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 DISCOVERY REQUESTS

DEC File No. R9-20111104-150

December 11, 2013

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

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON DISCOVERY REQUESTS

I. Proceedings

By letter dated November 8, 2013, staff of the Department of Environmental Conservation (Department) requested that a discovery schedule be established in this administrative enforcement proceeding pending decision on respondent U.S. Energy Development Corporation's motion for leave to appeal to the Commissioner from my August 23, 2013, ruling on motion to dismiss affirmative defenses, and Department's staff request to file a response to respondent's motion for leave.

Pursuant to the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), proceedings

are not adjourned while an appeal is pending except by permission of the Administrative Law Judge (ALJ) or Commissioner (see 6 NYCRR 622.10[d][7]). Because the parties had not requested adjournment of this proceeding pending decision on respondent's motion for leave to appeal from my prior ruling, I directed the parties to settle a discovery schedule. If the parties were unable to settle a schedule, I directed the parties to submit their proposed schedules to me for review by November 27, 2013. The parties subsequently agreed to extend the date for submission to December 2, 2013.

The parties each timely submitted their respective schedules. The proposed schedules are virtually identical. Both schedules propose (1) that all discovery responses to all demands on the parties be due by February 28, 2014; (2) that respondent serve discovery demands and subpoenas directly on the New York State Office of Parks, Recreation, and Historic Preservation (Parks) where it seeks discovery from Parks; and (3) that the parties disclose expert witnesses by June 1, 2014.

The proposed schedules differ in one respect. Respondent's schedule proposes a deadline of April 25, 2014, for all third-party depositions of Parks staff. In support of this provision, respondent notes in its December 2, 2013, letter that all of the relevant allegations in the amended complaint are based upon Parks staff's observations, sampling, testing, and records. Respondent asserts that attorney subpoenas and depositions are authorized by the Part 622 regulations, and that this third-party discovery is essential to respondent's defense.

Respondent recognizes that the Part 622 regulations require permission of the ALJ before depositions are allowed (see 6 NYCRR 622.7[b][2]). Respondent argues, however, that permission is required only for traditional party depositions, not third-party depositions. Thus, respondent requests that the April 25, 2014 deadline be included in the scheduling order.

In the alternative, respondent requests an opportunity to move for leave to conduct third-party depositions. Respondent indicates that it intends to question the training, procedures, qualifications, experiences, and background of Parks staff, an inquiry respondent claims would ordinarily not be required in cases investigated by Department staff. Respondent asserts that because this line of inquiry, if conducted for the

first time at hearing, will be time consuming and prejudicial to respondents, depositions will expedite the hearing process.

In Department staff's December 2, 2013, letter, staff opposes the use of depositions in this case. Staff asserts that it has already provided respondent with inspection reports and other documents from Parks in response to a Freedom of Information Law (FOIL) request by respondent. Staff also asserts that respondent is free to use subpoenas duces tecum to obtain evidence directly from Parks. Staff argues that additional discovery in the form of depositions is unnecessary, would be duplicative of evidence that will be submitted at hearing, would be wasteful of State resources, and would not expedite the proceeding. Accordingly, Department staff objects to any requests by respondent for leave to conduct third-party depositions.

II. Discussion

The scope of discovery under Part 622 is as broad as that provided under article 31 of the CPLR (see 6 NYCRR 622.7[a]). Moreover, the parties are authorized to employ any disclosure devices available under CPLR article 31, with some exceptions and restrictions (see 6 NYCRR 622.7[b][1]). For example, bills of particulars are not permitted in Part 622 proceedings (see 6 NYCRR 622.7[b][3]).

With respect to depositions and written interrogatories, Department staff correctly notes that these discovery devices are 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). Because the examination of witnesses is most efficiently conducted once during the hearing itself, depositions are seldom allowed under Part 622 (see Matter of Bonide Prods., Inc., ALJ Rulings on Motions, March 14, 2001, at 12). Moreover, contrary to respondent's assertions, no distinction is made between depositions and written interrogatories sought from parties to the proceeding or from third-parties (see id. [permission required to depose witnesses not employed by the Department]). The use of any depositions or written interrogatories in Part 622 proceedings, whether for parties or non-parties, requires leave of the ALJ.

In its request, respondent has not demonstrated that the use of depositions will likely expedite the proceeding. As Department staff notes, staff will have the burden of establishing the background and qualifications of Parks staff it calls as witnesses at the hearing, and the sampling procedures, methodologies, and policies of Parks staff will be part of the hearing record. Staff also notes that its case is based upon documentation provided by Parks staff, which Department staff indicates has been provided to respondent and will not change. As is the regular practice in Department administrative adjudications, respondent will have the opportunity to challenge the qualifications of and cross-examine staff's witnesses at hearing (see 6 NYCRR 622.10[a][3]). Respondent has provided no support for the conclusion that examining the Department's witnesses through depositions, in addition to examining them at hearing, will expedite the proceeding, or that following standard practice will result in prejudice in this case.

I recognize that respondent has not made a formal motion for leave to conduct depositions of Parks staff, and has requested that it be allowed the opportunity to do so if its argument that leave is not required is rejected. Accordingly, respondent's request that a deadline for depositions be established should be denied, with leave to renew upon a formal motion to conduct depositions.

With respect to the parties' assertion that respondent may issue subpoenas duces tecum pursuant to CPLR 2307 to obtain documents from Parks staff, some clarification is required. Under the CPLR, a subpoena duces tecum to be served upon a State department, bureau, or officer, such as Parks staff, must be issued by a court (see CPLR 2307). Where, as here, however, the administrative agency has the power to issue subpoenas, CPLR 2307 does not apply (see Matter of Irwin v Board of Regents of Univ. of State of N.Y., 27 NY2d 292, 296 [1970]). Instead, the Department's statutory grant of the subpoena power is examined to determine a party's entitlement to issuance of a subpoena (see id. at 297; Matter of Moon v New York State Dept. of Soc. Servs., 207 AD2d 103, 105 [3d Dept 1995]).

ECL 3-0301(2)(h) authorizes the Department, by and through the Commissioner, "to hold hearings and compel the attendance of witnesses and the production of accounts, books, documents, and nondocumentary evidence by the issuance of a

subpoena." Thus, the Commissioner and the Commissioner's designee, the ALJ, have broad discretion to issue subpoenas and subpoenas duces tecum in administrative adjudicatory proceedings conducted under Part 622.

By regulation, attorneys of record in Part 622 proceedings are authorized to issue subpoenas consistent with the CPLR and, thus, are authorized to issue subpoenas that would not require a court order under the CPLR (see 6 NYCRR 622.7[d]). The regulation, however, does not authorize attorneys of record to issue subpoenas, such as subpoenas duces tecum to be served on a State department or agency, for which a court order is required under the CPLR. Instead, a party to a Part 622 proceeding must seek issuance of a subpoena duces tecum to be served upon a State department or agency from the ALJ (see 6 NYCRR 622.10[b][1][v]; see also Matter of Suffolk County Water Authority, ALJ Ruling on Motion to Quash Subpoena Duces Tecum, Aug. 17, 2006, at 2). Thus, if respondent wishes to serve a subpoena duces tecum upon Parks, respondent must file a motion with my office, on notice to Department staff and Parks, requesting issuance of the subpoena.

In light of the above, those portions of the discovery schedule upon which the parties agree should be approved. In addition, the parties are requested to settle a schedule incorporating motions to conduct depositions and motions for subpoenas duces tecum, if any, into the agreed-upon schedule. If the parties are unable to settle the schedule, the parties shall submit proposed schedules to me for approval.

III. Ruling

It is hereby ordered that the discovery schedule for this proceeding is as follows:

(1) all discovery responses to all demands on the parties are due by February 28, 2014;

(2) respondent shall serve discovery demands and subpoenas directly on the New York State Office of Parks, Recreation, and Historic Preservation where it seeks discovery from Parks, in accordance with all applicable rules including, but not limited to, ECL 3-0301(2)(h) and 6 NYCRR 622.7(b); and

(3) the parties shall disclose expert witnesses by June 1, 2014.

Respondent's request to schedule depositions of Parks staff is denied without prejudice to renew upon a motion for leave to conduct depositions.

The parties are hereby directed to settle a schedule for the service and filing of motions for leave to conduct depositions, motions for subpoenas duces tecum, and any other necessary discovery motions in this proceeding. In the event good faith efforts fail to produce a schedule acceptable to the parties, the parties are directed to submit proposed schedules to me for review and ruling. The parties have until close of business on Monday, December 23, 2013, to file either a settled discovery schedule or the parties' proposed schedules.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 11, 2013
Albany, New York