STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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 (6 NYCRR), and permits issued pursuant to Environmental Conservation Law Article 17, Title 8 and Article 23, Title 13; and the application for ECL Article 23 modification permit by

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

Applicants-Respondents.

RULING ON RESPONDENTS' MOTION *IN LIMINE*

DEC Case No: R8-1088-97-01
and
ECL Section 23-1301 Permit Hearing

July 7, 2005

BACKGROUND

This ruling addresses a motion *in limine* filed jointly on May 4, 2005 by Respondents Bath Petroleum Storage, Inc. ("BPSI"), E.I.L. Petroleum, Inc. ("EIL") and Robert V. H. Weinberg ("Respondent Weinberg") (collectively, "Respondents"). Respondents' motion seeks to preclude Department Staff from offering certain evidence, described more particularly below, at the adjudicatory hearing in this matter.

This action was commenced in March 1997 by service of a Notice of Hearing and Complaint upon BPSI and EIL. In an amended complaint served November 17, 2003 (the "2003 Amended Complaint"), Staff of the New York State Department of Environmental Conservation ("Department Staff") sought to impose liability upon Respondents for alleged violations of Articles 3, 17, and 23 of the Environmental Conservation Law ("ECL"), as well as violations of a State Pollutant Discharge Elimination ("SPDES") permit.

Department Staff opposed the motion in a submission filed May 16, 2005. Respondents requested leave to submit a surreply, which was granted, and Department Staff submitted a response to

the surreply dated May 19, 2005, which will also be considered in this ruling.

DISCUSSION AND RULING

Respondents' motion *in limine* seeks a ruling that would preclude Department Staff "from introducing evidence, opinion, legal argument and/or requests for civil penalties" related to the alleged illegal expansion of Caverns 1-6 prior to November 6, 1997, as well as claims related to alleged water quality violations in the Cohocton River, "except for those alleged water quality violations that are alleged to arise from a violation of a specific effluent based discharge parameter" in the SPDES permit. Motion, at 1.

Penalty Calculation: Cavern Expansion

In support of their arguments, Respondents note that on August 31, 1998, administrative law judge ("ALJ") Daniel P. O'Connell granted Department Staff's motion for leave to amend its complaint, and also ordered that Respondents were not required to file an answer until Department Staff set forth a specific penalty demand. Matter of E.I.L. Petroleum, Inc., ALJ Ruling, at 3, 1998 WL 1759901, * 2-3 (Aug. 31, 1998). In response to the ruling, by letter dated September 25, 1998 (the "Cordisco Letter"), Department Staff counsel Dominic Cordisco stated that the Department was limiting its request for civil penalties for alleged illegal expansion of the caverns to violations that occurred after November 6, 1997. On that date, the Appellate Division, Third Department, upheld a declaratory ruling that provided that a modification permit was required for any expansion of a previously grandfathered underground storage cavern (Matter of Bath Petroleum Storage, Inc. v. NYSDEC, 244 A.D.2d 624, 625 (3rd Dept. 1997), lv. denied, 91 N.Y.2d 768 (2000); see Declaratory Ruling 23-08 ("DR 23-08"), May 2, 1996)). Respondents take the position that the Cordisco Letter "conclusively binds Department Staff in these proceedings." Motion, at 2.

Department Staff opposes the motion, arguing that evidence of expansion of the storage caverns prior to November 6, 1997 is relevant and admissible. Department Staff argues that the Cordisco Letter "is not a stipulation and does not purport to be so," inasmuch as Respondents never agreed to the terms therein. Department Staff's Reply, at 2. Department Staff points out that the Cordisco Letter requests that the maximum available statutory penalty be imposed for each violation of Articles 17 and 23, arguing that Respondents would be highly unlikely to agree to

such a position. Department Staff maintains that the Cordisco Letter did not represent a final calculation of the penalty to be requested in the hearing. In support of its argument, Department Staff quotes from that portion of the Cordisco Letter that states

> "[t]oday, it remains appropriate that Staff not be compelled to finalize a request for penalties prior to the close of evidence at hearing for the very reason that the [Civil Penalty Policy[1]] requires that '[e]very effort should be made to calculate and recover the economic benefit of noncompliance among other things.' As the Department can most accurately calculate economic benefit, among other potential mitigating factors, with the benefit of evidence produced pursuant to discovery and the hearing itself, Department Staff respectfully reserves the right to amend the currently requested penalties as the proof may warrant."

According to Respondents, this reservation "in no way impacts the limitation on the penalty period," which the Cordisco Letter indicated commenced on November 6, 1997. Motion, at 7. Respondents go on to point out that the 2003 Amended Complaint "changes nothing except adding Mr. Weinberg as a Respondent," and note that Department Staff have never updated or amended the Cordisco Letter. Id. Respondents contend that they have had no notice of any allegations that would support civil penalties for alleged expansion of caverns 1 through 6 for the period prior to November 6, 1997, and prepared their defense in reliance upon the representations in the Cordisco Letter.

Respondents' arguments with respect to the binding effect of the statements in the Cordisco Letter, and the prejudice to Respondents if Department Staff were permitted to revise its penalty demand at this point, are not persuasive. Respondents have been aware of the allegations in the 2003 Amended Complaint since November 2003, and any inconsistency between those allegations and the Cordisco Letter, since that time. This is evident from the record in this proceeding, because each of the Respondents have raised as an affirmative defense waiver and release of certain violations based upon the Cordisco Letter. See BPSI Answer, ¶¶ 119-124 (Fourth Affirmative Defense); E.I.L. Answer, ¶¶ 153-158 (Fifth Affirmative Defense); Weinberg Answer,

[1] The Department's Civil Penalty Policy was issued on June 20, 1990.

¶¶ 27-32 (Fifth Affirmative Defense). Thus, Respondents were in a position to present argument as to the issues raised in this motion some time ago, and cannot assert that they would be prejudiced by a revised calculation at this point.

Moreover, at the time the Cordisco Letter was written, the parties had not completed discovery. As Department Staff points out, it is entitled at the close of the hearing to move to conform the pleadings to the proof, consistent with Section 622.5(b) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Finally, ALJ O'Connell's December 1998 ruling on Respondents' motion to dismiss clearly contemplated further inquiry at the hearing with respect to the appropriate penalty amount. See Matter of E.I.L. Petroleum, Inc., Ruling on Motion to Dismiss and Affirmative Defenses, at 2, 1998 WL 1759900, *2 (Dec. 21, 1998). After denying Respondents' motion to dismiss, ALJ O'Connell stated that

> [t]he Respondents' objection does raise an issue about what the appropriate civil penalty should be if the Department proves the violations alleged in the Amended Complaint. Accordingly, the Parties are encouraged to develop the record about this question. The Parties may offer evidence and argument on the criteria identified in the *Civil Penalty Policy* (June 20, 1990) and any other related Enforcement Guidance Memoranda.

Id. Accordingly, Respondents' motion *in limine* is denied.

Nevertheless, it is appropriate at this point to require Department Staff to provide further detail as to the penalties sought in the 2003 Amended Complaint. Although "[i]n an administrative forum, the charges need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him and to allow for the preparation of an adequate defense." Matter of Block v. Ambach, 73 N.Y.2d 323, 333 (1989) (citations omitted), the 2003 Amended Complaint, as drafted, lacks sufficient specificity as to the commencement date of some of the violations alleged. For example, the violations set forth in causes of action 9 through 17 are alleged to have commenced "on or about" a particular year, with no day of the month provided. Cause of action 18 does not indicate a commencement date. "The Department's Civil Penalty Policy provides that in an adjudicatory hearing, Department Staff should request a specific penalty amount, and should provide an explanation of how that

amount was determined, with reference to the potential statutory maximum, the DEC Civil Penalty Policy, any program-specific guidance documents, other similar cases and, if relevant, any aggravating and mitigating circumstances Staff considered." Matter of Locaparra, Commissioner's Decision and Order, at 9, 2003 WL 21633072, *4 (June 16, 2003); see Civil Penalty Policy, at IV(1). The 2003 Amended Complaint is deficient in this regard, and Department Staff is directed to provide a written penalty calculation in conformance with the Civil Penalty Policy.

"Permit Shield" Defense

In their motion, Respondents also argue that they "are shielded from an enforcement proceeding that is purportedly based upon discharges that are in compliance with the SPDES permit but which allegedly violate water quality standards." Motion, at 3. According to Respondents, Department Staff's enforcement action is based upon hundreds of days of alleged water quality violations, even though the 2003 Amended Complaint only identifies one day of alleged exceedance of the permit's flow parameters. Respondents assert that the SPDES permit expressly states that water quality violations may be the basis for requesting additional information and/or modification of the permit, and that Department Staff obtained that information in 1998 and modified the SPDES permit accordingly. Thus, Respondents contend, Department Staff's theory that civil penalties may be assessed against Respondents for alleged water quality violations, notwithstanding compliance with the effluent limitations in the permit, is "flawed as a matter of fact and law." Motion, at 2-3.

Department Staff's submission in opposition points out that Respondents failed to satisfy a condition precedent to assertion of the permit shield defense, because Respondents cannot demonstrate compliance with the SPDES permit. In support of this argument, Department Staff cites to EPA guidance that provides that a permittee may only avail itself of the permit shield defense under the federal Clean Water Act if the permittee has complied with the terms and conditions of its discharge permit. 33 U.S.C. § 1342(d); "Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits," U.S. E.P.A., Memorandum to Regional Administrators and Counsels from Robert Perciasepe, Assistant Administrator for Water, Steven A. Herman, Assistant Administrator for Enforcement, and Jean C. Nelson, General Counsel (July 1, 1994) ("The availability of the section 401(k) shield is predicated upon the issuance of an NPDES permit and a permittee's full compliance with all applicable application requirements, any additional information requests

made by the permit authority, and any applicable notification requirements.") In its response to the surreply, Department Staff notes that the SPDES permit contains specific permit limits for total dissolved solids and chlorides, and argues that Respondents' position that the permit's flow limit obviates the water quality based limits of the SPDES permit has no legal or factual support.

In their motion, Respondents seek to preclude Department Staff "from introducing evidence, opinion, legal argument and/or requests for civil penalties related to alleged water quality violations in the Cohocton River, except for those alleged water quality violations that are alleged to arise from a violation of a specific effluent based discharge parameter" in the facility's SPDES permit. Motion, at 1. Although Respondents have styled this application as a motion *in limine*, the relief sought is essentially partial summary judgment as to causes of action 2 and 3 in the 2003 Amended Complaint, which allege violations of the SPDES permit due to exceedances of the permit limits for total dissolved solids and chlorides.

A motion of this type "has a concretely restrictive effect on the efforts of plaintiffs to prove their case against defendants and recover certain damages from them." Scalp & Blade, Inc. v. Advest, Inc., 309 A.D.2d 219, 224 (4th Dept. 2003). In Scalp & Blade, Inc., the court observed that the lower court's order granting defendants' motion *in limine* "does not really limit the production of certain evidence as immaterial to damages, but rather effectively grants defendants partial summary judgment on the critical substantive issue of what constitutes the proper measure of damages on plaintiffs' causes of action." Id. Although labeled a motion *in limine*, the court stated that the application was actually "'the functional equivalent of a motion for partial summary judgment dismissing the complaint.'" Id. (quoting Rondout Electric, Inc. v. Dover Union Free School Dist., 304 A.D.2d 808, 810 (2nd Dept. 2003)). The court pointed out that a motion *in limine* is not an appropriate substitute for a motion for partial summary judgment. See Scalp & Blade, Inc., 309 A.D.2d at 224 (citing Rondout Electric, Inc., 304 A.D.2d at 810-11; Rivera v. City of New York, 306 A.D.2d 456, 457 (2nd Dept. 2003); Marshall v. 130 N. Bedford Rd. Mount Kisco Corp., 277 A.D.2d 432, 432 (2nd Dept. 2000), lv. denied, 96 N.Y.2d 714 (2001); Downtown Art Co. v. Zimmerman, 232 A.D.2d 270, 270 (1st Dept. 1996)); see George Miller Brick Co., Inc. v. Stark Ceramics, Inc., 2005 N.Y. Slip Op. 25226, 2005 WL 1364379, *11 (Sup. Ct. Monroe Cty. 2005).

In this proceeding, Respondents have already moved for summary judgment or dismissal with respect to the causes of action at issue, and those motions have been denied. See Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion to Dismiss and Respondents' Affirmative Defenses, 1998 WL 1759900 (Dec. 21, 1998); Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion for Summary Judgment and Staff's Motion to Amend and Cross-Motion for Order Without Hearing, 2000 WL 33340964 (Mar. 27, 2000); Matter of Bath Petroleum Storage, Inc., Ruling on Motion to Dismiss, 2004 WL 598983 (Mar. 18, 2004). It would be inappropriate at this juncture to entertain a motion for partial summary judgment, particularly since one of the rationales for denial of the prior motions was the existence of disputed factual issues. See Matter of E.I.L. Petroleum, Inc., Ruling on Respondents' Motion for Summary Judgment and Staff's Motion to Amend and Cross-Motion for Order Without Hearing, at 7, 2000 WL 33340964, *6-7 (Mar. 27, 2000). This matter should proceed to hearing so that the record may be developed with respect to these causes of action.

Moreover, the permit at issue authorizes an enforcement action by the Department for noncompliance with any permit requirement. Specifically, Paragraph 1(g) of the permit's General Conditions provides that "[t]he permittee must comply with all terms and conditions of this permit. Any permit noncompliance constitutes a violation of the Environmental Conservation Law and the Clean Water Act and is grounds for enforcement action . . .." Paragraph 4(a) ("Modification, Suspension, Revocation") states that "[i]f the permittee fails or refuses to comply with any requirement in this permit, such noncompliance shall constitute a violation of the permit for which the Commissioner may modify, suspend, or revoke the permit after notice and opportunity for hearing and take direct enforcement action according to law." As Department Staff points out, the SPDES permit sets forth permit limits based on water quality standards for total dissolved solids and chlorides. Accordingly, Respondents' argument that "to the extent that BPSI was discharging within the 440,000 gpd parameter of the SPDES permit, any resulting water quality violations may only be a basis to modify the permit" is unpersuasive.

CONCLUSION

Respondents' motion *in limine* is denied. On or before July 18, 2005, Department Staff is to provide to Respondents and the ALJs a written request for a specific penalty amount and a brief explanation of the basis for the calculations employed in arriving at the penalty amount. This submission shall be

consistent with the Department's Civil Penalty Policy and any other related Enforcement Guidance Memoranda that Department Staff may rely upon in calculating the penalties requested in this proceeding.

The parties shall provide a report to the ALJs as to the status of settlement discussions on or before Friday, July 15, 2005. The hearing dates scheduled for July and August, 2005 remain in effect.

/s/

Maria E. Villa
Administrative Law Judge

Dated: July 7, 2005
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List