OGC-5 / Testimony by Department Employees in Judicial Proceedings

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Office of General Counsel, Alison H. Crocker, Acting General Counsel	**Title:** Testimony by Department Employees in Judicial Proceedings
Date Issued: October 5, 2006	**Latest Date Revised:**

I. Summary: This policy provides guidance to Department employees who have been subpoenaed[1] to give testimony in a judicial proceeding.

II. Policy: It is the policy of the Department that employees may not testify as an expert witness in private litigation with respect to subject areas relating to their employment. Employees may testify concerning matters related to their employment or responsibilities with the Department at the request of a Department Attorney or Assistant Attorney General. In all other situations, regardless of whether factual or expert testimony is sought, the employee may only testify if properly served with a subpoena (which means personal service on the individual or service upon a person of suitable age and discretion, followed by a mailing) and provided that the subpoena is accompanied by fees as required by law. If an employee is not properly served, a Department Attorney or Assistant Attorney General will seek to have the subpoena quashed in accordance with provisions of the CPLR.

Unless directed by a judge, a Department employee who has been subpoenaed may not testify as to anything other than facts of which the employee has personal knowledge. The Department employee may not give expert or opinion testimony or to answer hypothetical questions. A Department employee may properly testify solely on factual issues of which the employee has personal knowledge. For example, if an employee is subpoenaed and is asked whether particular actions constitute violations of the Environmental Conservation Law or Department regulations, such testimony is not properly obtained pursuant to subpoena. Similarly, if an employee is asked whether the Department would have granted a permit for a certain activity if an application had been made it been, the employee is not required to answer such a question.

In situations where a current Department employee is subpoenaed to testify as either a factual or expert witness, it is the Department's policy that the employee will be afforded legal counsel by either the Department's Office of General Counsel and/or the Office of the New York State Attorney General.

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[1] *Subpoenas* are legal documents issued by an attorney for a party, a court, or a judicial officer (such as an administrative law judge or clerk of a court) in a litigated proceeding requiring testimony, sometimes accompanied by the presentation of documentary materials. The procedures applicable to subpoenas are found in New York Civil Practice Law and Rules (CPLR) Article 23.

Affidavits are sworn written statements supplying information on a subject within the affiant's knowledge or area of expertise and are sometimes accompanied by the presentation of documentary materials. Affidavits are typically utilized in conjunction with motion practice in a litigated proceeding (such as summary judgment or a motion to dismiss).

When a private party subpoenas a Department employee, the relevant Program or Regional Attorney should be consulted to determine whether Department records would adequately meet the party's needs. If this is the case, the private party may seek a judicial subpoena duces tecum and certified records may be submitted pursuant to CPLR §2307 in lieu of staff testimony. The appropriate Program or Regional Attorney will make this determination and contact the private party to make alternative arrangements for furnishing Department records in lieu of an employee as a witness.

III. Purpose and Background: The purpose of this Policy is to provide Department employees with policy and guidelines regarding testimony in, or affidavits for, judicial proceedings arising out of, or relating to, their employment with the Department.

Many employees with the Department are experts in various scientific, engineering, and environmental fields. Department employees are called upon to testify or provide affidavits, as expert and/or factual witnesses, in generally four different types of proceedings:

(1) in administrative or judicial proceedings involving the Department;

(2) in administrative or judicial proceedings involving another state agency;

(3) in criminal cases and grand jury appearances for District Attorneys, U.S. Attorneys, and the New York State Attorney General; or

(4) in private litigation on matters involving subject areas related to the employee's employment or regulated activities where the Department is not a party to such litigation.

In a proceeding where an employee is being called upon to testify or prepare affidavits on behalf of the Department (#1 above), the employee will be represented by a Department Attorney (and most likely an Assistant Attorney General). Testimony on behalf of the Department's position in the proceeding or litigation is not the subject of this Policy.

In the circumstance where an employee is subpoenaed to appear in administrative proceedings or litigation involving another state agency (#2 above), a determination must be made whether a degree of cooperation may be appropriate in a particular proceeding. In such cases, the employee will be represented by a Department Attorney or Assistant Attorney General.

When an employee is testifying or preparing affidavits involving a criminal prosecution for violations of the Environmental Conservation Law (#3 above), the employee will be represented by either a Department Attorney or the assigned prosecuting attorney.

In a proceeding where an employee is subpoenaed to appear in, or requested to provide affidavits for, private litigation as a factual or expert witness on subject matters related to Department employment or regulation (#4 above), several issues arise. The Department must maintain a position of impartiality during litigation in which it is not a party. If employees are asked to testify as expert witnesses, it may appear to show favoritism to one party in the litigation and utilize State resources to support a private concern. Expert testimony by the Department's employees could also lead to conflicts of interest for employees who are acting as both regulator of, and an expert witness for, the same party. One example

of where this conflict could arise is when an employee who testified as an expert witness for one of the involved parties at a site, acts as a regulator of the same party at another site.

Additionally, if Department staff could be subpoenaed at will, the Department's day-to-day activities could be disrupted. If the opinion testimony of such employees were available to private litigants, employee resources would be strained in providing such testimony. In order to conserve scarce public resources, the Department's staff must be allowed to concentrate on day-to-day activities, rather than being constantly called on to provide expert witness information. For these reasons, legal staff will move to quash the subpoena and prevent such expert testimony.

If an employee is asked to testify on factual issues, the Department's role as an impartial regulator could also be affected, since the Department typically must address concerns affecting the general public and not one particular interest. However, staff may be compelled by subpoena to testify as factual witnesses. If so, they will be represented by a Department Attorney or Assistant Attorney General.

IV. Procedure:

A. General

1. When a current employee is personally served with a subpoena to testify on any matters related to employment with the Department, the employee must immediately notify the appropriate supervisor and Program or Regional Attorney, whichever is applicable.

2. The Program or Regional Attorney is responsible for making a determination, based on the circumstances, whether it is necessary to make a referral to the Department of Law to request that the Attorney General seek to quash the subpoena, and to ensure that the employee is afforded adequate legal counsel. If the Program or Regional Attorney determines that a referral is necessary, the Department of Law should be contacted by telephone as soon as possible and prior to preparing the referral. This will ensure that the Department of Law has adequate time to respond to the subpoena.

3. A witness fee and travel expenses are typically provided in advance of honoring the subpoena. Employees should forward the subpoena check to the appropriate fiscal manager, to be applied towards agency reimbursement of travel expenses and time out of the office. Employees who testify will be paid for this time as if it were a normal work function.

B. Information Requested by AAG or DEC Attorney

1. An Assistant Attorney General or Department attorney may ask a DEC employee to testify in court or to prepare an affidavit to assist the State's position in a legal proceeding. In these situations, the DEC employee will typically be familiar with the matter and be aware well in advance that the request will be made.

2. The DEC program attorney who serves as liaison with the State Attorney General's Office should always be informed of a request made by the Attorney General's Office for testimony or an affidavit.

3. If a Department employee believes there are problems presented by the request, the employee should discuss them with the Program or Regional Attorney working on the matter. Examples would include situations where: (i) the employee feels uncomfortable about making a sworn statement because of uncertainty of the facts and/or conclusions to be drawn therefrom; (ii) the employee believes they are incapable of supplying the information because of a lack of knowledge on the subject or expertise in the area (*e.g.,* there is someone better qualified to respond); and (iii) the employee has schedule or time constraints (which should also be discussed with the relevant supervisor).

4. Although an employee may be asked by an Assistant Attorney General to draft their own affidavit or prepare their own testimony, the Department employee should always seek assistance or guidance from the applicable Program or Regional Attorney, as well as the Assistant Attorney General.

C. Information Requested by a Party

1. If a Department employee is subpoenaed to testify by a party in litigation, the subpoena should be reviewed by a Department Attorney to determine whether both the document and the manner of its service are lawful and proper. A Department employee cannot accept service of a subpoena intended for another Department employee without the express authorization of the employee named in the subpoena.

2. The appropriate Department Attorney should make other units within the Department aware of the subpoena in case any of them have an interest in the matter, as well as other agencies.

3. The appropriate Department Attorney, in conjunction with the Assistant Attorney General, if applicable, can deal with the party issuing the subpoena on such issues as scheduling, having the prospective witness placed "on call", and substituting a more appropriate witness for the subpoenaed employee.

V. Related References: This policy supersedes and replaces the September 28, 1978 Department *Memorandum* on this subject by Philip H. Gitlen, and the October 3, 1978 Department *Policy and Procedure* on this subject by Langdon Marsh.

VI. Responsibility: The responsibility for interpretation and update of this document shall reside with the Office of General Counsel.

STATE OF NEW YORK
SUPREME COURT CHAMBERS
Warren County Municipal Center
1340 State Route 9
Lake George, New York 12845-9803
518-761-6547
Fax: 518-761-6465

TATIANA N. COFFINGER
COURT ATTORNEY

DAVID B. KROGMANN
JUSTICE OF THE SUPREME COURT

KATHY L. FLORES
SECRETARY TO JUSTICE

May 10, 2010

Paul H. Wein, Esq.
Wein & Frament, PLLC
951 Albany Shaker Road, Suite 200
Latham NY 12110

Kathleen McCaffrey Baynes, Esq.
Carter, Conboy, Case, Blackmore, Maloney,
& Laird, P.C.
20 Corporate Woods Blvd.
Albany NY 12211

Eileen M. Haynes, Esq.
Bartlett Pontiff Stewart & Rhodes, P.C.
P.O. Box 2168
Glens Falls NY 12801-2168

John D. Aspland, Esq.
FitzGerald Morris Baker Firth, P.C.
P.O. Box 2017
Glens Falls NY 12801

Daniel J. Hogan, Esq.
McPhillips, Fitzgerald & Cullum
P.O. Box 299
Glens Falls NY 12801

Thomas J. Mortati, Esq.
Burke, Scolamiero, Mortati & Hurd, LLP
P.O. Box 15085
Albany NY 12212-5085

Daniel J. Stewart, Esq.
Brennan and White
163 Haviland Road
Queensbury NY 12804-8702

James C. Moore, Esq.
Harter, Secrest & Emery, LLP
1600 Bausch & Lomb, Place
Rochester NY 14604

Michael J. Muller, Esq.
Muller & Mannix
P.O. Box 143
Glens Falls NY 12801

Michael J. Smith, Esq.
Hiscock & Barclay
50 Beaver Street
Albany NY 12207-2830

Scott W. Crisafulli, Esq.
Office of General Counsel
NYS DEC
625 Broadway
Albany NY 12233

Kevin Donovan, Esq.
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany NY 12224

Re: Hosmer, et al v. Kubricky Construction Corp., et al
RJI No. 57-1-2007-0056 - Index No. 8805

Dear Counselors:

Non-parties Clough Harbour ("CH") and the New York State Department of Environmental Conservation ("DEC") each move for a protective order quashing subpoenas relative to the production of documents and the testimony of certain employees of CH and DEC and another at trial relating to the failure of the Hadlock Pond Dam which occurred on July 2, 2005.

In 2009, DEC provided some 21 boxes of documents pursuant to discovery subpoenas served upon it. It also provided a privilege log relating to documents it claims to be privileged. No party has moved against the privilege log and at oral argument, it was reaffirmed that there is no objection to the non-production of the documents listed on the privilege log. It further appears that the parties have agreed that no further documents need be produced pursuant to the subpoena duces tecum at issue unless a question of authentication arises at trial. It appears, therefore, that the issues surrounding the subpoena duces tecum have been substantially resolved.

The motions to quash the testimonial subpoenas served upon various persons, specifically Richard Bruce and Warren Harris, IV of CH; Peter Johnson of O'Brien and Gere, and DEC engineers Michael Stankiewicz and John Stawski presents a far more perplexing issue. At issue, of course, is the admissibility of the document entitled "Report of Engineering Investigation of the Hadlock Pond Dam Failure" dated October 3, 2005 (the "Report"). It is virtually conceded that these witnesses participated in sharing test information and observations and discussed by and amongst each other what the cause(s) of the failure might be. DEC and CH maintain that the deliberative process privilege applies to any potential testimony of the subject subpoenaed witnesses beyond mere description of what they observed and what data they considered or in other words, beyond being simply "fact witnesses". In addition, CH maintains that it is bound by privilege with DEC both as a matter of law and contractually.

Of note is the fact that DEC does not seek to preclude questions posed to its employees or consultants regarding the basis for the conclusions contained within the Report regarding the causes of the dam failure. DEC through its submissions and especially its Memorandum of Law have clearly set forth the importance of the deliberative process privilege both as a matter of law and as a matter of public policy (CPLR 3101[b]).

The dilemma, of course, is primarily caused by the position of Kubricky Construction Corp. ("Kubricky") and properly so. Kubricky maintains that the Report should not be admitted as evidence because its conclusions are hearsay agreeing with DEC and CH that their representatives should be protected from being asked about their opinions and conclusions. Kubricky further maintains that if the Report's conclusions are admissible, Kubricky should be entitled to fully cross examine the non-party engineers relative to those conclusions without limitation by the deliberative process privilege. Indeed, Kubricky maintains that the Report can only be admissible if the unmitigated testimony of the non-party engineers is available to the parties at trial.

As will be more fully explained in the more detailed Decision and Order of this Court, the Court has relied heavily upon the Third Department holdings in Kozlowski v City of Amsterdam, 111 AD 2d

416 (1985) and Cramer v. Kuhns, 213 AD 2d 131.

Applying the Kozlowski analysis and the more recent guidance contained in Cramer especially as it relates to the reliance upon the Federal counterpart to CPLR 4520[1], the Court finds that the Report passes all of the safeguard thresholds and should be admissible upon proper authentication under the public documents common law exception to the hearsay rule.

With regard to the motions to quash the subpoenas concerning testimony of the referenced DEC and CH personnel, the Court will not quash the subpoenas but will limit the questioning of the named persons as herein described. Although the Court cannot at this juncture anticipate all of the questions which may be posed to the witnesses described and acknowledging both the importance of the deliberative process privilege as well as Kubricky's right to conduct a thorough cross-examination, the following general limitations are described to assist trial counsel:

(1) Neither the DEC or CH employees shall be deemed expert witnesses and they shall not be so qualified or recognized by the Court. None of the witnesses named shall be asked any question which solicits a response "with a reasonable degree of engineering certainty". The witnesses identified can certainly state their educational background, training, employment, position, etc. but they are being called as fact witnesses not as experts in their field of expertise.[2]

(2) To the extent that the deliberative process privilege has been waived by public statements either orally made or made through position papers, counsel may fully explore such areas but should be prepared to provide to the Court the specific reference to such waiver . Of significance to the Court is the fact that not only has the Report been made available to the public but representatives of DEC, and perhaps CH, have attended public meetings and professional conferences and have discussed freely and candidly the conclusions reached in the Report and to a certain extent, the process by which they were reached. It is noted that the position of the Attorney General's Office is that if such a waiver has occurred, it is limited to that particular item and does not constitute a waiver of everything covered by the deliberative privilege concerning the causes of the dam's failure. The Court is fully cognizant of the fact that neither DEC or CH are parties to these actions. As such, the Court now becomes the "gatekeeper" as to assertion of the deliberative process privilege.

(3) Since the four bullet point conclusions contained within the Report shall be admitted, counsel may question a particular employee witness as to what information or data that witness considered or did not consider in arriving at a particular conclusion, assuming such is the case. More specifically, counsel may inquire of a particular witness as to what processes he personally employed as to any particular

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[1]Federal Rules of Evidence 803(8)(c).

[2]The final charge to the jury shall not identify the named witnesses as experts. Reference PJI 1:90.

conclusion. Such inquiry shall not expand into the deliberative process with others either within DEC or CH or a combination of representatives of both. The questioning of such witnesses and the guidance the Court is attempting to give to counsel to comply with the terms of this Order is best summarized by adopting a portion of the argument made by counsel this morning as follows: The witness may be questioned as to "how the dam failed not why".

Applying the limitations of this Order, the motion seeking to quash the subpoena of Walter Haynes is denied.

The Court is issuing this Letter order because the trial in these multiple actions now consolidated is about to begin. As indicated, a more detailed formal Decision and Order will be forthcoming.

Very truly yours,

David B. Krogmann
Supreme Court Justice

DBK/kf