STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of
SUFFOLK COUNTY WATER AUTHORITY
for a permit pursuant to
Environmental Conservation Law ("ECL")
Article 15 and Part 601 of
Title 6 of the Official
Compilation of Codes, Rules
and Regulations of the
State of New York ("6 NYCRR")
to install a public water supply well
(Middleville Road No. 3) on the
south side of Middleville Road,
Town of Huntington, Suffolk County, New York

DEC Project No. 1-4700-00010/00583

RULING ON MOTION TO QUASH SUBPOENA DUCES TECUM

Background

By letter dated July 25, 2006, the Applicant, Suffolk County Water Authority ("SCWA") advised the parties to this proceeding that the SCWA intended to serve a subpoena duces tecum upon the County of Nassau (the "County").[1] In that letter, counsel for the SCWA stated that pursuant to the New York Civil Practice Law and Rules ("CPLR"), it would be necessary for him to obtain any such subpoena from Supreme Court. CPLR 2307 provides, in pertinent part, that

> [a] subpoena duces tecum to be served upon . . . a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is required is triable.

In a memorandum dated July 26, 2006, the administrative law judge ("ALJ") determined that the issuance of such subpoenas is

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[1] The background and procedural history of this matter is set forth in a Ruling on Issues and Party Status dated November 9, 2005 (2005 WL 3078503). That Ruling granted *amicus* status to the County, pursuant to Section 624.5(d)(2) of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

within the Department's sole authority. As the Court of Appeals held in Matter of Irwin v. Bd. of Regents of the University of the State of New York, CPLR 2307 does not govern issuance of a subpoena duces tecum by the Supreme Court where an administrative entity's authority to issue such subpoenas is derived from a specific statutory grant of power. See 27 N.Y.2d 292, 296 (1970); see also Matter of Anonymous v. State Dept. of Health, 173 A.D.2d 988, 988 (3rd Dept. 1991) (Supreme Court without authority to issue subpoena duces tecum where Public Health Law granted express authority to agency in professional misconduct hearings); Matter of New York State Supreme Court Officers Ass'n v. New York State Unified Court System, 2 Misc. 3d 960, 962 (Sup. Ct., Kings Cty. 2004) (where administrative board has been granted statutory power to issue subpoenas, such power "is derived solely from such grants.").

In this case, both Section 304(2) of the State Administrative Procedure Act, as well as Section 3-0301(2)(h) of the Environmental Conservation Law authorize the presiding officer in a Department proceeding to issue subpoenas, including subpoenas duces tecum. Pursuant to Section 624.7(f) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), any attorney of record in a proceeding has the power to issue subpoenas. Nevertheless, in light of CPLR 2307, where, as here, a party to a Department hearing seeks to serve a subpoena duces tecum on a municipal corporation, the authority to issue the subpoena rests with the Commissioner and her designee, the ALJ. Accordingly, the SCWA submitted, and the ALJ approved, a subpoena duces tecum which was served on the County.

By letter dated August 1, 2006, the County requested that the subpoena be withdrawn. During a conference call on August 2, 2006, the ALJ denied the request, and advised the parties that the County's letter would be treated as a motion to quash the subpoena. In response, the County cited to Section 2304 of the CPLR which provides, in pertinent part, that if a subpoena "is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court." According to the County, any motion to quash would be properly returnable before Supreme Court.

The provisions of the CPLR with respect to a subpoena duces tecum are not controlling in this proceeding. As discussed above, where an administrative entity's authority to issue such subpoenas is derived from a specific statutory grant of power, Section 2307 of the CPLR does not apply, and Supreme Court is not

empowered to issue the subpoena. Matter of Irwin, supra, at 296.

Moreover, "the propriety of the issuance or nonissuance of [a] subpoena is appropriately challenged on review of the agency's final determination." Matter of Fisher v. Tax Appeals Tribunal, 177 A.D.2d 801, 801-02 (3rd Dept. 1991), appeal dismissed, 79 N.Y.2d 914 (1992), lv. denied, 80 N.Y.2d 751 (1992), cert. denied, 506 U.S. 953 (1992). In Matter of Anonymous v. State Dept. of Health, 173 A.D.2d 988, 989 (3rd Dept. 1991), the court observed that because express statutory authority had been granted to the agency to issue subpoenas, CPLR 2307 did not apply and the Supreme Court was without authority to issue a subpoena duces tecum. The court went on to state that "[i]n view of the factors that must be weighed in determining the propriety of the grant or denial of a request for the issuance of a subpoena duces tecum in an administrative medical disciplinary hearing, including confidentiality, it appears appropriate that judicial review be made after the hearing has concluded." Id. According to the court, "[p]etitioner's contention that respondent should have moved by motion to quash the subpoena pursuant to CPLR 2304 rather than prosecuting this appeal is academic in light of our decision that Supreme Court had no authority to issue the subpoena." Id. This reasoning is controlling here.

The County also cited to Anonymous v. Axelrod, 92 A.D.2d 789 (1st Dept. 1983) as further support for the proposition that any application by the County for further relief must be made to Supreme Court. Axelrod is distinguishable because Section 2304 does not apply, and also because that case involved an investigation by the State Board for Professional Medical Conduct, not an administrative adjudication. 92 A.D.2d at 789. Here, the County has moved to quash a subpoena served by the SCWA, not the Department. Pursuant to Section 624.8(b)(1)(v) of 6 NYCRR, the ALJ has the power to quash and modify subpoenas. That authority, which contemplates the ALJ's oversight of the scope of the subpoena, is not altered by the decision in Axelrod.[2]

In addition, the courts have emphasized the need to examine the specific statutory language that grants subpoena power to an agency. Matter of Moon v. New York State Dept. of Social

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[2] See Brooks v. City of New York, 178 Misc.2d 104, 105 (Sup. Ct. N.Y. Cty. 1998) (distinguishing Axelrod on the basis that it concerned "a non-judicial subpoena issued by a State agency to appear before an agency.")

Services, 207 A.D.2d 103, 105 (3rd Dept. 1995) (authority to issue subpoenas in case at bar must be determined solely by reference to specific grant of subpoena power in Social Services Law). Where the regulatory language states that an agency's subpoena power is "regulated" or "enforced" under the CPLR, the Supreme Court has jurisdiction to entertain a motion for relief. Matter of New York State Supreme Court Officers Assn. v. New York State Unified Court System, 2 Misc.3d 960, 964 (Sup. Ct. Kings Cty. 2004) (discussing Appellate Division decisions where subpoena power was "regulated" under the CPLR). That is not the case here. Section 624.7(f) of 6 NYCRR requires only that the Department exercise its subpoena power "[c]onsistent with the CPLR."

Accordingly, the County's August 1, 2006 letter was treated as a motion to quash, returnable before the ALJ. Citations to the County's submission appear in this ruling as "Motion (August 1 submission), at ___." By memorandum dated August 3, 2006, the ALJ directed the County to particularize its objections to the specific paragraphs in the subpoena. That submission was timely received on August 4, 2006. Citations to that document in this ruling appear as "Motion (August 4 submission), at ___." Both submissions constitute the County's motion to quash the subpoena duces tecum. For the reasons set forth below, the motion is granted in part, and denied in part.[3]

Discussion and Ruling

The subpoena sought documents[4] relied upon by certain witnesses offered by a consolidated group of petitioners who were granted full party status in this proceeding ("Petitioners").[5] The subpoena also requested documents concerning the Lloyd and other Long Island aquifers, as well as information with respect to individuals referenced in Petitioners's witnesses's testimony. Initially, the SCWA sought those documents through discovery requests directed to Petitioners and through a motion to compel, but was advised by Petitioners's then-counsel, Sarah Meyland,

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[3] The chart attached provides a summary of the ruling.

[4] The term "document" is defined in the subpoena duces tecum on page 1, paragraph 1.

[5] The Petitioners's group includes Sarah Meyland in her individual capacity and also on behalf of Rea Schnittman, the Nassau County League of Women Voters, the North Shore Land Alliance, the Sierra Club, the East Norwich Civic Association, the Long Island Drinking Water Coalition, the Huntington League of Women Voters, the Conservation Board of the Village of Lloyd Harbor, Friends of the Bay, Residents for a More Beautiful Port Washington, and the League of Women Voters of Suffolk County.

that the documents were in the County's possession and that Petitioners did not have access to the documents.[6] The County declined to provide the documents unless directed to do so pursuant to a subpoena duces tecum.

In its motion, the County objected to the subpoena as overly broad and unduly burdensome. The County further characterized the requests as a "fishing expedition" engaged in by the SCWA in an effort to establish that the County, which was denied full party status in this proceeding, was in fact participating as a full party through the testimony offered by Petitioners. The County took exception to the SCWA's claims, and argued further that even if County employees had, without the County's authorization, assisted in the preparation of Petitioners's prefiled testimony, such activities would be "strictly an internal issue for the County" and irrelevant to this proceeding. Motion (August 1 submission), at 3. The County asserted that it "had no involvement or control over the submission of this testimony, no knowledge of the basis of such testimony, and was unaware of the content thereof until receiving service of the prefiled testimony." Id. at 2. According to the County, "[t]o the extent the documents sought by the Subpoena exist, they are appropriately sought from the Meyland Group [Petitioners], not the County." Id.

In its subsequent submission, the County reiterated the arguments set forth in the motion, and argued further that the sole purpose of the subpoena was to harass the County. Motion (August 4 submission), at 2. With respect to the specific items sought by the subpoena, the County stated that without waiving its objections, it would determine whether documents responsive to items 37-40 and 45 existed. Those paragraphs sought information concerning the safe yield of various aquifers. In addition, those items requested well permits and well permit applications for specific wells. Accordingly, by the date specified below, the County shall provide any documents responsive to these paragraphs of the subpoena.

The County objected to paragraphs 1, 48, 61, 70, 82, 88, 93, 98, 103, 108, 113, 118, and 123, arguing that these sought responses "other than the production of 'books, papers [or] other things'" which are the sole items identified in CPLR Section 2301

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[6] Shortly after service of the County's motion to quash and the SCWA's response to that motion, Petitioners retained other counsel. By notice dated August 10, 2006, E. Christopher Murray, Esq., of the law firm of Reisman, Pierez & Reisman LLP, notified the ALJ and the parties of his appearance on Petitioners's behalf.

as obtainable by a subpoena duces tecum." Id. at 13. Those paragraphs of the subpoena consist of demands for the job title, job position and department of employment of certain individuals, some of whom provided prefiled direct testimony on behalf of Petitioners. The County went on to argue that the information sought was irrelevant, because "to the extent that any individuals identified in the referenced items have participated in this proceeding in their capacity as private citizens, questions concerning their status as County employees are utterly irrelevant to any proper inquiry in this case." Id.

In its opposition[7] to the motion by letter dated August 8, 2006 ("Opposition"), the SCWA asserted that the information sought in these paragraphs was relevant, because the individuals in question had either submitted prefiled direct testimony or were identified in Nassau County documents and e-mails submitted by Petitioners in support of that testimony. The SCWA argued that whether those individuals participated in their private capacity or otherwise, "the requested information is material and relevant to the reliability and credibility of the testimony and documents submitted by Petitioners." Opposition, at 2. The SCWA agreed to modify the request in response to the County's objection to seek "'any books, papers [or] other things' that set forth the title, job description, and department of employment of the subject Nassau County employee." Id.

"The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is 'utterly irrelevant to any proper inquiry.'" Ayubo v. Eastman Kodak Co., Inc., 158 A.D.2d 641, 642 (2nd Dept. 1990) (citations omitted). In this case, the County has not made the requisite showing with respect to the paragraphs in question, and the motion to quash with respect to paragraphs 1, 48, 61, 70, 82, 88, 93, 98, 103, 108, 113, 118, and 123 is denied. The information is relevant to the subject matter of this proceeding, particularly because several of the individuals named in the subpoena have offered prefiled direct testimony. The County may either provide the requested information, or provide documents setting forth the information sought.

According to the County, paragraphs 2-6, 49-51, 62-64, 71-73, 83-87, 89-92, 94-97, 99-102, 104-107, 109-112, 114-117, 119-122, and 124-129 are objectionable because those sections of the

[7] In its opposition, the SCWA withdrew item 41 from the subpoena. Accordingly, that paragraph, which requested a list of every e-mail address used by Mr. Alarcon since January 1, 2003, is not considered in this ruling.

subpoena request documents associated with a particular individual's activities as private citizens, not in their capacity as County employees. The County asserted that it has no basis to inquire about those activities and that this would have a chilling effect on the First Amendment rights of the employees named in the subpoenas.

The SCWA responded that it is not seeking documents maintained by Nassau County employees as private citizens, in their homes or private computers. Rather, the SCWA took the position that the documents sought are records within the County's possession, custody and control, in County offices and on County computers.

The motion to quash with respect to paragraphs 2-6, 49-51, 62-64, 71-73, 83-87, 89-92, 94-97, 99-102, 104-107, 109-112, 114-117, 119-122, and 124-127 is denied. The documents requested in some of the paragraphs consist of material prepared or reviewed by witnesses who have offered prefiled testimony with respect to the Lloyd Aquifer, the SCWA's application, and the Magothy Aquifer. The SCWA has also requested any documents concerning a particular witness's communications about these topics. Similarly, other items seek production of documents dealing with the same subject matter prepared or reviewed by individuals referenced in documentation provided by Petitioners as part of the prefiled direct testimony, or communications concerning those subjects by those persons. These documents are clearly relevant. Moreover, the requests are sufficiently specific for the County to identify the documents, and thus are not overly broad. As the SCWA acknowledged, the documents to be provided are only those non-privileged documents maintained in the County's offices.

In addition, during a conference call on August 4, 2006, counsel for the County stated that it had come to counsel's attention that Mr. Alarcon, one of Petitioners's witnesses, had performed an analysis with respect to the County's appeal of the issues ruling denying the County full party status. Mr. Alarcon is employed by the Nassau County Department of Health. Petitioners provided a copy of Mr. Alarcon's analysis. This provides a further basis for denial of the motion to quash with respect to these paragraphs, as well as paragraph 47, which seeks "[e]ach document containing any and all of Alarcon's pre-filed direct testimony." The County's motion is also denied with respect to paragraphs 9 and 10. Those paragraphs request documents concerning communications between the County and Mr. Alarcon as to the SCWA's application and the Lloyd Aquifer.

In its motion, the County argued that the requests in

paragraphs 7, 8, 15-36, 42-44, 47, 56-60, 69, 78 and 80 of the subpoena were directed to the wrong party. The subpoena paragraphs in question seek documents prepared or reviewed by certain witnesses offered by Petitioners in preparing their prefiled direct testimony. In some instances, the items request further information concerning statements made in the prefiled testimony. For example, paragraph 17 requests "[a]ny and all documents setting forth the basis of Alarcon's pre-filed direct testimony response number 18. Please include any and all documents relating to testing of water produced by the Manhasset Lakeville Water District (MLWD) Well # 7 as referred to in response number 18. Please include any and all documents concerning the investigation performed on MLWD # 7 to determine that 'a hole in the well casing was allowing contaminated shallow groundwater to enter well.'"

The County pointed out that it had not submitted any prefiled direct testimony, "had no involvement or control over the submission of such testimony, no knowledge of the basis of such testimony, and was unaware of the content thereof until receiving service of the pre-filed testimony." Motion (August 4 submission), at 15. The County also objected to paragraphs 128 and 129, which sought documents prepared or reviewed by Ms. Meyland, and documents concerning any communications by Ms. Meyland concerning the Lloyd Aquifer or the application. In this proceeding, Ms. Meyland has served as Petitioners's counsel, and is a member of that group in her individual capacity. Moreover, she has submitted prefiled direct testimony. According to the County, these requests should be directed to Petitioners.

Section 624.7(d)(2) of 6 NYCRR provides that:

> [i]f a party fails to comply with a discovery demand without having made a timely objection, the proponent of [sic] discovery demand may apply to the ALJ to compel disclosure. The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

Section 624.7(e) of 6 NYCRR states:

> (e) *Prefiled Testimony.* The ALJ may require

> the submission of prefiled written testimony for expert witnesses. Such testimony must be attested to at the hearing and the witness must be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ. Whenever the ALJ requires the submission of prefiled testimony, the testimony must provide, or must be accompanied by a technical report which provides, a full explanation of the basis for the views set forth therein, including data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography or reports, studies and other documents relied upon. Upon 10 days notice (which time may be shortened or extended by the ALJ) the party submitting prefiled testimony may also be required to make available all raw data, well logs, laboratory notes, and other basic materials, as well as all items on the bibliography provided. Whenever prefiled testimony is not required, any party may demand, from any other party or the department propounding an expert witness, all backup information that would be required in connection with prefiled testimony.

As these provisions make clear, as part of Petitioners's affirmative discovery obligations, Petitioners must provide all relevant and responsive documents, or risk preclusion at the hearing. The SCWA filed a motion to compel, and Petitioners did not raise any objection to the motion, other than to state that the documents requested were not in their possession. According to Petitioners, the SCWA was obliged to obtain the documents from the County.

Nevertheless, as the County points out, it was not involved in the preparation of the prefiled testimony at issue, and is not in a position to ascertain what documents are responsive to those paragraphs of the subpoena that make reference to that testimony. Moreover, the purpose of a subpoena duces tecum is "'to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.'" Matter of Constantine v. Leto, 157 A.D.2d 376, 378 (3rd Dept. 1990), aff'd, 77 N.Y.2d 975 (1991), citing Matter of New York State Dept. of Labor v. Robinson, 87 A.D.2d 877, 878 (2nd Dept.

1982). In this case, the general requests in the subpoena for documents relating to the basis of prefiled testimony are overly broad, and do not make reference to specific documents, such that the County could identify and provide the material requested.

Accordingly, the County's motion with respect to paragraphs 7, 8, 15, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 35, 36, 57, 58, 59, 60, 69, 78, and 80 is granted. For the same reasons, the County's motion to quash with respect to paragraphs 11, 12, 13, 14, 52, 53, 54, 55, 65, 66, 67, 68, and 74, 75, 76, 77, 79 and 81 is granted, and the County need not respond to those paragraphs. Paragraphs 128 and 129 request documents prepared or reviewed by Ms. Meyland, and any communications made by Ms. Meyland, with respect to the Lloyd Aquifer. The County's motion as to paragraphs 128 and 129 is granted.

Petitioners are reminded of their continuing obligation to provide documentation concerning the basis for the prefiled testimony offered. If Petitioners are in possession of any documents responsive to paragraphs 7, 8, 11, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 35, 36, 52, 53, 54, 55, 57, 58, 59, 60, 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 81, 128 or 129 of the subpoena, those documents are to be produced forthwith.

To the extent other items in the subpoena request specific information within the County's possession, custody or control, the County's motion is denied. The portions of the subpoena affected by this ruling include paragraphs 17, 20, 31, 32, 33, 34, 42, 43, 44, and 56.

Paragraphs 46 and 130 requested the names of the files on Mr. Alarcon's and Ms. Meyland's computers owned by the County, or network space assigned to those individuals by the County. The County objected to these requests as overbroad and unduly burdensome, irrelevant, and improper inasmuch as the subpoena did not request "books, papers, [or] other things." In its opposition, the SCWA modified those items to request "only those files related to or concerning the Lloyd aquifer, chloride concentrations in the Magothy aquifer, and the SCWA's application." Opposition, at 3. As so modified, the County's motion to quash with respect to these paragraphs is denied. Both Mr. Alarcon and Ms. Meyland have offered prefiled testimony in this proceeding, and the information sought is relevant and not overly broad.

Consistent with this ruling, all documents responsive to the subpoena are to be provided for inspection and copying at the

County's offices no later than Thursday, August 24, 2006.

/s/
Maria E. Villa
Administrative Law Judge

August 17, 2006
Albany, New York

TO: Service List

Suffolk County Water Authority
Summary of Ruling on Motion to Quash

Paragraph	Ruling	Paragraph	Ruling	Paragraph	Ruling
1	Denied	44	Denied	87	Denied
2	Denied	45	No motion	88	Denied
3	Denied	46	Denied	89	Denied
4	Denied	47	Denied	90	Denied
5	Denied	48	Denied	91	Denied
6	Denied	49	Denied	92	Denied
7	Granted	50	Denied	93	Denied
8	Granted	51	Denied	94	Denied
9	Denied	52	Granted	95	Denied
10	Denied	53	Granted	96	Denied
11	Granted	54	Granted	97	Denied
12	Granted	55	Granted	98	Denied
13	Granted	56	Denied	99	Denied
14	Granted	57	Granted	100	Denied
15	Granted	58	Granted	101	Denied
16	Granted	59	Granted	102	Denied
17	Denied	60	Granted	103	Denied
18	Granted	61	Denied	104	Denied
19	Granted	62	Denied	105	Denied
20	Denied	63	Denied	106	Denied
21	Granted	64	Denied	107	Denied
22	Granted	65	Granted	108	Denied
23	Granted	66	Granted	109	Denied
24	Granted	67	Granted	110	Denied
25	Granted	68	Granted	111	Denied
26	Granted	69	Granted	112	Denied
27	Granted	70	Denied	113	Denied
28	Granted	71	Denied	114	Denied
29	Granted	72	Denied	115	Denied

Paragraph	Ruling	Paragraph	Ruling	Paragraph	Ruling
30	Granted	73	Denied	116	Denied
31	Denied	74	Granted	117	Denied
32	Denied	75	Granted	118	Denied
33	Denied	76	Granted	119	Denied
34	Denied	77	Granted	120	Denied
35	Granted	78	Granted	121	Denied
36	Granted	79	Granted	122	Denied
37	No motion	80	Granted	123	Denied
38	No motion	81	Granted	124	Denied
39	No motion	82	Denied	125	Denied
40	No motion	83	Denied	126	Denied
41	Withdrawn	84	Denied	127	Denied
42	Denied	85	Denied	128	Granted
43	Denied	86	Denied	129	Granted
				130	Denied

SERVICE LIST

Proposed Middleville Road Well No. 3, Huntington, NY
NYSDEC Application No. 1-4700-00010/00583

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