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RELATED CORRESPONDENCE

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

DOCKETED
USNRC

In the Matter of)

KERR-McGEE CHEMICAL CORPORATION)
(Kress Creek Decontamination))

Docket No. 40-2061 SC
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MOTION FOR LEAVE TO
FILE SUPPLEMENTAL AUTHORITY

The People of the State of Illinois respectfully move the Board for leave to file the attached pleading relating to that portion of Kerr-McGee's motion to compel demanding that we specify which of Kerr-McGee's discovery documents and interrogatory answers support the People's position on various material issues. The People recently came across a decision from the Third Circuit which, we believe, disposes of the question Kerr-McGee has raised. We therefore request leave to bring it to the Board's attention as a supplement to the People's July 29 response to Kerr-McGee's motion to compel.

Respectfully submitted,

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
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SUPPLEMENT TO PEOPLE'S
RESPONSE TO MOTION TO COMPEL

Kerr-McGee has objected that the People improperly answered Interrogatories 1(c), 3(b), 4(c), 5(d), and 15(d) by stating that the documents or information that the People rely on for certain contentions include discovery documents produced by Kerr-McGee and/or responses made by Kerr-McGee to interrogatories. Kerr-McGee would have the People specify which discovery documents and which interrogatory answers support the People's position.

A recent case from the U.S. Court of Appeals for the Third Circuit, though decided in a different context, is relevant here. In Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), a securities fraud action, the defendants produced hundreds of thousands of documents, of which 100,000 were selected for copying by the attorneys for plaintiff Peil. Prior to a deposition of defendant Sporck, the defendants' attorney prepared him for the deposition by showing him an unspecified number of the many documents previously produced by the defendants in discovery. Defense counsel had selected and compiled these documents for Sporck's use in preparing for the deposition; and according to defense counsel, "the selected documents represented, as a group, counsel's legal opinion as to the evidence relevant both to the allegations in

the case and the possible legal defenses." Id. at 313. The selected documents did not contain notes of defense counsel.

During the deposition Peil's attorney requested identification of all documents Sporck reviewed or referred to in preparation for the deposition. Defense counsel refused to identify those documents, arguing that (1) they had all previously been produced, and (2) the select grouping of the documents was attorney work-product protected from discovery by Rule 26(b)(3), since

the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation. Because identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions, ... identification of the documents as a group must be prevented to protect defense counsel's work product.

Id. at 315.

The Third Circuit agreed with this argument, holding that the selection and compilation of documents fell within the "highly-protected category of opinion work-product" (id. at 316):

'In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research.'

Id., quoting James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D.Del. 1982).

Though the context of Sporck v. Peil is different than that involved here, the court's reasoning applies equally. What Kerr-McGee seeks is the identification of a group of discovery

documents selected and compiled by an opposing party and that party's attorney as evidence supporting the allegations in the litigation. This selection process constitutes a marshaling of the evidence and reflects the party's and counsel's understanding of the case and strategy for trial--all of which is work-product protected by R. 26(b)(3). Moreover, just as the documents sought in Sporck v. Peil were already in the interrogating party's possession, so here: the documents Kerr-McGee seeks came from its own files and the interrogatory answers from its own hand. Hence, the evidence the People consider probative is already within the company's possession; and the manner in which the People have processed that evidence in preparation for trial is protected from discovery.

Respectfully submitted,

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PROOF OF SERVICE

I, ELAINE C. THOMAS, having been sworn and under oath do state that I have this 20th day of August, 1985 served copies of the foregoing Motion For Leave To File Supplemental Authority and Supplement To People's Response To Motion To Compel upon the persons listed on the attached Service List by placing same in envelopes addressed to said persons, by first class mail, postage prepaid, and depositing same with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.

Elaine C. Thomas

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 20TH DAY
OF AUGUST, 1985.

NOTARY PUBLIC

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