STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law and Part 673 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

DEC Case No. CO3-20070201-9

- by -

ROBERT BERGER,
KAREN BERGER,
DAVID COOK and
JODY COOK,

Respondents.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Robert and Karen Berger ("Berger respondents"), and David and Jody Cook ("Cook respondents"), by service of a notice of hearing and complaint, both dated April 27, 2007. The complaint alleges that respondents are owners of the Honk Falls Dam (State Dam ID No. 177-0735) and that they failed to operate and maintain the dam in accordance with the provisions of section 15-0507 of the Environmental Conservation Law ("ECL").

Currently before me is Department staff's Motion for a Protective Order ("staff motion"), dated May 15, 2009. Attached to the motion are several documents, including (i) an affirmation ("staff affirmation") by staff counsel, (ii) a copy of the Berger respondents' third demand for documents ("third demand"); (iii) staff's response to the third demand; and (iv) a copy of a letter ("Dworkin letter") from the Berger respondents' counsel, Carl Dworkin, to staff counsel, Robyn Adair, dated April 15, 2009.

By its motion, Department staff argues that the Dworkin letter "criticized Staff's discovery response in an annoying and harassing manner, and appears to seek additional discovery information which is beyond the bounds of discovery" (staff motion ¶ 7). Staff requests a ruling "directing Berger Respondents' counsel to cease all inflammatory and harassing communications with Department Staff's counsel immediately [and to] make all future discovery requests through the [Office of Hearings and Mediation Services],

and plac[ing] Mr. Dworkin on notice that failure to comply with [such ruling] could result in sanctions under 6 NYCRR § 622.7(c)(3)" (staff motion at 4-5).

The Berger respondents, by letter ("Berger reply") dated May 29, 2009, oppose Department staff's motion, arguing that staff "has failed either to specify the relief that [it] seeks . . . or to set out any basis, drawn from law or other authority, for asserting that [the Berger respondents' counsel] engaged in misconduct or that [staff's] motion is even cognizable, much less grantable" (Berger reply at 1).[1]

DISCUSSION

Pursuant to 6 NYCRR 622.7(c)(1), a party may move for a protective order "to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." The motion is to be made "in general conformance with CPLR section 3103" and must be accompanied by an affidavit "reciting good faith efforts to resolve the dispute without resort to a motion" (id.).

Department staff bears the burden of proof on its motion (6 NYCRR 622.11[b][3]) and must make "a factual showing of prejudice, annoyance or privilege" (Brignola v Pei-Fei Lee, 192 AD2d 1008, 1009 [3d Dept 1993] [citations omitted]). Consideration of a motion for protective order must balance the "general preference for allowing discovery . . . against the objecting party's prerogative to be free of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" (id. [citing CPLR 3103(a), other citations and internal quotation marks omitted]).

As discussed below, because Department staff failed to conform its motion to the requirements of 6 NYCRR 622.7(c)(1), staff's motion for protective order must be denied. Nevertheless, consistent with my authority to maintain order and efficiency in these proceedings (see 6 NYCRR 622.10[b][1][x]), I am directing the parties to bring discovery to a close in accordance with the process and schedule set forth herein.

Department staff failed to satisfy the requirement under 6 NYCRR 622.7(c)(1) for a motion for protective order to be accompanied by an affidavit reciting good faith efforts to resolve the discovery dispute without resort to a motion. Staff requests that I "waive this requirement" because "it is no longer practicable to engage in matters of courtesy with Mr. Dworkin" (staff affirmation ¶ 9). Although an administrative law judge ("ALJ") may modify rules of practice involving time periods, as was done in relation to staff's filing of the instant motion,[2] "any other rule may be modified by the commissioner upon recommendation of the ALJ or upon [the commissioner's] own initiative" (6 NYCRR 622.6[f]). Moreover, a party seeking to modify a rule must make a showing that

[1] The Cook respondents did not file papers in response to the instant motion.

[2] Department staff requested an extension to file the motion. Over the objection of the Berger respondents, I granted staff additional time to file.

the modification is necessary to avoid prejudice to the party (id.). The likelihood that a good faith effort will be rejected or may lead to an unpleasant exchange with opposing counsel does not equate to prejudice to a party. Accordingly, staff has failed to make the requisite showing and I decline to waive, or recommend that the Commissioner waive, the requirement for a good faith affidavit.

Although Department staff's motion failed to satisfy the requirements of 6 NYCRR 622.7(c)(1), I will briefly address the merits of the motion. First, it appears that staff is attempting to shoehorn a broader dispute into the context of a motion for protective order. There have been ongoing complaints, predominately from staff but also from the Berger respondents, concerning the content and tone of various correspondence and filings in these proceedings. By its motion for a protective order, staff requests that I direct the Berger respondents' counsel to "cease all inflammatory and harassing communications," this request goes beyond the scope of a protective order. Staff's request to be free from all annoying and harassing communications is understandable. However, 6 NYCRR 622.7(c)(1) may be properly invoked only to "deny, limit, condition or regulate the use of any disclosure device" (emphasis supplied).

Moreover, while it is clear that the Berger respondents' counsel has repeatedly engaged in hyperbole when attacking Department staff's arguments and assertions, staff does not allege that the Berger respondents have failed to produce any discoverable material. Accordingly, staff's request for sanctions under 6 NYCRR 622.7(c)(3) is inapposite. Section 622.7(c)(3) provides for sanctions in relation to a party's failure to produce discoverable material. Specifically, if a party fails to produce such material after being directed by the ALJ to do so, the ALJ may then preclude the material from the proceedings and "draw the inference that the material demanded is unfavorable to the noncomplying party's position." Here, staff does not complain of any failure by the Berger respondents to produce discoverable material and relief under section 622.7(c)(3) is not available.

Nevertheless, I have twice admonished the parties to eschew needless rhetoric and to make their respective arguments based upon the facts of the matter and the applicable law.[3] These admonitions appear to have had little influence, particularly with regard to Mr. Dworkin who continues to impugn the integrity of staff counsel and to recite allegations of misconduct at length. In his April 15, 2009 letter to Department staff, Mr. Dworkin states that staff counsel "might want to consider what is now occurring in the

[3] By letter-ruling dated January 18, 2008, I directed the Berger respondents' counsel to "avoid needless rhetoric and to make his arguments on the facts of the case and the applicable law and regulations." By letter-ruling dated May 5, 2009, I directed the parties to "focus on the facts of the case and the applicable law and regulations" and further stated that "[t]he accusations and recriminations in the parties' recent filings distract from the merits of the parties' respective positions, do not foster the resolution of this matter and are a disservice to the State and to the respondents."

Ted Stevens[4] case as indicative of the seriousness with which your conduct is viewed" (Dworkin letter at 1). In Mr. Dworkin's filing in opposition to the instant motion, he again impugns the ethics of staff counsel, stating that "I understand [staff counsel] worked for and [was] mentored by Rensselaer District Attorney DeAngelis, whose record as reflected by the Appellate Division's decisions by which convictions were reversed for unethical conduct speaks for itself" (Berger reply at 4). Statements such as these serve no legitimate purpose in these proceedings. Moreover, filings containing ad hominem attacks on opposing counsel are grossly inappropriate and hostile to the orderly and efficient conduct of the hearing.

Over the past two years, this matter has been the subject of multiple discovery demands, motions and rulings. Given the often vituperative exchanges between the Department and the Berger respondents, particularly on the part of Mr. Dworkin, it appears that further pre-hearing proceedings will serve little purpose beyond engendering greater animus among the parties. Therefore, in furtherance of my authority to maintain order and efficiency in these proceedings, the parties are directed to promptly conclude discovery.

Going forward, no additional discovery demands are authorized. All previously served demands must be properly responded to by production of the materials demanded, except for those materials that a party elects to withhold on the basis of privilege. In the event that a party to these proceedings desires to serve an additional demand for discovery, that party must first file a motion with this office requesting permission to serve the demand. Any motion to serve additional discovery must explain why the demand was not made previously and why the material sought has now become necessary for the prosecution of this matter. The non-moving parties may respond to the motion but, unless the motion to serve additional discovery is granted, no response to the demand itself is necessary. Redundant demands will be summarily rejected.

With regard to disputes over outstanding discovery demands, these may be resolved either by direct negotiations between the parties or by resort to this office in accordance with 6 NYCRR 622.7(c). Any request for a ruling from this office concerning either an outstanding discovery demand or a request for additional discovery must be filed within thirty days of the date of this ruling. Immediately after the time for filing motions concerning discovery has expired or, if there are any outstanding motions concerning discovery, upon issuance of the associated ruling, I will convene a conference call with the parties to schedule the dates for the hearing.

[4] Ted Stevens is the former U.S. Senator from Alaska who was convicted in 2008 on federal corruption charges. The conviction was dismissed in April of this year after the Department of Justice, citing possible ethical breaches by its prosecutors, filed a motion to withdraw the underlying charges.

CONCLUSION

For the reasons set forth herein, Department staff's motion for a protective order is denied.

The parties are directed to conclude discovery expeditiously. To that end, any motion under 6 NYCRR 622.7(c), and any motion for additional discovery, must be filed with this office within 30 days of the date of this ruling.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: June 25, 2009
Albany, New York