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ZULIMA V. FARRER
Attorney General

May 17, 2006

Ralph I. Lancaster, Jr., Esq.
Pierce Atwood, LLP
One Monument Square
Portland, Maine 04101

Re: New Jersey v. Delaware, No. 134, Original
Motion to Quash, or in the Alternative for a
Protective Order, of BP America, Inc.
and Five Affiliates

Dear Mr. Lancaster:

Plaintiff State of New Jersey respectfully submits this letter and the attached Declarations of Gerard Burke, Assistant Attorney General, and William Andersen, Deputy Attorney General, to address the common interest and work product privileges asserted by BP America, Inc. and its affiliates ("BP") in response to subpoenas issued by defendant State of Delaware and in BP's Motion to Quash, in Part, Subpoenas, or, in the Alternative, for a Protective Order.

As argued by New Jersey in its pending Motion to Strike, discovery concerning BP's pending project should be precluded, because information about the project is not relevant to



determining the parties' rights under the Compact of 1905, the matter at issue in this case. In addition, New Jersey concurs that the work product and common interest privileges also preclude discovery of New Jersey's work product, or communications with BP concerning this litigation or the Compact of 1905. Therefore, if the Special Master does not preclude this discovery as a result of New Jersey's Motion to Strike, he should preclude discovery of the communications sought by Delaware on the basis of privilege.

Delaware has asserted it served the subpoenas based on its contention that New Jersey may not be the real party in interest in this case. However, as argued in New Jersey's Motion to Strike, this issue is completely devoid of merit, and Delaware should be precluded from pursuing it. New Jersey's view that Article VII of the Compact precludes Delaware from exercising riparian jurisdiction over improvements appurtenant to the New Jersey shoreline within the Twelve Mile Circle predates this litigation and the BP application to construct a liquified natural gas plant and related pier. As set forth in the attached Declaration of Deputy Attorney General William Andersen, Deputy Andersen has provided legal advice to New Jersey's Bureau of Tidelands, which is the New Jersey governmental entity responsible for conveying riparian grants, leases and licenses to owners of waterfront property in New Jersey, since 1981. Deputy Andersen has

been aware of and familiar with the Compact of 1905, as it pertains to the exercise of riparian jurisdiction, for many years.

In 2004, as counsel for the Bureau of Tidelands, Deputy Andersen became aware of BP's proposed project and conferred with the Bureau of Tidelands and with counsel for BP regarding the project and the riparian instruments it would require. Deputy Andersen's discussions with BP included discussion of the Compact of 1905 and of Deputy Andersen's view that the Compact does not give Delaware jurisdiction to regulate or convey riparian rights on the New Jersey, or easterly, side of the Delaware River.

In February 2005, Delaware denied a permit for the proposed BP project. To New Jersey's knowledge, this was the first time that Delaware had purported to veto a project on the New Jersey shoreline within the Twelve Mile Circle.

Following Delaware's exercise of jurisdiction over the BP project, which New Jersey viewed as a violation of its Compact rights, Deputy Andersen conferred with counsel for BP regarding the protection of New Jersey's Compact rights. In addition, Assistant Attorney General Gerard Burke conferred with upper management within the Attorney General's office, the Office of Counsel to the Governor, and with Stuart Raphael, current counsel for BP. At that time, New Jersey was considering retaining Mr. Raphael to assist in the assertion of New Jersey's Compact rights, based on his prior

experience in the *Virginia v. Maryland* original action that also involved riparian rights and an interstate compact.

Although it was determined that New Jersey would not retain Mr. Raphael as counsel, counsel for New Jersey and Mr. Raphael agreed to share work product to further New Jersey's assertion of its rights under Article VII of the Compact. Because New Jersey anticipated litigation to vindicate its Compact rights, and New Jersey and BP had a common legal interest that New Jersey prevail in asserting those rights, counsel fully expected that their work product, communications, and exchanges of work product were and would remain confidential. Thus, New Jersey never intended that any of its work product, or the work product generated through its exchanges with BP, would become available to Delaware.

Based on these circumstances and on the work product and common interest privileges, work product and communications between BP and New Jersey related to this litigation and to the Compact are not subject to discovery by Delaware, even if it is assumed that the communications are relevant to a bona fide issue in this case. The work product privilege protects from discovery an attorney's mental impressions, conclusions or legal theories, allowing the attorney to work with a degree of privacy. *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981). The work product privilege is

not lost when work product is shared by parties with a common interest or when work product is generated through such an arrangement, because there is no intent or expectation that the materials exchanged will be provided to the parties' adversary. *United States v. American Telephone & Telegraph Co.*, 642 F. 2d 1285, 1299 (D.C. Cir. 1980).

The common interest privilege precludes the disclosure to third persons of information that otherwise would be privileged, where counsel for clients with a common interest have agreed to exchange information concerning the matter. Restatement 3d of the Law Governing Lawyers, §76. The purpose of the common interest privilege is to allow persons with a common interest to share information, without destroying the attorney-client or work product privileges held by either person. *Cavalleri v. United States*, 284 F. 3d 236, 250 (1st Cir. 2002); *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 577 (S.D.N.Y. 1960); *In re Sunrise Sec. Lit.*, 130 F.R.D. 560, 583 (E.D. Pa. 1989).

The common interest privilege applies to the work product produced and exchanged between counsel for New Jersey and counsel for BP. The privilege applies so long as the transferor and the transferee of the information anticipate litigation against a common adversary on the same issue, and therefore have an interest in sharing work product on that issue. The privilege is not limited

to co-parties or to persons whose interests are identical. *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). See also *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985); *Schachar v. American Academy of Ophthalmology*, 106 F.R.D. 187, 191 (D.C. N. Ill. 1985). Moreover, a governmental entity has the same entitlement as any other party to assistance from those sharing common interests. *American Telephone and Telegraph Co.*, 642 F.2d at 1300.

Here, New Jersey anticipated litigation to protect its rights under the 1905 Compact. Its work product prepared in anticipation of litigation is not discoverable. Moreover, BP and New Jersey have a common interest in the protection of New Jersey's rights under the Compact of 1905, and agreed to share work product related to the Compact and to New Jersey's assertion of its Compact rights. New Jersey clearly has a sovereign interest in protecting and asserting its jurisdiction, while BP has an interest in its right, under the Compact, to make application only to New Jersey. Delaware is not entitled to discover the privileged information or protected work product that was produced or exchanged as a result of the understanding between counsel based on this common interest.

Counsel for New Jersey and for BP intended and reasonably expected that work product and exchanges of work product would remain confidential, would not be shared with Delaware, and would

remain privileged. That expectation must be protected. Rather than gaining through discovery access to the privileged work product that was prepared and exchanged in anticipation of litigation, Delaware should be required to conduct its own legal and historical research on the substantive Compact issues in dispute.

Delaware has suggested that because counsel for New Jersey and current counsel for BP agreed to share work product related to New Jersey's Compact rights, the real party in interest in this litigation is BP, not New Jersey. Delaware also has suggested that it must have access to the privileged work product produced and exchanged by counsel, in order to prove its real party in interest theory. Delaware's suggestions are entirely baseless, and must be flatly rejected.

As New Jersey explained in its filings in the Supreme Court, New Jersey filed this action to protect its rights under Article VII of the Compact. In New Jersey's view, Article VII plainly does not allow Delaware to determine what improvements appurtenant to New Jersey's shoreline are appropriate, and thereby to dictate what development may or may not occur on the New Jersey waterfront. The Compact provided that the right of riparian jurisdiction would belong to New Jersey, not to any private entity. Consequently, New Jersey clearly is the real party in interest, and clearly had the right to bring this original action to protect its

jurisdiction. Moreover, no other forum would have allowed New Jersey to press its case directly against Delaware.

Delaware's efforts to divert attention from the substantive issues in this case, and apparent desire to protract this litigation by seeking privileged documents, should not be countenanced. Accordingly, the Special Master should enter an order precluding discovery directed at the non-issue of whether New Jersey is the real party in interest, and protecting the privileged materials and communications exchanged.

Respectfully submitted,

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY

By: *Rachel Horowitz*
Rachel Horowitz
Deputy Attorney General

c: David Frederick, Esq.
C.J. Seitz, Esq.
Stuart Raphael, Esq.

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

DECLARATION OF GERARD BURKE

I, Gerard Burke, declare that the following facts are true to the best of my knowledge, information, and belief :

1. I am an Assistant Attorney General of the State of New Jersey, and of counsel in this matter.
2. I first became involved in this matter in January, 2005. At that time, I was informed that the State of Delaware was exercising jurisdiction over the BP Crown Landing liquefied natural gas plant project, notwithstanding New Jersey's riparian jurisdiction under Article VII of the Compact of 1905. In February, 2005, I was informed that Delaware had denied the project. Subsequently, I became aware that Delaware was asserting jurisdiction over other projects appurtenant to the New Jersey shoreline, including projects by the E.I. Dupont de Nemours Company and by

Fenwick Commons, LLC.

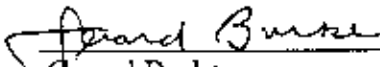
3. In February and March 2005, I conferred with upper management within the Attorney General's office and the Office of Counsel to the Governor of New Jersey to determine how New Jersey would respond to Delaware's actions to protect New Jersey's interests and Compact rights. In addition, starting in March, 2005, we also conferred with Stuart Raphael, Esq. At that time, New Jersey was considering retaining Mr. Raphael to assert its Compact rights, in light of his experience in the *Virginia v. Maryland* original action that also involved riparian rights subject to an interstate compact.

4. The Governor of New Jersey and the Attorney General decided to reopen or file an original action against Delaware to assert New Jersey's rights under the Compact. The State of New Jersey decided not to retain Mr. Raphael in this action. Mr. Raphael then was retained by BP.

5. When New Jersey decided that it would not retain Mr. Raphael and he was retained by BP, we asked him if he would continue to share attorney work product with New Jersey. Mr. Raphael agreed. Based on the common legal interest shared by BP and New Jersey in fully protecting New Jersey's riparian jurisdiction pursuant to Article VII of the Compact, we expected that our prior discussions and future exchanges of work product would remain confidential and would not be subject to disclosure through discovery.

I declare under penalty of perjury of the laws of the United States that the foregoing facts are true and correct.

Executed on: May 17, 2006


Gerard Burke

**In The
Supreme Court of the United States**

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

DECLARATION OF WILLIAM E. ANDERSEN

I, William E. Andersen, declare that the following facts are true to the best of my knowledge, information and belief:

1. I am a Deputy Attorney General of the State of New Jersey and I have served in that position since August 1981. Since August 1981, I have been assigned by the Attorney General to represent the State of New Jersey in its riparian interests. I do so primarily as counsel to the Tidelands Resource Council, the State agency designated by the Legislature with the responsibility of the stewardship of the State's riparian lands. N.J.Stat.Ann. § 12:3-12.1 (Supp. 1998). I have served as counsel to the Tidelands Resource Council since February 1982.

2. I became aware of the Compact of 1905 and the Twelve Mile Circle in conjunction with the efforts of New Jersey and Delaware to restore their boundary markers. Those efforts began in 1985 and led to agreements between the two States in 1986, 2001 and 2005.

3. In 1992, I met with representatives of Keystone Urban Renewal Limited Partnership in conjunction with its application for a license to occupy riparian lands within the Twelve Mile Circle. As counsel to the Tidelands Resource Council, it is my custom to meet with dozens of applicants for tidelands licenses and conveyances each year.

4. Keystone advised me that it was applying for a Subaqueous Lands Lease from Delaware as well as for a New Jersey tidelands license. Keystone was aware that there could be a dispute between New Jersey and Delaware on these issues, and it decided to apply to both states in order not to be delayed while these matters were resolved. I advised Keystone's representatives that the Delaware lease would be a violation of New Jersey's sovereignty, but that I could not stop Keystone from making the Delaware application. The Keystone lease from the State of New Jersey is dated June 12, 1992. It extends 1,600 feet outshore of the original mean high water line into the Delaware River. Tidelands Application No. 91-0190; Liber H-8 page 79.

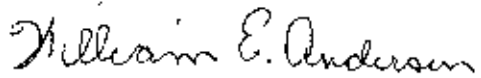
5. Sometime in February 2004, I similarly met with representatives of BP, Inc. and was advised by them of BP's plans for a liquified natural gas facility on the Delaware River in Logan Township, Gloucester County, again within the Twelve Mile Circle. We discussed the Compact of 1905, and I took the position, as I had with Keystone, that licensing piers is part of the riparian jurisdiction awarded New Jersey in Article VII of the Compact. N.J. Stat. Ann. § 52:28-41. As of February 2004, I was aware of the then recent decision of *Virginia v. Maryland*, 540 U.S. 56 (2003), primarily because of my interest in State boundary disputes and my former involvement in *New Jersey v. New York*, 523 U.S. 767 (1998), concerning New Jersey's boundary on Ellis Island in New York Harbor. We discussed the *Virginia v. Maryland* decision, which we agreed favored New Jersey's position with respect to the 1905 Compact.

6. In November 2004, BP filed an application for a lease of New Jersey tidelands. Crown Landing, L.L.C., Tidelands Application No. 04-0383-T. That application is still pending.

7. In February 2005, counsel for BP, David Swayze, Esq., advised me of Delaware's exercise of jurisdiction over the BP project, and that Delaware had denied approval of the project. Mr. Swayze suggested that counsel share information on the 1905 Compact issue, in light of our agreement that Delaware's exercise of jurisdiction was a violation of that Compact. I agreed that sharing information in light of this common interest would be appropriate. I reasonably expected that any subsequent communications with BP counsel regarding the Compact and New Jersey's assertion of its rights under the Compact would remain confidential.

I declare under penalty of perjury of the laws of the United States that the foregoing facts are true and correct.

Executed on: May 17, 2006.


William E. Andersen
William E. Andersen

**In The
Supreme Court of the United States**

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of May 2006, counsel for the State of New Jersey caused New Jersey's Letter re Motion to Quash, Declaration of Gerard Burke, and Declaration of William E. Andersen, to be served upon counsel for the State of Delaware and counsel for BP America, Inc. in the manner indicated below:

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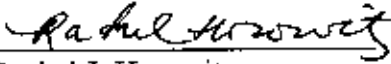
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