



**DEPARTMENT OF ENVIRONMENTAL QUALITY  
POLICY AND PROCEDURES**

**SUBJECT: LITIGATION; RESPONSE TO RECEIPT  
OF LITIGATION-RELATED DOCUMENTS,  
SUBPOENAS, AND REQUESTS FOR  
TESTIMONY; OBTAINING LEGAL  
REPRESENTATION FROM THE  
ATTORNEY GENERAL**

**Number: 09-003**

**Date: September 30, 1997  
REVISED: August 15, 2006**

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**ISSUE:**

There are a number of issues related to litigation and response to receipt of litigation-related documents, Subpoenas, and requests for testimony for which the Department of Environmental Quality (DEQ) desires to provide guidance to its employees. These issues include: (1) how a DEQ employee should process receipt of a litigation-related document, such as a Subpoena and/or Summons and Complaint; (2) how a DEQ employee should process receipt of a Subpoena for Records; (3) when a DEQ employee may provide a statement or testimony to be used in a legal action to which the DEQ is not a party; and (4) when and how a DEQ employee may request legal representation from the Attorney General.

**DEFINITIONS:** (Sources: Black, Henry Campbell, *Black's Law Dictionary*, 5<sup>th</sup> ed. [St. Paul, MN: West Publishing Co., 1979], and *Webster's New World Dictionary of American English*, 3<sup>rd</sup> College Edition [New York: Simon & Schuster, Inc., 1988]).

- "Affidavit" means a voluntary declaration of facts written down and sworn to before an officer authorized to administer oaths.
- "Complaint" means the original pleading by which a civil action is commenced in court. The complaint, together with the summons, is required to be served on the defendant.
- "Personal Service" means hand delivery of a Summons and Complaint or a Subpoena to a DEQ employee.
- "Subpoena" means a command to appear at a certain time and place to give testimony upon a certain matter. A Subpoena *duces tecum* requires production of books, papers, and other things. A Subpoena is a court order even when it is signed by an attorney instead of the court. Failure to perform as required by the Subpoena may result in legal sanctions.
- "Summons" means an instrument used to commence a civil action or special proceeding and is a means of acquiring jurisdiction over a party. It is a writ or process directed to the sheriff or other proper officer, requiring the officer to notify the person named that an action has been commenced against him or her in the court from where the process issues and that the person is required to appear, on a day named, and answer the complaint.

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- “Testimony” is a declaration or statement made under oath or affirmation in response to a Subpoena. Testimony may be given by means of a deposition, which is testimony made under oath, but not in open court, and written down to be used when the case comes to trial.

### **POLICY AND PROCEDURE:**

#### I. Processing receipt of a Summons and Complaint.

This policy statement applies only to a Summons and Complaint that names the DEQ or a DEQ employee as the defendant or party. In cases where a DEQ employee is named as the defendant or party, this policy statement applies only if the employee is named as a defendant or party due to actions taken during the performance of the employee’s work-related responsibilities.

This policy statement does not apply to a Summons and Complaint an employee may receive regarding personal matters.

A Summons and Complaint may be received by personal service or by U.S. Mail.

#### A. Processing and Accepting Personal Service of a Summons and Complaint

Occasionally, a Summons and Complaint is delivered to the DEQ by means of personal service. It is important for DEQ employees to understand in which circumstances an employee may accept personal service of a Summons and Complaint. If a person appears at a DEQ office and indicates that he or she intends to serve a Summons and Complaint, a DEQ employee should ask the person delivering the document to open the document so that the employee can see who is named as a party on the Summons and Complaint. The DEQ employee should not handle or touch the document unless the document names that employee as a party.

##### 1. Circumstances Under Which an Employee Should Accept Personal Service of a Summons and Complaint

A DEQ employee should accept personal service of a Summons and Complaint if the document names that person as a party on the Summons and Complaint, OR names both the employee AND the DEQ as parties.

##### 2. Circumstances Under Which an Employee May Not Accept Personal Service of a Summons and Complaint

A DEQ employee may not accept personal service of a Summons and Complaint if the document names another DEQ employee as a party, OR names another employee AND the DEQ as parties, OR names only the DEQ as a party. If a DEQ employee named as a party on a Summons and Complaint is not available to accept personal service of the document(s), the person attempting to personally serve the document should be provided information regarding when the employee will be available and asked to

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return at that time. An employee may not disclose the home address or home telephone number of another employee to a person attempting to personally serve a Summons and Complaint. If in doubt, an employee should contact his or her supervisor for assistance.

An employee may not accept personal service of a Summons and Complaint that names the DEQ, the DEQ Director, the DEQ Deputy Director(s), or other member of the DEQ Executive Division as a party or defendant. Deputy Director Stanley Pruss's Management Assistant or other DEQ Executive Division employees are the only people who should accept personal service of a Summons and Complaint that names an Executive Division employee and/or the DEQ as a party to the Summons and Complaint. An employee should immediately contact Deputy Director Pruss's Management Assistant at 517-241-7392 in the event a person attempts personal service of a Summons and Complaint naming the DEQ, the DEQ Director, the DEQ Deputy Director(s), or other member of the DEQ Executive Division as a party or defendant.

**B. Processing U.S. Mail Delivery of a Summons and Complaint**

Most Summons and Complaints delivered to the DEQ and/or a DEQ employee are delivered by means of U.S. Mail. An employee who opens and distributes mail must ensure that a Summons and Complaint is immediately delivered to the employee named as a party on the Summons and Complaint. A Summons and Complaint that names the DEQ as a party should be immediately delivered to Deputy Director Pruss's Management Assistant.

**C. Required Notifications Upon Receipt of a Summons and Complaint**

An employee who receives a Summons and Complaint, either by personal service or by U.S. Mail, must immediately perform the following steps:

1. The employee must immediately notify his or her supervisor of receipt of the document(s). If the employee's supervisor is not immediately available, the employee should immediately notify the next higher level supervisor, or if that is not possible, perform Steps I.C.2.a and b, below.
2. A supervisor notified in Step I.C.1, above, must immediately notify the following persons:
  - a. Deputy Director Stanley Pruss's office; a copy of the Summons and Complaint must be hand carried to Deputy Director Pruss's office or faxed to his office if received in a district or field office. Deputy Director Pruss's office will notify the Department of Attorney General and other members of the DEQ Executive Division, as appropriate.
  - b. Bureau/Division/Office Chief, through the supervisor's chain of command.

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II. Processing receipt of a Subpoena requiring appearance or testimony.

This policy statement applies only if the employee receives a Subpoena due to actions taken during the performance of the employee's work-related responsibilities. This policy statement does not apply to a Subpoena an employee may receive regarding the employee's personal matters.

Please also see policy statements III and IV, below, regarding processing receipt of a Subpoena *duces tecum* or Subpoena for Records only.

The processing of a Subpoena Requiring Appearance or Testimony (including a deposition) is similar to the processing of a Summons and Complaint. A Subpoena Requiring Appearance or Testimony may be served by personal service or by U.S. Mail.

A. Processing and Accepting Personal Service of a Subpoena Requiring Appearance or Testimony

1. Circumstances Under Which an Employee Should Accept Personal Service of a Subpoena Requiring Appearance or Testimony

A DEQ employee should accept personal service of a Subpoena Requiring Appearance or Testimony if the document names the employee as a witness or a party.

2. Circumstances Under Which An Employee May Not Accept Personal Service of a Subpoena Requiring Appearance or Testimony

A DEQ employee may not accept personal service of a Subpoena Requiring Appearance or Testimony if the document names another DEQ employee as a witness or a party. If a DEQ employee named on a Subpoena Requiring Appearance or Testimony is not available to accept personal service of the document(s), the person attempting to personally serve the document should be provided information regarding when the employee will be available and asked to return at that time. An employee may not disclose the home address or home telephone number of another employee to a person attempting to personally serve a Subpoena Requiring Appearance or Testimony. If in doubt, an employee should contact his or her supervisor for assistance.

An employee may not accept personal service of a Subpoena Requiring Appearance or Testimony that names the DEQ Director, the DEQ Deputy Director(s), or other member of the DEQ Executive Division as a witness or party. Deputy Director Stanley Pruss's Management Assistant or other DEQ Executive Division employee are the only people who should accept personal service of a Subpoena Requiring Appearance or Testimony that names the DEQ Director, the DEQ Deputy Director(s), or other member of the DEQ Executive Division as a witness or party. An employee should immediately contact Deputy Director Pruss's Management Assistant at 517-241-7392 in

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the event a person attempts personal service of a Subpoena Requiring Appearance or Testimony that names the DEQ Director, the DEQ Deputy Director(s), or other member of the DEQ Executive Division as a witness or party.

**B. Processing U.S. Mail Delivery of a Subpoena Requiring Appearance or Testimony**

Most Subpoenas Requiring Appearance or Testimony delivered to a DEQ employee are delivered by means of U.S. Mail. An employee who opens and distributes mail must ensure that a Subpoena Requiring Appearance or Testimony is immediately delivered to the employee named on the Subpoena.

**C. Required Notifications and Actions Upon Receipt of a Subpoena Requiring Appearance or Testimony**

An employee who receives a Subpoena Requiring Appearance or Testimony must perform the following steps:

1. The employee should immediately notify his or her supervisor of the receipt of the Subpoena. If the DEQ or the DEQ employee is a party to the legal action referenced on the Subpoena, the employee or the employee's supervisor should immediately notify the Assistant Attorney General assigned to the matter that the Subpoena has been received. The supervisor should ensure that others in the bureau/division/office are also notified as appropriate (such as bureau/division/office chief and/or Enforcement Section Chief).
2. The employee should appear and provide the required testimony at the place and time indicated, on work time, with any necessary travel costs borne by the DEQ in accordance with applicable DEQ and State of Michigan travel policies. The employee should contact the attorney named on the Subpoena to confirm the time and place of testimony prior to appearing. If the employee must bring original DEQ records to the deposition or trial, the employee should also prepare and bring with him or her a copy of the original records to provide in response to the Subpoena in order to protect the original records from loss, mutilation, or destruction.

If the employee and the employee's supervisor believe that the employee has been named as a party or a witness on a Subpoena in error, or need more information about the logistics of the employee's appearance, the subject matter to be covered during the employee's appearance, or other details, the employee or the employee's supervisor should contact the attorney named on the Subpoena for clarification.

3. An employee may not keep or cash a check made out to the employee for witness fees and costs associated with providing testimony required by a Subpoena due to actions taken during the performance of the employee's work-related responsibilities. **If an employee receives a check for this**

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**purpose, the employee must endorse the check payable to the State of Michigan and promptly deposit the check with the DEQ Cashier's Office through the employee's bureau/division/office Administration Section/Unit.**

- III. Processing receipt of a Subpoena for Records (Subpoena *duces tecum*) when the DEQ is a party to a legal action.

This policy statement applies only to a Subpoena for DEQ records in cases where the DEQ is a party to the legal action described on the Subpoena. (If the DEQ is not a party to the legal action, see policy statement IV, below.) An employee who receives a Subpoena for DEQ records must remember that timely processing of the Subpoena is *essential*.

An employee who receives a Subpoena for records in a legal action to which the DEQ is a party must *immediately* deliver the Subpoena to his or her supervisor. If the employee's supervisor is not immediately available, the employee should immediately deliver the Subpoena to another supervisor or manager in the employee's chain of command.

A supervisor receiving a Subpoena as described above should review the Subpoena to determine which DEQ program division is involved in the legal action described on the Subpoena and immediately deliver the Subpoena to that program division chief or assistant chief. The program division chief or assistant chief should ensure that the Assistant Attorney General representing the DEQ in the legal action is promptly notified of the receipt of the Subpoena and is consulted before responding to the Subpoena. The program division chief or assistant chief should oversee the response to the document production and ensure that the required document production is done in a timely, complete, and orderly manner, protecting the records from loss, mutilation, or destruction, consistent with the advice of the Assistant Attorney General assigned to the matter. A DEQ employee who takes original record(s) with him or her to a deposition or trial should also take a copy of the record(s) with him or her to provide in response to the Subpoena. An employee who provides a copy of a record or records in response to a Subpoena should prepare a statement that the copy is a true copy of the records in the possession of the DEQ, using the template in Attachment A.

In the event documents are needed from multiple divisions, the lead program division chief or assistant chief should confer with the division chief or assistant chief in the other program divisions to establish a mutually-agreeable process for coordinating document production. If the program division needs records from the DEQ Executive Division, the program division chief or assistant chief should contact the Chief of the Office of Civil Enforcement Coordination, who will coordinate the Executive Division's response.

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- IV. Processing receipt of a Subpoena for Records (Subpoena *duces tecum*) when the DEQ is not a party to the legal action.

This policy statement applies only to a Subpoena for DEQ records in cases where the DEQ is NOT a party to the legal action described on the Subpoena. An employee who receives a Subpoena for DEQ records must remember that timely processing of the Subpoena is essential.

An employee who receives such a document must immediately forward the Subpoena to the DEQ Freedom of Information Act (FOIA) Coordinator in the Financial and Business Services Division. If the Subpoena is received in the DEQ's Lansing office, a complete copy of the Subpoena should be hand carried to the DEQ FOIA Coordinator's office. If the Subpoena is received in a district or field office, the employee who received the Subpoena should call the DEQ FOIA Coordinator to notify him or her of receipt of the Subpoena and fax a copy of the Subpoena to the DEQ FOIA Coordinator. The DEQ FOIA Coordinator will route the Subpoena to the proper DEQ division or divisions for response and will provide coordination, advice, and assistance to the divisions as needed. An employee who receives a Subpoena for Records routed from the FOIA Coordinator must respond by producing the records described on the Subpoena, following any coordination instructions provided by the FOIA Coordinator, protecting the records from loss, mutilation, or destruction.

If an employee believes that some or all of the records described in a Subpoena for Records contain information that is protected from disclosure by a legal privilege (such as an attorney-client or a deliberative process privilege) described in a court rule, the employee should promptly notify the FOIA Coordinator. The FOIA Coordinator will contact an Assistant Attorney General for assistance in responding to the Subpoena in that circumstance.

An employee who provides a copy of a record or records in response to a Subpoena should prepare a statement that the copy is a true copy of the records in the possession of the DEQ, using the template in Attachment A.

- V. Providing an affidavit or a statement for use in litigation to which the DEQ is not a party.

The following policy statement applies only in a situation when a party to a lawsuit in which the DEQ is not a party *requests* a statement or a deposition from a DEQ employee, but has not subpoenaed the employee to testify. (An employee who receives a Subpoena *requiring* the employee to testify in a deposition or trial in a lawsuit in which the DEQ is not a party must respond to the Subpoena as required in policy statement II, above.)

A party to a lawsuit will sometimes request a written statement from a DEQ employee that will be used to prove a fact the party needs in order to prevail in the lawsuit. This statement is called an "affidavit" when it is sworn under oath.

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While it is understandable that a party to a lawsuit would approach the DEQ for a statement to use in a lawsuit, voluntarily providing such a statement to one side in a lawsuit can cause the DEQ to appear partisan. As a regulatory agency, the DEQ must be scrupulous in avoiding any appearance of partiality. There are alternatives open to that party that do not pose such appearance problems for the DEQ, including issuance of a Subpoena requiring the DEQ employee to provide the deposition or testimony.

Therefore, in the absence of a Subpoena, a DEQ employee may only provide a statement or affidavit to a party to a lawsuit with the prior approval of the appropriate Deputy Director. The employee must request this approval through the employee's chain of command prior to providing such a statement.

**VI. Obtaining legal representation from the Attorney General.**

A DEQ employee may request legal representation from the Department of Attorney General in the event the employee is named as a party on a Summons and Complaint on a work-related issue or the employee may retain his or her own legal counsel, at the employee's own expense, at the discretion of the employee.

If the employee decides to request Attorney General representation, the employee must immediately complete and sign forms EQ0181E and EQ0182E and forward them to Deputy Director Stanley Pruss for review and action. NOTE: Deputy Director Pruss should have already received a copy of the Summons and Complaint as described in policy statement I, above.

In most circumstances, an employee who receives a Subpoena requiring the employee to provide testimony in a legal matter in which the DEQ is not a party does not need legal representation. If there are unique circumstances (e.g., concerns about individual liability or the state potentially becoming a party to the lawsuit), an individual may elect to request Attorney General representation. In that case, the employee must immediately complete and sign forms EQ0181E and EQ0182E and forward them to Deputy Director Pruss as described in the preceding paragraph.

Approved: \_\_\_\_\_



Date: \_\_\_\_\_

8-21-08

**ATTACHMENT A**

**STATEMENT OF TRUE COPY**

The enclosed copy or copies are true copies of the records in the possession of the Michigan Department of Environmental Quality.

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Employee Signature

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Employee Name

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Date