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RELATED CORRESPONDENCE

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N. W.

P. O. BOX 7566

WASHINGTON, D. C. 20044
AUG 30 AIO:48

(202) 662-6000

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DOCKETING & SERVICE
BUREAU (202) 662-5304

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JOHN T. SAPIENZA
JAMES H. MCGLOTHLIN
ERNEST W. JENNES
EDWIN S. COHEN
COUNSEL

JOHN SHERMAN COOPER
DON A. ZIMMERMAN
OF COUNSEL

TWX: 710 822-0005 (CS WSH)
TELEX: 88-593 (COVLNG WSH)
TELECOPIER INFORMATION:
(202) 662-6280
CABLE: COVLNG

August 28, 1985

John H. Frye, III, Esq.
Dr. Peter A. Morris
Dr. James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Kerr-McGee Chemical Corporation (Kress Creek
Decontamination), Docket No. 40-2061-SC;
ASLBP No. 84-502-01 SC

Gentlemen:

We have received the State's Motion for Leave to File Supplemental Authority. We have no objection to the Board considering Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), and the State's three-page supplement describing the case.

We must note, however, that Sporck is not on point. Defendants' counsel in Sporck had selected and compiled documents that had been produced by the plaintiff to prepare a witness for a deposition. The plaintiff sought the identification and production of the documents. The court held that the documents fell within the category of opinion work product because the production of the documents might reveal the legal strategy of defendants' counsel, and his evaluation of the strengths and weaknesses of his case. 759 F.2d at 316. The court was careful to emphasize, however, that a response would be required to a more tailored discovery request. The court explained:

[I]f respondent's counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect -- counsel's opinion of the strengths and weaknesses of the case as represented by the

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group identification of documents selected by counsel -- would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.

Id. at 318.

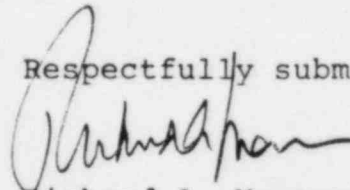
In this case Kerr-McGee has not requested documents selected by counsel in preparation for discovery or for depositions. Rather, it has asked for documents on which the State relies in support of certain specific contentions. The request falls within the scope of permissible inquiry recognized by the majority in Sporck. Indeed, as Judge Seitz noted in dissent: "[A] typical interrogatory from a leading treatise would permit questions of the following form: 'Identify each writing . . . which relates or refers directly or indirectly to [a transaction in question.]' It cannot seriously be contended that an answer is not required because it would reveal the fact that the attorney thought that certain documents were relevant to the transaction." Id. at 319 (Seitz, J., dissenting) (citation omitted).

Moreover, in several of the interrogatories at issue, Kerr-McGee asked the State to explain the factual basis for certain specific contentions. The State answered by a vague reference to "documents produced by Kerr-McGee." See Interrogatories 3, 15. Now in responding to a Kerr-McGee request that the State identify these documents, the State claims that the documents are protected work product. In short, the State is impermissibly attempting to avoid discovery of its factual assertions.

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As the State admits, Sporck was "decided in a different context." Its holding cannot be extended to the situation presented here.

Respectfully submitted,



Richard A. Meserve
Attorney for Kerr-McGee
Chemical Corporation

cc: Chief, Docketing and Service
Section (3)
Stephen H. Lewis, Esq.
Anne Rapkin, Esq.
Thomas J. McDaniel, Esq.
John C. Berghoff, Jr., Esq.
Steven Seiple, Esq.