STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the matter of the alleged violation(s) of the New York State Environmental Conservation Law (ECL) Articles 3, 17 and 23, Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR), and permits issued pursuant to Environmental Conservation Law Article 17, Title 8 and Article 23, Title 13; and the application for ECL Article 23 modification permit by

BATH PETROLEUM STORAGE, INC., E.I.L. PETROLEUM, INC., and ROBERT V. H. WEINBERG,

Applicants-Respondents.

RULING ON DISCOVERY DISPUTES AND RESPONDENTS' MOTION TO DISMISS

DEC Case No: R8-1088-97-01
and
ECL Section 23-1301 Permit Hearing

June 13, 2005

BACKGROUND

This ruling addresses a motion filed jointly on May 4, 2005 by Respondents, Bath Petroleum Storage, Inc. ("BPSI"), E.I.L. Petroleum, Inc. ("EIL") and Robert V. H. Weinberg ("Respondent Weinberg") (collectively, "Respondents"), as well as certain disputes in connection with discovery.[1] Because this matter has been the subject of a number of rulings and decisions[2], the

[1] A motion *in limine* filed jointly by Respondents on that same date is the subject of a separate ruling.

[2] See Matter of E.I.L. Petroleum, Inc., Ruling on Motion to Amend Complaint, 1998 WL 1759901 (Aug. 31, 1998); Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion to Dismiss and Respondents' Affirmative Defenses, 1998 WL 1759900 (Dec. 21, 1998); Matter of E.I.L. Petroleum, Inc., Ruling of the Deputy Commissioner, 1999 WL 33283813 (Feb. 17, 1999); Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion for Stay, 1999 WL 33250497 (Apr. 30, 1999); Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion to Recuse ALJ, 1999 WL 33250496 (May 26, 1999); Matter of E.I.L. Petroleum, Inc., Ruling of the Deputy Commissioner, 1999 WL 33283709 (Oct. 8, 1999); Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion for Summary Judgment and Staff's Motion to Amend and Cross-Motion for Order Without Hearing, 2000 WL 33340964 (Mar. 27, 2000); Matter of Bath Petroleum Storage, Inc.,

procedural history has not been summarized below, except as may be relevant to these rulings.

DISCUSSION AND RULINGS

Respondents' Motion to Dismiss

Respondents seek dismissal of causes of action 9 through 16 of the 2003 Amended Complaint for lack of subject matter jurisdiction. Respondents contend that staff of the New York State Department of Environmental Conservation ("Department Staff") is judicially estopped from prosecuting claims related to the alleged expansion of caverns used to store liquified petroleum gas ("LPG") at Respondents' facility in Bath, New York. According to Respondents, Department Staff's attempt to do so in this proceeding is inconsistent with the position taken by Department Staff in a prior proceeding in federal court (Bath Petroleum Storage, Inc., et al. v. Sovas, No. 98-CV-347 (N.D.N.Y.). That action was dismissed in a decision by Judge Kahn (Bath Petroleum Storage, Inc. v. Sovas, 309 F. Supp.2d 357 (N.D.N.Y. 2004) (the "Decision").

By letter dated May 17, 2005, Respondents sought leave to file a surreply, and by letter dated May 19, 2005, Department Staff responded to the surreply, and both submissions will be considered in this ruling. In the surreply, Respondents assert that Department Staff "may not regulate the act of expansion itself; it may only regulate the expanded cavern." Respondents' Surreply, at 2. To support this position, Respondents cite to that portion of the Decision which states that "[w]hile DEC cannot regulate the expansion of the caverns, regulation of the resulting modified structure, i.e., the newly formed caverns, for the storage of LPG, is within the purview of DEC pursuant to

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Ruling on Motion to Consolidate, 2002 WL 1824983 (July 26, 2002); Matter of Bath Petroleum Storage, Inc., Commissioner's Interim Decision, 2003 WL 21707875 (Jun. 17, 2003); Matter of Bath Petroleum Storage, Inc., Ruling on Motion for Severance, 2003 WL 22162381 (Sept. 11, 2003); Matter of Bath Petroleum Storage, Inc., Ruling on Motion to Amend Complaint, 2003 WL 22456078 (Oct. 23, 2003); Matter of Bath Petroleum Storage, Inc., Decision and Order, 2003 WL 22472099 (Oct. 29, 2003); Matter of Bath Petroleum Storage, Inc., Ruling on Motion to Dismiss, 2004 WL 598983 (Mar. 18, 2004); Matter of Bath Petroleum Storage, Inc., Ruling on Motion for More Definite Statement, 2004 WL 956969 (Apr. 28, 2004); Matter of Bath Petroleum Storage, Inc., Ruling on Motion to Recuse the General Counsel, 2004 WL 2916179 (Dec. 10, 2004); Matter of Bath Petroleum Storage, Inc., Commissioner's Second Interim Decision, 2005 WL 218315 (Jan. 26, 2005); Matter of Bath Petroleum Storage, Inc., Ruling on Motion to Clarify Affirmative Defenses, 2005 WL 238584 (Jan. 27, 2005); Matter of Bath Petroleum Storage, Inc., Ruling on Department Staff's Motion for a Protective Order, 2005 WL 408291 (Feb. 18, 2005).

Article 23." 309 F. Supp.2d 357, 375-76. According to Respondents, this statement, "coupled with Department Staff's express acknowledgment that 'regulation of the resulting cavern for the storage of LPG is within DEC's bailiwick under ECL Article 23,' (emphasis supplied) (Brief for Defendants-Appellees, pp. 40-41), means that DEC may require a permit for the modified structure, i.e, 'the resulting cavern.'" Surreply, at 1-2.

Respondents go on to assert that, as a result, causes of action nine through sixteen in the 2003 Amended Complaint "are overbroad and beyond the scope of DEC's admitted authority," because those causes of action "rely upon the process of expansion as the basis for enforcement and not the alleged failure to acquire a modification permit for the expanded cavern." Surreply, at 2. Thus, according to Respondents, these causes of action must be dismissed, because the Department's theory of recovery in this enforcement action is directly contrary to its position in the federal litigation.

Department Staff's reply dated May 13, 2005 points out that the Decision goes on to state that "[a]dditionally, modifications of caverns that will be used to store LPG is within the jurisdiction of DEC. Therefore, DEC is not precluded from bringing an enforcement action pursuant to the authority." 309 F. Supp.2d at 376. The footnote to this sentence indicates that "[t]he Court will not consider the merits of DEC's action except to say that it is not preempted." Id., fn. 8. Based upon this, Department Staff maintains that its authority to bring this enforcement action "was not in question and the merits of the enforcement action were left to this Tribunal to decide." Reply, at 2. According to Department Staff, the caverns have been used to store LPG for some time, and causes of action nine through sixteen in the 2003 Amended Complaint are based upon the alleged modification, or expansion, of these storage caverns. Id.

Respondents' argument that judicial estoppel bars Department Staff's prosecution of the Article 23 causes of action must be rejected. "The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding." 67 Vestry Tenants Ass'n v. Raab, 172 Misc. 2d 214, 219 (N.Y. Sup. 1997) (citing Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993)), cert. denied, 510 U.S. 992 (1993). For judicial estoppel to apply, "the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding, and that inconsistent position must have been adopted by the court in some manner." Id. "Strictly speaking, for judicial estoppel to apply, the party

estopped must have procured a judgment on the basis of the inconsistent position." Fourth Fed. Sav. Bank v. Nationwide Assocs. Inc., 183 Misc.2d 165, 170 (N.Y. Sup. 1999) (citations omitted). The Second Circuit, in Bates, determined that judicial estoppel only applies when a tribunal in a prior proceeding has accepted the claim at issue by rendering a favorable decision. 997 F.2d at 1038; see also Manhattan Avenue Dev. Corp. v. Meit, 637 N.Y.S.2d 134, 134-35 (1st Dept. 1996) ("prior success" element is necessary for judicial estoppel) (citations omitted).

As an initial matter, the federal court expressly declined to consider the merits of this enforcement action, and affirmatively stated that such action is not precluded. Bath Petroleum Storage, Inc. v. Sovas, 309 F. Supp.2d at 376. Thus, even assuming that Department Staff's position in the federal litigation is inconsistent with its posture here, the requirement that a judgment be rendered in Department Staff's favor based upon that inconsistent position has not been satisfied.

Moreover, the court noted that both parties to the litigation agreed that the Class III Underground Injection Control ("UIC") permit, issued by the United States Environmental Protection Agency, allows Bath to expand its caverns to a diameter of 200 feet. 309 F. Supp.2d at 368, 375. Department Staff's position with respect to the enforcement action, according to the court, is that "the administrative enforcement proceeding is 'wholly independent of plaintiffs' UIC permits and former gas conversion project' because it 'concerns plaintiffs' violations of the ECL and applicable regulations regarding their 1992 ECL article 23 permit, a former SPDES [State Pollutant Discharge Elimination System] permit, and expansion activities without a permit." Id. In this case, Department Staff's claims in the 2003 Amended Complaint also go to the alleged unpermitted expansion of the storage caverns. Under the circumstances, Respondents' argument that Department Staff has adopted a position in this proceeding that is at variance with its stance in the federal litigation is not persuasive. Therefore, Respondents' motion to dismiss is denied.

Department Staff's Objections to Combined Discovery Demands

On April 15, 2005, E.I.L. served combined discovery demands (the "Demands") upon Department Staff. The Demands sought information concerning any expert witnesses that Department Staff proposed to call at the hearing, including identification of such witnesses, the subject matter of the expert's testimony, the facts and opinions as to which the expert was expected to testify, and the grounds for each such opinion. In addition, the

Demands requested the dates of all expert reports, and the expert's qualifications.

E.I.L.'s Demands also sought information concerning the testimony to be offered by any other witnesses, to include generally each person who had or might have knowledge concerning the transactions or events alleged in the 2003 Amended Complaint. Finally, the Demands contained a "Request for Statements" which would require disclosure by Department Staff of statements made by or attributable to Respondents, with further particulars as to the nature and substance of such statements.

By letter dated April 20, 2005, Department Staff contended that the Demands were an abuse of process, and that the discovery sought was "largely redundant" of the document demands E.I.L. had already served. Department Staff asserted that to the extent the Demands consisted of interrogatories, those Demands were untimely, and noted that Department Staff had already provided the names and affiliations of the witnesses who would testify at the hearing.

E.I.L. replied to Department Staff's letter by correspondence dated April 22, 2005, arguing that the demands were standard discovery devices that were neither document demands nor interrogatories. E.I.L. went on to state that "the intent of the expert witness demand is to sort out which witnesses the Department will call to testify as to factual matters and which witnesses the Department will call to provide opinion testimony and as to the latter, to disgorge the basis of those opinions in accordance with New York law."

Department Staff responded in a letter dated April 29, 2005, contending that the disclosure devices authorized under the CPLR are limited to those enumerated in Section 3102(a), specifically, "depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission," and noting further that Part 622 of 6 NYCRR provides for additional restrictions on disclosure. In addition, according to Department Staff, "because the Department routinely uses its staff as both expert and fact witnesses, the distinction in this matter is not that relevant."

During the conference on May 4, 2005, the parties discussed further the Demands and Department Staff's objections. Department Staff stated that the witnesses at the hearing would consist of those previously identified by Department Staff in

prior correspondence, many of whom are employed by or formerly worked for the Department. Department Staff also indicated that it did not intend to hire any expert witnesses. Tr. at 33. Respondents took the position that if Department Staff's witnesses would not be qualified as experts, those witnesses would be limited to testimony as to facts, not opinion. Tr. at 35-36. Department Staff maintained that Respondents were incorrect as to the applicable law on this point.

As an initial matter, the information sought in the Demands as to expert testimony is authorized pursuant to Section 3101(d)(1)(i) of the CPLR, which provides that

> "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

Section 622.7(a) of 6 NYCRR provides that "[t]he scope of discovery must be as broad as that provided under article 31 of the CPLR." Thus, the enforcement hearing regulations do not prohibit E.I.L. from seeking information as to the identity of Department Staff's expert witnesses, or the substance of the testimony, in reasonable detail, to be offered by those witnesses.

Moreover, in order to ensure that this hearing will proceed in an orderly manner by scheduling witnesses to testify as to particular allegations in the 2003 Amended Complaint, it is necessary for each party to identify the witnesses to be called to testify as to each cause of action and each affirmative defense. Department Staff has already indicated that it is prepared to do so, and has provided a list of witnesses and their affiliations. Accordingly, Department Staff is directed to respond to the E.I.L.'s Demand for Experts, and to identify the allegations in the 2003 Amended Complaint and the affirmative defenses as to which each witness will testify. Respondents must provide the same information with respect to their witnesses.

Similarly, the Demand for Statements is authorized pursuant to CPLR 3101(e), which provides that "[a] party may obtain a copy of his own statement." Accordingly, Department Staff is directed to respond to this discovery request. As should be obvious, the statements sought are limited to those, if any, made by Respondent Weinberg and corporate personnel, and would not include statements made by counsel for Respondents.

The Demand for Witnesses, however, seeks information duplicative of that already requested in E.I.L.'s Interrogatory No. 1 ("Identify all persons who have information or Documents relating to the subject matter of the allegations in the Complaint, and, for each such person identified, describe the information known by each such person in detail and identify all Documents held by such person"), and E.I.L.'s Document Request ("All documents identified in your answers to these interrogatories"). Therefore, Department Staff need not respond to this portion of the Demands, except to indicate which witnesses will offer testimony as to particular causes of action.

As for the dispute among the parties concerning the admissibility of opinion testimony to be offered by Department Staff's witnesses, in Cassano v. Hagstrom, 5 N.Y.2d 643, 646 (1959), the Court of Appeals observed that "it is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." It is also well settled that a determination as to the admissibility of expert testimony is within the sound discretion of the trier of fact, and such testimony is proper if it would help to clarify an issue requiring professional or technical knowledge. De Long v. County of Erie, 60 N.Y.2d 296, 307 (1983); Selkowitz v. County of Nassau, 45 N.Y.2d 97, 101-02 (1978) (expert testimony is appropriate to clarify "a wide range of issues calling for the application of accepted professional standards.")

In order for an expert's testimony to be admissible, "all that is required is that the testifying expert possess the requisite skill, training, education, knowledge and experience from which it can be assumed that the opinion rendered is reliable." Matter of Enu v. Sobol, 208 A.D.2d 1123, 1124 (3rd Dept. 1994); Mattot v. Ward, 48 N.Y.2d 455, 459 (1979). The issue of the weight to be accorded expert testimony "is properly resolved in the administrative process," Matter of Lampidis v. Mills, 305 A.D.2d 876, 877 (3rd Dept. 2003), and the extent of the witness's qualifications goes to the weight to be afforded the testimony. Felt v. Olson, 51 N.Y.2d 977, 979 (1980).

These principles are adhered to in Department enforcement hearings. While the rules of evidence are not strictly applied in administrative proceedings, and hearsay is admissible, "the weight given to a witness' testimony is based, in part, on the reliability of that evidence." Matter of Tubridy, Decision of the Commissioner, at 9; 2001 WL 470657, *6 (Apr. 19, 2001). In light of this, any witnesses called upon to offer opinion testimony in the hearing must be qualified to do so. A witness may be qualified to offer such testimony based upon personal

knowledge or facts in the record, or because the witness possesses the requisite education or experience that would ensure reliability.

Respondents' Request to Serve Discovery on Counsel for Department Staff

When the parties convened on May 4, 2005, counsel for Robert V. H. Weinberg requested leave to serve interrogatories or conduct some type of documentary examination with respect to conversations that allegedly took place among Respondent Weinberg and Ms. Schwartz and Ms. Lotters, both of whom are counsel for Department Staff in this proceeding. Tr. at 55. According to Respondent Weinberg's counsel, the conversations took place before the complaint was filed, outside the presence of Respondent Weinberg's then-counsel, and during the course of those conversations, "certain statements and representations were made . . . personally by Ms. Schwartz and Ms. Lotters that we believe are relevant and pertinent to at least the penalty aspects of this case." Tr. at 55-57. Respondents stated further that the conversations included some discussion of settlement, as well as "things outside of settlement, things that related to meetings that were held regarding the Department's stance on the declaratory ruling, for example, and certain other aspects of that which related to personal threats being made. That sort of thing. Things we want to get on the record in this proceeding." Tr. at 58. Department Staff indicated that they would likely object to the proposed discovery. Tr. at 57.

Pursuant to Section 622.7 of 6 NYCRR, "depositions and written interrogatories will only be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding." Respondents essentially are requesting leave to depose opposing counsel. This practice is disfavored. See Giannicos v. Bellevue Hosp. Medical Center, 7 Misc. 3d 403, 406-07 (Sup. Ct. N.Y. County 2005) (noting that practice of calling opposing counsel as a witness at trial is offensive to the concept of the adversarial process). In Giannicos, the court refused to allow the deposition of opposing counsel, relying upon a three-part test articulated by the Eighth Circuit Court of Appeals in Shelton v. Amer. Motors Corp., 805 F.2d 1323 (8th Cir. 1986). The Shelton test requires a party to establish that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and, (3) the information is crucial to the preparation of the case." 805 F.3d at 1327 (citations omitted). The test was employed in New York federal court in Alcon Laboratories, Inc. v. Pharmacia Corp., 225 F. Supp.2d 340, 342

(S.D.N.Y. 2002) (noting that while the Second Circuit had not expressly adopted the Shelton standard, it expressed agreement with the principles articulated in that decision, and observing further that the Shelton test had been "widely followed by district courts in this Circuit." (citations omitted)).

As the caselaw makes clear, courts view attempts to depose opposing counsel with some concern, and it is incumbent upon a party seeking such discovery to make a strong showing that the information is important enough to justify a practice that is offensive to the adversarial process. Here, it is difficult to ascertain what relevance the conversations alleged may have, given that they took place before the complaint in this action was filed. It also does not appear that the information would be "crucial to the preparation of the case." Testimony as to settlement discussions is inappropriate. See CPLR 4547 ("[e]vidence of any conduct or statement made during compromise negotiations shall also be inadmissible.") Department Staff's representations to Respondent Weinberg as to the interpretation of a declaratory ruling[3] prior to the complaint being filed are highly unlikely to have any bearing upon the hearing. If Respondent Weinberg wishes to testify, subject to cross-examination, as to alleged personal threats against him, he is free to do so. Therefore, it cannot be said that there is no other means for Respondents to obtain the information other than by deposing Department Staff, inasmuch as Respondent Weinberg claims already to be in possession of the information sought by his participation in the alleged conversations.

Rather than expediting the proceeding, the information sought appears to be irrelevant or tangential at best. Section 622.10 allows the ALJ to exclude testimony or argument of this kind. As the court observed in Giannicos, "'depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case.'" 7 Misc.3d at 407(quoting West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302 (S.D. Fla. 1990)); State v. Solvent Chemical Co., Inc., 214 F.R.D. 106, 111 (court concluded that notice of deposition would only serve as a means to ascertain substance of confidential communications and mental impressions of counsel in determining reasonableness of settlements with

[3] Matter of Bath Petroleum Storage, Inc., DEC 23-08 (May 2, 1996). The ruling held that the permit modification exemption provision of ECL Section 23-1301(3) is not applicable to an expansion or modification of the storage capacity of an underground storage reservoir. According to the ruling, ECL Section 23-1301(5) requires a permit application and fee for a modification to the storage capacity for an underground storage reservoir.

other defendants; settlement information was not relevant or crucial to preparation of case)(W.D.N.Y. 2003). Moreover, while the parties were granted leave to serve interrogatories, the time to serve such discovery has passed. Accordingly, Respondents' request is denied.

Respondents' Assertion of Privilege With Respect to "Z-Scans"

During the conference call held on May 13, 2005, Department Staff stated that they wished to obtain copies of the "Z-Scan" studies that were performed at the facility. Tr. at 101-03. According to Respondents, Z-scans are ultrasound surveys that rely upon pulses from surface probes to generate sound waves in an attempt to acquire information as to the contours of underground structures. Respondents objected on the grounds that the scans were privileged, asserting that the studies were performed at the request of counsel and were prepared in anticipation of litigation. Respondents went on to state that the company that performed the work has since gone out of business, and that in any event, the results of the studies were not reliable. Department Staff challenged Respondents' assertion of the privilege, pointing out that the privilege is a qualified one, and contending that the Z-scans were discoverable. This dispute was discussed further during the conference call on May 19, 2005, and a ruling was requested. In correspondence dated June 6, 2005, Department Staff provided information concerning a company named Digital Magnetotelluric Technologies ("DMT"), which Department Staff believed to be the contractor hired to perform the Z-scans at the Bath facility. According to Department Staff, DMT is still in business. During the conference call held on June 7, 2005, Respondents corroborated this information.

Section 622.8(a) of the Department's enforcement hearing regulations provides that "[t]he scope of discovery shall be as broad as that provided in the CPLR." Section 3101(a) of the CPLR establishes the general scope of disclosure as "all evidence material and necessary in the prosecution or defense of any action." "Privileged matter" is not obtainable upon objection to its disclosure, and the "work product of an attorney" is not obtainable. CPLR 3101(b) and (c).

CPLR 3101(d)(2) provides, in pertinent part, that materials otherwise discoverable under CPLR 3101(a), which were prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including a consultant), may only be obtained "upon a showing that the party seeking discovery has substantial need of the materials in the

preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Thus, material prepared in anticipation of litigation is not absolutely immune from discovery. Corcoran v. Peat, Marwick, Mitchell and Co., 151 A.D.2d 443, 445 (1st Dept. 1989). Rather, such material is conditionally immune, and may be obtained if the party seeking disclosure can meet the test articulated in the statute. Id. If discovery is ultimately ordered, the court must "protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." CPLR 3101(d)(2); Matter of Britestarr Homes, Inc., ALJ Rulings, at 1, 1993 WL 1470940, *1 (Jan. 15, 1993).

As an initial matter, the party resisting disclosure has the burden of showing that the materials sought were prepared solely in anticipation of litigation. See Mavrikis v. Brooklyn Union Gas Co., 196 A.D.2d 689, 690 (1st Dept. 1993); Carden v. Allstate Ins. Co., 105 A.D.2d 1048, 1049 (3rd Dept. 1984)(material must be prepared exclusively for litigation). Conclusory allegations to that effect are insufficient to satisfy that burden. See State v. Sand and Stone Assocs., 282 A.D.2d 954, 956 (3rd Dept. 2001) (in light of sequence of events, conclusory claim that investigative summary was prepared solely for litigation was inadequate to establish privileged status of material); Crazytown Furniture v. Brooklyn Union Gas Co., 145 A.D.2d 402, 403 (2nd Dept. 1988) (conclusory allegations of counsel were not enough to demonstrate that reports should be protected from disclosure).

At this point, Respondents have stated merely that the Z-scans are privileged as material prepared in anticipation of litigation, and that in any event, the studies are not reliable. This is inadequate to establish Respondents' entitlement to the privilege. Respondents are directed to provide the Z-scans, and all other documentation associated with the preparation and performance of the studies, to the ALJs for review *in camera*. See State v. Sand and Stone Assocs., supra, at 956 (Supreme Court erred in exempting documents from disclosure without first conducting *in camera* review to evaluate claim that investigative reports were prepared exclusively for litigation). In order to support Respondents' privilege claim, the documentation submitted should include, but not be limited to, copies of any agreements entered into between the consultant and Respondents that would indicate that the studies were performed in anticipation of litigation.

Notwithstanding Respondents' arguments as to the accuracy or probative value of the Z-scans, the phrase "material and necessary" must be

> "interpreted liberally to require disclosure upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason."

Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968). Broad disclosure of all relevant evidence as well as information reasonably calculated to lead to relevant evidence is mandated under CPLR 3101(a). Inasmuch as cavern size and contours, as well as alleged cavern expansion, are one of the central controversies among the parties in this proceeding, it cannot be said that the Z-scans would be outside the scope of permissible discovery at this point.

If it is determined that the privilege applies, disclosure may only be ordered upon a showing by Department Staff of its substantial need for the studies in preparing its case, and that it is unable without undue hardship to obtain the substantial equivalent of the Z-scans without other means. If Department Staff makes such a showing, disclosure will be subject to the requirement in CPLR 3101(d)(2) that mental impressions, conclusions, opinions or legal theories of an attorney or other representative of Respondents concerning this proceeding be safeguarded.

CONCLUSION

Respondents' motion to dismiss is denied. Respondents' request to serve discovery concerning conversations among Respondent Weinberg and Department Staff is denied. Discovery with respect to the witnesses called to testify at the hearing shall take place in accordance with the scheduling order below. Respondents are to provide copies of the Z-scans as well as copies of all documents related to those studies for review by the ALJs, who will make a determination as to the privilege, if any, to be afforded to the documents sought.

SCHEDULING ORDER

1. On or before Friday, June 17, 2005, Respondents shall provide copies of the Z-scans, and copies of all documentation associated with the preparation and

performance of the studies, to the ALJs for review *in camera*, so that a determination may be made as to the privileged status of the studies.

2. During the hearing preparation scheduled for June 20th through the 22nd, Department Staff will respond to the combined discovery demands, except as set forth above. At that time, all parties are to provide the names and affiliations of all fact and expert witnesses who will be called to testify. In addition, the parties are to identify the causes of action in the 2003 Amended Complaint and/or the affirmative defenses as to which each witness will testify. Disclosure with respect to expert witnesses will conform with the provisions of CPLR 3101(d)(1)(i).

2. A conference call will take place at 10:00 a.m. on Friday, June 17, 2005. As noted above, the parties will meet in Albany on Monday, June 20 to begin hearing preparation. The hearing will begin the following Monday, June 27, 2005.

/s/
Maria E. Villa
Administrative Law Judge

Dated: June 13, 2005
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List