STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 12 of the Navigation Law and Article 17 of the New York State Environmental Conservation Law, and Parts 608 and 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

by

SUPREME ENERGY CORPORATION, SUPREME ENERGY, LLC, and FREDERICK KARAM, individually,

Respondents.

RULING ON MOTION TO QUASH

DEC# 7-1780

November 3, 2008

SUMMARY

This ruling denies DEC Staff's motion to quash a subpoena served on August 29, 2008 on a DEC standby contractor, "Aztech." The ruling directs Aztech to comply with the subpoena, but allows for a thirty day extension, as requested.

BACKGROUND

DEC Staff has initiated an administrative enforcement proceeding against the respondents seeking: (1) a civil penalty of $1 million; and (2) the closure of a petroleum bulk storage facility located at 7433 and 7437 Hillside Road, Baldwinsville, New York (facility or site). The site is one of several current or defunct oil storage facilities which are the subject of ongoing litigation. The facilities sit atop a plume of petroleum contamination (State of New York v. Stratus Petroleum Corp., et al., Supreme Court, Albany County, J. Teresi, index #L000134-01).

The administrative hearing began on July 10, 2008 and continued on July 11, 24, 25, August 18, September 11 and 15, 2008. DEC Staff has rested its direct case and this dispute involves the respondents' last witness, Mr. Fina, who testified on September 15, 2008, and a document demand made on Mr. Fina's company, Aztech.

In its amended complaint, dated March 24, 2008, DEC Staff alleged four causes of action against the respondents: (1) operating a major oil storage facility (MOSF) without a licence,

in violation of Navigation Law (NL) section 174; (2) failing to pay licensing fees due, in violation of NL 174; (3) failing to maintain adequate secondary containment at the facility; and (4) failing to comply with the terms of an earlier consent order involving the facility (#7-20040909-3, September 29, 2004).

In their answer, the respondents generally deny DEC Staff's claims and raise an affirmative defense that some of the alleged defects in the secondary containment at the facility were caused by a DEC contractor, Aztech, who put holes in the secondary containment system for the purpose of installing wells related to the ongoing remediation efforts beneath the site. These wells were installed with the permission of the respondents and at the request of DEC Staff. After the wells were installed, DEC Staff then instructed Aztech not to repair the holes in the liner that Aztech had caused.

The respondents contend that this administrative enforcement action is part of a pattern of conduct by DEC Staff to improperly deprive the respondents of their rights and property. The respondents have alleged that after the respondents complained of the pace and the cost of remediation of the petroleum plume below the site and threatened to contact USEPA about the issue, DEC Staff entered into a course of conduct to punish the respondents. This course of conduct included improperly denying the respondents a license to operate the facility as well as damaging and not repairing the facility (and then seeking civil penalties as a result of the damage). According to the respondents, all of DEC Staff's actions are intended to force the closure of the facility and its dismantling, to make the remedation of the spill beneath the site easier and less costly.

While the parties have not yet completed entering their cases in the record, the respondents have shown, among other things: (1) that the first time a DEC contractor (a company called Land Tech) entered the site and installed wells (prior to the respondents taking title to the site), holes in the secondary containment liner were almost immediately repaired (this was not the case with the wells drilled by Aztech); (2) that after the holes were placed in the liner, Aztech did secure three estimates from firms for repair of the holes in the liner at the facility; and (3) DEC Staff has stipulated to the fact that it directed Aztech not to repair the holes in the liner.

The respondents have sued Aztech seeking $16 million in damages (Supreme Energy LLC, and Fred Karam Individually v. Aztech Technologies, Inc., Supreme Court, Oneida County, Index #CA2008-001856). According to Aztech's counsel, joinder of issue

in this case is due on or before October 15, 2008 and discovery in this matter has not commenced. Counsel advised that Aztech will argue it is immune from liability pursuant to NL 178-a and that it will counterclaim against the respondents for bringing a frivolous lawsuit.

PROCEEDINGS

The respondents, in a subpoena duces tecum dated August 29, 2008, sought the testimony of Mr. F.L. Fina on September 11, 2008 at the administrative hearing and sought two categories of documents from his firm, Aztech; (1) copies of estimates obtained by Aztech for repairs to the secondary containment (provided by DEC staff counsel and entered into the hearing record (Exh. 85)); and (2):

> "Any written communications, including letters, e-mails, telefaxes, etc. between New York State Department of Environmental Conservation and Aztech regarding Supreme Energy LLC premises at 7433 and 7437 Hillside Road Baldwinsville, New York."

By e-mail dated September 5, 2008, DEC Staff counsel stated he had been provided a copy of the subpoena by Aztech and that the documents sought were property of NYSDEC. Counsel requested a conference call to discuss the matter.

By e-mail dated September 5, 2008, counsel for Aztech requested to participate in any conference call.

By letter dated September 10, 2008, counsel for Aztech wrote to me expressing two concerns regarding the subpoenaed documents: (1) that the documents sought were already addressed in an earlier ruling; and (2) if the documents needed to be produced, that a thirty day extension should be granted due to the large number of documents sought. Counsel did not object to Mr. Fina's testifying, but requested he appear later in the day, due to his schedule. This request was granted and Mr. Fina appeared and testified.

During a break in the administrative hearing in Syracuse on September 11, 2008, counsel for the respondents, DEC Staff and I participated in a conference call with Aztech's counsel, who was in Albany. On this call, a schedule was established for DEC Staff to file its motion to quash the portion of the subpoena related to document requests (quoted above) and for the respondents and Aztech to respond.

By papers dated September 17, 2008, counsel for DEC Staff moved to quash the subpoena pursuant to 6 NYCRR 622.10(b(1)(v). Attached to the motion was a cover letter and a copy of Contract Number D400302, a 2003 agreement between DEC Staff and Aztec Technologies for services related to Standby Investigation and Remediation in NYSDEC Regions 3, 4 & 5.

DEC Staff's motion to quash was opposed by the respondents by papers dated September 19, 2008.

Aztech's counsel filed an affirmation in support of the motion to quash, dated September 24, 2008. Attached to this document were: (1) a copy of the summons and complaint in the respondents lawsuit against Aztech; and (2) a copy of Aztech's September 10, 2008 letter to me.

Respondents' counsel requested an opportunity to respond to matters raised in Aztech's filing which was granted. The respondents' final email submission on this issue was received on September 29, 2008.

DISCUSSION

DEC Staff argues: (1) it has standing to bring this motion to quash; (2) that there are procedural defects with the respondents subpoena; and (3) there are substantive grounds to quash the subpoena. In addition, in its response to DEC Staff's motion to quash, Aztech makes two new motions regarding the testimony of Mr. Fina, a principal of Aztech. DEC's regulations state that the party making a motion bears the burden of proof on that motion (6 NYCRR 622.11(b)(3)).

I. Standing

DEC Staff argues it has a proprietary interest in the documents sought by the respondents' subpoena, and therefore, it has standing to bring this motion to quash. To support this proposition, DEC Staff cites Eschel Gasoline Corp. v. New York Department of Consumer Affairs, 108 AD2d 717 (2nd Dept. 1985). Specifically, DEC Staff argues that Article 14 of its contract with Aztech (Contract Number D400302) stating the "Contractor agrees that all data, analyses, materials, reports, or other information, oral or written made available to the Contractor with respect to this Contract, and all data, analyses, materials, reports or other information, oral or written, prepared by the Contractor, with respect to this Contract shall be the property

of NYSDEC." DEC Staff interprets this language broadly and asserts ownership of all documents.

The respondents argue that DEC Staff's standing claim lacks merit but argues the motion should be decided on its merits, since Aztech could renew the motion were it denied on this ground. The respondents argue for a more narrow reading and assert that ownership extends only to scientific, professional, expert or otherwise factually relevant type of information to the services rendered by Aztech, and that DEC Staff cannot claim ownership of letters or other communications reflecting a scheme to create violations at the site to cause damage to the respondents. The respondents argue that the ALJ should undertake an *in camera* review of the documents and information. The respondents note that Eschel is essentially a one line opinion that states petitioner has no proprietary interest in the subpoenaed documents and, therefore, does not have standing to challenge the subpoena served on a third party. Respondents argue that this does not mean that a proprietary interest always gives a third party standing to file a motion to quash.

While not raised by the respondents in their papers, DEC Staff has failed to carry its burden of proof on the issue of its ownership of the documents in question. Two different company names are identified in the subpoena and the contract. The respondents' subpoena seeks documents from "AZTECH, INC., 5 McCrea Hill Road, Ballston Spa, New York." However, contract D400302 which DEC Staff states is dispositive of the question of document ownership names the contractor as "Aztec Technologies, Corner Rte 50 & Marion Avenue, Saratoga Springs, NY 12866." No explanation is given for the disparity between company names or addresses by DEC Staff, so it is impossible to conclude that this contract applies to these documents. In addition, the contract is for NYSDEC Region(s): 3,4 & 5, and the respondents facility is in NYSDEC Region 7. Again, no explanation is provided.[1]

In addition to its claim of ownership of the documents, DEC Staff also cites Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 133 (1985) as an additional basis for its standing to bring this motion. In this case, the court held that communications between agency staff and an outside consultant are interagency materials, pursuant to New York's Freedom of Information Law (FOIL). DEC Staff argues that this case supports

[1] As an aside, a third company name appears on the lawsuit filed by the respondents in Oneida County against "Aztech Technologies, Inc. 5 McCrea Hill Road, Ballston Spa, NY 12020."

DEC Staff's position that it has standing to bring the instant motion. Respondents argue correctly that this ruling, dealing with an interpretation of FOIL, is not relevant to the question of whether DEC Staff has standing in this dispute.

> **RULING**: DEC Staff has failed to meet its burden of proof demonstrating ownership of the documents sought by respondents' subpoena because it has failed to show that the contract attached to its motion applies in this case. There may be an explanation that will show DEC Staff's ownership pursuant to this contract, but it is not supplied in these papers, and thus, DEC Staff has failed to carry its burden of proof. In addition, DEC Staff's reliance on FOIL to show standing in this case is misplaced. However, while the motion could be denied solely on DEC Staff's lack of standing, as the respondents note, it is more efficient to decide this matter on substantive grounds, because Aztech would certainly have grounds to renew this motion were it denied on standing grounds alone.

II. Alleged Procedural Defects

DEC Staff alleges two procedural defects. First, DEC Staff argues that the respondents' subpoena is defective on its face because it fails to include language required by DEC's administrative enforcement regulations that "all subpoenas shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23" (6 NYCRR 622.7(1)(d)).

The respondents counter that the DEC regulation quoted above applies only to a subpoena issued pursuant to CPLR Article 31 "Discovery" and that the instant subpoena is not issued pursuant to Article 31, but rather for the purpose of requiring documents to be produced at the hearing which relate to a material and relevant issue of fact in dispute at the hearing. Further, the respondents continue, even if the language quoted above should have been in the subpoena, it would not render the subpoena void, but simply insulate the party served from a contempt charge for failing to comply. Finally, the respondents argue that DEC Staff's objection is academic since a motion to quash has been made.

> **RULING**: Since DEC Staff has moved to quash the subpoena with respect to the disputed documents, the respondents are correct that this dispute is academic. It would be

inefficient to the hearing process and a benefit to no one to quash this subpoena on this ground, only to have respondents' counsel re-serve a second subpoena with the missing language and have DEC staff file a new motion to quash on substantive grounds. There may be cases where an ALJ may quash a subpoena for the reasons cited by DEC Staff, but in this case such action would only slow the resolution of the matter with no attendant benefit.

The second procedural defect alleged by DEC Staff is that the respondents incorrectly characterized the subpoena as a "Subpoena Duces Tecum" because it seeks both documents from Aztech and the testimony of Mr. Fina.

In his response papers, the respondents' counsel includes a copy of a form of a subpoena duces tecum from Carmody Wait 2d which he argues clearly reflects that a subpoena duces tecum is designed to secure both the witness' attendance and the witness' production of documents at the same time. The respondents conclude that DEC Staff's assertion that two subpoenas need to be issued, one for the witness' appearance and the other to secure the production of documents is "ludicrious."

RULING: DEC Staff's motion to quash relates only to one category of documents sought by respondents. DEC Staff produced documents pursuant to the uncontested portion of the subpoena and did not raise any objections to Mr. Fina testifying at the hearing. As in the ruling above, it would be inefficient to the hearing process and a benefit to no one to quash this subpoena on this ground, only to have respondents' counsel re-serve a second subpoena.

III. Substantive Defects

DEC Staff and Aztech both allege several substantive defects with the respondents' subpoena duces tecum that warrant it being quashed, including: (1) that a prior ruling on discovery is dispositive of this dispute; (2) that the subpoena is an improper attempt to circumvent discovery; (3) the subpoena is an improper "fishing expedition"; (4) the subpoena is overbroad, sweeping and vague, and calls for documents not relevant to the complaint; and (5) the subpoena calls for production of privileged documents.

Before addressing each of these assertions, a brief summary of events in this case is necessary. In its Statement of

Readiness, dated May 16, 2008, DEC Staff stated that discovery had been completed by staff and had not been requested by respondents. On the May 27, 2008 conference call with the parties, the parties confirmed that discovery was complete and that respondents had not requested discovery. The respondents' counsel indicated that because of the other litigation involving the respondents, DEC Staff, and the site, he believed all documents had been previously disclosed.

Despite the statements by the parties, discovery was not complete before the hearing began and a process of continuing discovery has been occurring throughout the hearing.

After the hearing began, but prior to the testimony of Mr. Karam, DEC Staff served a subpoena upon the respondents seeking access to financial documents of the respondents. The respondents did not object and allowed DEC Staff access to their office and files. Some of these financial documents, including tax returns and profit and loss statements were entered into the administrative record for this case by DEC Staff after this discovery was allowed (Exh. 28, 29, 30 & 31). These documents were also the basis of extensive cross examination of Mr. Karam. It is important to note that in this case, DEC Staff has used a subpoena after the close of discovery to compel production of evidence. This evidence has not been helpful to the respondents.

Also after the hearing began, the respondents' counsel made a series of discovery demands which DEC Staff generally opposed. After a series of emails and conversations, some of the respondents' requests were withdrawn and DEC Staff provided information in response to others. Two requests required a letter ruling, which I issued on September 8, 2008. In this ruling, I granted the respondents' first request and directed DEC Staff to produce all memorandums and other notes of DEC Staff member Richard Brazell regarding the holes in the secondary containment liner at the site. In response, DEC Staff reported it had no documents responsive to this request. Also in my ruling, I denied respondents' second request which sought all correspondence between Aztech and DEC Staff member Chris Magee. Mr. Magee is responsible for overseeing the remediation of the petroleum spill at the site and surrounding area on the grounds that respondents failed to provide a sufficient reason why this information was not sought during pre-hearing discovery. It was also not made clear the relevance of this information to this hearing.

Also, as noted above, DEC Staff did supply copies of estimates obtained by Aztech for repairs to the secondary

containment (provided by DEC staff counsel and entered into the hearing record (Exh. 85). These documents were part of the uncontested portion of the respondents' subpoena which is at issue here.

Prior Ruling

Both DEC Staff and Aztech argue that my prior letter ruling of September 8, 2008, regarding the prior discovery dispute should require a ruling in their favor on this motion to quash. However, the facts involved in the two disputes are different. The prior ruling dealt with a discovery request for documents in the possession of DEC Staff, while the instant dispute involves a subpoena for records in the possession of Aztech. Therefore, I conclude that the prior ruling does not control the outcome of this dispute.

The Subpoena is an improper attempt to Circumvent Discovery

DEC Staff and Aztech both argue in their papers that the subpoena is an attempt to circumvent discovery. DEC Staff cites Matter of Terry D. 81 NY2d 1042, 1044 (1993) for the proposition that a subpoena may not be used for the purpose of discovery.

The respondents concede that a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence; rather, its purpose is to compel the production of specific documents that are relevant and material to facts at issue in a pending proceeding (West 16th Realty Co. v. Ali, 176 Misc. 2d 978 (Civ. Ct., New York County, 1998).

> **RULING**: In this case, despite the representation made in the statement of readiness and the parties pre-hearing statements, discovery was not complete before the hearing began, and has been ongoing, with both DEC Staff and the respondents requesting and receiving information and documents as the hearing has progressed. It is important to note that DEC Staff has used a subpoena to obtain additional evidence from the respondents after the close of discovery, while the hearing was ongoing. It is only fair that the respondents be allowed a similar opportunity. My prior ruling did not deal with documents in the possession of Aztech, rather with those in the possession of DEC Staff. While some of the documents may be the same, the issue is not. The fairness of this proceeding and the appearance of fairness in all DEC administrative enforcement proceedings requires that DEC Staff and

respondents have a similar opportunity to obtain evidence. In this case DEC Staff has used a subpoena to obtain evidence while the hearing was continuing, therefore, it is only fair that the respondents be allowed a similar opportunity. Since Mr. Fina was identified as the respondents' last witness and no other discovery requests are outstanding, no additional discovery requests will be entertained.

The Subpoena is a "Fishing Expedition" and is Overbroad, Sweeping, Vague and Calls for Documents not Relevant to the Complaint

DEC Staff makes two similar arguments in its papers both of which fall under the argument that the documents sought by the respondents are not relevant to this case. DEC Staff argues that the subpoena is a fishing expedition and that respondents' counsel has failed to identify what he was looking for or how it may be relevant. DEC Staff cites Mestel & Co., Inc. v. Smythe Materson & Judd, Inc., 215 AD2d 329, 330 (1st Dept, 1995). DEC Staff continues that respondents' counsel failed to request pretrial disclosure and now seeks to use an overbroad subpoena to obtain DEC records.

DEC Staff also argues that the subpoena should be quashed because it is overbroad, sweeping and vague and calls for documents not relevant to the complaint (Matter of Dr. D. v. Guest, 105 AD2d 915 (3rd Dept. 1984); lv denied 64 NY2d 607 (1985)). DEC Staff argues that the subpoena calls for documentation of Aztech's work in general, including sampling results, reports, potential repairs to blacktop outside of the secondary containment system, etc. without limitation.

The respondents' argue that the subpoena duces tecum at issue here is related to a specific relevant and material fact at issue: namely, did DEC Staff knowingly and vindictively engage in a course of conduct as part of a plan to deny the respondents' a MOSF license and force closure of the facility. The respondents note that DEC Staff has admitted: (1) that Aztech made holes in the secondary containment liner; (2) that it directed Aztech not to repair the holes; and (3) now seeks closure of the facility and a large civil penalty based, in part, on the respondents' failure to maintain the secondary containment liner at the facility. The documents sought through the subpoena may show more evidence of DEC Staff's alleged plan to close the facility. The respondents note that the actions of Aztech in not repairing the secondary containment liner are in apparent contradiction to language in its contract with DEC Staff, stating that Aztech is

responsible for correcting any damage caused by its activities. The respondents conclude that the documents sought are relevant and material to facts at issue in the pending case.

> **RULING**: The respondents have demonstrated that the documents sought are relevant to their affirmative defense which may be relevant to liability and would certainly be relevant to the amount of civil penalty the Commissioner may assess. Again, in a situation where DEC Staff has used the subpoena to obtain evidence during the hearing, it is simply not fair to deny respondents a similar opportunity to obtain documents in a similar fashion.

Privilege

Finally, DEC Staff argues that some of the documents covered by the subpoena are privileged documents including confidential and privileged e-mails between DEC's Office of General Counsel and the NYS Attorney General. The respondents reply that they are seeking documents between DEC Staff and Aztech, not communications between DEC Staff and the Attorney General's office. No dispute exists regarding these documents.

Aztech's counsel raises a second argument regarding privilege, that for the purposes of this administrative action, as an agent contracted by the DEC to respond to environmental issues at the site, Aztech's status is akin to agency staff. Staff of state agencies are represented by agency staff-attorneys. State agencies are in turn represented in court by the New York State Attorney General's Office. As authority for this proposition, Aztech cites Matter of Mt. Hope Asphalt Corp., 1994 WL 1735265 (NY Dept. Of Env. Conserv. 1994). Aztech also argues that since it acted as a member of DEC Staff, all communications between DEC Staff counsel's office and/or the Attorney General's Office should be considered as privileged communications pursuant to CPLR 4503 provided these communications are made for the purposes of facilitating, rendering and obtaining legal advice or services (Matter of Morgan v. NYSDEC, 9 AD3d 586 (3d Dept 2004)). Aztech's counsel continues that it is the responsibility of DEC staff counsel and/or the NYS Attorney General's Office to determine which documents are confidential attorney-client communications or attorney work product.

In response to the claim of privilege, respondents' counsel argues that such claim cannot be made in the absence of a privilege log identifying the documents and also setting forth

the specific reasons for the claim, pursuant to CPLR 3122(b). Since no such information is presented with DEC Staff's motion, this claim must be rejected. Respondents' counsel notes that Matter of Mt. Hope Asphalt Corp., 1994 WL 1735265, cited by Aztech's counsel involved a case where a privilege log had been created and, because of that is not relevant in this case. Likewise, reliance on Matter of Morgan v. NYSDEC, 9 AD3d 586 (3d Dept. 2004) is misplaced because the facts in that case involved communications between DEC Staff members and DEC Staff counsel and are not applicable to this case, where the communications are between DEC Staff and an outside contractor. The respondents argue that no claim of privilege can be made for documents between DEC Staff and Aztech because NYSDEC Staff is not counsel for Aztech.

> **RULING**: Neither DEC Staff nor Aztech have established a sufficient case that the documents sought by this subpoena should be categorically found to be privileged. If individual documents are identified as privileged, a log should be created pursuant to CPLR 3122(b) and, if necessary, I will review these documents to determine if the privilege is properly claimed.

IV. AZTECH'S CROSS MOTION

In addition to addressing the points raised in DEC's Motion to Quash and the respondents' reply, Aztech's counsel raises two new issues in its papers: (1) Aztech seeks to quash the portion of the subpoena requiring the testimony of Mr. Fina; and (2) in the alternative, limiting Mr. Fina's testimony to factual observations. Neither of these requests, which are essentially new motions are identified as such in Aztech's counsels' "Affirmation in Support of Motion to Quash." In addition, notice that such new motions were to be made was not given to the parties or the ALJ on the conference call which occurred on September 11, 2008. Following receipt of Aztech's counsels' papers, the respondents' counsel asked for and received an opportunity to respond.

With respect to the first motion seeking to quash so that Mr. Fina not be required to testify, counsel provides no justification or argument. Since Mr. Fina has already testified at length and may not be recalled after the documents subpoenaed are provided, this motion is denied as untimely, but may be

renewed if the respondents seek additional testimony from Mr. Fina.

With respect to Aztech's second motion, Aztech's counsels argue that Mr. Fina's testimony should be limited to only factual matters. Respondents' counsel does not disagree and argues that if questions are asked that Aztech objects to, the best way to handle the contingency is to have Aztech's counsel present at the hearing and object to specific questions.

Aztech's counsel also requests the award of legal fees covering the costs of responding to the subpoena.

> **RULING**: Aztech's cross-motions are denied, without prejudice and may be renewed if Mr. Fina's testimony is required at a later time to close the hearing record. and during such testimony, counsel will be allowed to object to any questions that may be asked. Aztech's request for the award of legal fees is also denied. No authority is cited for this request, nor is there any. This request is denied.

IMPACT ON OTHER MATTERS

Finally, counsel for Aztech raises a concern regarding the impact of this ruling on other litigation, specifically alleging that the respondents are using this case to seek information designed to aid in the pending Supreme Court action pending in Oneida County involving the respondents and Aztech (paragraph 26, 32).

The respondents dispute this claim and state that the information sought by the instant subpoena would be discoverable in the action for damages it has filed against Aztech. The respondents term Aztech's claim nonsensical and a red herring.

While it is possible that this ruling may impact the other litigation involving the respondents, Aztech and DEC Staff, it is my responsibility to ensure that this administrative enforcement proceeding be conducted properly. I have not considered the impact of this ruling on the other litigation, nor would such consideration be appropriate.

CONCLUSION

DEC Staff's motion to quash the portion of the respondents' subpoena duces tecum relating to documents in the possession of

Aztech is denied. Aztech's request for a 30 day extension to comply with the document production is granted. No additional discovery will be permitted in this matter and the hearing will be completed expeditiously after this document request is complied with.

November 3, 2008
Albany, New York

_____/s/_____
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