

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violation(s) of the New York
State Environmental Conservation Law (ECL)
Articles 3, 17, and 23, Title 6 of the
Official Compilation of Codes, Rules, and
Regulations of the State of New York (NYCRR),
and Permits Issued pursuant to Environmental
Conservation Law Article 17, Title 8 and
Article 23, Title 13; and the Application for
an ECL Article 23 Modification Permit,

- by -

BATH PETROLEUM STORAGE, INC.,
E.I.L. PETROLEUM, INC.,
and
ROBERT V.H. WEINBERG,

Applicants-Respondents.

DEC Case No. R8-1088-97-01
DEC Project No. 8-4624-00008
ECL Article 23-1301 Permit Hearing

COMMISSIONER'S SECOND INTERIM DECISION

January 26, 2005

COMMISSIONER'S SECOND INTERIM DECISION

In this consolidated permit and enforcement hearing proceeding, respondents Bath Petroleum Storage, Inc., E.I.L. Petroleum Storage, Inc., and Robert V.H. Weinberg (collectively "respondents") appeal as of right pursuant to 6 NYCRR 622.10(d)(2)(i) from a December 10, 2004 Ruling on Respondents' Motion to Recuse the Department's Deputy Commissioner and General Counsel issued by Administrative Law Judge ("ALJ") Maria E. Villa. For the reasons that follow, respondents' appeal as of right is dismissed.

On November 19, 2004, respondents moved for "recusal" of James F. Ferreira, the Deputy Commissioner and General Counsel (hereinafter "the General Counsel") for the Department of Environmental Conservation ("Department"), and his immediate staff from any further consideration or participation at any level in this matter. Department staff opposed the motion. In the December 10, 2004 ruling, the ALJ denied respondents' motion.

Without first seeking leave to file an expedited appeal, respondents filed an appeal dated December 20, 2004. In that appeal, respondents request that the Commissioner reverse the ALJ's ruling in part, and issue an order directing that any request for a declaratory ruling in this case be submitted to the Department's Office of Hearings and Mediation Services ("OHMS") for disposition and not to the Office of the General Counsel.

Department staff filed a response dated December 23, 2004, requesting that the appeal be denied. Staff contends that the issue respondents raise on the appeal concerning any potential request for a declaratory ruling from the General Counsel is not ripe for review. In addition, staff argues that no appeal lies as of right from the ALJ's ruling.

The Department's uniform enforcement hearing procedures set forth at 6 NYCRR part 622 do not authorize an appeal as of right from the ALJ's December 10, 2004 ruling. Accordingly, respondents' appeal pursuant to 6 NYCRR 622.10(d)(2)(i) must be dismissed (see Matter of Bath Petroleum Storage, Inc., Interim Decision of the Commissioner, June 17, 2003, at 2). Section 622.10(b)(2)(iii) of 6 NYCRR authorizes the filing of a motion requesting that the ALJ assigned to a matter be recused on the basis of personal bias or other good cause. Section 622.10(d)(2)(i) authorizes an expedited appeal as of right from a ruling by an ALJ denying a section 622.10(b)(2)(iii) motion seeking that ALJ's recusal. A party seeking expedited review of any other ruling issued by an ALJ under 6 NYCRR part 622 must first make a motion to the Commissioner for leave to file an expedited appeal (see 6 NYCRR 622.10[d][2][ii]). The Commissioner's determination whether to grant leave to appeal is discretionary (see id.).

Respondents did not seek the ALJ's recusal in their

November 19, 2004 "recusal" motion. Although respondents' motion was denominated a "recusal" motion, the motion was in reality in the nature of a motion to disqualify opposing counsel. Because the ALJ did not deny a motion seeking her recusal in the December 10, 2004 ruling, no appeal lies as of right from that ruling.

Moreover, respondents did not seek leave to file an expedited appeal, and I did not otherwise authorize such an appeal (see 6 NYCRR 622.10[d][4]). Thus, respondents' present appeal is not properly before me.

Even if I were to consider the merits of respondents' appeal, I would reject respondents' request. The relief respondents seek on their appeal is premature. As Department staff correctly notes, no request has been made to the General Counsel to issue a declaratory ruling in this proceeding. In addition, as the ALJ correctly indicated in her ruling, the Department's General Counsel has no role in the deliberative process in this proceeding -- a point that respondents "acknowledge and accept" (see Respondents' Expedited Appeal [12-20-04], at 2). Furthermore, there is nothing in the record that indicates or supports any contention that the General Counsel has gone beyond the limits of his role as an attorney representing the Department.

Accordingly, respondents' appeal pursuant to 6 NYCRR 622.10(d)(2)(i) is dismissed and the matter is remanded to the

ALJ for further proceedings consistent with this Second Interim Decision, including the convening of the adjudicatory hearing at the earliest date possible.

For the New York State Department
of Environmental Conservation

/s/
By: Erin M. Crotty, Commissioner

Dated: Albany, New York
January 26, 2005