

In the Matter of the Alleged
Violation of Article 23 of the
New York State Environmental
Conservation Law

RULING ON MOTION FOR ORDER
WITHOUT HEARING

- by -

DEC Case # R620040610-41

ZAHN SAND AND GRAVEL,

Respondent.

December 7, 2004

This ruling denies a motion for order without hearing brought in papers dated November 1, 2004, by Staff of the Department of Environmental Conservation ("DEC staff") against Zahn Sand and Gravel¹ ("the respondent"). DEC Staff alleges that the respondent violated section 23-2715 of the Environmental Conservation Law ("ECL") by failing to maintain financial security to ensure the reclamation of the respondent's sand and gravel mine in the Town of Watertown,² Jefferson County. A letter from Mr. Donald Zahn, a partner in the respondent, dated November 24, 2004 was received on December 1, 2004.³ Attached to Mr. Zahn's letter were several documents, which are discussed below.

¹ There is a discrepancy in DEC Staff's papers relating to who is/are the respondent(s). DEC Staff's attorney brief and the two accompanying affidavits are captioned "Herman and Donald Zahn D/B/A Zahn Sand and Gravel," however, the notice of motion and the motion itself list only "Zahn Sand and Gravel." In this case, since the motion serves as the complaint or accusatory instrument, there is only one respondent in this case.

² The second discrepancy in DEC Staff's papers relates to the location of the mine. The permit states that the mine is in the Town of Rutland, while the permit application and other papers indicate that the mine is in the town of Watertown.

³ Although this letter was received more than 20 days after service of the motion, in order not to prejudice the respondent, upon my own initiative, I am accepting this submission as timely (6 NYCRR 622.4[a] & 622.6[f]).

APPLICABLE LAW

To commence the DEC administrative enforcement hearing process, DEC Staff may, in lieu of a notice of hearing and complaint, serve a motion for order without hearing and supporting affidavits (6 NYCRR 622.12[a]). A contested motion for order without hearing will be granted if the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (6 NYCRR 622.12[d]). Section 3212 of the CPLR authorizes the granting of a motion for summary judgment if, based upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. A motion must be denied if a party shows the existence of substantive disputes of facts sufficient to warrant a hearing. (6 NYCRR 622.12[e]). A hearing is only necessary in a DEC administrative enforcement proceeding when a substantial issue of fact exists and the hearing would serve as a means to resolve this issue. As in all DEC administrative enforcement hearings, DEC Staff bears the burden of proof on all charges (6 NYCRR 622.11[b][1]). DEC Staff must sustain its burden of proof by a preponderance of the evidence (6 NYCRR 622.11[c]).

DISCUSSION

ECL 23-2715(1) requires applicants for mined land reclamation permits to furnish financial security naming the state as beneficiary to ensure the performance of reclamation as provided in the approved mined land-use plan. In this case, the respondent provided a bond for \$7,500 which was subsequently cancelled effective October 25, 2003. DEC Staff have provided a copy of the notice of cancellation. ECL 23-2715(4) states that if the financial security provided by a permittee is cancelled, the permittee must provide a valid replacement within 30 days of receiving notice of cancellation. DEC Staff member Jerome Zaykoski states in his affidavit that he has confirmed that the bond has been cancelled and that the respondent has not replaced it with some other type of financial security.

In his unsworn, pro se letter replying to the motion, Mr. Zahn (a partner in the respondent) states that he has not had a bond for almost a year and had tried to get a replacement bond from at least ten companies, but has been unsuccessful. Mr. Zahn continues:

"I have agreed to put up a cash bond for one acre since I cannot buy a bond; money was to be put in escrow by the State in my name to cover the bond from now on. I also agreed to have enough topsoil to cover this acre within two hundred feet; also I will cover the bottom as fast as it is taken out. I don't think there is a better looking active pit in Jefferson County.

In early September I went to the local DEC office in Watertown to pay my cash bond. Mr. Jaykowski was not there, but Mr. Young was. He was very rude and told me that he would not take my money and that I owed another \$7507.91 in judgements that had to be paid also because they were against the sand pit. I indicated to him that I had had a lengthy conversation with Mr. Schwank and Mr. Bill Cooper and that the judgements had nothing to do with the sand pit according to their computers."

The existing record omits substantial facts and it is not clear what happened after the respondent's bond was cancelled. Apparently there were conversations between Mr. Zahn and members of DEC staff which are not mentioned in DEC staff's motion or supporting papers. The agreements mentioned in the first paragraph above suggest some negotiations toward settlement may have been ongoing and that DEC staff may have been exercising its enforcement discretion regarding the loss of the respondent's bond. Thus, factual disputes exist that could be relevant to a determination of liability and certainly will be relevant to a determination of the appropriate civil penalty. Factual disputes also exist regarding the current activity at the mine and how much of the mine has been reclaimed to date.

Regarding the judgments mentioned by Mr. Zahn, DEC staff asserts that the respondent has failed to pay annual regulatory fees for the mine for the years 1997 to 2001. In addition, six outstanding judgments, totaling \$16,933.17 including interest, have not been satisfied. As evidence, DEC staff presented the affidavit of Lawrence Pitts, a Civil Prosecution Specialist with the New York Attorney General's Office. In reply, Mr. Zahn states that he had made an agreement with Mr. Robert Schwank (of DEC staff) to make payments for owed regulatory fees for the mine in question in 2001 (a copy was provided) and that he has made all payments he agreed to make (copies of cancelled money orders

were provided). Mr. Zahn states that the pending judgments are for a second mine (a gravel pit permitted by DEC as 602-3-30-0500), which was seized by Key Bank in foreclosure over seven years ago that for some reason, DEC staff continues to assess regulatory fees. None of the information provided by Mr. Zahn was addressed in DEC staff's motion and substantial factual questions remain. While DEC staff does not allege a violation based on these judgments, it does seem to be using them to support its suggested penalty. The nature and circumstances regarding these judgments is not clear in the record at this time.

Although the regulations authorize the ALJ to rule on which facts have been established for the purposes of the hearing, in this case, because of the nature of the factual disputes, I decline to do so. A hearing in this matter will be scheduled when a statement of readiness is received from DEC staff.

CONCLUSION

DEC staff has failed to demonstrate its entitlement to judgment as a matter of law on its claim that respondent violated ECL 23-2715(4) by failing to maintain its reclamation bond. Material questions of fact remain regarding negotiations that may have occurred following the cancellation of the respondent's bond. In addition, material questions of fact exist regarding the respondent's payment of regulatory fees which DEC Staff cite as evidence of past misconduct. For these reasons, DEC staff's motion for order without hearing is denied.

December 7, 2004

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

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