

NEW YORK STATE:  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Environmental  
Conservation Law of the State of New  
York article 17, and Title 6 of the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York  
parts 703 and 750

Order to Compel  
Disclosure

by

Charles H. Buckley

DEC Case No.  
R4-2009-0724-117

Respondent.

August 17, 2010

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**Proceedings**

Staff from the Department's Region 4 Office, Schenectady, New York (Department staff) commenced the captioned administrative enforcement matter with service, by certified mail, return receipt requested, of a notice of hearing and complaint dated April 26, 2010 upon Charles H. Buckley (see Title 6 of the Official Compilation of Codes, Rules and Regulations [6 NYCRR] § 622.3[a][1]). Mr. Buckley received the April 26, 2010 notice of hearing and complaint on April 30, 2010 (see 6 NYCRR 622.3[a][3]).

According to the April 26, 2010 complaint, Mr. Buckley owns real property in the Town of Hancock, Delaware County, adjacent to the Town of Hancock Golf Course. Mr. Buckley's parcel is identified as No. 429.1-5-11. The complaint contends further that on August 26, 2009, Mr. Buckley filed a notice of intent with Department staff for a State Pollutant Discharge Elimination System (SPDES) general permit for stormwater discharges from construction activity (GP-0-08-001). The proposed construction activities stated in the notice of intent included, among other things, an expansion of the Hancock Golf Course.

In five causes of action, the April 26, 2010 complaint alleges that Mr. Buckley violated various provisions of Environmental Conservation Law (ECL) article 17; implementing regulations at 6 NYCRR part 703 (Surface Water and Groundwater Quality Standards and Groundwater Effluent Limitations) and 750 (SPDES Permits); as well as the terms and conditions of the

SPDES general permit for stormwater discharges from construction activity. For these alleged violations, Department staff requests an Order from the Commissioner that would assess a total civil penalty of \$100,000; revoke the SPDES general permit; and direct Mr. Buckley to develop an erosion and sedimentation control plan and the required stormwater pollution prevention plan (SWPPP). In addition, Department staff wants the Commissioner to direct Mr. Buckley to remove a temporary stream crossing structure.

With service of the April 26, 2010 notice of hearing and complaint, Department staff also included a notice of discovery. Among other things, the notice of discovery requests copies of documents related to Mr. Buckley's purchase of the real property in 2008, the August 26, 2009 notice of intent and the SWPPP, the development of Mr. Buckley's parcel and the Hancock Golf Course, as well as any photographs of the parcel taken between May 29, 2009 and October 30, 2009.

Subsequently, Department staff served Mr. Buckley with a notice of hearing and an amended complaint dated May 13, 2010. The amendment was limited to correcting a typographical error in Paragraph 60 concerning a date. In the May 13, 2010 second amended complaint, the year of the violation alleged in the second cause of action was changed from 2010 to 2009. Department staff served the notice of hearing and the May 13, 2010 amended complaint by certified mail, return receipt requested. Mr. Buckley received these documents on May 22, 2010.

With a cover letter dated June 23, 2010, Robert G. Davis, Esq. (Hancock, New York) filed an answer dated June 22, 2010 on behalf of his client Mr. Buckley.

In these proceedings, Department staff is represented by Richard Ostrov, Esq., Regional Attorney.

### **Motion to Compel Discovery**

With a cover letter dated July 7, 2010, Department staff provided the Office Hearings and Mediation Services with copies of the following papers:

1. Notice of hearing and complaint dated April 26, 2010;

2. Notice of discovery;
3. Notice of hearing and amended complaint dated May 13, 2010;
4. Letter dated May 24, 2010 from Mr. Ostrov, to Mr. Davis;
5. Letter dated June 16, 2010 from Mr. Davis to Mr. Ostrov;
6. Cover letter dated June 23, 2010 from Mr. Davis and enclosed answer dated June 22, 2010;
7. Notice of motion to compel discovery and motion to compel dated July 7, 2010; and
8. Affirmation by Mr. Ostrov affirmed July 7, 2010 in support of the motion, and statement of readiness.

In the July 7, 2010 notice of motion and motion to compel, Department staff outlines the following sequence of events. First, with the April 26, 2010 notice of hearing and complaint, Department staff included a notice of discovery. As outlined above, the notice of discovery requested documents and photographs, among other things. Department staff served the notice of hearing and the April 26, 2010 by certified mail, return receipt requested. Mr. Buckley received the notice of hearing and complaint, as well as the notice of discovery on April 30, 2010.

Second, after Department staff served the May 13, 2010 amended complaint, the parties' counsel conferred twice. As a result of these discussions, Mr. Davis accepted the May 13, 2010 amended complaint. In addition, the parties agreed that Mr. Davis would answer the May 13, 2010 amended complaint and respond to the notice of discovery by June 15, 2010. This return date was extended by mutual consent to June 25, 2010. As noted above, Mr. Davis filed his client's answer with a cover letter dated June 23, 2010. However, Mr. Davis did not provide anything responsive to Department staff's notice of discovery with the June 23, 2010 cover letter.

Finally, on June 24 and 29, 2010, counsel conferred about Department staff's notice of discovery. As of the date of Department staff's motion (July 7, 2010), Mr. Buckley had not

produced any materials responsive to Department staff's notice of discovery.

Based on these circumstances, Department staff moves for an order compelling a response to the notice of discovery (see 6 NYCRR 622.7[c][2]). If the motion is granted and if Mr. Buckley does not disclose the requested materials, Department staff requests that the sanction outlined at 6 NYCRR 622.7(c)(3) be imposed.

In his July 7, 2010 affirmation, Mr. Ostrov affirms the sequence of events outlined above, and reiterates Department staff's request for an order to compel and, if necessary, the authorized sanction. Mr. Ostrov affirms further that the parties have attempted in good faith to resolve the discovery dispute as well as the alleged violations. Mr. Ostrov states these efforts were unfortunately not successful.

By letter dated July 20, 2010 to Chief Administrative Law Judge (ALJ) McClymonds, Mr. Davis requested an extension of time to respond to Department staff's July 7, 2010 motion to compel. In his July 20, 2010 letter, Mr. Davis represented that Mr. Ostrov did not object to an extension. By e-mail dated July 26, 2010, Chief ALJ McClymonds set August 2, 2010 as the return date for Mr. Davis' response to Department staff's motion to compel.

By e-mail dated August 12, 2010, Mr. Ostrov noted that Department staff had received neither materials responsive to the outstanding notice of discovery nor a response to the motion to compel. Mr. Ostrov requested a ruling on Department staff's pending motion. Accordingly, in a cover letter dated August 12, 2010, Chief ALJ McClymonds advised the parties, that the captioned matter was assigned to the undersigned ALJ.

In an administrative enforcement proceeding, such as the captioned matter, discovery is authorized (see 6 NYCRR 622.7). A party against whom discovery is demanded may move for a protective order (see 6 NYCRR 622.7[c][1]). If a party fails to comply with a discovery demand without making a timely objection, the proponent of the discovery demand may move for an order to compel discovery (see 6 NYCRR 622.7[c][2]).

As noted above, Department staff served the notice of discovery with the April 26, 2010 notice of hearing and complaint. During the pendency of this matter, Department staff

has not amended or modified the notice of discovery. To date, Mr. Buckley has not provided materials responsive to the notice of discovery. To date, Mr. Buckley has not moved for a protective order, and the time to move for one has expired. Despite an extension of time, Mr. Davis has not responded on behalf of his client to the July 7, 2010 motion to compel. The Department staff's motion to compel is unopposed. I grant Department staff's July 7, 2010 motion to compel disclosure.

Accordingly, Mr. Buckley is directed to respond to Department staff's notice of discovery by **September 15, 2010**. This deadline will not be extended. Department staff's discovery request has been pending since April 30, 2010. As of the date of this ruling, Mr. Buckley has neither provided materials responsive to the notice of discovery, nor responded to Department staff's motion to compel after requesting and receiving additional time to do so.

When a party does not comply with the ALJ's order to disclose, 6 NYCRR 622.7(c)(3) authorizes the ALJ to preclude from the hearing record the material sought during discovery. In addition, the ALJ and the Commissioner may draw the inference that the material demanded is unfavorable to the noncomplying party's position (see 6 NYCRR 622.7[c][3]).

Department staff requests that I impose the sanction authorized by 6 NYCRR 622.7(c)(3) if Mr. Buckley does not comply with my order to compel discovery. I reserve on this request because the time to comply with my order has not yet expired. I will consider this request after September 15, 2010.

#### **Further Proceedings**

Paragraphs 12 through 19 inclusive of Mr. Ostrov's July 7, 2010 affirmation provide the information required for a statement of readiness (see 6 NYCRR 622.9). But for a response to the pending discovery demand, Department staff is ready to commence the administrative hearing.

I would like to convene a telephone conference call with the parties' counsel during the week of September 20, 2010. The purpose of the telephone conference call will be to schedule the administrative hearing. I am available to hold the

administrative hearing in October except on October 5, 2010. The hearing will be held at the Department's Region 4 Offices.

By **September 15, 2010**, counsel shall advise me via e-mail of their availability for a telephone conference call during the week of September 20, 2010. After reviewing this information, I will schedule the telephone conference call and provide the parties with the call-in information.

\_\_\_\_\_/s/\_\_\_\_\_  
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Dated: Albany, New York  
August 17, 2010