UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
DOUG BLOSSOM,	**)**	**DOCKET NO. CWA-10-2002-0131**
	)	
Respondent.	**)**	

ORDER GRANTING MOTION TO QUASH SUBPOENA OF ALLEN MOOR

I. Background

The State of Alaska Department of Transportation and Public Facilities ("Alaska"), by Motion to Quash Subpoena dated April 27, 2004 ("Motion to Quash"), moves this Tribunal to quash the subpoena which was issued to Respondent's witness Allen Moor pursuant to this Tribunal's Order Granting Respondent's Motion for Subpoenas, issued April 15, 2004 ("Order Granting Subpoenas"). For the reasons described below, Alaska's motion is granted.

The Prehearing Order ("PHO") in this case, issued November 18, 2002, directed the parties to exchange and file, *inter alia*, "the names of the expert and other witnesses intended to be called at hearing, with a brief narrative summary of their expected testimony ... [and] a curriculum vita or resume for each identified expert witness." PHO ¶¶ 1(A)-(B). Respondent's Initial Prehearing Exchange ("PHE") lists "Allan Moor"[1] as an expert witness, stating:

> 5. Allan [sic] Moor / Expert
>
> Mr. Moor is the Head Construction Engineer for the State of Alaska Department of Transportation. He will testify about the construction of the culvert running under the Sterling Hwy.

Respondent's PHE brief at 3. Respondent's PHE also included "Respondent's Exhibit 23: Allen Moor's curriculum vitae." Id. at 7.

[1] There has apparently been some confusion regarding the correct spelling of Mr. Moor's name. Alaska's Motion clarifies that the correct spelling is "Allen Moor."

On April 14, 2004, Respondent filed a Motion for the Issuance of Subpoenas ("Motion for Subpoenas"), explaining:

> The Respondent intends to call several witnesses who are currently employed by the State of Alaska. The state is requiring subpoenas for the attendance of its employees at this hearing in order to justify their time away from their jobs. Two witnesses, Jeff Graham, and Allan [sic] Moore, [sic] work outside the Kenai/Soldotna area and will be provided roundtrip travel to attend the hearing.

Motion for Subpoenas at 1-2. Respondent's Motion for Subpoenas, pursuant to 40 C.F.R. § 22.21(b), described the grounds, necessity, materiality and relevancy of Mr. Moor's testimony as follows: "Allan [sic] Moore [sic] is the Head Construction Engineer for the State of Alaska Department of Transportation. He will testify about the construction of the culvert running under the Sterling Hwy. near Mr. Blossom's property." Motion for Subpoenas at 2 (underlining omitted).

This Tribunal's Order Granting the Subpoenas stated:

> Respondent represents that the four witnesses were disclosed in its initial prehearing exchange and that their testimony is material and essential to the hearing of this matter. Further, Respondent asserts the subpoenas are necessary because the witnesses are employees of the State of Alaska and their employer will not permit them to be absent from their positions to attend the hearing without the subpoenas. In telephone conference with the staff of the undersigned's office, Complainant represented that it had no objection to the issuance of the subpoenas.

Order Granting Subpoenas, April 15, 2004.

II. Authority

Section 1319(g)(10) of the Clean Water Act (33 U.S.C. § 1319(g)(10)) authorizes the issuance of subpoenas for the attendance and testimony of witnesses for any administrative penalty proceeding under Section 1319(g). Sections 22.4(c)(9) and 22.19(e)(4) of the Consolidated Rules (40 C.F.R. §§ 22.4(c)(9) and 22.19(e)(4)) provide that the Presiding Judge may issue such subpoenas, pursuant to such statutory authority. Section 22.21(b) states, in relevant part: "The Presiding Officer may require the attendance of witnesses ... by subpoena ... upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced."

III. Discussion

Respondent's PHE, pursuant to this Tribunal's PHO, specifically listed Mr. Moor as an "expert" witness and provided his curriculum vitae as Respondent's Exhibit ("RX") 23, as required by the PHO for "expert" witnesses. Respondent's Motion for Subpoenas stated that "[t]he state [of Alaska] is requiring subpoenas for the attendance of its employees at this hearing in order to justify their time away from their jobs." Motion for Subpoenas at 1. Thus, Respondent has never offered any indication that Mr. Moor was anything other than a *willing* "expert" witness. In Respondent's Opposition to Motion to Quash Subpoena ("Respondent's Opposition"), sent to this Tribunal by facsimile on April 29, 2004 (today), Respondent for the first time since this litigation began nearly two years ago suggests that Mr. Moor is actually a "fact" witness, stating: "As a representative of the state [of Alaska] with access to state records memorializing the construction and placement of the culvert, Mr. Moor can testify as a fact witness concerning the matter." Respondent's Opposition at 2 (emphasis added).

Respondent's *post hoc* characterization of Mr. Moor as a "fact witness" will not suffice to justify Respondent's request for what turns out to be a subpoena for an *unwilling expert* witness. Further, even if Mr. Moor were a "fact witness," Respondent has not made "a showing of the grounds and necessity ..., and the materiality and relevancy..." of Mr. Moor's testimony pursuant to 40 C.F.R. § 22.21(b).

A. Subpoena of Unwilling Expert

Federal Rule of Civil Procedure ("FRCP") 45, pertaining to subpoenas, is applicable in the present case. The court in In re Grand Jury Subpoena Duces Tecum Issued to the First National Bank of Maryland, 436 F.Supp. 46, 48 (D.Md. 1977), explained:

> [I]n a proceeding to enforce administrative subpoenas, [FRCP] 45(b), provides expressly that the court may condition compliance with the subpoena on reimbursement. Rule 45(b) is made applicable to proceedings to enforce administrative subpoenas by [FRCP] 81(a)(3). Application of the Civil Rules to administrative subpoenas, especially with respect to this provision for transferring the cost of compliance, reflects a significant policy judgment that the weight and import of administrative subpoenas is comparable to that of ordinary civil subpoenas and that witnesses, particularly neutral witnesses, should not bear unreasonable expenses in complying with subpoenas in either a civil or an administrative proceeding.

(Emphasis added) (footnotes omitted).[2] Under FRCP 45, the federal courts have held that,

[2] It remains unclear whether Respondent's statement that Mr. Moor "will be provided roundtrip travel to attend the hearing" (Motion for Subpoenas at 2) reflects an arrangement

absent "extraordinary circumstances," a non-party "expert" witness cannot be forced to testify against his or her will. For example, in Owns v. Silvia, 838 A.2d 881, 901-902 (R.I. 2003), the court held:

> Absent extraordinary circumstances not present in this case, a non-party expert cannot be compelled to give opinion testimony against his or her will. *See* Sousa v. Chaset, 519 A.2d 1132, 1136 (R.I. 1987); Ondis, 497 A.2d at 18. In Sousa, 519 A.2d at 1135, the plaintiff attempted to subpoena an expert who did not wish to testify. This Court held ... "[a]n expert who has not been engaged, but only subpoenaed, cannot be compelled to give opinion testimony against his or her will." Id. at 1136. In Ondis, 497 A.2d at 18, ... [t]his Court held that it is the "obligation of a party who desires expert testimony to obtain the services of a qualified person on a voluntary basis." Id.[3]

In Young v. United States, 181 F.R.D. 344, 346 (W.D.Tex. 1997), the court similarly held:

> In the absence of a statute to the contrary, a professional witness may not generally be compelled to testify as an expert at the request of a private litigant, as such testimony is a matter of contract or bargain. *See* Karp v. Cooley, 349 F.Supp. 827, 836-37 (S.D.Tex. 1972); [FRCP] 45(c)(3)(B)(ii); 97 C.J.S. *Witnesses* § 16 (1957 & Supp.1997). *In other words, just because a party wants to make a person work as an expert does not mean that, absent the consent of the person in question, the party generally can do so*. Karp, 349 F.Supp. at 836-37; 97 C.J.S. *Witnesses* § 16 (1957 & Supp.1997).

(Emphasis added).

In the present case Respondent has led this Tribunal to believe that Allen Moor was a willing expert witness, and that the State of Alaska required a subpoena as part of its procedures

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between Respondent and Mr. Moor, or was part of Respondent's explanation for why the State of Alaska "required subpoenas for the attendance of its employees at this hearing" (*e.g.*, because the State would, in that case, pay their travel expenses).

[3] In a footnote to this language, the court opined that "[s]uch [extraordinary] circumstances might exist, for example, when there are no other experts available who can address the substance of the issues in the case, or when the expert in question is uniquely qualified to do so." Owens, 838 A.2d at 901, n.13. In the present case, no such "extraordinary circumstances" exist, as Mr. Moor has no actual knowledge of the culvert and is neither the only person available who can address the substance of the issues identified, nor is he uniquely qualified to do.

for allowing state employees to give testimony. However, it now appears that Mr. Moor is not, in fact, a *willing* "expert." Therefore, under FRCP 45 and well-established precedent, this Tribunal declines to compel Mr. Moor to provide expert testimony on behalf of Respondent against Mr. Moor's wishes.

B. Subpoena of a "Fact" Witness

Even if Mr. Moor were a "fact witness" (which he is not), Respondent has not made the requisite "showing of the grounds and necessity ..., and the materiality and relevancy..." of Mr. Moor's testimony, pursuant to 40 C.F.R. § 22.21(b).

Respondent explains:

> ... Allan [sic] Moore [sic] is being subpoenaed to testify for the State of Alaska ... about the construction of the culvert... He is expected to testify about the construction and placement of the culvert, reasons for its placement, and the diversion of water onto Respondents [sic] land... As a representative of the state with access to state records memorializing the construction and placement of the culvert, Mr. Moor can testify **as a fact witness** concerning the matter... Mr. Blossom has submitted [RX-8] ... [which] is a plan and profile for the ... culvert... Respondent intends to have Mr. Moore [sic] authenticate and explain this exhibit and its relationship to the culvert in question. Mr. Moore's [sic] testimony is material and relevant to the issue of whether Mr. Blossom's land in question is in fact wetlands ... [and] is also material and relevant to the issue of the need for Mr. Blossom to channel and drain the water from the culvert in order to conduct his reforestation project.

Respondent's Opposition at 2-3 (emphasis added). Thus, Respondent argues that Mr. Moor's "factual" testimony is "material and relevant" to: 1) construction of the culvert; 2) placement of the culvert; 3) reason for the culvert; 4) diversion of water onto Mr. Blossom's land; 5) authentication of RX-8; 6) explanation of RX-8; 7) "relationship" of RX-8 to the culvert; 8) whether the 13 acres at issue is "wetlands" or otherwise; and 9) "the need for Mr. Blossom['s] [ditching activities] to conduct his reforestation project."

Alaska points out that "Mr. Moor has no knowledge of the culvert or its construction." Motion to Quash at 2. Indeed, Mr. Moor's Affidavit, attached to the Motion to Quash, states that "I have no personal knowledge of the culvert, property, or wetland at issue... To my knowledge, I have never even seen this culvert and have no knowledge of its construction..." Moor Affidavit ¶ 2 (emphasis added). Thus, Mr. Moor has no *factual* knowledge of the 1) construction of the culvert; 2) placement of the culvert; 3) reason for the culvert; or 4) diversion of water onto Mr. Blossom's land. Mr. Moor's testimony is unnecessary to

"authenticate" RX-8 because Complainant has stipulated to the admissibility of RX-8. *See* Joint Prehearing Stipulations (Sept. 5, 2003). The "relationship" of RX-8 ("State of Alaska Department of Highways Plan and Profile of Proposed Highway Project (culvert project)" (Respondent's PHE brief at 6)) speaks for itself, in that RX-8 appears to be a plan for a culvert and there has been no suggestion made the plan is not for *the culvert* related to Respondent's property. Since Mr. Moor has no "factual" knowledge of the culvert or its construction, his testimony in "explanation" of RX-8 would be "expert" testimony, and as discussed *supra*, this Tribunal declines to compel Mr. Moor to provide expert testimony against his wishes. Finally, never having seen the culvert or the 13 acres in question, Mr. Moor is incapable of providing "factual" testimony regarding whether the land is "wetland" or otherwise,[4] or regarding the "necessity" of Mr. Blossom's ditching activities "to conduct his reforestation project."[5] Therefore, Respondent has not made the requisite "showing of the grounds and necessity ..., and the materiality and relevancy..." of Mr. Moor's "factual" testimony, pursuant to 40 C.F.R. § 22.21(b).

Accordingly, Alaska's Motion to Quash the Subpoena of Allen Moor is **GRANTED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2004
Washington, D.C.

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[4] In this regard, it is difficult to imagine how Mr. Moor's testimony regarding highway construction would be ***material*** to any issue in this case. Neither the "man-made"/"artificial" nature of the "wetland" (even if caused by "government" action), nor the "intermittent" or "seasonal" nature of the "wetland" (if any of these circumstance is shown to exist) would affect Federal jurisdiction over the wetlands. *See e.g.*, Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126, 111 S.Ct. 1089, 112 L.Ed.2d 1194 (1991).

[5] To the extent that Respondent may be implying that the culvert caused the flooding/wetland which impedes/prevents Mr. Blossom's use of the land for "silviculture," the resolution of that question is ***immaterial*** to any issue before this Tribunal. *See e.g.*, Leslie Salt, 896 F.2d at 358, *citing* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). *See also*, Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 927 (5th Cir. 1983).