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

DEC Case No.
CO 1-20031229-415

**Ruling on
Staff's
Supplemental
Motion to Compel
Disclosure**

- by -

PLP, II LP,

Respondent.

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Proceedings

In this enforcement proceeding in which staff of the New York State Department of Environmental Conservation (Department Staff) allege violations of the Environmental Conservation Law (ECL) by the respondent PLP, II LP (PLP) with respect to the 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), the parties have engaged in continuing discovery disputes. In response to staff's July 2008 motion to compel discovery, Administrative Law Judge (ALJ) Kevin Casutto issued a ruling dated September 18, 2008 ordering the respondent to comply with the staff's discovery requests and directing the staff to specify the affirmative defenses that were purportedly not supported by the documents produced by the respondent.

By affirmation dated September 23, 2008, Ms. Mucha submitted her affirmation detailing the affirmative defenses and claiming that the documents produced by the respondent do not support these defenses. On September 30, 2008, the respondent submitted a supplemental response to the Department staff's discovery demands, an affirmation by Marc A. Romanowksi, Esq., and a privilege log. In a supplemental affirmation dated November 14, 2008, Ms. Mucha maintains that the respondent has still failed to produced the documents supporting the affirmative defenses, has not produced a copy of the check issued by respondent to pay the contractor for the actions at issue, and has also failed to show that the privileges asserted with respect to two letters are supported.

Because ALJ Casutto was leaving the Department for a position at the Public Service Commission, he and I decided to have a

conference call with the parties to ascertain the current status of the dispute. On January 23, 2009, we convened the call and ascertained that with the exception of the copy of the check described above and the documents relating to the affirmative defenses, the disclosure disputes had been resolved. By letter dated January 23, 2009, I confirmed our discussion and directed Mr. Romanowski to provide staff with the copy of the check and a reply to Ms. Mucha's affirmation by February 6, 2009.

By letter dated January 30, 2009, Mr. Romanowski submitted to Ms. Mucha 3 documents related to the tree cutting and described by him as "all the documents in PLP, II's possession relative to the retention of TMD Construction to engage in the cutting of vegetation on PLP's property in Westfield, New York." With his cover letter dated February 6, 2009, Mr. Romanowski submitted his affirmation in response to staff's claims concerning the documents related to the respondent's affirmative defenses. In this affirmation Mr. Romanowski explains that PLP has produced the documents that support said affirmative defenses but it was not up to the respondent to specifically identify which record corresponds with which defense.

Discussion

Based upon the parties' submissions, I find no basis to demand any further production of PLP. Mr. Romanowski has affirmed that all records responsive to staff's requests have been produced. As he has explained, it is not the obligation of the respondent to make the connections for staff between the records and the defenses. In addition, as he also notes, to the extent that the staff does not find support for these defenses, it may move to dismiss them. 6 NYCRR § 622.6(c). Of course, at hearing, if the respondent attempts to use any records that it failed to produce in response to staff's requests and Judge Casutto's ruling, the sanctions available pursuant to 6 NYCRR § 622.7(c)(3) may be triggered.

Dated: Albany, New York
March 12, 2009

_____/s/_____
Helene G. Goldberger
Administrative Law Judge