STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

U.S. ENERGY DEVELOPMENT CORPORATION,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR LEAVE TO CONDUCT DEPOSITIONS

DEC File No. R9-20111104-150

May 9, 2014

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

-- Elaine H. Bartley, Senior Counsel, for the New York State Office of Parks, Recreation and Historic Preservation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR LEAVE TO CONDUCT DEPOSITIONS

I. Proceedings

By notice of motion dated April 14, 2014, respondent U.S. Energy Development Corporation requests leave to conduct depositions in the above referenced administrative enforcement proceeding. Specifically, respondent seeks leave to conduct depositions of staff of the New York State Office of Parks, Recreation and Historic Preservation (Parks). The observations of Parks staff form, in part, the basis of the violations alleged in the April 24, 2012, amended complaint filed by staff

of the Department of Environmental Conservation (Department) in this proceeding.

In a ruling dated December 11, 2013, I previously denied respondent's request to schedule depositions of Parks staff on the grounds that the use of depositions in proceedings pursuant to the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]) requires permission of the Administrative Law Judge (ALJ), and respondent had failed to demonstrate that depositions would likely expedite the proceeding (see 6 NYCRR 622.7[b][2]). Because respondent had not formally moved for leave to conduct depositions, however, I denied the request with leave to renew upon a formal motion (see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Discovery Requests, Dec. 11, 2013, at 4, 6).

I subsequently granted respondent's motion for issuance of a subpoena duces tecum as against Parks for the production of documents relevant to this proceeding pursuant to a schedule agreed to by the parties (see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Motion for Issuance of Subpoena Duces Tecum, Feb. 4, 2014, at 2; id., Ruling of the Chief ALJ Further Amending Discovery Schedule, Feb. 12, 2014).

On its present motion, respondent filed a notice of motion dated April 14, 2014, together with an affirmation in support by Charles W. Malcomb, Esq., with exhibits, also dated April 14, 2014. In support of its motion, respondent argues that allowing depositions in this case will likely expedite the proceeding because it will allow respondent's expert to evaluate the observations, qualifications, training, and sampling methodologies of witnesses from Parks prior to the hearing, thereby leading to more efficient examination at hearing and the avoidance of delays associated with adjournments. Moreover, respondent alleges chain of custody problems with sampling conducted by Parks staff that require expert evaluation prior to the hearing. Respondent asserts that because Parks staff, and not Department staff, are the witnesses in this proceeding, Parks' investigative procedures and protocols are unfamiliar and, thus, warrant use of depositions. Respondent asserts that the failure to allow depositions in these circumstances will prejudice respondent in the preparation of its defense.

Department staff opposes the motion by affirmation in opposition of Maureen A. Brady, Regional Attorney, dated April

23, 2014. Department staff argues that the water quality standard involved in this matter -- the turbidity standard at 6 NYCRR 703.2 -- is a narrative standard that relies on visible contrast detectable by human observation. Although turbidity may be proven by measured nephelometric turbidity units (NTUs), staff assets that it will prove the violations alleged through testimony from Parks and Department staff concerning their visual observations. Moreover, Department staff contends that information about the witnesses' observations are contained in contemporaneous reports, photographs, and other information already provided to respondent in response to Freedom of Information Law (FOIL) requests and document demands.

With respect to chain of custody issues, Department staff asserts that because the challenged information will not be presented at hearing, inquiry into chain of custody for that information is irrelevant to this proceeding. Department staff argues that the use of experts to analyze the Department's case and provide expert testimony is not unusual in Departmental enforcement proceedings, and neither the facts of this case nor the credentials of witnesses are sufficiently complex or unusual to require extensive probing by respondent's experts prior to the hearing. Staff asserts that respondent has sufficient information about the Department's case to prepare its defense, and to the extent something unexpected arises at hearing, an adjournment may be granted if respondent's expert requires additional time to evaluate Parks staff's testimony. Thus, Department staff asserts that conducting depositions of Parks staff will not likely expedite the proceeding.

Under cover letter dated May 6, 2014, respondent filed a notice of motion for leave to file and serve a reply to Department staff's response. Attached to the notice of motion is an affirmation dated May 6, 2014, of Charles W. Malcomb, Esq., in reply to Department staff's April 23, 2014, response. In its affirmation, which respondent requests be considered, respondent reasserts its desire to inquire into the observations, qualifications, training, and sampling methodologies of witnesses from Parks prior to the hearing to prepare its defense. Respondent contends that Department staff's decision to rely on the visual observations of Parks staff should not limit respondent's request for further discovery or their ability to prepare a defense. Respondent also challenges Department staff's assertion that neither the facts of the case, nor the credentials of the witnesses are

sufficiently complex or unusual to warrant use of depositions. Respondent asserts that the education, work experience and training of Parks staff, particularly with respect to their evaluation of the sufficiency and adequacy of stormwater controls, is central to its defense, and justifies examination prior to the hearing.

Parks staff filed no submissions on this motion.

II. Discussion

As an initial matter, respondent's request to file and serve a reply shall be granted, and its affirmation in reply to Department staff's response accepted as filed (see 6 NYCRR 622.6[c][3]).

With respect to respondent's motion to conduct depositions, the Department's regulations provide that the scope of discovery under Part 622 is as broad as that provided for under article 31 of the CPLR (see 6 NYCRR 622.7[a]). While the scope of discovery under Part 622 is broad, the use of some specific disclosure devices available under CPLR article 31 are subject to exceptions and restrictions (see 6 NYCRR 622.7[b][1]). As previously noted, use of depositions in proceedings under Part 622 is allowed only with the permission of the ALJ upon a finding that they are likely to expedite the proceeding (see 6 NYCRR 622.7[b][2]; see also Matter of Cobleskill Stone Products, Inc., Rulings of the Chief ALJ on Motions, Jan. 31, 2013, at 6). No distinction is generally made between depositions sought from parties to the proceeding or from third-party witnesses -- both require leave of the ALJ (see id. [permission required to depose witnesses not employed by the Department]).

The State Administrative Procedure Act grants to the Department the discretion, through rulemaking, to determine how much, if any, discovery is appropriate in its adjudicatory proceedings (see State Administrative Procedure Act [SAPA] § 305). The courts have consistently held that due process does not require the full panoply of discovery tools available to civil litigates, including oral depositions (see Matter of Miller v Schwartz, 72 NY2d 869 [1988]; Matter of Singa v Ambach, 91 AD2d 703 [3d Dept 1982]). Thus, placing limitations on the

use of depositions does not necessary prejudice a respondent or otherwise deprive that respondent of due process.

Part 622's limitation on the use of depositions is grounded upon the Department's determination that the examination of witnesses is most efficiently conducted once, during the hearing itself (see Matter of Bonide Prods., Inc., ALJ Rulings on Motions, March 14, 2001, at 12). Moreover, the Department is subject to broad document disclosure obligations under both FOIL and Part 622. As a result, respondents generally have access to the documentary and other evidence that supports the Department's case and, thus, have ample opportunity to explore staff's case and prepare a defense prior to hearing. The availability of the documentary and other evidence supporting the Department's case significantly reduces the need and utility of pre-hearing depositions in the typical case. Accordingly, depositions are seldom allowed absent a showing of particularized need arising from unique or unusual circumstances (see Cobleskill, at 6).

On this motion, respondent has not demonstrated unique circumstances that warrant departure from the usual course under Part 622. The gravamen of respondent's argument is that pre-hearing depositions are necessary for the expert evaluation of the Department's case prior to hearing and the preparation of a defense. However, respondent has been on notice of Department staff's theory of liability and the factual bases supporting its allegations since as early as the filing of the amended complaint. Moreover, staff has repeatedly stated its theory of the case and the underlying factual bases throughout the proceeding. As Department staff notes, the proof required in this case is not highly technical or complex. In addition, staff contends that the factual observations of its witnesses are documented and those documents have been provided to respondent in response to FOIL requests and discovery demands.

Under these circumstances, respondent makes no compelling argument supporting the conclusion that use of depositions is necessary to further evaluate staff's case and prepare a defense. Moreover, respondent does not explain how examining the credentials and observations of Parks staff first in depositions, and presumably a second time at hearing, will serve to expedite proceedings. Thus, respondent has failed to provide any compelling reason why use of depositions in this

proceeding will likely expedite the proceeding or why following standard practice will result in prejudice in the defense of this case.

III. Ruling

Accordingly, based on the foregoing, it is hereby ordered that:

(1) respondent's motion for leave to file and serve a reply to Department staff's response to the motion for leave to conduct depositions is granted, and respondent's reply affirmation is accepted as filed; and

(2) respondent's motion for leave to conduct depositions of Parks staff is denied in its entirety.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: May 9, 2014
Albany, New York