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 (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 DEPARTMENT STAFF'S MOTIONS FOR A PROTECTIVE ORDER

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

February 18, 2005

PROCEEDINGS

This ruling addresses two motions for protective orders, one filed on July 2, 2004 by staff of the New York State Department of Environmental Conservation's Central Office and one filed on July 14, 2004 by staff of the Department's Region 8 office. The regional and Central Office staff are referred to collectively herein as "Department Staff." The July 2, 2004 motion sought a protective order to vacate or limit document requests served by corporate respondent Bath Petroleum Storage, Inc. ("BPSI"). BPSI is a wholly-owned subsidiary of respondent E.I.L. Petroleum, Inc. ("EIL"), which operates a liquefied petroleum gas ("LPG") storage facility (the "Facility") in Bath, New York. Department Staff's July 14, 2004 motion requested similar relief with respect to EIL's document requests. As required pursuant to Section 622.7(c)(1) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Department Staff's motions also included a statement that it had made a good faith effort to resolve its objections with opposing counsel. BPSI served its opposition to the July 2 motion on July 12, 2004, and EIL opposed the July 14 motion in a submission dated July 19, 2004.

By letter dated July 26, 2004, Department Staff sought permission to reply to respondents' opposition, and included the proposed reply. To the extent that the arguments therein are relevant to the issues that remain following the parties' attempts to narrow the dispute, that response will be considered.

On September 14, 2004, a conference call was held to discuss the motions. The administrative law judge ("ALJ") directed the parties to confer in an attempt to narrow the scope of the dispute, and to summarize in writing the results of those discussions. On October 5, 2004, counsel for EIL wrote to advise that EIL and Department Staff had been unable to resolve their disagreements with respect to EIL Requests 5, 9, and 20. In addition, counsel indicated that the parties were unable to reach agreement as to whether Department Staff should be required to examine backup and archival data to determine if there is any additional responsive information to be found in that material (EIL Requests 2 and 16). Finally, the parties indicated that they had agreed to exclude the terms "residual data," "archival data," and "backup data" from the definition of "Document" as applied to EIL Requests 3, 4, 10, 13, 14, 18, 19, 21 and 22, but had not reached any other resolution with respect to these requests.

By letter dated October 5, 2004, counsel for BPSI stated that, after good faith efforts to resolve the dispute, one significant issue remained in connection with Document Request No. 12. That request sought electronic data relevant to the allegations set forth in causes of action 9 through 18 in the 2003 Amended Complaint.[1] The letter went on to state that the dispute centered around whether Department Staff should be required to produce archival and backup electronic data. Attached to the letter was BPSI's revised Document Request No. 12, Department Staff's counterproposal and a letter dated September 30, 2004, setting out BPSI's final position with respect to this document request.

DISCUSSION AND RULING

Section 622.7(c)(1) of 6 NYCRR provides that "[a] party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR [New York Civil Practice Law and Rules] section 3103, to deny, limit, condition or regulate the use of any disclosure device in order

[1] In an effort to avoid confusion, the November 17, 2003 complaint has been referred to in these proceedings as the "2003 Amended Complaint."

to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." The language of CPLR Section 3103 is similar. As the moving party, Department Staff bears the burden of establishing any right to protection. See Spectrum Systems Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 377 (1991); Matter of Bonide Products, Inc., ALJ Ruling, at 11, 2001 WL 283793, *8 (Mar. 14, 2001) (the party moving for a protective order has the burden of showing good cause why the opposing party's "right to prepare itself thoroughly for trial should be curtailed").

Section 622.7(a) states that "[t]he scope of discovery must be as broad as that provided under article 31 of the CPLR." Section 3101(a) of the CPLR mandates full disclosure by a party to an action of "all matter material and necessary in the prosecution of the action . . . regardless of the burden of proof." The New York State Court of Appeals has stated that the phrase "material and necessary" must be

> interpreted liberally to require disclosure upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.

Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968). Thus, the rule requires broad disclosure of all relevant evidence as well as information reasonably calculated to lead to relevant evidence.

BPSI's Document Requests

As noted above, following the parties' attempts to resolve the motion, one issue remained with respect to BPSI's Document Request No. 12, which requested "all Documents, including active data, archival (or replicant data, backup data or residual data) relating to any allegations in the Complaint of violations of Article 23 by BPSI." In its motion, Department Staff objected to the scope of this request, arguing that the request for archival or backup data would lead to the production of voluminous material that would be "largely irrelevant," and would impose unreasonable burdens on Department Staff. Motion, ¶ 7, at 7. Department Staff objected to Request No. 12 "in its entirety as it is a classic example of a 'fishing expedition' and is impermissible." Id. Department Staff's motion detailed the parties' attempts to resolve the discovery dispute, and described

the exchange of lists of documents that had taken place in response to interrogatories and document production requests.

BPSI's opposition provided further discussion of the discovery that had taken place to date, as well as the objections to that discovery and stipulations entered into among the parties. BPSI argued that Department Staff's attempt to limit discovery in this matter would impermissibly authorize Department Staff "to determine which documents BPSI will be allowed to use to prepare its defense." Opposition, ¶ 2, at 6. BPSI pointed out that the request was "limited to those documents, including electronically stored documents that relate to specific claims made in the Complaint." Id.

By letter dated September 27, 2004, counsel for BPSI particularized the request, asking for data relating to the alleged expansion of caverns 1 through 7, the alleged use of excessive injection pressure on cavern 7, and the alleged failure to run geophysical well logs over the required interval during the drilling of well number 7. Department Staff responded by letter dated September 29, 2004, proposing that the request be further modified to require the production only of active data, but excluding archival, backup and residual data, and adding the phrase "in the Department's possession, custody or control." In that letter, Department Staff stated that based upon its discussions with technical and program staff, "electronic or computerized data, beyond that defined as 'active data' in the Document Request, is either impossible or exceedingly difficult to retrieve and is also extremely unlikely to contain any information not previously produced or in the process of being produced."

In a response dated September 30, 2004, BPSI agreed that the request was limited to only those documents within Department Staff's possession, custody or control, but did not accept the proposed exclusion of archival and backup data. BPSI pointed out that Department Staff had initiated the litigation, and contended that "[t]he fact that it is now inconvenient or burdensome for the Department to produce the data is of no consequence." According to BPSI, if data relevant to this action has not been maintained, or has been altered, destroyed or otherwise disposed of, Department Staff "has created a situation where its failure to maintain the data is sanctionable to include the dismissal of this action."

In cases that have considered this question, courts have held that "information which is stored, used, or transmitted in new forms should be available through discovery with the same

openness as traditional forms." Daewoo Electronics Co. v. U.S., 650 F. Supp. 1003, 1006 (U.S. Court of Int'l Trade 1986). Thus, documents maintained in electronic form are subject to discovery to the same extent as paper records. See Rowe Entertainment, Inc. v. William Morris Agency, 205 F.R.D. 421, 428 (S.D.N.Y. 2002). "This is true not only of documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks." Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (citations omitted).

Given the liberal rules governing discovery, Department Staff's motion with respect to BPSI's demands does not provide a sufficient basis to grant a protective order. The motion asserts generally that the production of the data requested will impose an unreasonable burden on Department Staff, but fails to particularize the nature and scope of that burden. As an initial matter, it is obvious that to the extent the data is "impossible" to retrieve, it cannot be produced, or if the material is an exact duplication of documents already produced, it need not be provided. See Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 WL 22976, *1 (S.D.N.Y. 1996) (plaintiff sought electronic version of documents already provided in hard copy "presumably to facilitate computerized analysis;" prior production did not foreclose plaintiff's demand, but plaintiff was required to pay costs of production).

Moreover, the courts have acknowledged the difficulties attendant upon production of computerized data. As the court explained in Rowe, "[b]ack-up tapes, for example, are not archives from which documents may easily be retrieved. The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system." Rowe, supra, at 429. Nevertheless, there is no information, other than Department Staff's general statements that the material is "voluminous," and that its retrieval would be "extremely difficult," that indicates, for example, the number of hours required to obtain the data or that quantifies the volume of data in question.

The case cited in Department Staff's motion is a matrimonial action, and the court's decision states merely that "[a] review of the record reveals that defendant's demands were unduly broad and burdensome and sought material that was largely irrelevant," without any discussion of the demands in question. Hoyt v. Hoyt, 307 A.D.2d 621, 623 (3rd Dept. 2003)(citations omitted). The citations in support of this proposition in the court's decision are to factually distinguishable cases. Accordingly, this authority is not persuasive.

In addition, the motion characterizes the material sought as "largely irrelevant." This contention presupposes that Department Staff has reviewed the material and made a determination in this regard. Nevertheless, the motion does not make any offer of proof as to the data's relevancy, or lack thereof, to the theory under which Department Staff is proceeding with respect to the Article 23 violations alleged in the 2003 Amended Complaint, and the facts in support of that theory. Department Staff's motion also fails to assert that the data sought is not reasonably calculated to lead to the discovery of relevant evidence. Absent a showing of the nature of the evidence Department Staff intends to offer, it is not possible to evaluate Department Staff's claim that the material sought by BPSI is irrelevant. To determine otherwise would in effect improperly shift the burden to the party seeking disclosure. See Mitchell v. Stuart, 293 A.D.2d 905, 906 (3rd Dept. 2002) (although upholding lower court's denial of motion to compel and grant of protective order, finding no predicate for disclosure that would require a "factual basis to demonstrate the existence or relevance of the data or items sought"). Accordingly, Department Staff's motion for a protective order with respect to BPSI's Document Request No. 12 is denied.

Under the circumstances, it may be worthwhile for Department Staff to confer with respondents in an attempt to define the scope of a "trial run" that would allow the parties to ascertain more precisely how much time and effort would be involved in retrieving potentially relevant material from the Department's backup tapes. This is not without precedent. See Toshiba America Elec. Components, Inc. v. Superior Court, Santa Clara County, 124 Cal. App. 4th 762, 773, 21 Cal. Rptr. 3rd 532, 543 (Cal. Ct. App. 2004) ("Since it may be possible to determine in advance whether or to what extent the backup tapes will yield relevant material, the court should encourage the parties to meet and confer about translating a sample of the tapes and to otherwise develop information in order to inform the analysis [with respect to cost-sharing]") (citations omitted); Zubulake, supra, 217 F.R.D. at 323-24 (directing parties to perform limited search in an effort to assess the time and expense involved in retrieving information).

EIL's Document Requests

As noted above, EIL and Department Staff could not resolve their disputes with respect to EIL Requests 5, 9, and 20, nor were the parties able to agree as to whether Department Staff should be required to examine backup and archival data to determine if there is any additional responsive information to be

found in that material (EIL Requests 2 and 16). While the parties agreed to exclude the terms "residual data," "archival data," and "backup data" from the definition of "Document" as applied to EIL Requests 3, 4, 10, 13, 14, 18, 19, 21 and 22, objections to these requests by Department Staff still remained.

Request No. 5 would require Department Staff to "[i]dentify and provide all documents regarding monitoring points in the Cohocton River relating in any way to BPSI facility discharges." Department Staff's motion objects to the definitions of "document," "identify" and "relating." These words appear in several of BPSI's requests, including those specifically at issue here (5, 9, and 20, as well as 3, 4, 10, 13, 14, 18, 19, 21, and 22). Department Staff contends that the definitions of those terms are overly broad, and as a result, compliance with the requests where those terms appear would impose an unreasonable burden upon Department Staff. Department Staff argues further that this request is vague and ambiguous.

Department Staff maintains that the definition of "document" would require it to provide documents "'known to' the Department, regardless of whether such documents are in the Department's custody or control." Motion, ¶ 1, at 5. This, according to Department Staff, would be "a virtually impossible task." In opposition, EIL maintains that it is entitled to review all documents within the Department's possession and control.

Department Staff raises a similar objection to instruction 5 in the request, which seeks the production of "any information which, while not within [Department Staff's] knowledge, is nonetheless within [Department Staff's] custody, control, or reasonably available" to Department Staff, its attorneys, "or any other source from whom it may reasonably be secured." Department Staff contends that it is impossible for it to produce documents that are not within its knowledge. In its opposition, EIL clarifies that the instruction is intended to refer to those documents that are within the Department's custody and control, "notwithstanding the lack of *current* Staff's knowledge of such documents." (Emphasis in original).

Under the circumstances, there is no basis to grant a protective order based upon the definition of the word "document." Clearly, Department Staff can only produce documents within its custody and control, and can only locate such documents if it knows of them. This does not, however, obviate Department Staff's obligation to conduct a diligent investigation within the Department for all responsive documents. Nevertheless, the document requests should not be read to require

Department Staff to conduct a search outside the Department and produce documents that it does not possess, for example, documents maintained by another agency.

Department Staff objects to the burden imposed by the definition of the word "identify." The document request would require Department Staff to provide such information as the date and title of the document, the author, the type of document, its present location, and so on. Nevertheless, as EIL points out, Department Staff may simply produce a true and complete copy of the document in order to avoid the effort involved in identifying the document as set forth in the definition section of the document requests. Accordingly, the language of the definition does not provide a basis to grant Department Staff's motion without considering the word in the context of a specific request.

The word "relating" is defined in the request to include any documents that are "legally, factually, or in any way connected to" the subject of the request. Department Staff contends that this definition is completely unworkable and unreasonably burdensome. In opposition, EIL notes that Department Staff failed to provide any example of how compliance with the definition would impose an unreasonable burden, and argues that the definition is reasonable in light of the expansive nature of discovery authorized pursuant to the CPLR. This definition is not, standing alone, sufficient to grant Department Staff's motion with respect to the requests in which it appears. Thus, each request should be considered individually.

As for Request No. 5, which seeks documents regarding monitoring points and BPSI's discharges, the scope of the request is proper and reasonably calculated to lead to the discovery of relevant evidence. Accordingly, Department Staff's motion is denied with respect to Request No. 5.

Request No. 9 would require Department Staff to "[i]dentify and provide all documents relating to the date or dates that the Department first became aware of the earliest of the SPDES violations alleged in the Complaint." The wording of this request is ambiguous, particularly the phrase, "relating to the date or dates that the Department first became aware." It is evident that EIL is attempting to elicit information as to when the Department learned of the alleged violations. This phrase should be omitted from the request, and Department Staff should respond to the Request as revised. The motion for a protective order with respect to this Request as modified is denied.

In Request No. 20, EIL asks that Department Staff "[i]dentify and provide all documents relating to the submission by Permittee, of discharge monitoring reports relating to the SPDES discharge at the BPSI Facility." As was the case with Request Nos. 5 and 9, Department Staff objects to the defined terms, and EIL reiterates its general opposition. Inasmuch as Department Staff's complaint alleges numerous SPDES violations, the Facility's discharge monitoring reports are relevant. While the phrase "relating to the submission by Permittee," is somewhat ambiguous, Department Staff did not make this argument in its motion. Under the circumstances, the request is not overly burdensome, and Department Staff's motion with respect to it must be denied.

Request No. 3 refers to Paragraph 24 of the 2003 Amended Complaint, and asks that Department Staff "identify and provide all documents relating to the 'point of mixing.' Include all GPS and survey information relating to this request." Department Staff objects to the words "identify," "document," and "relating to" contained in this request. Paragraph 24 is Facility-specific, and read in the context of the 2003 Amended Complaint, the request cannot be deemed overbroad. Department Staff's motion for a protective order as to Request No. 3 is denied.

The same cannot be said of Request No. 4, which would require Department Staff to "[p]rovide all documents relating in general to the definition, interpretation, or application of 'point of mixing' in SPDES permits." This request, as worded, could conceivably require Department Staff to search the files of every SPDES permit holder for responsive documents. In addition, the request could be read to require production of works of general reference such as textbooks, research papers, or other publications that would be irrelevant to this proceeding. Department Staff's motion for a protective order in connection with this request is granted.

Request No. 10 refers to Appendix A to the 2003 Amended Complaint. That Appendix contains a table of alleged SPDES violations at the Facility. Department Staff objects to Request No. 10 because of the defined terms contained within the request, which seeks documents relating to the sources of information reflected in Appendix A, the formulas used to derive the numbers, and the person(s) who performed the calculations, as well as any worksheets or data relied upon by that individual. The request also seeks all water quality data collected by the Department from "the relevant section" of the River since 1971, and "all information, bathymetry and imagery of the relevant section of

the Cohocton River." Finally, the request seeks documents relating to the person(s) who compiled the formula.

As Department Staff argues, portions of this request are overly broad, vague, and ambiguous. The request in Subsection (c) for documents relating to "the person or persons who performed the calculations" or "all worksheets or data" relied upon could require production of material connected to other projects that are wholly irrelevant to this action. Subsection (d) should be revised to require production of worksheets and data relied upon in preparation of Appendix A. Subsection (e) is overly broad and not sufficiently specific in that it seeks all water quality data of the "relevant section" (which phrase is nowhere defined) since 1971, and should be revised to reflect the specific allegations in the 2003 Amended Complaint, including a limitation as to the time that the violations allegedly occurred. Finally, the phrase in Subsection (f) that seeks production of "all information, bathymetry and imagery" of the "relevant section" of the Cohocton River is overly broad and ambiguous. "All information" would impose an undue burden upon Department Staff to locate and produce numerous irrelevant documents.

Request No. 13 would require Department Staff to "[i]dentify and provide all documents relating to volumetric measurements in the Cohocton River or its tributaries within ten miles of the BPSI facility." Department Staff objects to the this request because it includes the terms "identify," "documents," and "relating to," and notes further that responsive documents were being produced. In response, EIL points out that total flow of the receiving water body is one of the input parameters in Department Staff's Mass Balance Formula. As a result, EIL argues that it is "entitled to every shred of information bearing upon those calculations." EIL Opposition, ¶ 5, at 9. Department Staff's motion asserts that this request imposes an unreasonable burden, but provides no further detail in this regard. In light of the allegations in the 2003 Amended Complaint, this request is proper, and the motion for a protective order is denied as to Request No. 13.

Request No. 14 asks that Department Staff "[i]dentify and provide all documents relating to laboratory requirements, quality assurance and quality control concerning water quality data gathered at or near the BPSI facility." Department Staff's objection to this request is based upon the use of the defined terms discussed earlier. As was the case with Request No. 13, Department Staff's motion must be denied. The request is directly related to the allegations in the 2003 Amended Complaint, which alleges that respondents failed to conduct

hundreds of laboratory tests which were required to be performed at a facility approved by the Commissioner of Health.

Request No. 18 calls for the production of documents relating to the relationship between EIL and BPSI. Department Staff seeks a protective order based upon the use of the defined terms, and argues further that this request is vague and ambiguous. According to Department Staff, responsive documents have been produced previously. The motion for a protective order is granted as to this request. First, it is likely that any such documents within the Department's custody and control would be encompassed within other requests, and thus have already been provided. Furthermore, given that EIL admits the allegations in the 2003 Amended Complaint concerning the relationship between the corporate entities, it does not appear that this request will yield evidence with respect to matters that are in dispute. EIL Answer, ¶ 3, at 2.

Request No. 19 would require Department Staff to identify and provide documents regarding the name of the SPDES permittee at the BPSI Facility. Department Staff objects, based upon the use of the defined terms, and asserts further that the request is vague and ambiguous. This request is ambiguous, and further is not limited as to date. It is unclear what information is sought. Department Staff's motion with respect to this request is granted.

Request No. 21 asks that Department Staff "[i]dentify and provide all documents relating to any requirements E.I.L. or BPSI had or did not have regarding the monitoring of its effluent discharge from the BPSI facility." As Department Staff points out, this request is vague and ambiguous, and seeks information concerning requirements the Facility "did not have," potentially opening the door to production of large amounts of irrelevant material. EIL's opposition does not directly reply to these assertions. Department Staff's motion as to this request is granted. It is not possible to ascertain the universe of requirements that are not applicable to the Facility, and the request, as worded, is unclear.

Request No. 22 would require Department Staff to "[i]dentify and provide all documents relating to the use of laboratories for water quality analysis regarding water and brine samples at and near the BPSI Facility." Department Staff seeks a protective order based upon the use of the defined terms. In addition, Department Staff contends that Request No. 22 is vague and ambiguous. Again, EIL does not specifically address this request. Department Staff's motion is granted, because the

request is not limited as to distance, seeks information concerning water quality analysis that would require the production of information not related to the constituents at issue here, and is therefore impermissibly broad.

The remaining objections by Department Staff concern Requests Nos. 2 and 16. As noted above, Department Staff took issue with EIL's position that archival and backup data should be examined to determine if additional information responsive to these requests might exist, and noted that its preliminary list of documents designates "all documents that Staff 'will or may' rely upon to support its allegations." Motion, ¶ 6, at 8. Referring to paragraph 16 of the 2003 Amended Complaint, Request No. 2 would require Department Staff to "identify and provide all of the documents that support or relate in any way to the Department's allegation that the Cohocton River, from its mouth to its Tributary 22, has been classified as a Class C protected stream since approximately 1966."

According to Department Staff, because Request No. 2 seeks all documents that support the allegations in the 2003 Amended Complaint, any responsive material has already been identified, and any additional documents would be "inessential and redundant" to those already on the preliminary list. EIL points out that multiple copies with different notations may exist in the Department's files, and those copies would be helpful to its defense. Department Staff's argument in this regard is unpersuasive.

Nevertheless, Department Staff's motion as to Request No. 2 should be granted. The request is distinguishable from BPSI's Request No. 12, which sought archival and backup data in connection with specific allegations in the 2003 Amended Complaint, and, as noted above, was further particularized in an effort to resolve the dispute. In contrast, a request for such data relating to the Cohocton River's classification does not reasonably limit the computerized search that must be undertaken, which could potentially retrieve thousands of documents only peripherally related to this action. For example, the request may fairly be interpreted to require production of documents relating to Class C water bodies in general. Those documents could very likely number in the thousands.

Moreover, in its response to Paragraph 16 of the 2003 Amended Complaint, EIL states that this paragraph

> purports to contain characterizations and quotes from state regulations to which no

> response is required. To the extent that a response is required, EIL denies the Department's characterizations. EIL denies knowledge or information sufficient to form a belief as to the balance of the allegations set forth in Paragraph 16.

EIL Answer, ¶14, at 3. The basis for the denial is unclear, because the Answer indicates both that a response is not required and also that this respondent denies knowledge or information "as to the balance of the allegations." Under the circumstances, the Answer does not provide further clarification with respect to the documents sought by EIL in Request No. 2, and therefore fails to provide sufficient specificity such that Department Staff would be able to undertake a search of backup or archival data for responsive material.

Request No. 16 seeks production of "all documents relating to aerial photography by or for the Department at or near the BPSI facility." This request is identical to BPSI's Request No. 14. Department Staff and BPSI agreed to limit the request to "'all photographs' that were obtained or taken by Staff in relation to the allegations set forth in the 2003 Amended Complaint and to provide all descriptions, reports or analysis, if any, relevant to the taking or interpretation of such photographs." Department Staff's motion, ¶ 9, at 8. As so limited, the request is sufficiently specific to provide guidance to Department Staff. Accordingly, this same limitation will be imposed upon EIL's Request No. 16, and for the reasons articulated above in connection with BPSI's Request No. 12, the motion for a protective order with respect to this request is denied.

CONCLUSION

Department Staff's motion for a protective order is granted in part and denied in part. The motion is denied with respect to BPSI's Request No. 12, and EIL Requests Nos. 3, 5, 10(a), (b) and (g), 13, 14, 16 and 20. The motion is granted as to EIL Requests Nos. 2, 4, 18, 19, 21 and 22. EIL may revise Requests 9 and 10(c), (d), (e) and (f), in accordance with this Ruling. Any such revisions are to be served on or before February 28, 2005. If no revisions to these requests are served, Department Staff's motion for a protective order as to those requests is granted.

SCHEDULING ORDER

1. The hearing in this matter will commence on Tuesday, May 3, 2005, and will continue day to day as necessary. The memorandum accompanying this ruling provides information as to the hearing location and schedule.

2. The deadline to complete discovery is April 15, 2005. All parties shall respond to all outstanding discovery requests on or before that date. On that same date, the parties will serve a list of the witnesses each party intends to call at the hearing on this matter, as well as a statement of the witnesses' qualifications.

3. Department Staff will file a statement of readiness, pursuant to Section 622.9, upon the completion of discovery and any further settlement discussions.

/s/
Maria E. Villa
Administrative Law Judge

Dated: February 18, 2005
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List