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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
 DOUG BLOSSOM, ) Docket No. CWA-10-2002-0131  
 )  
 Respondent. )  
\_\_\_\_\_ )

**MOTION TO QUASH SUBPOENA**

Respondent caused a subpoena to be served on Allen Moor (identified as Allan Moore in the subpoena), a management level employee with the State of Alaska Department of Transportation and Public Facilities. The State of Alaska Department of Transportation and Public Facilities moves to quash the subpoena.

40 C.F.R. § 22.19 and 40 C.F.R. § 22.21 authorize the issuance of a subpoena “upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.” 40 C.F.R. § 22.21(b). Respondent filed a Motion for the Issuance of Subpoenas stating:

Allan Moore [sic] is the Head Construction Engineer for the State of Alaska Department of Transportation. He will testify

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about the construction of the culvert running under the Sterling Hwy. near Mr. Blossom's property.

Motion at 2.

Respondent failed to note that the culvert at issue was constructed in the 1960's and that Mr. Moor has no knowledge of the culvert or its construction. *See attached exhibits.* Mr. Moor has not been subpoenaed for his knowledge of the culvert or its construction, but for his general knowledge of culvert construction. Essentially, Mr. Moor has been subpoenaed as an unpaid expert witness.

Respondent's paralegal confirmed to counsel for the State of Alaska that Mr. Moor has NOT been subpoenaed to testify from his personal knowledge, but rather to testify about how or why culverts are installed. *Id.* A letter Respondent's paralegal sent to Mr. Moor explains, "your testimony will be based on your knowledge of highway construction, and the installation and purpose of a culvert." *Id.* Apparently, Respondent expects Mr. Moor to look at an as-built drawing of the culvert and opine on the content of this as-built. Again, Respondent has subpoenaed a state employee to act as an unpaid expert witness, not as a witness with any personal knowledge of the facts at issue.

Moreover, Mr. Moor lives and works in Anchorage, 165 highway miles from the location of the hearing. Respondent expects a high-level state construction manager to take an entire day away from state business to travel to Kenai to opine about a culvert he has never seen and its installation forty years ago, about which he has no personal knowledge. Respondent expects the State of Alaska to pay the manager's wage for this day of travel and testimony. The State of Alaska objects to

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2 this unwarranted subpoena and moves to quash the subpoena. If Respondent needs an  
3 expert witness to opine generally about how or why culverts are installed, or even  
4 about how this culvert may have affected the surrounding landscape, Respondent  
5 should hire one of the many excellent expert witnesses available in Alaska.

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7 If this were a proceeding under the Rules of Civil Procedure, Rule 45  
8 (c)(3)(A)(iv) would allow a witness to move for protection from a subpoena that  
9 subjects the witness to undue burden. Rule 45 (c)(3)(B)(iii) would also place severe  
10 constraints on the ability to issue a subpoena to a person more than 100 miles away  
11 from the place of trial. The State of Alaska believes the same concepts should apply in  
12 this case.

13  
14 It is an undue burden to require the State of Alaska to forgo the services  
15 of an important management-level employee and to pay the salary of that employee so  
16 that he can be forced to act as Respondent's expert witness. Moreover, it is an undue  
17 burden to require the employee to travel 165 miles to Kenai.<sup>1</sup> Respondent should not  
18 be allowed to subpoena a public employee who has no personal knowledge to act as an  
19 unpaid expert.

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23 <sup>1</sup> Aside from actual travel costs, the State would also be liable for a considerable  
24 variety of uncompensated expenses if by chance its employee were injured or killed  
25 while driving to Kenai on the two-lane roads through the Chugach and Kenai  
26 Mountains or flying in a small plane from Anchorage to Kenai. While a fact witness  
may be indispensable and thus, in appropriate circumstance, may be have to attend  
despite this risk, a witness with no personal knowledge is not indispensable.  
Respondents should engage their own expert witness for that testimony.

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Accordingly, the State of Alaska Department of Transportation and Public Facilities respectfully requests that the presiding officer quash the subpoena of Al Moor.

Dated this 27th day of April, 2004.

GREGG D. RENKES  
ATTORNEY GENERAL

By:   
James E. Cantor  
Chief Assistant Attorney General  
ABA No.: 8611100

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of April, 2004, a true and correct copy of the foregoing document was mailed by U.S. Mail to:

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