

BRIGGS NORFOLK LLP

2296 SARANAC AVENUE
LAKE PLACID, NEW YORK 12946

RONALD J. BRIGGS*
MATTHEW D. NORFOLK

JENIFER R. BRIGGS

TEL: 518.523.5555
FAX: 518.523.5559

www.briggsnorfolk.com

* ALSO ADMITTED IN SOUTH CAROLINA

March 16, 2011

Via Email and First Class Mail

James T. McClymonds
Chief Administrative Law Judge
N.Y.S. Department of Environmental Conservation
Office of Hearings and Mediation Services, 1st Floor
625 Broadway
Albany, New York 12233-9037

Re: JAMES W. MCCULLEY; DEC Case No. R5-20050613-505

Dear Judge McClymonds:

I am in receipt of your letter, dated January 24, 2011, in response to mine of January 19, wherein I request an affidavit from Mr. Iwanowicz stating that he signed the Ruling of the Acting Commissioner ("Ruling") on December 30, 2010. Please be advised that we respectfully reject your letter as being sufficient proof that Mr. Iwanowicz signed the Ruling on December 30, 2010.

As you know, a certification pursuant to CPLR §4520 is a certification or sworn statement by a public officer as to a fact ascertained, or an act performed, by him in the course of his official duty. Obviously, you did not sign the Ruling. Mr. Iwanowicz appears to have done that. Accordingly, pursuant to CPLR §4520, Mr. Iwanowicz, if he remains a public official, is the only one that may properly certify his act of signing the Ruling on December 30, 2011.

Of course, you as public officer may also make a certification pursuant to CPLR §4520 of a fact ascertained by you in the course of your official duty. In your January 24 certification you state that the copy of the Ruling I received was a true and accurate copy of the original "ruling signed by Acting Commissioner Iwanowicz on December 30, 2010... on file with the Department's Office of Hearings and Mediation Services." In your letter you do not state the bases or grounds upon which you make the certification of fact. Nonetheless, my client and I do not doubt that the copy of the Ruling I received is a true and accurate copy of the original Ruling. What we are questioning is whether Mr. Iwanowicz signed the Ruling on December 30, 2010.

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Your certification does not conclusively affirm, but rather merely suggests, that the Ruling was signed on December 30, 2010. As a consequence of the manner or way that your certification was crafted, it can reasonably be interpreted that you are only certifying that the copy of the Ruling I received is a true and accurate copy of the original. Accordingly, my client and I are of the opinion that your certification is insufficient as to the factual issue we are raising of whether or not Mr. Iwanowicz actually signed the Ruling **on December 30, 2010**.

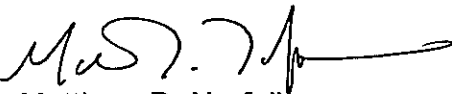
Based upon the foregoing, we maintain our request for an affidavit from Mr. Iwanowicz stating he signed the Ruling on December 30, 2010. This is a simple request. We do not ask much of the Department or Mr. Iwanowicz. If he signed the Ruling on December 30, 2010, Mr. Iwanowicz should not refuse to attest to it.

Additionally, in the event you were intending in your letter of January 24 to certify the purported fact that Mr. Iwanowicz, indeed, signed the Ruling on December 30, 2010, we invite you to expressly certify that fact pursuant to CPLR §4520. As you know, CPLR §4520 certifications and affidavits, in general, must be based upon personal knowledge. Bald, conclusory statements are insufficient. The factual basis for having the requisite personal knowledge must be included in the certification or affidavit. For example, if you personally witnessed Mr. Iwanowicz sign the Ruling on December 30, 2010, that fact should be included in the certification. Accordingly, we ask that any certification made by you include the bases or grounds for the certification and how you ascertained such fact or facts you are certifying.

Thank you for your attention to our request. We look forward to hearing from you.

Sincerely,

Briggs Norfolk LLP

By: 
Matthew D. Norfolk

cc: Mr. Joseph Martens, Commissioner (Via Facsimile and First Class Mail)
Mr. James W. McCulley (Via Email Only)
John S. Banta, Esq. (Via Email and First Class Mail)
Marc S. Gerstman, Esq. (Via Email and First Class Mail)
Randall C. Young, Esq. (Via Email and First Class Mail)
✓ Mr. Peter M. Iwanowicz (Via First Class Mail Only)
Mr. Louis Alexander (Via Email and First Class Mail)