

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: )  
 )  
Nicor Gas, )  
 )  
Respondent. )

DOCKET NO. TSCA-HQ-2015-5017

**COMPLAINANT’S MOTION IN LIMINE TO EXCLUDE ATTORNEY MONY CHABRIA AS A WITNESS**

In accordance with 40 CFR § 22.16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), Complainant, the Acting Director of the Waste and Chemicals Enforcement Division of the United States Environmental Protection Agency (EPA), through counsel, submits this Motion in Limine to Exclude Attorney Mony Chabria as a Witness.

Under the Consolidated Rules, a Presiding Officer may exclude any evidence under 40 CFR 22.22(a)(1) which is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value and grant a motion in limine on the finding that the evidence is “clearly inadmissible for any purpose.” In re Strong Steel Prod., LLC, 2005 E.P.A. ALJ LEXIS 7, \*1-2 (EPA Feb. 18, 2005). According to prior Environmental Protection Agency (EPA) administrative, state court and U.S. Supreme Court decisions summarized below, testimony from an attorney who has served in the role of an attorney in the matter presently before this court should be excluded. Attorney-client privileged communications and work-product privilege

surrounding this subject area would be jeopardized by any proffered testimony of an EPA attorney-witness involved with this case.

Complainant hereby requests this Court exclude the Respondent from calling Attorney Mony Chabria as a witness. Respondent's Prehearing Exchange correctly recognizes Mony Chabria as an attorney in EPA Region 5's Office of Regional Counsel. Respondent's Prehearing Exchange, ¶ 28. More specifically, Mony Chabria is presently a first-line supervising attorney though he had been actively involved as an attorney in various aspects of this enforcement case against the Respondent. Attorney Chabria has discussed case strategy with other government attorneys (both within the Agency and partner state agencies) and discussed case related matters with EPA personnel (clients) both at Headquarters and with the Region 5 (Chicago) counsel's office. If Attorney Chabria were required to testify, any testimony he would give regarding the matters articulated in Respondent's Prehearing Exchange –

“regarding Nicor's findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation; and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation”

– will be influenced by judgements and perceptions the attorney contemplated during case development and, accordingly, should be barred as attorney-client communications and attorney work product.

### **I. Attorney-Client Privilege**

Attorney-client privilege protects an attorney from compelled testimony of confidential attorney-client communications and has been recognized consistently as a foundational element of our justice system. This foundational privilege has accordingly been codified in the ABA

Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information, which serves as a model for the ethics rules of most states.

The purposes of the attorney-client privilege is to facilitate full and frank disclosure between attorney and client. Upjohn Co. v. United States, 449 U.S. 383 (1981). This includes attorneys working within organizations as general counsel and the clients being the organization. *Id.* The attorney-client privilege is of such importance that it survives the death of a client. Swidler & Berlin v. United States, 524 U.S. 399, 404 (1998). Even with multiple parties involved in one single conversation, the assertion of attorney-client privilege has been validated by the court. In the Matter of Proceedings to Determine whether to Withdraw Approval of North Carolina's Hazardous Waste Mgmt Program, 1989 EPA ALJ Lexis 36, \*30 (E.P.A. Nov. 30, 1989). "Work prepared in anticipation of litigation by or at the direction of the attorney, are either privileged as attorney work products, the attorney-client privilege or come within the deliberative process privilege." In the Matter of Hawaiian Indep. Refinery, Inc., 1992 EPA ALJ LEXIS 311, \*10-11 (E.P.A. July 14, 1992). This Court has accordingly allowed the assertion of privilege to exclude the testimony of an agency attorney.

## **II. Attorney Work-Product Privilege**

Second, the concept of attorney work-product privilege provides that all mental impressions, legal conclusions, and factual interpretations made by an attorney are considered privileged. The Consolidated Rules are silent on this issue but the Federal Rules of Civil Procedure serve as a guide. The Environmental Appeals Board recognizes that "[a]lthough the Federal Rules of Civil Procedure do not apply to EPA administrative proceedings, the EAB may look to them for guidance in interpreting the [Consolidated Rules of Practice]." Environmental Appeals Board

Practice Manual at 21 (Aug. 2013). The Board has looked to the Rules of Civil Procedure in a number of cases cited by the Board. *Id.*

Federal Rules of Civil Procedure, Rule 26(b)(3) codifies the work-product privilege, stating “the court shall protect against disclosures of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.” Fed. R. Civ. Pro. Rule 26(b)(3). “[W]ork product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.” Upjohn Co. v. United States, 449 U.S. 383 (1981). This Court has not hesitated to exclude EPA attorneys as witnesses for the sake of this privilege. See In the Matter of Ensco, Inc., 1992 EPA ALJ LEXIS 898, \*19-20 (E.P.A. May 7, 1992), In the Matter of Lu Verne G. Kienast, 2001 EPA ALJ LEXIS 168, \*2-3 (E.P.A. Nov. 30, 2001). In the Matter of Chautauqua Hardware Corp., 1991 3 E.A.D. 616, \*17.

Any questioning of Attorney Chabria about Nicor’s PCB matter will breach both privileges. Attorney Chabria’s testimony would reveal details of conversations between Attorney Chabria and other EPA employees. Questioning Mr. Chabria will encroach on the attorney-client and attorney work product privilege. In addition, Respondent asserts that it will question Chabria with regards to the Respondent’s “cooperation and interaction.... with the PCB investigation.” These questions, which require Mr. Chabria to express legal conclusions and interpretations, will encroach on the attorney work-product privilege. Therefore, Mr. Chabria should be excluded as a witness.

### **III. Uniform Common Interest Doctrine**

The Uniform Common Interest Doctrine (or common interest rule) is recognized by the Seventh Circuit, (where Nicor resides and the asserted violations took place.) The Common

Interest Doctrine “serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” United States v. Evans, 113 F.3d 1457, \*33-34 (1997).

The requested testimony of Attorney Chabria’s with respect to his interactions with the Illinois Attorney General’s office are protected under the Common Interest Doctrine as EPA was working with the Illinois Attorney General’s office in developing a joint enforcement strategy in the Nicor Gas matter.

For the forgoing reasons, Complainant respectfully requests that this Motion be granted, excluding Attorney Mony Chabria, from the Respondent’s witness list. Prior to filing this Motion, the undersigned contacted the Respondent as to the relief requested herein and understands the Respondent opposes this Motion.

Complainant reserves the right to, at a later date, motion for the exclusion of other witnesses called by Respondent. Such request will be made prior to any scheduled prehearing conference.

Respectfully Submitted,

11.1.2016

Date

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