

In the Matter of Alleged Violations
of Articles 27, 34 and 71 of the New
York State Environmental Conservation
Law ("ECL") and Parts 360, 505 and
622 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("NYCRR")

DEC Case No.
CO 1-20031229-415

**Ruling on Motion
to Compel
Disclosure**

-by-

Sept 18, 2008

PLP, II LP,

Respondent.

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Proceedings

Staff of the N.Y.S. Department of Environmental Conservation ("Department Staff") commenced this proceeding by service of a Notice of Hearing and a Complaint (dated February 8, 2008). Department Staff alleges three causes of action arising out of alleged removal of approximately 151 trees within the Natural Protective Feature Area along a bluff on Respondent's property located at 7444 Route 5 in the Town of Westfield, New York (the "site"). Department Staff further alleges that Respondent violated its Coastal Erosion Management Permit No. 9-0672-00105/00001 and Orders on Consent Nos. 9BU-053-0405 and R9-20050215-59.

Respondent, by its attorney, Marc A. Romanowski, Esq., served an Answer dated February 28, 2008, and discovery demand, both received by Department Staff on February 29, 2009.

On March 13, 2008, Department Staff mailed, via certified mail, DEC's First Demand for Production of Documents and Omnibus Discovery Demands upon Respondent's counsel. This demand and the Department Staff's subsequent discovery demands have been met with partial or no response from Respondent.

By Notice of Motion to Compel Discovery, Motion to Compel Discovery and Affirmation in Support of Motion to Compel Discovery, each dated July 16, 2008, Department Staff seeks an Order requiring Respondent to submit a complete response to each of the Department Staff's First Demand for Production of Documents and Omnibus Discovery Demands ("Department Staff's

First Demand"); and for such other relief as may be just, proper and appropriate.

Pursuant to Section 622.7(b)(1) of Title 6 of the New York Codes, Rules and Regulations ("6 NYCRR"), documents in response to a discovery demand are to be furnished within ten days of receipt of the discovery request unless a motion for a protective order is made. If a party fails to respond by that date, 6 NYCRR 622.7(c)(2) provides that a motion may be made to an Administrative Law Judge ("ALJ") to compel disclosure.

No responsive motion papers have been received from Respondent.

On August 22, 2008, this matter was assigned to the undersigned ALJ.

Discussion

Below is a summary of Department Staff's several attempts to obtain discovery in this matter, as set forth more fully in the July 16, 2008 Affirmation of Teresa J. Mucha, Esq.

In response to mailing the Department Staff's First Demand, Department Staff received a U.S. Postal Service signed return receipt card from Respondent's counsel bearing a delivery date of March 14, 2008.

Because Respondent did not move for a protective order, Respondent's responses were due by March 24, 2008. Respondent failed to produce the documents by that date. By certified mail letter sent March 28, 2008, Department Staff counsel advised Respondent's counsel of the missed deadline, and requested that responsive documents be produced no later than April 7, 2008.

Respondent's counsel did not respond to the discovery demand by April 7, 2008. Instead, on April 7, 2008, Respondent's counsel sent an e-mail to Department Staff counsel in which he stated that he would provide the responses no later than April 11, 2008. However, Department Staff received no responsive documents by that date.

By letter dated April 18, 2008, Department Staff received a partial response to the discovery demands. Respondent's counsel stated in his cover letter that he "hope[d] to have the remaining information to [Department Staff] by the end of next week."

Department Staff states that out of 13 discovery demands, Respondent failed to provide any response to five demands (Demand numbers two, four, five, six and seven), and provided only a partial response to four of the demands (Demand numbers one, three, ten and twelve).

Discovery demand number two requests Respondent to identify the name and address of each contractor, business, company, entity and/or person who engaged in or was otherwise involved with the removal of the vegetation within the Natural Protective Feature Area on the top of the bluff at the site and provide all documents concerning that action. Respondent responded by stating that "Respondent will provide a response to this demand under separate cover," but never did so.

Discovery demand number four requests Respondent to identify the name and address of each contractor, business, company, entity and/or person who placed the yellow tape and other marks on the tree within the Natural Protective Feature Area on the top of the bluff at the site and the purpose of such markings and to provide all documents concerning that action. Respondent responded by stating that "Respondent will provide a response to this demand under separate cover," but never did so.

Discovery demand number five requests that Respondent identify all costs associated with the removal of all vegetation within the Natural Protective Feature Area on the top of the bluff at the site and provide all documents concerning the disposal or removal costs including, but not limited to, receipts, cancelled check(s), invoices, bills, contracts, agreements, letters and other communications. Respondent responded by stating that "Respondent will provide a response to this demand under separate cover," but never did so.

Discovery demand number six requests that Respondent identify the name and address of the disposal facility or facilities that received the trees and other vegetation that was removed from the Natural Protective Feature Area on the top of the bluff at the site and to provide all documents concerning the disposal of that material including, but not limited to, bills, invoices, receipts, cancelled checks, contracts, agreements, letters and other communications. Respondent responded by stating that "Respondent will provide a response to this demand. under separate cover," but never did so.

Discovery demand number seven requests that Respondent provide all documents concerning the method(s) and equipment used to remove all vegetation within the Natural Protective Feature

Area on the top of the bluff at the site and the ownership of such vehicles and equipment used in that activity. Respondent responded by stating that "Respondent will provide a response to this demand under separate cover," but never did so.

Discovery demand number one requests all documents concerning Respondent's removal of the vegetation within the Natural Protective Feature Area on the top of the bluff at the site including, but not limited to, contracts, agreements, correspondence, notes, surveys, records, maps and other communications. Respondent only provided photographs taken allegedly before and after the vegetation removal and noted that "[a]dditional documents responsive to this demand will be provided under separate cover," but those documents were never provided.

Demand number three requests that Respondent identify the name and address of each contractor, business, company, entity and/or person who decided or was otherwise involved or participated in the decision regarding the trees and other vegetation within the Natural Protective Feature Area on the top of the bluff at the site that were cut and/or removed and to provide all documents concerning that determination. Respondent responded by stating that it objected to the demand to the extent that it sought attorney/client communications and noted that it provided correspondence between the Department Staff and Respondent which "...reference the Department's position and Respondent's express statement and that it intended to trim certain vegetation from the bluff area." Because Respondent failed to identify the individuals and/or entities involved in the vegetation removal, beyond Respondent, as requested by demand number two, Department Staff is not able to determine if the limited documents referenced in Respondent's response to demand number three are a complete response.

Similarly, Respondent did not provide a complete response to demand number ten which requests all documents that support the seven affirmative defenses set forth in Respondent's Answer. Those defenses include that (1) the Department Staff's claims are barred by the applicable statute of limitations; (2) the Department Staff's claims are barred by the application of laches, waiver and estoppel; (3) the Department Staff lacks jurisdiction over the removal of vegetation from the Natural Protective Feature Area and therefore lacks jurisdiction over that issue; (4) some or all of the Department Staff's claims fail to state a claim upon which relief can be granted; (5) the 2005 Order on Consent is no longer enforceable; (6) the Department Staff's action is barred by other pending actions between the

same parties involving the same issues addressed herein; (7) Respondent is a Pennsylvania Limited Partnership so the tribunal lacks jurisdiction over it. In response to discovery demand number ten, Respondent only provided a summons and complaint for an action it filed in State Supreme Court for a declaratory ruling (that its conduct of cutting the trees was not a "regulated activity" under 6 NYCRR 505.2[hh]) and copies of the 2005 and 2006 Orders on Consent between the parties. Department Staff asserts that those documents do not support all seven of the affirmative defenses set forth in Respondent's Answer.

Further, Department Staff contends that Respondent's response to demand number twelve is also incomplete. That demand requests all documents regarding the vegetation removal which were prepared in the regular course of business operations or practices of any person, firm, corporation or other public or private entity or prepared for any motive other than exclusively in anticipation of litigation. Respondent only referenced the documents provided in response to other demands which included the correspondence between Department Staff and Respondent, photographs of the site and engineering drawings prepared relative to Respondent's permit. Because Respondent failed to identify the individuals and/or entities involved in the vegetation removal beyond Respondent as requested by demand numbers two and three, Department Staff is not able to determine if the limited documents referenced in Respondent's response to demand number twelve are a complete response.

Department Staff concludes that as of July 16, 2008 (the date of Department Staff's motion papers), Department Staff has not received a complete response to Department Staff's discovery demands. This information, Department Staff contends, is material and necessary to the prosecution of this action, consisting of facts which are relevant and bear on the controversy at issue, and which will assist in the preparation for the hearing and sharpen the contested issues.

Ruling: The Department Staff's motion to compel disclosure is granted. Within five days of issuance of this Ruling, Department Staff must identify which of Respondent's seven affirmative defenses are unsupported by Respondent's response to demand number ten. Pursuant to 6 NYCRR 622.7(c)(2) and (3), Respondent must provide a full response to Department Staff's disclosure demands (Demand numbers one through seven, ten, and twelve) within twelve days of receipt of notice that Department Staff's motion to compel is granted. Failure to comply with discovery as required by

this ruling shall result in imposition of sanctions,
including sanctions specifically identified in 6 NYCRR
622.7(c)(3).



Kevin J. Casutto
Administrative Law Judge

Dated: September 18, 2008
Albany, New York

To: PLP, II LP Distribution List (Dated August 28, 2008)

PLP, II LP

DEC CASE NO. R9-20080205-6

SERVICE LIST

August 28, 2008

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