one where a tailings pile is already present.

JUDGE WILBER: Let's stop right there. I thought it was premised on the fact that you were not going to move the pile.

MR. MESERVE: The pile might be reconfigured, but basically the notion of an existing site is they're going to

1 use a place where the tailings are.

2 JUDGE WILBER: In fact, I read from the Statement
3 of Considerations, the Commission in the 1980 publication,
4 it said it would not be possible, on the other hand, to line
5 the bottom of an existing tailings pile. Now, I just heard
6 this morning that you're putting in two or three liners
7 here. I can't remember the names of them all, but how does
8 that agree with the word "existing?"

9 MR. MESERVE: I think that there are various
10 contexts that the Commission was considering the word
11 "existing" and I think that what they were worried about and
12 what the Congress was worried about is that you have a pile
13 someplace, it's been established someplace, and the question
14 is how are you going to dispose of it. Obviously, if the
15 requirement is to establish a liner underneath it and you
16 have the materials all there and you're basically going to
17 change slopes and so forth, then that's enormously difficult
18 to lift the material up and slide a liner underneath it and
19 then drop it back down again.

20 But the context is also one of just the general
21 difficulties of taking a site which is one where the
22 materials are present and the incremental costs and risks
23 associated with moving it.

24 JUDGE WILBER: We shouldn't be worrying about
25 costs if it's an existing -- or if it's not an existing

1 site, should we?

2 MR. MESERVE: No. I believe the cost balancing
3 requirement is a uniform requirement. It isn't just towards
4 existing sites. The Commission has indicated on three
5 different occasions that it intends the criteria to be
6 applied differently to new and existing sites, but that is
7 related to, but does not necessarily limit the cost
8 balancing requirement.

9 JUDGE WILBER: And these costs are the
10 transportation costs?

11 MR. MESERVE: All the costs.

12 JUDGE WILBER: What are the major costs that we're
13 talking about?

14 MR. MESERVE: The SFES has a whole appendix which
15 talks about the entirety of the costs associated with the
16 stabilization process and certainly transportation costs,
17 when you come to moving materials, is a very, very
18 significant component of costs. The state has suggested and
19 has argued that none of the alternatives suggested by the
20 staff here are appropriate. They would like to have the
21 materials moved to Utah.

22 The transportation costs and the states' favored
23 alternative in their analysis was \$70 or \$80 million for the
24 West Chicago waste with a total cost of something on the
25 order of \$140 million, as it compared to the NRC's estimate

1 of about \$23 million for on-site disposal.

2 So transportation costs are a significant cost,
3 but in the context when they're using costs, I think they
4 mean the entirety of the costs.

5 There are only four matters which I would like to
6 cover and I will try to be brief. One, on the
7 jurisdictional point, I did want to call the Board's
8 attention to the Commission's decision on its action on
9 Kerr-McGee's rehearing request. There is some very
10 important language on the bottom of Page 2 that's found at
11 Tab 8 of the materials that I submitted earlier that I want
12 to bring to your attention.

13 The Commission said Kerr-McGee has given no reason
14 why the further hearing which must be held before Illinois
15 can impose its different standards must be held now, before
16 Illinois has even formulated a disposal plan detailed enough
17 to permit the Commission to determine in a hearing whether
18 the plan achieved the level of protection requirements.

19 I wanted to point that language out because it
20 relates to much of our discussion this morning. The
21 Commission clearly envisioned that on the state's side,
22 there would be a detailed disposal plan that the Commission
23 would then compare with its counterpart that would arise
24 under the NRC regulations. That is our argument on 274,
25 that we should complete -- there's a dispute among the

1 parties as to whether the plan that's approved by the
2 Licensing Board is one that complies with NRC requirements,
3 so that the benchmark for comparison is necessary for the
4 hearing that the Commission envisions, and we, therefore,
5 argue that this Appeal Board is a live controversy in a
6 matter within the Commission's retained jurisdiction, and
7 that's why this Board should proceed to resolve the matter.

8 JUDGE KOHL: Mr. Meserve, I'd just like to explore
9 the language that you just quoted there. Where does the
10 obligation of Illinois to formulate a disposal plan come
11 from? I thought it was the state's obligation to come up
12 with standards, but that the actual plan for disposal is
13 Kerr-McGee's responsibility.

14 MR. MESERVE: That's a matter of state law, I
15 presume, as to how the plan will be developed, but this is
16 the Commission's language, that it expects that there will
17 be an Illinois proposal --

18 JUDGE KOHL: I know, and I didn't understand it.

19 MR. MESERVE: I suspect that the state may have
20 some disagreements as to who has that obligation, but the
21 Commission has clearly envisioned the hearing. It
envisioned the hearing before the state action at which it's
going to make a comparison in order to have this apples-to-
apples comparison.

25 We submit that a detailed disposal plan is

1 envisioned, whoever creates it, on the state behalf and
2 there similarly should be a detailed disposal plan that
3 reflects the NRC requirements, and that is what this hearing
4 is about.

5 On the issue --

6 JUDGE MOORE: But it can't be an apples-to-apples
7 comparison if the state has the authority under their
8 statute to have more stringent requirements.

9 MR. MESERVE: They do have the right and the
10 comparison is whether there is an equivalent or more
11 stringent protection under the state standards. That's what
12 the NRC has to evaluate. The comparison then would have to
13 be with what the state would advocate as compared with what
14 the NRC would allow. And if the state plan were more
15 stringent in the sense of being more protective of public
16 health and the environment, then the state plan would be
17 acceptable.

18 But the hearing is to assess that very point.

19 JUDGE MOORE: So all the state has to do is say
20 ship it off-site and close the containers in which you ship
21 it, and you lose the SFES huge transportation exposures and
22 you've taken it off-site. Isn't that a fruitless
23 comparison?

24 MR. MESERVE: In fact, as I think I mentioned
25 earlier this morning, the transportation risk is wholly

1 apart from radiological.

2 JUDGE MOORE: But there's a rail spur right on-
3 site. So you ship it in 50 trains.

4 MR. MESERVE: Perhaps someone from the city can
5 speak about this, but I believe that that rail spur is going
6 to be vacated. You need arrangements in terms of being able
7 to get onto that rail spur and connections, interconnections
8 onto other railroads. The possibility of materials being
9 moved by rail to another site is by no means an obvious and
10 easy outcome.

11 These materials are not welcome in West Chicago
12 and I suspect wouldn't be welcome anywhere else. Basically
13 we're dealing with a not-in-my-backyard phenomena with this
14 material. The community that's had all the tax and economic
15 benefits from this facility over the years would rather have
16 the materials moved after they've received those benefits.

17 JUDGE WILBER: This hearing you mentioned, is that
18 a hearing before the Commission or is that a hearing before
19 the state?

20 MR. MESERVE: The hearing that is envisioned under
21 274(o) is one that the Commission is obligated to have.
22 Now, whether the Commission would refer the matter to a
23 Licensing Board, I'm not sure. It's a Commission
24 requirement that there be this site-specific hearing and
25 that's what these decisions, there were incidents and the

1 transfer hold.

2 We've had a lot of discussion about erosion this
3 morning and it's just only one small point that I want to
4 make that I hope hasn't gotten lost in all of the
5 conversation. We've had a lot of claims about the intrusion
6 barrier, but the real point here is that nothing has
7 changed. Kerr-McGee in 1986 proposed a cell that would have
8 an intrusion barrier of two-feet thick with clay and cobble
9 and had not specified the size.

10 JUDGE WILBER: But they weren't allowed to
11 litigate that, were they, because the Board dismissed it,
12 saying that's not a -- what's the magic word there?

13 MR. MESERVE: The genuine issue of material fact.
14 In fact, there is no contention submitted in this proceeding
15 that makes any mention of the word "PMP."

16 JUDGE WILBER: I'm sorry. Not PMP. The human
17 intrusion thing.

18 MR. MESERVE: I'm going to come to that in a
19 moment. I just wanted to make the point on erosion. I want
20 to deal specifically with intrusion in a moment. But with
21 the point about whether there's -- I think there's been a
22 sense that perhaps there's been some radical and earth-
23 shattering change in the Kerr-McGee plan. In fact, exactly
24 the intrusion barrier that we have contemplated for this
25 cell all along is still going to be there. We had not

1 specified the details as to its size of the cobbles. We
2 have now done so at the staff's request.

3 We have demonstrated in so doing that the cell
4 will not only satisfy erosion of the type that is likely to
5 occur in West Chicago, but also will satisfy erosion that's
6 highly unlikely to occur and has two layers of protection;
7 vegetative layer and an intrusion barrier.

8 There's been no significant change in the design.
9 There's been no change in the health and environmental
10 impacts of the design. In fact, the further work and the
11 further specification has only proved to show that the
12 Licensing Board underestimated the protections that are
13 provided by the cell.

14 JUDGE MOORE: Mr. Meserve, you say that the PMP is
15 highly unlikely. Is that a factual matter on which there is
16 something in the record? In your brief, you quote the
17 Licensing Board and that's in a motion for reconsideration,
18 and when you go back to the Licensing Board's memorandum and
19 order, there's no basis for that statement cited.

20 MR. MESERVE: I believe that there is in the --
21 there's a discussion of PMP. I'm trying to think of places
22 in the record where you could find it. There is a
23 discussion of PMP in the submittal to the Board, Kerr-
24 McGee's submittal of July 23 which I think was transferred
25 to you in late July. The early sections of that submission

1 discuss what a PMP is and what it is basically is the
2 hydrologically most extreme rainfall that could ever occur
3 in this area, based on the atmospheres, worst case on worst
4 case on modeling.

5 As such, it has low recurrence frequency and if
6 one wanted to see the likelihood of -- I mean, if some sort
7 of curve that exists, and I believe there is such a curve
8 that is reproduced in the record and perhaps in that
9 document, that shows that one gets asymptotically close to a
10 PMP on the order of 100,000 years or something like that.

11 So it's a highly, highly unlikely event. And this
12 is not, as I mentioned earlier, not a requirement that is
13 one that's imposed by the Board's regulations and the
14 Commission's regulations.

15 Let me turn very briefly to the issue of human
16 intrusion. There was a city and state claim that the cell
17 is vulnerable to intrusion and the Licensing Board rejected
18 the claim. Basically, they were confronted with an
19 assertion by the state that there would be human intrusion
20 and it was premised on much the same basis that was argued
21 here; that there was evidence to show that people
22 occasionally came on to the facility.

23 JUDGE MOORE: And the affidavit of an admitted
24 expert that, in his opinion -- an expert on tailing piles --
25 there would be human intrusion. It would be because of the

1 proximity to the population center, the way it looks over a
2 1,000 years. I believe he testified it was a virtual
3 certainty that there would be the human intrusion.

4 MR. MESERVE: The Board looked at that and as to
5 the -- I think it's very important to understand the
6 criterion we're dealing with here. We're dealing with
7 criterion six, the issue in which this human intrusion
8 arises, which has to do with preserving the radiological
9 integrity of the cell.

10 Now, the fact that --

11 JUDGE KOHL: Isn't criterion twelve also
12 implicated? I thought that was Illinois' argument.

13 MR. MESERVE: There was an argument that they
14 subsequently made on criterion twelve which has to do with
15 active maintenance. The Board did discuss the fact and
16 said, look, if we have somebody that actually starts digging
17 into this cell, then this is the kind of activity that does
18 not -- repair of such activity does not constitute active
19 maintenance and that it is not something that's ongoing or
20 active. It's the kind of thing like re-vegetation,
21 repairing, incidental repair, which they saw without serious
22 or strenuous objection as being within what was contemplated
23 by those words. We talked a little bit about this this
24 morning.

25 I'd like to deal, though, with the fact that this

1 fact that -- the statement that people have occasionally
2 gone into the cell or gone onto the site doesn't deal with
3 the likelihood or the -- it doesn't reflect anything about
4 whether somebody is actually going to go onto the site and
5 then burrow somehow so that the radiological integrity of
6 the cell would be compromised.

7 Remember, we're dealing with a cell which, on its
8 top, has an eight-foot thick cover with two feet down of
9 two-foot layer of boulders. If somebody is going down in
10 the cover, he's going to be very serious about it. He's got
11 to be going down eight feet to get to the radiological
12 materials. If he comes in the easier way, which is on the
13 side, then you're going through the berms. There are berms
14 that will be placed on the side and the cover goes down
15 along side of them. So you're talking about a shaft to get
16 to the radiological materials which is far greater than
17 eight feet.

18 JUDGE MOORE: But I understood the cell was like
19 an umbrella, that it keeps water out by allowing water to
20 come in and then draining it off before it ever reaches the
21 tailings.

22 MR. MESERVE: That's correct.

23 JUDGE MOORE: All right. Now, if that drain
24 system is interfered with by intruding, you don't have to go
25 through all eight feet to interfere with the drain system.

1 Water then can enter the cell. It's designed so that it
2 will be quickly percolated through, I guess. Then aren't
3 you into a groundwater problem? So human intrusion seems to
4 have -- at least I thought that was behind a great number of
5 their contentions, one of the concerns; that because of this
6 rather unique -- I believe it's a unique design, that you'd
7 hardly have to reach the tailings for there to be a
8 radiological hazard or the potential for a radiological
9 hazard.

10 MR. MESERVE: Let me respond to the specific issue
11 that you've raised. There is -- you're quite correct that
12 part of the functioning of the cover is basically a gravel
13 layer which is above the clay. So one could get to that
14 layer if one were to -- from the top of the cell to dig down
15 five feet rather than eight and burrow into the cell there.

16 But, in fact, Kerr-McGee did an analysis of the
17 specific issue you've raised which has to do with the
18 impacts on groundwater. The Licensing Board held, after a
19 hearing, with an opportunity to hear the testimony, the
20 state's witnesses, and I'm reading from Tab 13 at Page 174
21 of the Commission's decision, "Kerr-McGee's analysis showed
22 that the prediction of small impacts to groundwater is not
23 dependent on the effectiveness of the cell cover in limiting
24 infiltration."

25 In fact, we performed an analysis in which we

1 assumed that there was greater infiltration than is natural
2 in that area. It's a highly improbable event. The Board
3 found, in its discussion elsewhere in its opinion, about the
4 fact even with that assumption, the extravagant assumption
5 that the cell cover doesn't exist for purposes of
6 infiltration, that the groundwater standards at the site
7 still would not be compromised.

8 That's not implausible because these are -- these
9 tailings materials are materials which have been hit with
10 acid, been hit with caustic, they've been hit with a whole
11 grinding steps in order to extract materials from them.
12 What you're left with is a very refractory material which is
13 highly insoluble. It's very difficult to get something to
14 dissolve out of it and it's going to be neutralized, which
15 is going to further enhance the insolubility of the
16 materials.

17 So we're dealing with a situation where the
18 groundwater threat that you've postulated is one that, in
19 fact, has been examined and has been -- and the Licensing
20 Board concluded, after hearing on the matter, that the
21 threat that you suggested just doesn't exist. This is an
22 issue in which -- although this is the matter on which we
23 had a hearing. This is not an issue that the state has
24 advanced on the appeal, if they have any question about this
25 matter.

1 Let me turn very quickly -- I know that I'm trying
2 your patience, I suspect -- to the final issue that I wanted
3 to mention, which has to do with something that Mr.
4 Karaganis talked about, which had to do with the dose
5 calculations at the site.

6 The Board, in fact, I think in two of its orders,
7 has raised a question about the SFES and, in particular,
8 Table 5.11, which I believe I have set out as Tab 15, which
9 has to do with the dose to the maximally exposed individual.
10 That table does set out the doses as to maximally exposed
11 individual and also sets out organ doses.

12 As you'll note by the captions that the dose to
13 the -- total dose is set out as total effective dose
14 equivalent and the SFES elsewhere indicates that that is a
15 committed dose. The organ dose, as the caption indicates,
16 are set out as annual dose equivalents, and that is because
17 that is the statutory -- that is the regulatory language
18 that EPA has established.

19 Now, this is an issue that's outside any
20 contention in the case.

21 JUDGE MOORE: But it was decided by the Licensing
22 Board.

23 MR. MESERVE: The Licensing Board said it steps --
24 that the state steps outside its contention and then they
25 went on to --

1 JUDGE MOORE: And decided the issue.

2 MR. MESERVE: I think a lawyer might view that as
3 an alternative holding and that either one would be
4 sufficient to sustain the Licensing Board.

5 JUDGE MOORE: The case law of the Commission, when
6 the -- we are charged with reviewing all findings that the
7 Licensing Board makes, whether or not they're raised on
8 appeal. So it made a finding that there is no problem here.
9 Now, is that finding correct?

10 MR. MESERVE: That finding is correct and I think
11 that one would want to look at the history as the evolution
12 of this claim. The argument about annual dose equivalent
13 and that it was an error was, in fact, something that was
14 submitted with a second or third affidavit by Mr. Bernhardt,
15 who has also appeared here as one of the EPA consultants.
16 That argument that that was not a committed dose equivalent,
17 I believe, was submitted on a motion for reconsideration
18 that was filed after all the briefing in these cases.

19 The specific issue that is sought to be advanced
20 here today is one that's not only outside the contention, it
21 wasn't even raised in the opposition to our motion for
22 summary disposition. It's just a late developing claim by
23 the state of error.

24 But I think it's important to recognize that that
25 issue really doesn't bear on what is before you. This is a

1 dose during construction activities. Organ doses are
2 roughly the same, certainly the same order of magnitude for
3 all the alternatives. If you do anything at that site,
4 you're going to kick up some dust and if you don't have
5 adequate control measures, there are going to be people
6 impacted.

7 The only way to avoid this is to not stabilize.
8 So the issue that this somehow turns on whether the site
9 should be stabilized, the material should be stabilized on-
10 site or not is incorrect. This organ dose calculation shows
11 -- the table they're challenging shows that they were all
12 roughly equivalent from one alternative to the next and it's
13 because it arises during construction. No matter what
14 you're doing, you're going to have to dig up in West
15 Chicago.

16 JUDGE KOHL: So if you were to pack the stuff up
17 and put it on a truck or a train and move it out west, you
18 would still have the same.

19 MR. MESERVE: That's correct, because this is the
20 dose to the maximally exposed individual who happens to be
21 in the vicinity of the site.

22 JUDGE MOORE: But what it impacts is whether your
23 mitigation, essentially dust mitigation measures are
24 adequate.

25 MR. MESERVE: And you will recall that the

1 Licensing Board did require as a license condition that we
2 impose -- there was a specific issue relating to this --
3 that there be mitigation and that be supervised by the staff
4 to make sure that it was adequate mitigation.

5 JUDGE MOORE: And, once again, no opportunity for
6 any challenge to what those would be or whether they'd be
7 adequate.

8 MR. MESERVE: Your Honor, one can say adequate the
9 way any litigant, after he's lost the case, could say, oh,
10 gee, I could have thought of ten other issues that I wish I
11 had litigated, and if I had only been able to bring them to
12 the floor, the result might have been different. That's
13 what we're dealing with here.

14 It wasn't in the contention. It wasn't raised
15 until the very last minute and, in fact, they're wrong
16 anyway. The EPA language for what this organ dose
17 calculation, and the language is set out in the next tab,
18 states that these calculations are to be in terms of annual
19 dose equivalent. They calculate it exactly as they
20 understood the regulatory language --

21 JUDGE MOORE: Is that a term of art?

22 MR. MESERVE: Dose equivalent is a term of art.

23 JUDGE MOORE: But annual dose equivalent is not.

24 MR. MESERVE: The annual -- I think that the logic
25 that was followed is that committed dose equivalent is a

1 term of art.

2 JUDGE MOORE: And a 50-year committed dose --

3 MR. MESERVE: And it's usually a 50-year committed
4 dose to deal with effects of retainment of radionuclides.
5 The annual dose equivalent, it's plausible to believe, is
6 something different and it's intended to be something
7 different than a committed dose, and, in fact, if you look
8 at the EPA affidavits that have been submitted in this
9 hearing, they agree that annual dose equivalent can be
10 something different from a committed dose; that there have
11 been the Benetti, I believe, affidavits that were submitted
12 that are not properly in the record, of course, but those
13 affidavits say that, well, you can calculate this by doing
14 it as a committed dose, a 50-year committed dose, in which
15 we assume all the dose over 50 years is in the year in which
16 it's incurred, or you can sort of do an elaborate accounting
17 procedure and in each year look at the effects in that year
18 and from the prior years --

19 JUDGE MOORE: Which is the standard way, under the
20 Bier reports, it's been done for years, right?

21 MR. MESERVE: I'm not sure what the --

22 JUDGE MOORE: And absent doing that, you just use
23 the 50-year committed dose, if you can't make the elaborate
24 calculation.

25 MR. MESERVE: But it's interesting that this still

1 isn't a material issue because there never has been any
2 showing by any client for the state or the city to suggest
3 that the calculation was done differently, that there would
4 be an exceedance.

5 JUDGE MOORE: In the draft supplemental
6 environmental impact statement, when a 50-year committed
7 dose was used, you got above 40 millirem exposure levels
8 that clearly exceeded the EPA regulations. So the how as to
9 how the calculation is done is highly relevant.

10 MR. MESERVE: I believe that was a committed dose
11 and, of course, that first -- I think the first FES was done
12 before the EPA regulations were promulgated, which said do
13 this in terms of an annual dose, and that's what I think --

14 JUDGE MOORE: And that was done as a 50-year
15 committed dose. The EPA regulation may well be in the --
16 since they don't use a word of art, they're now seemingly
17 saying it's their regulation, that they mean a 50-year
18 committed dose.

19 MR. MESERVE: But they haven't said that.

20 JUDGE MOORE: Or if you don't do this elaborate
21 calculation.

22 MR. MESERVE: It's very puzzling to me and
23 incredible that you look at, in fact, the various EPA
24 submissions, that, in fact, the manner in which this
25 calculation is to be performed differs from one statement to

1 the other. Now, we only have two EPA statements on this
2 point that I'm aware of in this proceeding.

3 If one compares them, they're different. One says
4 we'll do it from 1983, look at the doses from 1983. The
5 other one says, no, we'll do it from the time that the
6 facility opened. Now, if this was something that was so
7 obvious to that regulatory agency as an error, one would
8 have expected that there be someplace an articulation of the
9 accounting procedure that's supposed to be done or an
10 explanation someplace that this is the procedure to follow.

11 It isn't until this litigation evidently that
12 they've taken a stand and they don't even take a consistent
13 stand. I believe the NRC staff was correct in what they
14 did. There's an affidavit that this is the way they've
15 handled these matters and there is a further analysis that
16 we have done that's been submitted by Dr. Chambers that is
17 outside the record and I believe you should take all of this
18 material and exclude it. But if you include their
19 materials, you should look at the second Chambers affidavit
20 which says if he looks at it as a committed dose, if he
21 looks at the annual dose, assuming all of the releases were
22 in a single year, it would be under the limit for the organ
23 dose. There's nothing to rebut that.

24 So on the dose issue, I believe that that doesn't
25 bear on the principal issue --

1 JUDGE MOORE: But doesn't the NRC's affidavit by
2 Swift say that it would exceed it?

3 MR. MESERVE: No. Dr. Swift says that if you were
4 to do it as a committed 50-year dose, it would exceed it.
5 Chambers used the annual -- basically the annual
6 alternative, in that you look at each year and see what the
7 impact of each year is. He squeezes it all into one year
8 and says let's see what the impact is in year one and there
9 would be impacts in year two which would be less than those
10 in year one, and he's under the 25 millirem.

11 We submit that this is not an issue that's
12 properly before you in any event, but it certainly is not a
13 genuine issue of material fact and the Licensing Board is
14 correct. We just merely state in conclusion that we would
15 urge you to retain jurisdiction. If not, you should retain
16 the vitality of the Licensing Board's decisions and not
17 vacate them. You should deny the motion to terminate, deny
18 the motion to open, and confirm the Licensing Board's
19 decisions.

20 Thank you.

21 JUDGE MOORE: One last question. If you do give
22 precedence to design features over site features, and I
23 believe there can really be no argument that we have a cell
24 -- your proposed cell does rely on design to overcome siting
25 features, what might be viewed as siting problems,

1 deficiencies, why then isn't the argument of the state
2 and/or West Chicago that because of the long-term nature and
3 the Commission's essential premise that designs fail, why
4 don't you have to take into account the consequences among
5 alternatives of a failure of your design features?

6 MR. MESERVE: Well, that's an argument that the
7 state has made, that you're supposed to do some sort of a
8 worst case analysis. This was not a contention, was not an
9 issue that has ever been raised in the contention. It
10 appeared only in the briefs before this Board.

11 I'm not aware of any foundation in the words of
12 the Commission's criteria or in the statute that suggests
13 that there should be anything like a worst case analysis.

14 JUDGE MOORE: I understand that, but the words of
15 the regulation suggests; indeed expressly state that siting
16 takes precedence over design features because design
17 features fail. So if we're not going to pay attention to
18 the -- that's the gist of what we have, that while isolation
19 of tailings will be a function of both site and engineering
20 design, overriding consideration must be given to siting
21 features given the long-term nature of the tailing hazards.

22 And if you read the statement of considerations,
23 they say that over a 1,000 years, things fail. If we're not
24 going to read that literally or take it to mean what it says
25 on its face, and so that design becomes very important over

1 siting, why then doesn't it just make -- isn't it common
2 sense that we want to look in our comparison of alternatives
3 as to what happens if our design does fail because of the
4 long-term nature of the tailings hazards?

5 MR. MESERVE: I don't believe that, in fact, one
6 does fairly look at the entirety of the criterion. All the
7 Commission has said over the years is that the Licensing
8 Board applied the criterion in any fashion inconsistent with
9 either literal words, statute, or the Commission's
10 statements as to what this criterion means.

11 The remoteness from other populated areas is the
12 first factor. We discussed that this morning. It's not a
13 remote area. There are other sites that are in the middle
14 of the cities. The Cannonsburg site is an example of a
15 site, for example, which is not remote and which was under -
16 - you gave the example of the Vitro site. Well, here's
17 another example. We're a tailings disposal site in a
18 situation which is very similar to -- West Chicago is one
19 that was allowed.

20 You deal with the hydrologic and natural
21 conditions and what that deals with is -- we had a hearing
22 on that issue. We have a situation in which this site, in
23 fact, is -- this location is favorable from a hydrologic
24 point of view. The drinking water is in the slurry and
25 aquifer. There were two clay layers that naturally exist,

1 that prevent anything from the site getting down into a
2 usable aquifer.

3 There was an extensive hearing on that issue, on
4 the impacts of the groundwater circumstances of the site
5 with, as I have mentioned to you, the Board's concluding
6 that there will be minimal effects and, in fact, they looked
7 at a worst case analysis. They assumed the cover just
8 wasn't there.

9 On the issue of minimizing erosion and so forth,
10 admittedly this is a cell which is above grade and,
11 therefore, there might be some erosion. We performed
12 calculations to suggest that there is -- even an incredible
13 storm would not erode it.

14 JUDGE MOORE: But you're telling me you're relying
15 on design.

16 MR. MESERVE: On design and --

17 JUDGE MOORE: Over siting.

18 MR. MESERVE: I don't see how one on that issue of
19 erosion is an example.

20 JUDGE MOORE: Okay.

21 MR. MESERVE: It is hard to understand how the
22 Commission's extensive criteria about how to design above-
23 grade cells could suggest that one can't do it. There's a
24 whole series of criteria that specifically deal with how you
25 design an above-grade cell. They specify slopes. Now,

1 admittedly this cell is above grade, but they read criterion
2 one to say, okay, you can't put it in West Chicago because
3 it's going to be above grade and be eroded.

4 It means that you not only have to look -- avoid
5 all the rest of the language in this criterion, but all the
6 specific criteria that set out -- the Commission has set out
7 as to how to do it, how to design an above-grade cell.

8 I don't think that you can fasten or you should
9 fasten on one phrase in the criterion and avoid the
10 extensive history that's gone into the entirety of the
11 criteria, which I suggest that no such narrow confined
12 reading is appropriate.

13 JUDGE KOHL: So the existence of all those
14 detailed criteria must be taken to mean that in the
15 Commission's view there is nothing inherently wrong about
16 such an above-grade cell.

17 MR. MESERVE: I don't think there's any other --

18 JUDGE KOHL: Would that summarize your argument?

19 MR. MESERVE: Yes. I don't think there's any
20 other way to read it. They've specifically allowed an
21 above-grade cell and have gone on to explain how the slopes
22 and the covers and so forth should look like. To read it
23 any other way is to cut out a major segment of the criteria,
24 which is hardly what the Commission could have meant.

25 Thank you very much.

1 MS. HODGDON: The argument the staff has prepared
2 mostly dealt with the motion to vacate and to terminate and
3 vacate is moot. That is in the staff's brief. In the
4 interest of saving time, I could just move to addressing the
5 arguments that have been made before and just touch a few
6 points in summary on that.

7 JUDGE WILBER: Excuse me. Could you get closer to
8 the mike, please? Thank you.

9 MS. HODGDON: I'm sorry. I think these people are
10 taller than I. Is that better?

11 JUDGE KOHL: I think you can move the podium up
12 and down. The whole thing goes up and down.

13 MS. HODGDON: Can you hear me now? I'll start
14 again in case you missed something I said. I said that I
15 was prepared to address in the first instance the motion to
16 vacate as moot -- to terminate as moot and to vacate the
17 decision based on the Commission's action on October 17,
18 1990.

19 However, I think I will address some of the points
20 made in the argument that's gone before and save that as a
21 summary, with the Board's permission.

22 JUDGE KOHL: I'm most interested in hearing about
23 the staff's change of position and what effect that has on
24 this. Why should we bother to review a record and a
25 Licensing Board decision that's based on the positions of

1 the NRC staff that have subsequently been recanted?

2 MS. HODGDON: I don't believe that the staff has
3 recanted.

4 JUDGE KOHL: You do have a different position on
5 active maintenance, is that correct?

6 MS. HODGDON: I was just going to try to
7 characterize what the staff might have done, because I did
8 want to address -- you said recanted and Judge Moore said
9 flip-flopped, and I think that one of the Intervenors
10 those terms.

11 JUDGE KOHL: What term would you use?

12 MS. HODGDON: I don't believe it's proper to
13 describe what the -- I think --

14 JUDGE KOHL: What does the staff call what it s
15 done?

16 MS. HODGDON: I think the staff's technical view
17 is that it was a very minor modification.

18 JUDGE KOHL: But you also required -- so you mean
19 you require license amendments now for minor changes? Isn't
20 that in and of itself a dramatic change in traditional NRC
21 staff views?

22 MS. HODGDON: I think it probably is, but I think
23 that notwithstanding the fact that that is a dramatic change
24 from traditional staff views and practices or traditional
25 NRC views and practices, notwithstanding that, we could have

1 dealt with it had we not had this other event; that is, the
2 Commission's transfer of jurisdiction to Illinois. It's the
3 two things that make for a problem that seems in many ways
4 to be difficult, perhaps insuperable, but certainly
5 difficult.

6 So I'm happy to address the staff's change of
7 position --

8 JUDGE MOORE: What is your answer to Mr. Meserve's
9 argument on our jurisdiction? I take it from your brief
10 that our jurisdiction is terminated upon the execution of or
11 at least the effective date of the transfer agreement.

12 MS. HODGDON: The staff's view is that the best
13 view of this matter is that this Board's jurisdiction is
14 terminated because the Commission itself lacks jurisdiction
15 and, therefore, cannot delegate to the Appeal Board
16 jurisdiction over this matter, which is passed to Illinois,
17 and if that happened on November 1.

18 The staff's further view is that this is the
19 better view and, of course, we don't have any guidance that
20 you don't have. I mean, we've looked at everything we can
21 find on this matter and there simply isn't any precedent in
22 Agreement State transfers before.

23 The Sheffield case is cited by the city and state
24 as precedent. Of course, that's not precedent. That case
25 was clearly distinguishable and that was an enforcement

1 action that was immediately effective. It had already had
2 the effect that the staff wanted it to have, which is to
3 make U.S. Ecology go back and take care of the site.

4 At the time of the transfer, the staff withdrew
5 the order. It was truly moot as opposed to this one, which
6 is moot only in the sense that there's no jurisdiction.

7 Trying to get back then to what the staff did --

8 JUDGE MOORE: How do you leave the license extant,
9 even though it's clearly not a final Commission judgment
10 because it's unreviewed?

11 MS. HODGDON: That's right.

12 JUDGE MOORE: So it's a preliminary view, even
13 though it's allowed to become immediately effective, because
14 it wasn't stayed, although it's practically been stayed not
15 by us, but by, as we understand it, activities in other
16 parts of the world. But will this -- what use is it to
17 leave the license outstanding then if jurisdiction has been
18 transferred and there's -- you have an unreviewed non-final
19 decision on the part of the Licensing Board, why shouldn't
20 it just be vacated so that it now, with the transfer of
21 jurisdiction, Illinois cannot rely on any judgments of this
22 agency.

23 MS. HODGDON: Well, I heard a number of questions
24 there and I'll try to answer them all, and also to get back
25 to the outstanding question to see if I can get that all in

1 the same paragraph.

2 I think, and I'm not entirely sure about this, but
3 since the Commission has not given any guidance on what the
4 Appeal Board is to do with regard to this, except that
5 apparently it's to do something, it would seem to me that
6 what the Commission had in mind was that things transfer to
7 Illinois in the state that they're in. And Illinois has a
8 procedure for this appeal. Illinois was asked whether they
9 had an administrative procedure act and they said, yes, they
10 did.

11 So it seems to me that --

12 JUDGE MOORE: That doesn't translate, does it, to
13 the conclusion that they have a procedure for this appeal?

14 MS. HODGDON: Well, I don't know that they have to
15 have a parallel procedure or something that's comparable.

16 JUDGE KOHL: Didn't we already reject that
17 argument, though, in Sheffield? There's a statement in the
18 footnote in Sheffield that says it's not to be inferred by
19 the Commission's agreement to transfer jurisdiction
20 generally that we were giving the state of Illinois the
21 authority to affirm, reverse or modify a preliminary ruling
22 of an NRC adjudicatory board. I'm paraphrasing, but there
23 was language to that effect.

24 MS. HODGDON: It was dictum in Sheffield because,
25 in fact, you vacated the Licensing Board decision at the

1 staff's request and the reason for that --

2 JUDGE KOHL: Why is that statement dicta? I don't
3 understand why.

4 MS. HODGDON: Because it wasn't an issue in
5 Sheffield.

6 JUDGE KOHL: Sure it was. It was the argument
7 made by the state of Illinois in that case. The footnote
8 began something like we find no merit or we reject --
9 lacking in merit -- Illinois' argument --

10 MS. HODGDON: Yes.

11 JUDGE KOHL: That we should just -- the point that
12 you just expressed, that you pick up this proceeding and
13 move it over to Illinois and they can take up where we left
14 off. Isn't that what you just suggested?

15 MS. HODGDON: Excuse me. I misunderstood you, and
16 I do know the footnote you're talking about in Sheffield.
17 That's where you're addressing the point that Illinois made.
18 Illinois said you don't have the jurisdiction to vacate this
19 decision. You've got to leave it the way it is.

20 JUDGE MOORE: Because they wanted it.

21 MS. HODGDON: I don't agree with that. I think
22 you have the jurisdiction to vacate this decision. I think
23 that you have the -- it's a discretionary matter what you're
24 going to do with this decision to a certain -- well, it
25 could be interpreted that way. I'm possibly offering two

1 views that are not exactly compatible, but one is the
2 position argued in the brief that you have the discretion to
3 either leave this decision standing or to vacate it. That's
4 clear from -- with regard to the other decisions.

5 The Kerr-McGee on the occasion when Illinois
6 became an Agreement State and the Sheffield, that was clear
7 there.

8 JUDGE KOHL: You mean Kress Creek.

9 MS. HODGDON: Kress Creek. Did I say something --

10 JUDGE KOHL: Yes.

11 MS. HODGDON: The other case. What went to
12 Illinois last time as opposed to what's going to Illinois
13 now. It was clear that in those decisions it was a matter
14 of discretion with what you might do with those things given
15 what they were, which is not this business. This is a
16 licensing case. It's also clear that the Commission
17 contemplated that licenses would transfer, because that's in
18 the policy statement.

19 What would happen to the licenses if the decision
20 underlying them is vacated, I don't really.

21 JUDGE KOHL: That's patently clear, isn't it? If
22 you have a license that is authorized by the Licensing
23 Board's initial decision and for some reason that supporting
24 decision is vacated, reversed or in some respect vitiated,
25 that license must fall, does it not? How can you have an

1 outstanding license if there's no support for it?

2 MS. HODGDON: That's true. That would be the case
3 if it were here, which it is not. But the cases that are
4 relied on for that proposition are cases in which the
5 licensee came in and asked to have the decision vacated
6 based on the fact that he had decided not to build the plant
7 or something. I mean, it depends on who the players are and
8 what role they're playing with regard to that analysis.

9 JUDGE MOORE: But you already conceded that this
10 was not a final Commission action and if we retain
11 jurisdiction and reversed, the license would then not
12 survive that reversal because the authorization would have
13 been withdrawn.

14 In that scenario, there is no license.

15 MS. HODGDON: That's right.

16 JUDGE MOORE: Why should that scenario change when
17 the license can't be reviewed because of a lack of
18 jurisdiction? You may well be passing on defective goods.

19 MS. HODGDON: There are other ways that you could
20 do that apart from this decision, as well. I don't know
21 that we --

22 JUDGE MOORE: How?

23 MS. HODGDON: -- have any guarantee that we're not
24 passing on defective goods in any event, but my point is --

25 JUDGE MOORE: But a point of appellate review is

1 to certainly minimize that possibility and at least some of
2 us would proffer the view that that becomes a minimally
3 likely if it gets reviewed.

4 MS. HODGDON: I'll try to make these things
5 simpler and put them all in categories then. In one
6 scenario, you take review. You have appellate review. You
7 do whatever you will with the Licensing Board license,
8 authorization. You uphold it, you reverse it, you remand
9 it, you do whatever you want to do. That's one thing. You
10 have appellate review.

11 The other scenario is you don't because
12 jurisdiction is passed to Illinois. In that case, you can't
13 visit the merits of a Licensing Board's decision, but you
14 can look at the equity of whether the decision stands or not
15 without regard to its merits. That's what I think we were
16 talking about when we were talking about the exceptions to
17 the Munsingware rules. That is the staff's position
18 regarding where this is.

19 It's this or it's that or it's the other thing.
20 It's not some mixture of them, because when you get into
21 some mixture of them --

22 JUDGE MOORE: If you look at the equity, where
23 does the staff come down?

24 MS. HODGDON: When you look at the equity, the
25 staff comes down on the licensing authorization should not

1 be vacated because of the exception to the Munsingware
2 rules, which is where the party, I think Mr. Karaganis said,
3 was culpable, and I don't think that that's what the rules
4 say. It's not the culpable party that sought to make the
5 decision moot, but it's the party that's guilty of having
6 lost the case.

7 That party comes in and says that he'd rather --
8 he settled the case or he did something else, but he wants
9 the decision vacated, the answer is too bad, you elected
10 another relief, and that's what they've done here. They've
11 --

12 JUDGE MOORE: But who controlled that? You as
13 staff could have certainly had a hand in it and certainly
14 the Commission had a big hand in it. They could have either
15 granted it months and months before they did or not granted
16 it for months and months later.

17 MS. HODGDON: Well, I'm not prepared to agree with
18 you about that, about the Commission's timing of this
19 matter. I believe that the Atomic Energy Act, 274, requires
20 that the Commission -- it says they must, I believe, shall,
21 shall is the word, shall surrender jurisdiction over
22 whatever it is that the state has applied for Agreement
23 State authority over. Apparently that means at such time as
24 they find that the conditions are met and that is what the
25 Commission did.

1 I think the thing that might have been hanging it
2 up was that Illinois -- was Kerr-McGee's request for a
3 hearing and once they determined that the hearing could take
4 place after the transfer and didn't have to take place
5 before, they transferred jurisdiction on October 17. I
6 would agree that it wasn't very good timing, but I think it
7 took place without regard to what's going on here, and this
8 is on a different track.

9 I wanted to finish my thought. The reason I think
10 that ordinarily the things just go in whatever state they're
11 in, unless there's some policy to the contrary, is that 274
12 also contemplates the Commission taking them back. So if
13 this decision went in the state it's in, if it ever came
14 back here -- I mean, the whole action that the 11(e)(2)
15 byproduct material, we would take it up wherever it was.

16 So that's another reason I don't think that this
17 Board can revisit this or actually visit it for the first
18 time, but can visit this after it's passed -- jurisdiction
19 of it is passed to Illinois.

20 JUDGE KOHL: Why don't you go back to what you
21 were talking about.

22 MS. HODGDON: I started -- I was going to connect
23 this up. I started with answering the question about what
24 the staff did while this was on appeal. I also started to
25 comment on a remark that Judge Moore made to somebody else

1 context of that or that dealt with this matter. He
2 s. the staff flip-flopped and that they did it
3 after the Licensing Board issued its decision.
4 I beg to disagree with both those
5 characterizations. What precipitated the staff's action,
6 which, to a certain extent, has disturbed this appeal or, in
7 fact -- well, that might not be the right word -- disturbed
8 this appeal, perturbed this appeal -- is that the EPA's
9 amicus brief, when the staff read EPA's -- that's a term of
10 art also -- the staff -- the staff read EPA's amicus brief
11 and decided that Mr. Bernero, Director of NMSS, as he says
12 in his affidavit, directed the staff to look at it and see
13 if it had any merit, their claim that the PMP event should
14 have been considered and protected against.

15 The staff did look at it and as the various
16 affidavits attest, they found that although they thought the
17 cell was very well designed and probably did protect against
18 this event, you couldn't really say so unless you followed
19 the staff guidance that became draft-final in May of 1990,
20 after the decision regarding how to do -- to assess the PMP
21 event and to design a cell that would protect against it.

22 So that's what happened and that's what we said in
23 our brief and at the same time we appreciated that people --
24 that parties should have an opportunity to respond to that,
25 and then Illinois and the city came in with motions to

1 vacate based on the staff's brief or to reopen to consider -
2 - and they never said what to consider, nor did they ever
3 say just exactly what contention -- the decision on what
4 contentions was implicated in this and what they would do
5 about it.

6 I mean, their papers were --

7 JUDGE KOHL: We know what the staff would do about
8 it. The staff is requiring a new license amendment, right?
9 That's in your brief.

10 MS. HODGDO. The staff seemed to suggest -- yes.
11 The staff stated that a license amendment was required. No,
12 no. We didn't seem to suggest -- that's a fact. They
13 stated right out you need a license amendment to put in this
14 cobble size just to be sure.

15 That might have been in excess of caution because
16 Kerr-McGee had already committed to do this and this is the
17 kind of thing that except for the licensing and the hearing
18 context, NMSS would have done anyway. It's not really part
19 of the preliminary application documents, the cobble size.
20 But NMSS thought that because this was in the hearing
21 context and before the Appeal Board that it was proper to
22 let everybody know what was going on here and --

23 JUDGE MOORE: My statement about the staff's flip-
24 flop was directly related to your position on active
25 maintenance and the definition of active maintenance. The

1 staff, before the Licensing Board, in spite of the language
2 of Part 61 that says explicitly that it is not applicable to
3 thorium mill tailings in excess of 10,000 kilograms, as I
4 understood it, supported that definition of active
5 maintenance and now has taken the position that active
6 maintenance is different, substantially different from the
7 definition contained in Part 61 dealing with low-level
8 waste.

9 MS. HODGDON: Well, I would disagree with you that
10 there's a substantial difference. I agree that the staff
11 supported the Part 61 definition to the extent the staff
12 supported it. Kerr-McGee said why don't we use this
13 definition because that's the only definition there is and,
14 in fact, it was at the time the only definition there was.
15 And the other definition is in that staff guidance document,
16 which became draft-final. You got the copy that was draft-
17 final in, I believe, May of 1990.

18 But the important thing is that this has
19 substantial difference between those two definitions. They
20 both say that you cannot rely on active maintenance. Active
21 maintenance cannot be necessary in order to achieve a design
22 goal. You can't design --

23 JUDGE MOORE: But it changed the staff not being
24 able to rely on their grass cover as the erosion barrier and
25 had to switch to determine whether the intrusion barrier was

1 sufficient, all because of active maintenance.

2 MS. HODGDON: No. I don't believe it's because of
3 active maintenance. It's not because of active maintenance.

4 JUDGE KOHL: Well, for whatever reason, the staff
5 no longer views the vegetative cover as the primary
6 intrusion barrier.

7 MS. HODGDON: The staff places its primary
8 reliance for erosion control on the cobble-clay layer.

9 JUDGE MOORE: Why?

10 MS. HODGDON: Because the staff likes big rocks.
11 Because the staff -- because there's a formula for it which
12 is in the staff's guidance document in question. The staff
13 was --

14 JUDGE KOHL: Don't all the analyses have to be
15 redone now given that the first set of analyses assumed the
16 vegetative cover. Now we're going to un-assume that,
17 according to the staff. What does that do to the technical
18 analyses of the cobble layer?

19 MS. HODGDON: It doesn't do anything to the
20 technical analyses of the cobble layer, except the finding
21 is that it's for erosion control, that it will withstand the
22 probable maximum precipitation event if challenged. And the
23 Kerr-McGee continues to maintain that the vegetative slope
24 will, but, in fact, the Board did address that and it's in
25 the decision on this summary disposition, I think on

1 contentions 4(c) and 4(d). And they did say that there
2 would be a succession and even -- they said if you have
3 active maintenance, you'll have this prairie grass that will
4 be mown, but if you don't, you're going to have trees, and
5 that's even better. Those are not the exact words, but I'm
6 paraphrasing.

7 JUDGE KOHL: Is there any significance to the use
8 of the word "ongoing maintenance," which also appears in
9 criterion one? Doesn't that suggest a temporal factor that
10 should be considered, that maybe you can have active
11 maintenance for the first few years, but not ongoing --

12 MS. HODGDON: I think that there's a great deal of
13 confusion about this and I think that a lot of the confusion
14 is possibly something that the staff didn't anticipate when
15 it wrote the criteria.

16 JUDGE KOHL: That's often the case.

17 MS. HODGDON: And that's often the case, yes.

18 JUDGE KOHL: But how do we resolve that confusion?
19 Why does the staff's view today on the significance of the
20 term ongoing in that criterion? Is there any significance
21 to it?

22 MS. HODGDON: I think that what was -- I would
23 have to look. It occurs in several places and in order to
24 give you a --

25 JUDGE KOHL: Right. That's why it's hard to --

1 MS. HODGDON: A definite answer, I would have to
2 give you, as we were talking about before about criterion
3 one, as you were talking with Mr. Meserve about criterion
4 one as opposed to the other criteria, and overriding and so
5 forth. This ongoing seems to be another term of art.

6 Certainly if you're going to try to grow grass,
7 you have to maintain it during the early years in order to
8 get good roots and so forth before you can let it give way
9 to succession. I don't know that a number is put down to
10 that, but I think Kerr-McGee anticipated maintaining the
11 site for ten years, in which case they would have an
12 opportunity for the prairie grass to be firmly established
13 and then to be succeeded by whatever comes up, which is the
14 successive forrest.

15 JUDGE KOHL: It's like the vegetation you would
16 see along the highway embankment.

17 MS. HODGDON: Yes. And I do think that the
18 maintenance -- I mean, there's also a lot of discussion
19 about maintenance being prohibited. Of course, maintenance
20 isn't prohibited. It just means you can't rely on
21 maintenance to meet your design goals after a certain point,
22 after you've established your cell with the cover. So
23 that's not done right away. As I said, you need to
24 establish that grass. You need to have the mature prairie
25 grass in order to give way to succession.

1 I think if you read it closely that you can see
2 that everybody was really trying to say that, but I do admit
3 that there is a lot of confusion here because the same words
4 are used to describe different things and different words
5 are used to describe the same thing, like intrusion barrier.
6 You know, that rock-cobble; it would have been good in
7 retrospect to have called that something else, when now it
8 is something else.

9 Now it's the erosion barrier, at least in the
10 staff's view. It's the primary erosion barrier. The staff
11 doesn't take any credit from the vegetative layer. It
12 continues to rely on that, but just not primarily.

13 JUDGE WILBER: In your brief, I think it's in this
14 general area, you speak of a document called a Management
15 Position.

16 MS. HODGDON: Yes.

17 JUDGE WILBER: Is that part of the record?

18 MS. HODGDON: I don't believe it is.

19 JUDGE WILBER: Then what can we assign to it?
20 What weight can we give it?

21 MS. HODGDON: I suppose you can't give it much
22 weight, except it's -- I think the reason it's mentioned in
23 the brief is that it's mentioned in one of the affidavits.
24 So I think that that portion of the brief is just arguing
25 the affidavit where Mr. Bernero or Dr. Swift, I think it's

1 Mr. Bernero, states that the staff relied on the management
2 position in the hearing, but subsequent to that time, after
3 reading EPA's brief, the staff relied on the staff -- the
4 draft-final staff guidance document.

5 JUDGE WILBER: You're saying that the staff's
6 position at the time of the hearing is that that's reflected
7 in that paper?

8 MS. HODGDON: Yes. And the point that's made
9 there is that the staff had taken the position prior to this
10 time that one did not need to assess or consider extreme
11 events, such as the probable maximum precipitation event.
12 That's what that is offered for. The management position
13 says that you don't have to evaluate extreme events.

14 JUDGE KOHL: Should I infer from something you
15 said earlier about the staff looking at some of these issues
16 after it received EPA's amicus brief, should I infer that
17 absent our invitation to EPA to file that brief, the staff
18 never would have looked at any of this stuff?

19 MS. HODGDON: I suppose I shouldn't admit to this,
20 but we discussed that at lunch and the staff -- the staff
21 feels that it would have come up with this anyway.

22 JUDGE KOHL: What did the staff do with respect to
23 this July 1989 EPA letter that was discussed earlier this
24 morning?

25 MS. HODGDON: Excuse me?

1 JUDGE KOHL: There was a reference made this
2 morning to an EPA letter of July of 1989, I believe.

3 MS. HODGDON: Yes. EPA wrote the staff a letter
4 in July of 1989. Dr. Swift answered the letter in, I
5 believe, August of 1989. The Licensing Board asked
6 questions about what was going on with regard to this.

7 JUDGE KOHL: So the Board knew, everybody knew
8 that that letter --

9 MS. HODGDON: Everybody knew about the letter,
10 yes. Everybody filed and the Board addressed this in its
11 decision and said as regards EPA -- EPA's views at that time
12 didn't have anything to do with the probable maximum
13 precipitation event. They were about other things.

14 JUDGE KOHL: I'm curious what you mean by Footnote
15 6 in your brief.

16 MS. HODGDON: May I get it?

17 JUDGE KOHL: Yes. Page 10.

18 [Pause.]

19 JUDGE KOHL: It's just a footnote to your subject
20 heading discussion of issues on appeal, and it states
21 although for reasons discussed below, the state's appeal on
22 these matters is unfounded. Some of the issues are, in
23 fact, affected by the state's resolution of the comments
24 raised in EPA's amicus brief. What do you mean by affected?
25 I don't understand.

1 MS. HODGDON: I think it means bear on. I mean, I
2 think what we meant to say is that it would be disingenuous
3 of us to suggest that nothing was changed except the
4 specification for cobble size, although that was the only
5 technical change, because, in fact, the reliance was
6 changed, and, in fact, the basis for the Licensing Board's
7 opinion might be affected to a certain extent.

8 Of course, this is in our brief. Then I expected,
9 I suppose the staff expected that -- we mentioned that we
10 thought that the state and the city ought to be given an
11 opportunity to file on this and they did, in fact, file, but
12 they didn't say what it was they wanted to reopen on or how
13 their -- well, Illinois was the only party that had
14 contentions. In fact, Illinois was the only party.

15 So Illinois didn't say how they thought their
16 contentions were affected or how they were affected or what
17 ought to be redone, what the scope of the --

18 JUDGE MOORE: Don't their affidavits spell that
19 out?

20 MS. HODGDON: No.

21 JUDGE MOORE: They raise innumerable questions
22 that they don't have adequate information now to tell
23 because they weren't privy to your analysis.

24 MS. HODGDON: But they don't sort out -- they were
25 privy to our analysis. We made all those documents

1 available. They argued here today that they didn't have
2 time to look at this because it came by messenger in August.
3 This is January.

4 JUDGE KOHL: Does the staff think that the change
5 in cobble size is significant?

6 MS. HODGDON: Significant for what purpose?
7 Technically significant, yes. The technical staff thinks
8 that the change in cobble size is technically significant
9 enough so that they can rely on the integrity of the cell
10 far beyond what they would have relied without that
11 specification.

12 JUDGE KOHL: Isn't that then precisely the sort of
13 issue that interested parties who participate in NRC
14 adjudicatory proceedings should be allowed to challenge?

15 MS. HODGDON: Yes.

16 JUDGE KOHL: And isn't the way you do that in a
17 hearing?

18 MS. HODGDON: Yes. We said that. We said as
19 much. We said that they should be allowed to address it and
20 we did not specifically say hearing, as I recall. But we
21 said if -- we did. We said they should be allowed to
22 address it. I'm just saying that --

23 JUDGE KOHL: Is the statutory basis for their
24 being allowed to address that Section 189?

25 MS. HODGDON: Yes. Certainly.

1 JUDGE KOHL: Just to clarify something, we talked
2 about what was in and out of the record. Is the engineering
3 report that Kerr-McGee did part of the record here? The
4 list of exhibits that we have is extremely brief.

5 MS. HODGDON: The engineering report is the
6 application.

7 JUDGE KOHL: Right, and is that part of the record
8 here?

9 MS. HODGDON: I suppose that it depends upon what
10 kind of view you take of the record. What was put into the
11 record at the hearing and admitted into evidence, the answer
12 is no, it was not.

13 JUDGE KOHL: Did everybody just assume that --

14 MS. HODGDON: Only certain parts of it.

15 JUDGE MOORE: The Licensing Board relied upon it
16 in several places in its decision.

17 JUDGE WILBER: Is it comparable to an FSAR?

18 MS. HODGDON: Yes. I think it is an FSAR. I
19 mean, it's the NMSS equivalent of an FSAR.

20 JUDGE MOORE: The engineering report, but it's
21 written by Kerr-McGee.

22 JUDGE WILBER: So is an FSAR.

23 MS. HODGDON: So is the FSAR. It's written by the
24 licensee applicant.

25 JUDGE WILBER: But an FSAR is not normally part of

1 the record just because it's attached to an application, is
2 it?

3 MS. HODGDON: Well, NMSS and NRR don't do things
4 the same way. This was the application. I checked on this,
5 for whatever difference it makes, and I don't know that
6 anybody cares, but this is in the Public Document Room.
7 This is the application. It's considered to be the
8 application.

9 JUDGE KOHL: There's a lot of stuff in the Public
10 Document Room which can be relied upon in making a formal
11 legal decision. This is not an insignificant detail. Maybe
12 I should ask the question this way; whether or not it was
13 ever served up properly, did Illinois or West Chicago or
14 anybody else for that matter ever raise an issue about this?
15 Everybody just talked about the engineering report and some
16 of these other documents without being particularly careful
17 as to its evidentiary status?

18 MS. HODGDON: Everybody had a copy of it and such
19 pages from it as were applicable to the admitted contentions
20 and the contentions in the hearing were put in by Kerr-McGee
21 with its testimony. If the Licensing Board used parts of
22 the engineering report other than what was put before it,
23 they didn't do that at the hearing. It's possible they did
24 it on the summary disposition motion.

25 JUDGE KOHL: They didn't do any exhibit list, so

1 it's difficult to locate some of these things.

2 MS. HODGDON: We had some problem with the
3 transcripts. Maybe you can tell that. The engineering
4 report, large parts of it were in the testimony.

5 JUDGE KOHL: What is the staff's view on the
6 significance, the overriding consideration terminology,
7 those words in criterion one? On the one hand we're told to
8 give economic costs due consideration. In criterion one,
9 we're told to give three siting features overriding
10 consideration. Is overriding consideration greater than due
11 consideration?

12 MS. HODGDON: It would seem to be just by the
13 meaning of the word overriding consideration.

14 JUDGE KOHL: But if you add to that the preceding
15 language that mentions both existing sites and new sites,
16 maybe not in those words, but it --

17 MS. HODGDON: Yes. We do discuss existing sites
18 and new sites and the Licensing Board discusses that at
19 length in its decision.

20 JUDGE KOHL: I'm specifically referring, though,
21 to the sentence in criterion one that says the following
22 site features which will contribute to such a goal or
23 objective must be considered in selecting among alternative
24 tailings disposal sites or judging the adequacy of existing
25 tailings sites, and it enumerates the three key siting

features.

2 Does that language that says you've got to
3 consider these three features both for existing sites and
4 new sites, is that language in conjunction with the
5 overriding consideration language in the next paragraph,
6 mean what it says?

7 MS. HODGDON: I don't think so. I don't think so
8 because in the statement of consideration on the adoption of
9 the criteria, the Commission addressed application of
10 regulations at existing sites and said regulations were
11 developed recognizing that it may not be practical to
12 provide the same measures of conservation at existing sites
13 as can be done at new sites where alternatives are not
14 limited. I just want to get down to this other thought.
15 That one itself is difficult enough.

16 But the next one, also, objectives concerning
17 remoteness from people providing below-grade burial and
18 transferring ownership of sites may not be met to the same
19 degree at an existing site as at a new site. It's hard to
20 tell what that means considering that they said overriding
21 there. I agree that they don't seem to have focused on this
22 language after the 1983 amendments in which they had every
23 opportunity to take that back.

24 But I don't know what it means. I think the
25 Licensing Board, although they addressed it, really focused

1 on the general goal which is isolation, which that may not
2 be doing criterion one justice, but it seems to fit better
3 with the other criteria. You say the goal is isolation and
4 you must take these things into consideration with the view
5 to achieving isolation and that will be three things;
6 remoteness, hydrologic conditions, and the potential for
7 minimizing erosion.

8 So you take those things, the Board did discuss
9 those things. But as far as what overriding consideration
10 is, I don't know.

11 JUDGE KOHL: It's not to be ignored, presumably.

12 MS. HODGDON: No. I'm sure it's not to be
13 ignored, but what it means --

14 JUDGE KOHL: That's what troubles me. The
15 Licensing Board's decision doesn't discuss it, as I recall.
16 There is no mention in that particular sentence.

17 JUDGE MOORE: It certainly makes it easier to read
18 the regulation if you ignore that whole paragraph.

19 MS. HODGDON: No. You don't have to ignore the
20 whole paragraph. You just have to ignore the word
21 overriding consideration because it is rather heavy in this
22 context.

23 JUDGE MOORE: I'll ask you the same question I
24 asked earlier of Kerr-McGee. In light of your
25 interpretation which dovetails that of Kerr-McGee of how

1 these are to be applied, there is so much room for
2 flexibility, if you will, in coming up with what's
3 applicable at a given site. What is left for the
4 alternatives that are allowed to be proposed by a licensee?
5 Haven't you essentially read those provisions out of the
6 statute, read them out of our regulations of having any
7 meaning, if you give our standards such a broad and flexible
8 reading that just about anything can be approved under the
9 criterion, what's the need for having the alternatives
10 provisions?

11 MS. HODGDON: I'm not sure and I'm not sure that
12 anybody -- but the alternative -- no alternative was
13 proposed here because it was -- Kerr-McGee felt that they
14 met the criteria and the staff agreed, as did the Licensing
15 Board. However, I think that there would not be so many
16 documents regarding how to build these things if someone did
17 not take seriously that someone -- as a matter of fact,
18 virtually all of them do follow this design. Only new sites
19 have followed the in-ground disposal and very few of those.

20 JUDGE MOORE: Speaking solely for myself, I would
21 find it easier to reconcile all parts of these regulations
22 if this cell were being proposed and judged as an
23 alternative under these regulations and, to the extent
24 practical, being found to provide an equivalent protection,
25 for instance, to our regulations than such a broad and

1 expansive view of our regulations.

2 Just again speaking for myself, it seems to me to
3 read these as broadly as you're suggesting really removes
4 the whole point of having the provision that if an applicant
5 doesn't like the requirements that are being proposed by the
6 agency, he can come up with an alternative proposal if he
7 can demonstrate that it will provide all the adequate
8 protections. That would seem to me to be a much more
9 sensible regulatory approach, but that's just one person's
10 opinion at this particular point.

11 MS. HODGDON: The only one of those criteria that
12 wouldn't be met by this site would be remoteness and
13 remoteness is not a defined term, but obviously it's not
14 remote in any sense that we understand the term. As Mr.
15 Meserve has said, there's a Title I site which the staff did
16 review and concur in which is within the city limits of
17 Cannonsburg, Pennsylvania and has been there for some time.

18 JUDGE WILBER: Do you have anything that supports
19 that this is an existing site?

20 MS. HODGDON: Sure it's an existing site.

21 JUDGE WILBER: The point I'm getting at, it
22 appears to me we're excavating a new area, we're repairing
23 an entirely new area. He's putting down a liner and the
24 Commission in their statement of consideration says you
25 can't do that at an existing site, it's physically

1 impossible. So if I read the reverse of that, then I can
2 say I don't see how this is an existing site. I think you
3 look through statements of considerations throughout. You
4 find this indication that an existing site is a tailings
5 pile that has not moved.

6 MS. HODGDON: I think clearly all the sites that
7 existed at the time that UMTRCA was enacted are existing
8 sites. I'm not sure --

9 JUDGE KOHL: Judge Wilber's question is more of a
10 technical or terminological one. Does the fact that this
11 proposal requires a liner and some excavation transform what
12 was an existing site into a new site?

13 JUDGE WILBER: It may be the same geographical
14 location, but it sure isn't the same piling site. I'll say
15 that for it.

16 MS. HODGDON: I don't believe that it does. I
17 think that existing sites are sites where tailings are
18 located. These tailings are located there. I think they're
19 going to have to move them over in order to do whatever it
20 is they do and then put them back in again.

21 JUDGE WILBER: Once you do that, why don't you
22 make the decision that you have to compare it to all other
23 sites, because you're moving it in every case? I don't know
24 which way the balance would come, but why doesn't it have to
25 be given the same treatment?

1 MS. HODGDON: It was given the same treatment.

2 JUDGE WILBER: No. The Licensing Board says it's
3 going to fail if you do that.

4 MS. HODGDON: The Licensing Board said you
5 wouldn't choose the site if the stuff -- if it weren't an
6 existing site.

7 JUDGE WILBER: That's right.

8 MS. HODGDON: If it were a new site you would not
9 choose it. However, the comparison for NEPA purposes and
10 even for UMTRCA purposes was done on the same basis and it
11 was on that basis that they found that this site had the
12 least effects, the most insignificant effects and all
13 effects were found to be insignificant of the alternate
14 sites in Illinois.

15 JUDGE MOORE: Do you have with you West Chicago's
16 response to the NRC staff's August 10 brief?

17 MS. HODGDON: Yes.

18 JUDGE MOORE: Would you turn to Page 11 of that
19 where --

20 MS. HODGDON: It will take me a second to find it,
21 but I have it.

22 [Pause.]

23 MS. HODGDON: Page 11 of the city's brief.

24 JUDGE MOORE: Correct. At the top of the page,
25 the city sites -- I'm sorry -- quotes the Commission's

1 decision.

2 MS. HODGDON: I'm still not there. Just one
3 second. Page 11. Yes.

4 JUDGE MOORE: Can you read that and comment what
5 the Commission means? Does that not support what Mr. Wilber
6 just said as to the difference between an existing and a new
7 site?

8 MS. HODGDON: I'm sorry. I'm not clear where I'm
9 directed to. The city's brief on Page 11 where?

10 JUDGE MOORE: The top of the page, starting with
11 the fifth line is a quotation.

12 MS. HODGDON: I think I must be on the wrong page.

13 JUDGE KOHL: Is your version the faxed version?
14 If it is, the page --

15 MS. HODGDON: West Chicago's memorandum in support
16 of its appeal --

17 JUDGE MOORE: No. West Chicago's brief in
18 response to your August 10 --

19 MS. HODGDON: I'm sorry. I have the wrong thing.

20 [Pause.]

21 MS. HODGDON: Thank you. I had it in another
22 volume. Yes.

23 JUDGE MOORE: That's from the Commission's
24 decision.

25 MS. HODGDON: Criterion two explicitly prefers on-

1 site storage in existing than existing rather than on-site
2 storage, and thus the addition of a new storage site --
3 well, this is with regard to criterion two and criterion two
4 has to do with -- I can't remember what you call those.

5 JUDGE MOORE: The Commission is saying, though,
6 that you're creating a new storage site in much the same way
7 that Mr. Wilber says that if you're going to move this pile
8 off one geographical location and do something to the
9 geographical location and then return it to that same
10 geographical location, you've created a new storage site.

11 The Commission seems to have said the same thing
12 in its own decision.

13 MS. HODGDON: Well, this is out of context and
14 it's not properly directed to what the contention was.
15 Criterion two says small sites and the staff took the view
16 that this is not a small site. But actually what was meant,
17 and it's in the statement of consideration, with regard to
18 this, is sites where the equipment was taken in in order to
19 mine just little bits and pieces here and there and not a --
20 just very small sites and it certainly didn't have anything
21 whatsoever to do with this

22 JUDGE MOORE: What they're saying, though, is if
23 you have a site and you are putting new materials, seemingly
24 new materials on that site, you're creating -- in this
25 instance it was source material from off-site -- you're

1 creating a new storage site. They aren't our words. We're
2 just looking at what the Commission has said.

3 I'm just curious if that doesn't support what Mr.
4 Wilber is saying from the statement of considerations.

5 MS. HODGDON: I think this has to do with whether
6 to bring the off-site materials on-site and whether they
7 were included within the material to be disposed there.

8 JUDGE MOORE: On-site in this case refers to West
9 Chicago.

10 MS. HODGDON: Yes. West Chicago.

11 JUDGE MOORE: We're talking about the same thing.

12 MS. HODGDON: That is true.

13 JUDGE MOORE: So we already have a site. So we're
14 talking about what you were calling an existing site, the
15 Commission seems to be calling, when you bring this new
16 material on it, is a new site.

17 MS. HODGDON: Yes. They were talking about
18 storage here and they're not talking about disposal anyway.
19 So it's a question about bringing the off-site materials on-
20 site and what's to be done with them. At that time, they
21 thought that this was source material. We now know that
22 it's 11(e)(2).

23 This is, as I say, out of context. In any event,
24 the city, who did not participate, seems to have been
25 pursuing on appeal here the state's contention on criterion

1 two, which was not pursued on appeal by the state. That's
2 what I have to say on this matter. This is not really even
3 pertinent to this controversy about existing -- with regard
4 to whether you're creating a site here, what an existing
5 site is.

6 JUDGE KOHL: The city isn't allowed to pursue an
7 appeal issue that may have been litigated below, but
8 Illinois, for one reason or another, doesn't choose to
9 pursue?

10 MS. HODGDON: No, I don't think so. I think the
11 regulations state that --

12 JUDGE KOHL: Those are the new regulations.

13 MS. HODGDON: You think they're not -- excuse me.
14 I didn't mean to ask the question.

15 JUDGE KOHL: I'm asking you.

16 MS. HODGDON: I think they might be binding on the
17 city because the city came in after these decisions -- after
18 these --

19 JUDGE KOHL: But it doesn't make any difference
20 that they're participating in the interested governmental
21 entity. The Commission has always been more liberal because
22 of the dictates of -- again, I think it's Section 274 that
23 provides for that type of participation in the first place.

24 MS. HODGDON: That's true, although I think that
25 the Licensing Board sought to restrict the city to the cases

1 it found and the city did represent that it would not
2 enlarge the issues before the Board. I think the --

3 JUDGE KOHL: This isn't enlarging an issue,
4 though, if it's something that was before the Licensing
5 Board. We're talking about an appellate matter.

6 MS. HODGDON: The city did not participate on this
7 contention because it was decided by summary disposition.
8 In fact, the city didn't participate except very minimally,
9 in any event.

10 So my feeling is that this relates to criterion
11 two, but this is not really what criterion two is about.
12 It's very skewed as it came up on appeal.

13 JUDGE WILBER: You mean there's two different
14 definitions for criterion two and criterion one?

15 MS. HODGDON: Excuse me?

16 JUDGE WILBER: Criterion two, you're saying that's
17 fine, that's an existing site or is not an existing site;
18 but, in criterion one, it becomes one?

19 MS. HODGDON: Criterion two talks about small
20 sites. It doesn't talk about existing sites. It says --

21 JUDGE MOORE: You can't have a small existing
22 site.

23 MS. HODGDON: To avoid proliferation of small
24 waste disposal sites, and I can't find the rest of the
25 sentence, waste from small remote above-ground extraction

1 operations must be disposed of at existing large mill
2 tailings disposal sites. So this is not waste from a small
3 remote above ground extraction operation and, therefore,
4 doesn't come under criterion two.

5 JUDGE WILBER: Which ones of those don't apply?

6 MS. HODGDON: It's not small. It's above ground.

7 JUDGE WILBER: I'll bet. It's extraction, too,
8 isn't it?

9 JUDGE MOORE: In the scheme of things, it's small,
10 isn't it?

11 MS. HODGDON: No, it's not. No, it's not small in
12 the scheme of things. It's 500,000 cubic meters, which is
13 above average for all the Title II sites and very big in
14 comparison with most Title I sites. It's not small.

15 JUDGE KOHL: Why don't you sum up here?

16 MS. HODGDON: Yes. I think I've made whatever
17 argument I might want to make about the rules. I'll just
18 look through my notes and see if there's anything --

19 JUDGE WILBER: One question before you go into
20 summary. I couldn't find in your brief where you address
21 the groundwater concerns that were in the appeals.

22 MS. HODGDON: In the appeals of?

23 JUDGE WILBER: Either West Chicago or --

24 MS. HODGDON: I don't believe that West Chicago
25 pursued any groundwater issue on appeal that we didn't

1 address in our brief. The groundwater -- if you could point
2 me to a particular point that -- excuse me. You're saying
3 West Chicago and not the state?

4 JUDGE WILBER: I thought West Chicago. I don't
5 see it here. I'm sorry. I don't have it now.

6 [Pause.]

7 JUDGE WILBER: Page 27, isolation and
8 contaminants.

9 MS. HODGDON: West Chicago's brief at what page?

10 JUDGE KOHL: Twenty-seven.

11 MS. HODGDON: Thank you.

12 [Pause.]

13 MS. HODGDON: Well, I don't have a chance to
14 review our brief now, but I suppose that to the extent that
15 those go beyond anything that the state articulated in its
16 brief, we may have missed a few of the points made here. If
17 you'd direct me to something in particular, I'd be glad to
18 answer it.

19 [Pause.]

20 JUDGE MOORE: If you can't find it, go ahead and
21 wrap up.

22 MS. HODGDON: Yes. I just read very rapidly
23 through that. I suppose the reason that we didn't address
24 that in addition to addressing that argument on criterion
25 one in the state's brief is that mostly this has to do with

1 the SFES and certain other things. It doesn't have much to
2 do with the Licensing Board's decision and it's for that
3 reason that we didn't address it, because it was the
4 decision that was on appeal and not the SFES.

5 Yes. I will wrap up. I just want to see if I
6 have anything in my notes that I wanted to answer, points
7 that were made by other parties that I thought I might
8 provide the staff's view about.

9 [Pause.]

10 MS. HODGDON: Yes. The state and perhaps the city
11 also in their argument mentioned the dose calculations. I
12 was going to address that, but the staff agrees with what's
13 been said by Mr. Meserve regarding the characterization of
14 the FES and the SFES and the EPA's regulations. I think
15 that Dr. Swift's affidavit tracks that. So we'd just
16 reiterate the position that's taken there with regard to
17 dose.

18 Unless the Board has further questions, I think
19 that's all I have. Thank you.

20 JUDGE MOORE: Thank you very much. We'd
21 appreciate any rebuttal you have and keep it very brief,
22 please.

23 MR. SEITH: May it please the Court, I think that
24 in listening to the comments and arguments of Mr. Meserve
25 and Ms. Hodgdon, comments of the Board, they've been very,

1 very illustrative. We have heard both from the Board now --
2 correction -- the staff and Kerr-McGee that the staff does
3 not consider and Kerr-McGee does not consider the disposal
4 cell that they have proposed to be an alternative to the
5 criteria in Appendix A. It is clearly not an alternative.

6 As Board members have pointed out or panel members
7 have pointed out a number of times, the language in
8 criterion one is quite clear that all three of the general
9 siting requirements must be considered, that's the language,
10 must be considered. And we have hashed and rehashed those
11 siting requirements. I don't intend to go over those, but
12 there is, in my opinion, no way you can read this record and
13 come to a determination that a disposal cell centered in the
14 center of a highly populated area ten feet from a
15 groundwater aquifer meets the three criteria or the three
16 elements of criterion one. It clearly does not.

17 JUDGE KOHL: What about Mr. Meserve's argument on
18 health effects?

19 MR. SEITH: Pardon me?

20 JUDGE KOHL: What about Mr. Meserve's argument on
21 health effects and the fact that of all the alternatives
22 studied, this has minimal health effects and the least
23 amount of all the alternatives?

24 MR. SEITH: I think that goes back to Judge
25 Moore's point that you cannot -- certainly if you consider

1 that this cell will succeed as planned and that all the
2 other alternatives will succeed as planned, there is very
3 little difference in health effects.

4 But what you have to consider and what criterion
5 one clearly implicates consideration of its siting
6 requirements and not design requirements for the simple
7 reason that when you're looking at a 1,000 year period,
8 designs do fail and the health effects of failure have not
9 been adequately considered.

10 Ms. Hodgdon has indicated, I suppose to some
11 extent tongue-in-cheek, but in response to one of your
12 questions, but nevertheless did say that you essentially
13 have to ignore the language in criterion one, that you have
14 to ignore the word overriding which is written into the
15 regulation, that you have to give overriding consideration
16 to the siting features.

17 And she said, well, you know, essentially you have
18 to ignore that word in order to come to the conclusion that
19 the Board has reached. She also indicated quite clearly in
20 her comments that the staff has indeed changed its positions
21 and Mr. Meserve indicated that despite that change in
22 position, the staff feels that Kerr-McGee's proposal
23 nevertheless complies. Again, the panel has indicated in
24 its comments that that determination by the staff has not
25 been subjected to a full and adequate review by any panel,

1 either a Licensing Board or this panel.

2 And to suggest that the mere submission of briefs
3 in response to that staff conclusion or the mere submission
4 of affidavits is adequate, I suggest to you is improper.
5 Clearly the Commission envisioned a full due process type
6 hearing. Otherwise, we would not have gone to this point
7 today through this licensing process.

8 Ms. Hodgdon also indicated in her comments, she
9 admitted quite clearly that the basis for the Licensing
10 Board decision has not changed and that there is no longer,
11 for a number of their considerations, a number of their
12 determinations, those bases are no longer valid because of
13 the change in circumstances, a change in conditions, and a
14 change of determinations by the staff.

15 She also indicated when discussing the merits or
16 the equities of whether or not the underlying decision
17 should be vacated that it's quite possible that in addition
18 to the events postulated by Judge Moore, the NRC's
19 interaction delaying the ultimate approval, Agreement State
20 status approval, that Kerr-McGee itself may have delayed the
21 Agreement State status approval by requesting a hearing
22 under Section 274.

23 Again, to suggest that Illinois is at fault for
24 the timing of the situation I think is inappropriate.
25 Ultimately, I think the briefs indicate and the arguments

1 indicate that quite clearly this panel has no jurisdiction.
2 Now that jurisdiction under Section 274 has transferred to
3 the state of Illinois, that under the circumstances, under
4 the case law and under the circumstances of this particular
5 case, it is appropriate to vacate the underlying decision.

6 But failing that, it is quite clear that due to
7 the numerous inconsistencies within the Licensing Board
8 decision and the now change of circumstances, it is quite
9 appropriate to, if the Board retains jurisdiction, to
10 reverse that decision on its merits.

11 What Kerr-McGee has proposed is a time bomb, that
12 under even the Alice-of-Wonderland type of scenario is bound
13 to explode. And I submit to you that it is appropriate for
14 this Board to reverse the decision of the Atomic Safety and
15 Licensing Board.

16 Thank you.

17 MR. KARAGANIS: Five minutes or less. Point one;
18 Mr. Meserve, in an attempt to preserve the jurisdiction of
19 the Appeal Board, suggested that the Commission retains
20 jurisdiction through a mechanism for an adjudicatory 274(o)
21 hearing. He suggests, without ever coming out clearly and
22 stating it, that the 274(o) hearing that he's thinking about
23 is this adjudicatory proceeding that is now on appeal. And
24 he suggests that whether this Board decides to hear the
25 evidence, affirm or reverse or whatever, that the decision-

1 making process in this window on this license is the 274(o)
2 hearing.

3 And it's not. What 274(o) contemplates is a
4 future hearing by the Commission applying Commission
5 standards, not site-specific decisions, but standards to a
6 site when brought to it through the state mechanism that
7 Judge Kohl referred to. So this is not the 274(o) hearing.

8 JUDGE KOHL: Well, I didn't understand Mr. Meserve
9 to argue that. I thought what he was arguing was that you
10 need to bring this particular proceeding to closure so that
11 it would be out there in existence and would be something to
12 which to compare the state proceeding at a later point in
13 time, and that comparison would then take place in the
14 context of hearing No. 3 which would be the 274(o)
15 proceeding before the Commission.

16 MR. KARAGANIS: Right. We're a little slow. What
17 I couldn't quite get was that on the one hand he said that
18 when you, Judge Kohl, referred to the fact that the Board
19 doesn't consider an undecided appeal a case that has just
20 had initial decision and has not gone to appeal decision, a
21 binding precedent.

22 Mr. Meserve and his client have referred to the
23 initial decision at least in one pleading I've been involved
24 in in the Federal Court in Chicago as essentially res
25 judicata. And we're going to face res judicata claims if

1 that decision lives.

2 What he said was that he's going to make this
3 Licensing Board decision, if it stands, as a res judicata
4 claim binding both the state and ultimately the Commission
5 on their 274(o) decision. That's the game that's in town
6 here. And I just suggest to you that when you raised that
7 with him, he then came back and said, well, a future
8 adjudicatory body might disagree with what this questionable
9 decision below had to say; but if this Board lets it rest,
10 let's it live, let's it fester there, Kerr-McGee is going to
11 be in its binding and that any future adjudicatory body, be
12 it administrative agency or Court, is bound by doctrines of
13 collateral estoppel and res judicata.

14 The thing is given where it's at --

15 JUDGE KOHL: They're going to argue that. They
16 may not succeed on that.

17 MR. KARAGANIS: But, again, as the Commission has
18 said, and I refer to this Board's language in U.S. Ecology
19 which puts U.S. Ecology in that sense in a position
20 identical to where the city of West Chicago is, "Inasmuch as
21 the agreement manifestly has the effect of depriving U.S.
22 Ecology of its preexisting ability to obtain a review within
23 the NRC of the Licensing Board's orders, operative effect
24 must be removed from those orders as an incident of the
25 termination of the proceeding."

1 JUDGE KOHL: There's a big difference. U.S.
2 Ecology was the appellant, correct?

3 MR. KARAGANIS: We are the appellant.

4 JUDGE KOHL: Right. I'm talking about in
5 Sheffield.

6 MR. KARAGANIS: Yes.

7 JUDGE KOHL: All right. That's what I talked
8 about depriving them of their right to appeal.

9 MR. KARAGANIS: Before the NRC.

10 JUDGE KOHL: In this case, you are the appellant
11 and you don't mind being deprived of your right to appeal.

12 MR. KARAGANIS: Let me suggest to you --

13 JUDGE KOHL: You wanted it terminated --

14 MR. KARAGANIS: No. With all due respect. If the
15 decision here, if your choice was either to vacate below or
16 to dismiss and let it stay in place below or to proceed on
17 to the merits of this appeal, we would say proceed on to the
18 merits of the appeal. We're not trying to diminish -- I
19 said that this morning. We honestly believe, and I think
20 the staff concurs, that you don't have jurisdiction to do
21 so.

22 If you had jurisdiction, we'd be hell bent for
23 leather to go to the merits of this question. We think that
24 this is a bad decision. It doesn't pass a basic smell test
25 of legality and facts and we think that under the

1 circumstances, we'd like to appeal on the merits. We don't
2 think this Board has the jurisdiction to address it and
3 that's why to vacate this now deprives us of our rights on
4 appeal, and we don't think that that's fair.

5 With respect to the factual claims going back and
6 forth, and this is what I meant before, Mr. Meserve in
7 colloquy said, well, on the erosion analysis, it shows that
8 the forrest is better, the forrest is better than the grass.
9 What does he rely on? A July 23rd submittal that we've
10 never had an opportunity to contest in an adjudicatory or
11 adversarial proceeding.

12 As far as the issue that Judge Moore set forth --
13 and we still didn't hear a direct answer to the question --
14 if the Board accepts the design as paramount, design
15 features can fix anything approach, the Kerr-McGee and the
16 staff, then there is truly never a downtown site, a downtown
17 pile that will be disapproved under that interpretation of
18 the regulations. They will always be the cheapest way to
19 go, and that is not what those regulations are for. That is
20 not the logic of the preamble in the Federal Register
21 Notices, nor is it the logic of the language of the
22 regulations themselves.

23 As far as the health factors that Judge Kohl
24 referred to in discussing this with my colleague, those
25 health factors have two problems with them. One is Dr.

1 Levin's affidavit suggests those health factors are premised
2 on the existence of the two-foot layer and the two-foot
3 layer always being there, the two-foot soil layer.

4 Once you take that two-foot layer away, those
5 numbers change and the numbers don't reflect what would
6 happen at a West Chicago site versus a deep mine site in
7 Illinois or a mining site in Utah in the event there were a
8 failure, and those health consequences are not addressed
9 anywhere in the record of this case.

10 With respect to the points of the rail issue, the
11 city of West Chicago used to be known as Junction and the
12 town was called Junction because Chicago-Northwestern
13 Railroad put a rail junction there. We've got some of the
14 best long-haul rail service in the country and we have a
15 number of major unit train operations that are available for
16 that city. So rail is readily available in the city of West
17 Chicago.

18 JUDGE KOHL: Has the spur that's been referred to
19 been abandoned?

20 MR. KARAGANIS: I honestly can't answer that
21 question, but I would suggest to you, I can speak for my
22 client to say that the city would be more than cooperative
23 in assisting Kerr-McGee in obtain rail spur or rail service
24 if they wanted to go that route.

25 With respect to the groundwater issue, I think

1 Judge Wilber is right. It wasn't addressed in the NRC
2 brief. We raised it in our initial brief. We raised it in
3 our response to the EPA brief. We raised it again in our
4 response to the NRC brief in response to the EPA.

5 The Commission staff did not address either our
6 concerns or the EPA's concerns, both in their letter and in
7 the EPA amicus brief. There are a number of problems here.
8 One, many of the concerns raised by EPA and us in the briefs
9 say that in order to obtain a license for a facility that
10 says you meet the requirements, the twelve criteria of
11 Appendix A, you must show that you have met these things
12 with respect to corrective action and these other measures.
13 There's no showing in the record that they've done this.

14 You have a July 31 staff memorandum, unsupported
15 by whose written it, which basically says these things
16 aren't here, and we're suggesting writing a letter to Kerr-
17 McGee saying, gee, you should have complied. This is not an
18 after-the-fact event. The regulations require it.

19 So what I'm suggesting, and I wish you could do
20 more, I wish this Board could do more under the
21 circumstances, I'd love to see a decision on the merits of
22 this case, but I don't think you can do so. And I suggest
23 to you that within your power, as the U.S. Ecology decision
24 indicated, your power to dismiss for want of jurisdiction,
25 which is both your power and your duty, and respectfully

1 suggest that coincident with that you vacate the decision
2 below and leave the baggage of this incredible summer of
3 1990 flurry of paper without prejudice to the legitimate
4 rights of the city of West Chicago to proceed.

5 Thank you.

6 JUDGE KOHL: Did the state or city make any effort
7 to get EPA involved in this case at the time it was pending
8 before the Licensing Board?

9 MR. KARAGANIS: Sure did.

10 JUDGE KOHL: To what end? I guess you failed.

11 MR. KARAGANIS: No. Let me suggest, Judge Kohl,
12 that we got them involved to some extent. I think it would
13 be a mild statement to suggest that Federal regulatory
14 agencies don't like to intrude on other regulatory agencies'
15 turf. The fact that they've participated to the extent that
16 they did is a major statement of EPA concern in this area.

17 Let me suggest that they don't want to get into
18 fights with the NRC and they express reluctance to do so,
19 but given the circumstances of this case, they took a very
20 aggressive stance in the amicus brief. And what you heard
21 Ms. Hodgdon say is the staff was ready to do it. Even if
22 EPA had not done it, the staff was waiting to come out and
23 strike a blow for justice. And I expect that they would
24 have done so had EPA not filed its brief and we would have
25 been in the same position.

1 Thank you.

2 JUDGE MOORE: The case will stand submitted.

3 JUDGE KOHL: I'd just like to apologize for
4 keeping you all here this long. As you can see, there are
5 many difficult issues and I'm sorry that we all got twice
6 the argument for our money today. But thank you for your
7 participation.

8 MR. KARAGANIS: I can tell you that counsel
9 appreciates the interest.

10 JUDGE MOORE: Thank you.

11 [Whereupon, at 3:55 p.m., the hearing was
12 concluded.]

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REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission

in the matter of:

NAME OF PROCEEDING: Kerr-McGee Rare Earths

DOCKET NUMBER: 40-2061-ML

PLACE OF PROCEEDING: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Mark Handy

MARK HANDY
Official Reporter
Ann Riley & Associates, Ltd.