

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 25 of the Environmental
Conservation Law and Part 661 of
Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York,

RULING

DEC Index No.
R1-20070208-65

- by -

**DAREN PFENNIG and PFENNIG
CONSTRUCTION CORPORATION,**

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Daren Pfennig and Pfennig Construction Corporation, by service of a notice of hearing and verified complaint, both dated August 15, 2007. The complaint alleges that respondents violated provisions of article 25 of the Environmental Conservation Law ("ECL") and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), governing activities in and proximate to tidal wetlands. Specific violations alleged by staff include clearing of vegetation, placement of fill and excavation in the adjacent area of a tidal wetland without a permit issued by the Department. Staff alleges these activities occurred on Lot 10 of the Cove Beach Estates Subdivision ("site") in East Marion, Town of Southold.

Respondents answered the complaint by verified answer dated September 4, wherein respondents generally deny the allegations set forth in the complaint and assert five affirmative defenses. By notice and affirmation ("staff affirmation"), both dated September 13, Department staff moved for clarification of respondents' affirmative defenses. Respondents opposed the motion by affirmation ("respondents affirmation"), dated September 18.

For the reasons set forth below, Department staff's motion for clarification of affirmative defenses is denied in part and granted in part.

DISCUSSION

Section 622.4(c) of 6 NYCRR provides that a respondent "must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense." Section 622.4(f) of 6 NYCRR provides that Department staff may move for clarification if an affirmative defense is so "vague or ambiguous . . . that staff is not thereby placed on notice of the facts or legal theory" of the defense.

Pursuant to 6 NYCRR 622.6(c)(2), Department staff's motion must clearly state its objectives and factual basis. Additionally, as the movant, staff bears the burden of proof on the motion (6 NYCRR 622.11[b][3]).

Department staff argues that the affirmative defenses pleaded by respondents are so vague and ambiguous that staff has not been placed on notice of the factual basis or legal theory upon which the defenses are based (staff affirmation, at 2). Respondents argue that "the purpose of pleadings is to put the opposing party on notice of the factual nature of the claim - not to set forth in detail the evidence supporting the claim or the law applicable thereto" (respondents affirmation, at 1). The parties' specific arguments relative to each of the affirmative defenses are discussed below.

First Affirmative Defense

Respondents' first affirmative defense states that respondents performed the work at issue under the direction of other named individuals who were responsible for ensuring regulatory compliance and that all work was approved by the owner of the site. Department staff requests clarification to identify the applicable provisions of law upon which this defense is grounded. Staff also requests specifics regarding when, what, where, how and by whom respondents were directed to perform the work and the basis of these individuals' responsibility for ensuring regulatory compliance. Staff seeks similar information

with respect to the assertion that the work done by respondents was approved by the site owner. Respondents state that much of staff's request relates to evidentiary issues that are not necessary to apprise staff of the nature of the claimed defense and that respondents are not required to plead the law upon which the defense is based.

The legal theory of respondents' first affirmative defense is sufficiently clear: respondents assert that they are not liable because they acted at the direction/approval of other specified individuals who were responsible for regulatory compliance. Because respondents assert that "any work" they may have performed at the site falls under this affirmative defense, it is also clear that respondents intend to raise this defense in response to each instance where staff has alleged that respondents' actions violated the governing law or regulations. Accordingly, respondents' first affirmative defense provides sufficient detail to place staff on notice of the legal theory and facts that constitute the defense. Of course, clarity is not necessarily indicative of merit and staff is free to challenge the validity of this defense during the course of these proceedings.

Ruling: Department staff's motion for clarification of the first affirmative defense is denied.

Second Affirmative Defense

Respondents' second affirmative defense states that the owner of the site has already been fined by the Department for the activities that form the basis of the violations alleged in the complaint. Staff seeks clarification as to what "provisions of applicable law . . . constitute the basis of this second affirmative defense" (staff affirmation, appendix, ¶ 6). Respondents again state that they need not plead the law in asserting an affirmative defense.

It is not clear from respondents' papers what legal theory is being asserted. The bald statement that the property owner has been fined by the Department in relation to the activities set forth in the complaint does not constitute a legal theory. This statement may potentially form the basis of a number of affirmative defenses, including, without commenting on their merits, estoppel, release or election of remedies.

However, the specific legal theory being propounded by respondents, whether one of the aforementioned or some other, cannot be discerned from their pleading. Because the second affirmative defense does not provide sufficient detail to place staff on notice of the legal theory being asserted, it fails to meet the criteria set forth at 6 NYCRR 622.4(f).

Ruling: Department staff's motion for clarification of the second affirmative defense is granted.

Third Affirmative Defense

The third affirmative defense states that the Department inspected the site and approved the activities noted in the complaint both before and after such activities were performed. Staff seeks clarification with regard to when, where, how and by whom the property was inspected and when, where, how and by whom the planned and completed work was approved. Respondents argue that the information sought by staff is not essential to staff's comprehension of the basis of the defense and that the information sought is already in staff's possession.

Respondents' third affirmative defense lacks sufficient detail to place staff on notice of its factual basis. Respondents do not state when the alleged Department inspection or approval took place, what Department staff were involved, nor whether the alleged approval was given orally or in writing. By its motion, staff has indicated that it is not aware of any Department approvals relating to respondents' alleged unlawful activities. If respondents are aware of factual details that constitute the basis of this affirmative defense, 6 NYCRR 622.4(c) requires that respondents make these facts known to staff. If such approvals were given, staff must be provided with sufficient factual detail to allow it to form an appropriate response.

Ruling: Department staff's motion for clarification of the third affirmative defense is granted.

Fourth Affirmative Defense

Respondents' fourth affirmative defense states that no environmental harm resulted from the activities alleged in the

complaint. Department staff requests clarification of the applicable provisions of law that form the basis of this affirmative defense. Respondents again state that the law need not be pleaded.

The legal theory of Respondents' fourth affirmative defense is sufficiently clear. Essentially, respondents argue that if there is no environmental harm there is no foul. While staff may vigorously contest the merits of such a defense, it is nonetheless sufficiently clear to place staff on notice of what respondents intend to argue.

Ruling: Department staff's motion for clarification of the fourth affirmative defense is denied.

Fifth Affirmative Defense

Finally, respondents' fifth affirmative defense states, in its entirety, that "[u]pon information and belief, work which may have been performed at the site was performed by others" (verified answer, ¶ 20). Staff seeks clarification as to when, what, where, how and by whom the work was done. Respondents note that the complaint does not provide such details and respondents cannot provide specifics in the absence of same in the complaint.

Although it is true that staff has not specified the dates upon which the alleged violations occurred, staff has specified the activities that it alleges respondents engaged in that were in violation of the tidal wetlands law and regulations. If respondents are aware of factual details that constitute the basis of this affirmative defense, 6 NYCRR 622.4(c) requires respondents to make these facts known to staff. As stated, the fifth affirmative defense is too vague to place staff on notice of its factual basis.

Ruling: Department staff's motion for clarification of the fifth affirmative defense is granted.

CONCLUSION

For the reasons set forth herein, Department staff's motion for clarification is granted as to the second, third and fifth affirmative defenses, and denied as to the first and fourth affirmative defenses.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: October 10, 2007
 Albany, New York

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