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.

RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON PRE-HEARING MOTIONS

DEC File No. R9-20111104-150

February 23, 2016

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, and Karen Draves, Assistant 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

-- Theresa B. Marangas, Associate Counsel, for the New York State Office of Parks, Recreation and Historic Preservation

RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON PRE-HEARING MOTIONS

Respondent U.S. Energy Development Corporation has filed two pre-hearing motions: (1) a motion in limine and (2) a motion for an adjournment of the hearing and for further discovery. For the reasons that follow, the motions are granted in part and otherwise denied.

I. Proceedings

In a notice of hearing dated January 6, 2016, adjudicatory hearings in the above referenced administrative enforcement proceeding were scheduled to begin February 2, 2016. The notice further provided that (1) the parties' witness lists were due to be disclosed and filed with the undersigned Administrative Law Judge (ALJ) by January 8, 2016; (2) respondent's motion in limine, if any, was due to be served and filed also by January 8, 2016; responses to respondent's motion were due to be served and filed by January 19, 2016; and any stipulations regarding exhibits were due to be filed by January 29, 2016.

On January 8, 2016, respondent and staff of the Department of Environmental Conservation (Department) filed their respective witness lists. Department staff's witness list included New York State Office of Parks, Recreation, and Historic Preservation (Parks) employees Karen Terbush and Meg Janis, and Department employees Lieutenant Donald Pleakis, Environmental Conservation Officer (ECO) Nathan Ver Hague, and Jeffrey Konsella, P.E., Division of Water.

Also on January 8, 2016, respondent filed and served a cover letter, a notice of motion in limine, and an affirmation of Daniel A. Spitzer with exhibits in support of respondent's motion (Spitzer Affirmation). In its motion, respondent seeks to preclude Department staff from offering (1) any expert testimony, (2) any evidence concerning respondent's past violations of water quality standards or regulations governing stormwater control, and (3) any evidence regarding laboratory analyses conducted by Microbac Industries at the request of Department staff on field samples taken from Yeager Brook by staff on December 21, 2011.

On January 19, 2016, Department staff filed and served a cover letter and affirmation of Maureen A. Brady, with one exhibit, in opposition to respondent's motion in limine. In addition, Department staff filed a January 19, 2016 amended witness list adding Department employee William Smythe, P.E., Division of Water, to its list of witnesses.

On January 25, 2016, respondent filed and served a cover letter, a notice of motion for an adjournment of the hearing and for further discovery, an affirmation of Charles W.

Malcomb with exhibits in support of respondent's motion (Malcomb Affirmation), and a due diligence affirmation of Joel J. Terragnoli in support of respondent's motion. In the affirmation in support of the motion, respondent made further argument in support if its motion to preclude expert testimony, and sought expert disclosure in the event its motion in limine was denied. In addition, respondent sought additional discovery arising from documents submitted by Department staff in opposition to the motion in limine not previously disclosed during discovery. In light of the pendency of the scheduled hearing, respondent requested that a telephone conference be convened to discuss the motions.

A telephone conference call was convened and electronically recorded on January 26, 2016. Participating in the conference call were the presiding ALJ and the parties noted in the appearances above. After hearing oral argument on the motions, I granted respondent's motions in part and otherwise denied the motions. Among other things, I adjourned the February 2, 2016 hearing, directed Department staff to serve and file expert disclosure pursuant to CPLR 3101(d)(1)(i), and authorized further discovery. This ruling documents the rulings made during the conference.

On January 26, 2016, after the telephone conference call, I issued the subpoena duces tecum requested by respondent in furtherance of its discovery against Parks staff. On February 5, 2016, Department staff served and filed expert witness disclosures of Mr. Konsella, Mr. Smythe, Lt. Pleakis, and ECO Ver Hague. It its transmittal letter, staff made further argument in opposition to the motion in limine.

By agreement of the parties, the hearing is scheduled to commence on April 26, 2016.

II. Discussion

A. Motion in Limine

In its motion in limine, respondent seeks to preclude Department staff from offering three types of evidence during the hearing in this matter. First, respondent seeks to preclude staff from offering any expert proof or testimony on the ground

that staff allegedly "purposefully" failed to provide expert disclosure as required by CPLR 3101(d)(1)(i) by the July 11, 2014 deadline agreed upon by the parties and confirmed by the presiding ALJ in a July 1, 2014 email (see Spitzer Affirmation, Exh B). Second, respondent seeks to preclude Department staff from offering evidence of past water quality or stormwater control violations by respondent on the ground that evidence of prior, similar acts is inadmissible to prove that a defendant perpetrated the same act on a later, unrelated occasion. Finally, respondent seeks to preclude Department staff from offering evidence pertaining to or based upon laboratory results obtained during stream monitoring performed on December 21, 2011 on the ground that the water samples submitted to Microbac Industries were not tested in accordance with laboratory or agency protocols.

Examining respondent's objections in reverse order, Department staff conceded in its affirmation in opposition to the motion and during the telephone conference call that it did not intend to introduce evidence of any samples submitted to Microbac and, thus, does not object to this evidence being precluded. Accordingly, respondent's motion to preclude is granted in part.

With respect to evidence of past violations, Department staff argues that evidence of respondent's past water quality and stormwater control violations are part of a "common plan" and, therefore, subject to an exception to the general rule that evidence of prior acts is inadmissible to prove a violation charged (citing People v Molineux, 168 NY 264, 293 [1901]).

During the telephone conference, I sought clarification from respondent regarding whether the prior acts to which it objects are the various violations alleged in the April 24, 2012 amended complaint in this matter. Respondent confirmed that it was not seeking to preclude evidence of the violations charged in the complaint. In addition, Department staff indicated that it was not planning on proving violations not charged in the complaint. Based on this clarification, I concluded that respondent's objection was not yet ripe. Accordingly, I denied respondent's motion in part with leave to renew at the hearing if Department staff sought to prove violations not charged in the complaint. I reserved on staff's argument that prior water quality and stormwater violations fall

within the "common plan" exception recognized in People v Molineux or are otherwise admissible in this proceeding.

Finally, with respect to expert proof and testimony, Department staff acknowledges that it had not provided respondent with an expert witness list by the July 2014 deadline. However, staff argues that it should not be precluded from presenting opinion evidence on several grounds. First, staff argues that staff witnesses, as lay fact witnesses, may offer their opinions provided they are based on facts in evidence and personal knowledge. In support of this proposition, Department staff relies on the common law rule that lay witnesses are competent to offer opinions on certain matters (citing Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 7.2 [2d ed 5A West's NY Prac Series 2011]). Staff asserts that Department staff witnesses are "rarely qualified" as expert witnesses as contemplated by the CPLR, and based upon their education and work experience, are allowed to offer their opinions based upon the facts in the record and their personal knowledge. Staff further argues that determining violations of the narrative water quality standard for turbidity requires no special training or expertise.

In the alternative, staff argues that if Department staff witnesses must be qualified as expert witnesses, disclosure at this time should be allowed. In its transmittal letter accompanying its expert disclosure, staff makes the further argument that because its witnesses are on staff, and not separately hired as is the case with respondent's experts, staff witnesses are not "retained" within the meaning of CPLR 3101(d)(1)(i) and, thus, are not subject to disclosure under the CPLR.

I disagree with Department staff's assertion that agency witnesses are in essence lay witnesses and that the opinions they offer in Departmental proceedings fall within the common law exception authorizing lay opinion. Although lay witnesses are not barred from offering opinion, the scope of lay opinion is limited to matters that fall within ordinary perceptions and experience such as color, weight, height, taste, smell, and the like (see Barker & Alexander, § 7:2; Jerome Prince, Richardson on Evidence §§ 7-201 to 7-202 [Farrell 11th ed 1995]).

A lay witness may not, however, offer opinions on matters calling for specialized knowledge the witness does not possess (see Larsen v Vigliarolo Bros., Inc., 77 AD2d 562, 562 [2d Dept], lv denied 52 NY2d 702 [1980]; Viacom Intl. v Midtown Realty Co., 193 AD2d 45, 55 [1st Dept 1993]). Where scientific, technical, or other specialized knowledge beyond the ken of a lay person will assist the trier of fact to understand the evidence or to resolve fact issues, a witness qualified by knowledge, experience and training may give an opinion about the issues in dispute provided the testimony is based upon reliable facts or data (see De Long v County of Erie, 60 NY2d 296, 307 [1983]). The admissibility of expert testimony on a particular point is addressed to the discretion of the trial court or tribunal (see id.).

In both Departmental administrative enforcement proceedings under Part 622, and permit hearings under 6 NYCRR part 624 (Part 624), agency staff is regularly called upon to offer opinions on a variety of issues that involve scientific, technical or professional knowledge that goes well beyond the knowledge or experience of lay persons. Such issues include testing procedures and protocols, the assessment of environmental impacts, the evaluation of the adequacy and effectiveness of pollution control measures, and the content and application of Departmental law and policy, including whether certain factual observations constitute violations of statutory or regulatory standards. Moreover, prior to presenting such evidence, Department witnesses state their education, training, and experience on the record, thereby demonstrating their qualifications to provide expert opinion. Indeed, both administrative tribunals and courts on judicial review have recognized that qualified agency staff are expert witnesses when testifying on these types of issues (see e.g. Matter of Karta Corp., Order of the Commissioner, Aug. 10, 2010, adopting Hearing Report, at 16-17 [staff monitor qualified to provide expert testimony]; Matter of Bath Petroleum Storage, Inc., ALJ Ruling on Discovery Disputes, June 13, 2005, at 5-6 [staff routinely called as both expert and fact witnesses]; State of New York v Barone, 74 NY2d 332, 338 [1989] [clean up costs]; State of New York v 158th St. & Riverside Dr. Hous. Co., Inc., 100 AD3d 1293, 1298 [3d Dept 2012] [impact and sources of oil spill]; Matter of DeCaprio v Zagata, 235 AD2d 970, 973 [3d Dept 1997] [pesticide identification and registration]).

An examination of the testimony staff plans to elicit from agency witnesses in this proceeding reveals that much of it depends upon scientific, technical, or professional knowledge outside the ordinary experience of lay persons. Among the subjects proposed are testimony concerning the review and evaluation of inspection reports, enforcement procedures, standard stormwater practices, the alleged ineffectiveness of respondent's erosion and sediment controls, and the contribution to and causes of the turbidity alleged in the complaint (see Expert Disclosure of Jeffery A. Konsella, P.E.; Expert Disclosure of William Smythe, P.E.; Expert Disclosure of Lt. Donald Pleakis; Expert Disclosure of ECO Nathan R. Ver Hague). Each of these subjects go beyond the ordinary experience of lay persons, and lay witnesses that lack the scientific, technical or professional training and experience of the Department's witnesses would not be qualified to provide opinion on these matters.

Department staff argues that determining whether the narrative water quality standard for turbidity -- no increase that will cause a substantial visible contrast to natural conditions (6 NYCRR 703.2) -- has been violated does not require special training or expertise. Staff asserts that "average citizens" with minimal training can make that determination (Brady Affirm at 6). Staff's argument does not support its conclusion. The fact that some training, even if only minimal, is required to determine whether the turbidity standard has been violated necessitates that a witness have that training before being qualified to offer an opinion about such a violation.

The circumstance that staff witnesses are not always formally certified as experts also does not compel the conclusion that agency witnesses are not expert witnesses. New York law does not require a party to formally request a tribunal to declare a witness to be an expert after the witness's background and qualifications are placed on the record (see People v Grajales, 294 AD2d 657, 659 [3d Dept], lv denied 98 NY2d 697 [2002]; People v Gordon, 202 AD2d 166, 167 [1st Dept], lv denied 83 NY2d 911 [1994]; see also People v Lamont, 21 AD3d 1129, 1132 [3d Dept 2005], lv denied 6 NY3d 835 [2006] [criticizing the practice of formally certifying experts in jury trials]). Generally, a formal determination whether a witness qualifies as an expert occurs only when and if an opposing party challenges the expert's credibility or qualifications and, even then, the determination need only be implicit (see People v

Gordon, 202 AD2d at 167). In those cases where an agency expert's credibility or qualifications have been challenged, the ALJ has examined the witness's background and experience and made a formal determination (see e.g. Matter of San Miguel Auto Repair Corp., Order of the Commissioner, Dec. 17, 2013, adopting Hearing Report, at 19-20; Matter of Karta, at 16-17; Matter of Bath, at 7-8). The circumstance that a formal determination is not made in cases where a respondent raises no objection to the qualifications of a Department witness does not compel the conclusion that the agency witness is not providing expert testimony in those matters. To the contrary, Department staff witnesses are regularly qualified as expert witnesses in Department proceedings.

Given that Department witnesses are regularly called upon to provide expert testimony, a respondent seeking expert disclosure is entitled to receive it upon request. As previously held, the scope of discovery under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]) is as broad as that provided under CPLR article 31 (see 6 NYCRR 622.7[a]; Matter of U.S. Energy Develop. Corp., Ruling of the Chief Administrative Law Judge [ALJ] on Motion for Leave to Conduct Depositions, May 9, 2014, at 4). With some exceptions and limitations not relevant here, the parties to a Part 622 proceeding may use any discovery device contained in article 31 of the CPLR (see 6 NYCRR 622.7[b][1]). Those discovery devices include expert disclosure pursuant to CPLR 3101(d)(1)(i) (see Matter of Bath, at 6). That section provides:

> "Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion"

(CPLR 3101[d][1][i]).

Staff argues that staff witnesses are not "retained" within the meaning of CPLR 3101(d) and, thus, that section does not apply. Staff's argument is unpersuasive. First, the term "retained" does not appear in the above referenced portion of the statute, which requires disclosure of any witness a party expects to call as an expert, whether "retained" or otherwise.

Moreover, staff does not cite, and research fails to reveal, any authority supporting the proposition that staff witnesses are not "retained" under the statute and, thus, exempt from disclosure under CPLR 3101(d). Accordingly, upon respondent's request, Department staff was obliged to provide expert disclosure of any staff witness it expected to call as an expert at the hearing.

On its motion, respondent argues that because Department staff failed to provide expert disclosure by the July 11, 2014 deadline, staff should be precluded from offering any expert testimony at the hearing. Although I agree that Department staff is obliged to provide expert disclosure, and has in fact done so in response to my oral directive during the telephone conference, I disagree that staff should be precluded from offering expert testimony at the hearing. Preclusion for failure to comply with CPLR 3101(d)(1)(i) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (see Marchione v Greenky, 5 AD3d 1004, 1004 [4th Dept 2004]; Young v Long Is. Univ., 297 AD3d 320, 320 [2d Dept 2002]). Here, although staff's failure to disclose may have been mistaken, it was not intentional or willful. Moreover, because the hearing has been adjourned for almost two months, respondent will not be prejudiced by staff's untimely disclosure. Accordingly, respondent's motion to preclude expert testimony should be denied.

B. Motion for an Adjournment and Further Discovery

As noted above, in its motion for an adjournment and further discovery, respondent seeks expert disclosure pursuant to CPLR 3101(d)(1)(i) in the event its motion in limine is denied. As discussed above, to avoid any prejudice, respondent's request for expert disclosure was granted, and Department staff was directed to provide expert disclosure. Department staff complied with that directive on February 5, 2016.

Respondent also sought an adjournment of the hearing and additional discovery from both the Department and Parks in light of a document attached to Department staff's response to the motion in limine that was not disclosed during discovery. Accordingly, respondent seeks leave to serve a third set of

document demands on the Department, and an ALJ-issued subpoena duces tecum on Parks. Because respondent seeks information that is reasonably calculated to lead to relevant evidence (see Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see also Matter of Bath Petroleum Storage, Inc., ALJ Ruling on Motions for a Protective Order, Feb. 18, 2005, at 3), I granted the adjournment and authorized the service of the third set of document demands on the Department, and service of the subpoena duces tecum on Parks (see Matter of U.S. Energy Dev. Corp., Ruling of the Chief ALJ on Motion for Issuance of Subpoena Duces Tecum, Feb. 4, 2014, at 2). I issued the requested subpoena duces tecum on January 26, 2016. Respondent is responsible for formally serving the subpoena on Parks.

III. Ruling

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

1) that portion of respondent's motion in limine that seeks preclusion of any evidence pertaining to or derived from laboratory analyses conducted by Microbac Industries at the request of the Department pertaining to the field samples taken from Yeager Brook by the Department on December 21, 2011, is granted;

2) that portion of respondent's motion in limine that seeks preclusion of any evidence concerning respondent's past violations of water quality standards or regulations governing stormwater control is denied without prejudice to renew at hearing; and

3) the remaining portions of respondent's motion in limine are denied;

4) respondent's motion to adjourn the hearing and for further discovery is granted;

5) the hearing is adjourned and, upon the agreement of the parties, will commence on Tuesday, April 26, 2016;

6) respondent is hereby authorized to serve the third set of document demands on Department staff, and the subpoena duces tecum issued on January 26, 2016 on Parks; and

7) Department staff is directed to provide expert disclosure pursuant to CPLR 3101(d)(1)(i), which disclosure was provided on February 5, 2016.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: February 23, 2016
Albany, New York