

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 REQUEST
FOR INSPECTION OF
DOCUMENTS CLAIMED AS
PRIVILEGED

DEC# 7-1780

April 15, 2009

SUMMARY

At the request of the respondents, I performed an *in camera* inspection of approximately 400 documents listed in privilege logs and withheld from discovery by the Staff of the Department of Environmental Conservation (DEC Staff) and its contractor, Aztech Technologies, Inc. (Aztech). These documents are primarily email strings and attachments thereto in the possession of Aztech and were withheld pursuant to several privileges: (1) attorney client (CPLR 4503); (2) attorney work product (CPLR 3101(c)); and (3) trial preparation materials (CPLR 3101(d)). Upon review, I find that a significant number of the documents, as detailed herein, were improperly withheld and must be released.

BACKGROUND

For a more detailed description of the background of this matter, please see my November 3, 2008 Ruling. In summary, DEC Staff initiated this administrative enforcement matter and seeks a \$1 million civil penalty and closure of the respondents' petroleum bulk storage facility (facility), located in Baldwinsville, NY. We have completed six full days of testimony, DEC Staff has completed its case and the respondents are nearly finished with their direct case. The hearing is in abeyance pending this ruling.

There are currently three matters pending between DEC Staff, Aztech, and the respondents: (1) this enforcement proceeding; (2) State of New York v. Stratus Petroleum Corp., et al., Supreme Court, Albany County, J. Teresi, Index #L000134-01, a cost recovery action in which New York State is seeking damages from the respondents and others allegedly involved with discharging petroleum at and around the facility; and (3) Supreme Energy LLC, and Fred Karam Individually v. Aztech Technologies, Inc., Supreme Court, Oneida County, Index #CA2008-001856, in which the respondents are seeking damages from Aztech.

PROCEEDINGS

By subpoena served on Aztech dated August 29, 2008, the respondents sought, in relevant part:

"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 papers dated September 17, 2008, DEC Staff counsel moved to quash the subpoena. The respondents opposed this motion.

By ruling dated November 3, 2008, I denied DEC Staff's motion to quash. In response to DEC Staff's claim that some of the documents sought were privileged, I ruled that this claim could not be evaluated without the creation of a privilege log.

By documents dated December 2, 2008, counsel for Aztech produced a log of 36 privileged documents. On the following day, DEC Staff counsel produced a log of 362 privileged documents. Almost immediately, the respondents had questions about the privilege logs, including the identity of addressees of certain emails. The respondents also questioned whether the DEC Staff and Aztech had properly asserted the privileges claimed.

A conference call was held to discuss this ongoing discovery dispute on December 9, 2008. During this call, I requested respondents' counsel to put in writing the arguments regarding the privilege logs. By memorandum dated December 11, 2008, respondents' counsel responded to my request. A second conference call occurred on December 15, 2008. These calls were not successful in resolving the controversy and so I set a schedule for the submission of DEC Staff's and Aztech's responses. DEC Staff responded by affirmation dated December 18, 2008 and Aztech provided a letter in support of DEC Staff's

papers. I also requested a copy of the documents withheld by DEC Staff and Aztech to conduct my *in camera* review. An incomplete set of documents was provided to me at that time.

Respondents filed an unauthorized reply memorandum dated December 22, 2008. In an email of the same date, I accepted respondents' reply and provided DEC Staff and Aztech an opportunity to respond. With a cover letter dated January 2, 2009, DEC Staff provided a Reply Affirmation/Memorandum. By letter dated January 2, 2009, counsel for Aztech joined in support of DEC Staff's arguments, but did not offer any independent arguments.

A complete set of the withheld documents was provided to me on March 10, 2009. It should be noted that DEC Staff's privilege log inaccurately or incompletely describes many, if not most, of the documents withheld. Many of the documents described in DEC's privilege log are email strings with only one or two of these emails described in the log. There are scores of emails withheld that are not described in the log. The rulings below require the release of the entire documents provided for the *in camera* inspection, not just those described in the log.

DISCUSSION

The privilege logs list several privileges for withholding various documents from disclosure, including: (1) attorney client privilege (CPLR 4503); (2) attorney work product (CPLR 3101(c)); and (3) trial preparation material (CPLR 3101(d)). The respondents argue that the privileges claimed by DEC Staff and Aztech are not applicable to many of the documents identified in the privilege logs. Each of these argument is discussed below.

Attorney Client Privilege

The respondents contend that the claim of attorney client privilege is not applicable for four reasons: (1) that the privilege was waived by DEC Staff disclosing material to Aztech; (2) that the privilege was waived by DEC Staff by reason of its commencement of this enforcement proceeding; (3) that two documents are not between attorneys and clients; and (4) that some documents do not involve communication in which legal advice is sought or given, and therefore, not protected by attorney client privilege. Before discussing each of these arguments in turn, it is helpful to set forth what is not in dispute and some legal background.

There is no dispute as to the identity of the client. In this case, it is DEC Staff, the employees of the State who work for DEC but are not members of DEC's Office of General Counsel (OGC). There is also no dispute that attorneys in DEC's OGC function as in-house counsel or that attorneys in the New York State Attorney General's (NYS AG's) office are authorized to represent DEC as outside counsel (Executive Law §63(1)). The parties also agree that the attorney client privilege set forth in CPLR 4503 applies whether the communication is between the client and in-house counsel or outside counsel, provided the communications are for the purpose of facilitating the rendition of legal advice (Rossi v. Blue Cross & Blue Shield, 73 NY2d 588, 592 [1989]).

With respect to Aztech, there is no dispute that Aztech is a private company and its employees are not employees of New York State or DEC. It is also undisputed that Aztech is not a client, for attorney client purposes, of either DEC's OGC or the NYS AG's office. Rather Aztech is represented by its own counsel. Aztech has a long-standing relationship with DEC Staff for investigation and remediation of polluted sites.

The attorney client privilege is set forth in CPLR 4503(a)(1) which states in relevant part:

"Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, in any ... administrative action...."

The Court of Appeals in Matter of Priest v. Hennessy (51 NY2d 62 [1980], 68-69) noted that the attorney client privilege "is not limitless. It has long been recognized that 'the attorney-client privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose.'" (Matter of Jacqueline F., 47 NY2d 215, 219...)."

Case law makes it clear that the burden rests on the party asserting the attorney client privilege, in this case DEC Staff and Aztech, "to show the existence of circumstances justifying its recognition" (Bloodgood v. Lynch, 293 NY 308, 314 [1944]) and of proving each element of the privilege (Priest 51 NY2d at 69).

1. Respondents' first argument: DEC Staff waived attorney client privilege for all documents disclosed to Aztech.

DEC Staff has claimed attorney-client privilege for communications between DEC Staff, DEC's in-house counsel and the NYS AG's office. Respondents do not challenge that these communications are privileged as attorney-client privilege, provided legal advice is sought or given in the communication and the communication was not shared with a third party (these communications are not at issue in this review, because the subpoena was served on Aztech and all documents in question were in the possession of Aztech).

DEC Staff has also claimed attorney client privilege for communications among DEC Staff, DEC Staff counsel, the NYS AG's office and Aztech. Aztech has also claimed attorney client privilege for communication between its staff and attorney and DEC Staff. The respondents argue that these documents between DEC Staff and Aztech are not entitled to attorney client privilege, and seek disclosure of these documents.

As the Court of Appeals stated in People v. Osorio (75 NY2d 80, 84 [1989]):

"The attorney-client privilege, which is codified in CPLR 4503(a), enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes (see, People v Mitchell, 58 NY2d 368, 373). The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services. The burden of proving each element of the privilege rests upon the party asserting it and even if the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case where strong public policy requires disclosure (Rossi v Blue Cross & Blue Shield, 73 NY2d 588, 592; Matter of Priest v Hennessy, 51 NY2d 62, 68-69; see also, People v. Mitchell, supra, at 373).

"Generally, communications made between a defendant and counsel in the known presence of a third party are not privileged (People v Harris, 57 NY2d 335, 343; People v Buchanan, 145 NY 1, 26). An exception exists for statements made by a client to the attorney's employees

or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential (see, Sibley v Waffle, 16 NY 180, 183). Similarly, communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged (see, United States v Kovel, 296 F2d 918, 921-922 [an accountant]; Jackson ex dem. Haverly v French, 3 Wend 337; see generally, Annotation, Attorney-Client Privilege-Extent, 96 ALR2d 125-150, §§ 9, 13).

DEC Staff argues that Aztech is its agent, and therefore, the attorney client privilege for shared communications remains intact.¹ In its papers, DEC Staff includes the quote: "while communications made between a defendant and counsel in the known presence of a third party generally are not privileged, an exception exists for 'one serving as an agent of either attorney or client'." (First American Commercial Bancorp, Inc. v. Saatchi & Saatchi Rowland, 56 AD3d 1137 (4th Dept. 2008) citing Robert V. Straus Productions, Inc. v Pollard, 289 AD2d 130, 131 (1st Dept. 2001)).

DEC Staff cites provisions in the "2003 Agreement Standby Investigation & Remediation, Contract Number D400302" between DEC Staff and Aztech which, it claims, demonstrates that Aztech is DEC Staff's agent. Specifically, DEC Staff cites clauses in the contract that require Aztech to: (1) indemnify and defend DEC and the state for torts committed by its employees (Paragraph II, p. B-1); (2) carry out its duties at time specified (Article 1, Paragraph a, p. 14); (3) discontinue any work at DEC Staff's direction (Article 1, Paragraph b, p. 14); (4) conduct restoration as directed by DEC Staff (Article 1, Paragraph c, p. 14); (5) provide litigation support (Article 2, Paragraph e, p. 14); (6) submit reports requested by DEC Staff (Article 2, Paragraph a, p. 14); (7) carry out work in compliance with DEC Staff's requirements (Article 2, Paragraph a, p. 14); and (8) acknowledge the ownership of all data, written material and documentation prepared under the contract belong exclusively to

¹ DEC Staff does not elaborate its argument in its papers. DEC Staff may be arguing that Aztech's employees are "de facto" employees of DEC (see In re Bieter Company, 16 F.3d 929 (8th Cir. 1994)). However, it appears that this reasoning is limited to federal cases, and this matter is a question of state law. New York State courts have not adopted this reasoning in interpreting CPLR 4503.

DEC Staff (Article 7, p. 17). The above-cited contractual provisions, DEC Staff asserts, create a fiduciary duty to DEC Staff. This fiduciary duty then proves that Aztech is DEC Staff's agent in DEC Staff's view.

The respondents argue that in this case, communications between DEC Staff, its attorneys (DEC in-house counsel and the NYS AG's office) and Aztech do not qualify for attorney client privilege. To support its contention, respondents cite Delta Financial Corporation v. Morrison, (13 Misc.3d 441, 445 (Sup. Ct., Nassau Co. 2006)), which states:

"Communications made to a person serving as a translator or interpreter in order to facilitate communications between the lawyer and the client are a commonly recognized exception to the third-party disclosure rule, and do not waive the attorney-client privilege. (Cf. People v Osorio, 75 NY2d 80, 84 [1989].) In United States v Kovel (296 F2d 918 [2d Cir 1961]), the Second Circuit applied the translator exception to communications to an accountant retained by the law firm for the purpose of assisting the firm in giving legal advice to its client. The court stated that:

"'Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of [a] linguist . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought to fall within the privilege.' (Id. at 922.)

"The court in Kovel was mindful to point out that 'if the advice sought is the accountant's rather than the

lawyer's, no privilege exists.' (Id. [emphasis added].)"

The critical issue is not whether or not Aztech was DEC Staff's agent, but rather what was the purpose of the agency. DEC Staff does not state the nature of Aztech's agency in its papers, arguing that Aztech's agency, alone, warrants extension of the attorney client privilege to communications between DEC Staff, its attorneys, and Aztech. The record in this case (including the contract between DEC Staff and Aztech) indicates that Aztech was not employed to assist either DEC's in-house counsel or the attorneys at the AG's office in rendering legal advice nor was Aztech hired to translate information from DEC Staff to its attorneys.² Rather, it appears that Aztech was hired to perform investigatory and remediation tasks under the direction of DEC Staff (which itself has considerable technical expertise). The facts in this case are similar to those in United States Postal Service v. Phelps Dodge Refining Corporation, 852 F.Supp. 156, 161 [E.D.N.Y. 1994]), where the court rejected the claim of attorney client privilege for documents shared with an environmental remediation contractor.

Under these circumstances, I find DEC Staff has not met its burden of proving that the documents for which it claims attorney client privilege which were shared with Aztech are, in fact, privileged.

² Article 3, "Work Assignments" of the contract between DEC Staff and Aztech states that the "Contractor will commence work at such time as NYSDEC may call out the Contractor to provide investigation and remediation services, when time is of the essence, at sites contaminated by petroleum, hazardous waste, or hazardous substances." From this it can be reasonably inferred that Aztech's agency involved investigation and remediation services. In Schedule 2 (Article 1(e)) to the contract additional relevant language is found. "When deemed to be in the State's best interest, the Contractor agrees to provide expert advice and/or testimony regarding all tests performed or services provided, hereunder. Such advice and/or testimony shall be made available to the State in preparation for and during administrative proceedings, arbitration, litigation, etc., concerning responsibility for damages where advice and/or testimony concerning the tests performed or services provided by the Contractor would be necessary or useful." Nothing in DEC Staff's papers or the contract indicate that Aztech serves as a facilitator of communications between the client (DEC Staff) and its attorneys.

A second argument that DEC Staff raises is that the documents shared between DEC Staff and Aztech would be exempt from disclosure under New York's Freedom of Information Law (FOIL 87(2)(g)) because they would be considered as "intra-agency" materials (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131). Therefore, these documents, *a fortiori*, must be exempt from disclosure under the CPLR. The respondents do not address this argument in their papers. DEC Staff offers no proof that this argument has ever been accepted in a matter involving discovery. Accordingly, I reject this argument; the standards for release under FOIL are not relevant to this discovery dispute. To adopt DEC Staff's position would allow different standards for discovery for governmental and non-governmental litigants.

RULING: DEC Staff has not met its burden of showing that attorney client privilege is applicable to documents involving communications with Aztech. Similarly, Aztech has not met its burden of showing that attorney client privilege is applicable to documents which it shared with DEC Staff. Accordingly, the following documents should be released.

Aztech #: 1, 5

DEC #: 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 190, 191, 192, 193, 194, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282,

283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293,
294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304,
305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315,
316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326,
327, 328, 329, 330, 331, 332, 333, 334, 335, 344.

2. Respondents' second argument: DEC Staff waived attorney-client privilege by commencing this enforcement action based on violations caused by DEC Staff.

The respondents argue that DEC Staff has waived any attorney client privilege it may have had with respect to some or all of its communications with Aztech due to the actions of DEC Staff and Aztech that have caused some of the alleged violations at issue in this enforcement case. DEC Staff argues that the respondents' argument would eviscerate any claim of attorney client privilege in future enforcement cases.

A review of certain undisputed facts in this case is helpful at this point. In its March 24, 2008 amended complaint, DEC Staff alleges, in its third cause of action, that the respondents failed to maintain adequate secondary containment at its petroleum bulk storage facility. Evidence introduced at the hearing has shown that in the course of attempting to determine the extent of contamination beneath the site, DEC Staff directed its contractor, Aztech, to puncture the secondary containment at the facility for the purpose of drilling test wells. It has also been shown that DEC Staff then directed Aztech not to repair the holes in the liner, after Aztech had solicited bids for the repair of these holes.

In their answer, the respondents assert an affirmative defense that these facts (and others) demonstrate a pattern of conduct by DEC Staff to improperly deprive them of their rights and property. Specifically, the respondents allege that DEC Staff is using the holes it caused as reason to force the closure of the facility, thereby making the cleanup of the site beneath the facility easier and less expensive. DEC Staff rejects respondents' argument and argues that the secondary containment system at the facility was in such poor condition that repairs of the holes it caused were not worthwhile. DEC Staff also argues that the respondents' duty to maintain its secondary containment required the respondents to repair the holes Aztech drilled.

With respect to this discovery dispute, the respondents argue that by directing Aztech to drill holes in the secondary containment system and then directing Aztech not repair the

holes, DEC Staff has waived its right to withhold documents, pursuant to attorney client privilege, at least to the extent these documents are related to the alleged violations involving failure to maintain the secondary containment system. Respondents argue that by commencing this civil administrative enforcement action and affirmatively placing privileged information into issue, DEC Staff has effectively waived its claim of privilege. To support its claim of waiver, respondents cite Marten v. Eden Park Health Services, Inc., (250 AD2d 44 (3d Dept. 1998)).

In its reply, respondents also cite the situation where a parent who seeks custody of a child is deemed to have waived his or her physician-patient privilege with respect to mental health records, because the parent's mental health has been placed at issue in the hearing, however, no cite is provided. Respondents also note that the direction of DEC Staff not to repair the secondary containment was not legal advice and that the stipulation by DEC Staff counsel to this fact constitutes a waiver of any attorney client privilege regarding communications about the holes in the secondary containment.

DEC Staff responds that it does not object to the release of information relevant to the respondents' affirmative defense, such as technical data, reports, and other analyses released already; however, it does object to the release of communications which were made for the purpose of obtaining legal advice. DEC Staff argues that if the attorney client privilege was waived each time an enforcement action was filed, the result would be the evisceration of the attorney client privilege.

The facts in this case are fairly unusual. It is not often that DEC Staff seeks to enforce against respondents for conditions DEC Staff, itself, created or caused to be created. In this case, DEC Staff had a choice of prosecuting alleged violations related to the secondary containment at the facility that were: (1) caused by the respondents; (2) caused by DEC Staff and its contractor, Aztech; or, (3) both. DEC Staff opted to prosecute both types of alleged violations. By doing so, DEC Staff placed its actions into issue. DEC Staff has waived its claim of privilege for documents relating to its placement of holes in the secondary containment. This information is relevant to and bears directly on the respondents' affirmative defense (Wright v. Snow, 175 AD2d 451 (3d Dept. 1991), lv dismissed 79 NY2d 822 [1991]). DEC Staff's claim that this ruling would eviscerate all attorney client privilege in future enforcement proceedings is rejected because, as noted above, the facts in

this case are unusual. Future claims can be determined on a case-by-case basis.

RULING: Given the unusual circumstances of this case, specifically, where DEC Staff caused the alleged violations which it now seeks to enforce, DEC Staff has waived its right to protect communications between itself and its attorneys from disclosure. However, since all the documents at issue in this ruling and claimed as attorney client privilege have been shared with third parties, the privilege has been waived. There are no documents which fall into this category.

3. Respondents' third argument: DEC Staff improperly claimed attorney client privilege for two documents that do not involve communications between an attorney and a client.

The respondents argue that two items identified in the privilege logs do not involve communications between attorneys and clients and, therefore, the claim of attorney client privilege for these documents is not proper. Specifically, the respondents argue Aztech #2³ and DEC #16⁴ should be disclosed.

RULING: Since these two documents are to be disclosed pursuant to other portions of this ruling, this argument is moot.

4. Respondents' fourth argument: DEC Staff improperly claimed attorney client privilege for documents that do not involve legal advice.

The respondents argue that an *in camera* review of all documents for which attorney client privilege is claimed on the privilege logs is necessary to determine if the documents involve legal advice. DEC Staff does not object.

³ In addition to a claim of attorney client privilege, Aztech #2 is also withheld on the basis of attorney work product, which is discussed later in the ruling.

⁴ DEC #16 is not accurately characterized in DEC's log because no mention is made of the fact that the withheld portion includes a cc to a DEC Staff attorney.

RULING: All documents for which attorney client privilege is claimed (as the sole ground for withholding) were shared with third parties, thereby waiving the privilege. Since no documents remain to review, this argument is moot.

Attorney Work Product CPLR 3101(c)

In addition to the documents to be released above, a series of documents were withheld on the dual basis of attorney client privilege and attorney work product. These documents include:

Aztech #: 2, 3, and 4

DEC #: 6, 43, 44, 45, 46, 47, 64, 111, 116, 117, 118, 119, 122, 185, 186, 187, 188, 189, 195, 196 and 218.

Respondents ask that the documents withheld by both DEC Staff and Aztech as attorney work product be examined *in camera*. There is no dispute that documents which qualify as attorney's work product are absolutely exempt from disclosure.

Since all of these documents were shared among DEC Staff and Aztech, the claim of attorney client privilege has been waived. The claim of attorney work product remains to be evaluated, each document is discussed below.

Aztech #2: This document consists of two emails and an attachment. The first email is from DEC Staff counsel to Aztech's counsel, the second email is from DEC Staff to DEC Staff counsel and the attachment is an email sent to the respondents. Only the first email is prepared by an attorney and it is merely forwarding material not prepared by an attorney, so no valid claim of work product exists. Release.

Aztech #3: This document is a string of three emails, only one was prepared by an attorney, so the portion of the string not prepared by the attorney should be released. Partial release.

Aztech #4: This document was also withheld as trial preparation material and unlike the other documents addressed below indicates preparation for this enforcement case. Withhold.

DEC #6: This document is a string of 15 emails, only three prepared by attorneys, so those portions of the string not prepared by attorneys should be released. Partial release.

DEC #43: This document is a string of 4 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #44: This document is a string of 5 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #45: The redacted portions of this document includes a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #46: This document is a string of 8 emails, only two prepared by attorneys, so those portions of the string not prepared by attorneys should be released. Partial release.

DEC #47: This document is a string of 8 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #64: This document is a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #111: This document is a string of 2 emails, only one prepared by an attorney, so the portion of the string not prepared by the attorney should be released. Partial release.

DEC #116: This document is a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #117: The redacted portion of this email string was not prepared by an attorney. Release.

DEC #118: This document was not prepared by an attorney. Release.

DEC #119: The redacted portion of this email string was not prepared by an attorney. Release.

DEC #122: This document is a string of 4 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #185: This document is a string of 2 emails, only one prepared by an attorney, so the portion of the string not prepared by the attorney should be released. Partial release.

DEC #186: This document is a string of 3 emails, only two prepared by an attorney, so the portion of the string not prepared by the attorney should be released. Partial release.

DEC #187: This document is a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #188: This document is a string of 3 emails, only two prepared by an attorney, so the portion of the string not prepared by the attorney should be released. Partial release.

DEC #189: The redacted portion of this document is a string of 7 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #195: This document is a string of 4 emails, only two prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #196: This document is a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

DEC #218: This document is a string of 3 emails, only one prepared by an attorney, so those portions of the string not prepared by the attorney should be released. Partial release.

Trial Preparation Privilege (CPLR 3101(d))

The final group of documents are those for which privilege is claimed on the basis of trial preparation materials, CPLR 3101(d). The respondents request an *in camera* inspection of these documents to assure that the claim of privilege is applicable and cite Reich v. Great Lakes Collection Bureau, Inc., (172 F.R.D. 58 (W.D.N.Y. 1997)). The respondents also argue that these documents should be released, if relevant, because denying the respondents access to these documents will create a hardship that the respondents cannot overcome otherwise.

CPLR 3101(d)(2) allows for disclosure of otherwise privileged trial preparation materials "only 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." The respondents argue that correspondence between DEC Staff and Aztech is likely to prove their affirmative defense. Respondents argue that this correspondence can only be obtained from DEC Staff or Aztech and that there is no other source.

DEC Staff does not object to the *in camera* inspection, but argues that the privilege was properly claimed. These documents were made in the course of preparation for the trial of this matter and the other matters pending involving the respondents' petroleum bulk storage facility.

RULING: Based on my review, I find that these documents all were properly categorized as trial preparation materials and relate to the other litigation involving the respondents, DEC Staff and Aztech and as such are not relevant to this enforcement matter. Respondents' claim of hardship is better heard before the judges handling these other cases. Accordingly, I find that the following documents were properly withheld:

Aztech #: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36

DEC #: 336, 337, 338, 339, 340, 341, 342, 343, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361 and 362.

CONCLUSION

DEC Staff and Aztech are directed to release the documents indicated, above, no later than April 30, 2009. I will contact the parties by email to schedule the conclusion of the hearing.

April 15, 2009
Albany, New York

_____/s/
P. Nicholas Garlick
Administrative Law Judge