STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the New York State Environmental Conservation Law ("ECL") and Part 360 of Title 6 of the official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and of Department Order on Consent No. R1-20080514-150

DEC Case No.
CO 1-2014-0507-159

-by-

ECOLOGY SANITATION CORP., ECOLOGY TRANSPORTATION CORP., and ERNEST DEMATTEO, INDIVIDUALLY AND AS OWNER AND OPERATOR OF ECOLOGY SANITATION CORP. and ECOLOGY TRANSPORTATION CORP.,

Respondents.

RULING ON MOTIONS TO COMPEL AND MOTIONS FOR PROTECTIVE ORDERS

I. Background

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Ecology Sanitation Corp., Ecology Transportation Corp., and Ernest DeMatteo, individually and as owner and operator of Ecology Sanitation Corp. and Ecology Transportation Corp. (collectively "respondents") by service of a notice of hearing and complaint, both dated October 26, 2015.

The complaint asserts two causes of action, the first of which is entitled "Operating a Solid Waste Management Facility without the Required Part 360 Permit." See Complaint at seventh unnumbered page. In that cause of action, staff alleges, among other things, that (i) respondents own and/or operate a solid waste management facility, specifically a construction and demolition ("C&D") debris processing facility, at the site; (ii) an operator of a solid waste management facility that processes C&D debris must have a permit pursuant to 6 NYCRR § 360-16.1(c); and (iii) respondents have never had a Part 360 permit for the activities conducted at the site, in violation of 6 NYCRR §§ 360-1.5(a)(2), 360-1.7 and 360-16.1(c). See generally Complaint ¶¶ 53-60.

Respondents' remaining affirmative defense[1] asserts that staff's claims are barred in whole or in part due to the actions of the Department, "which arbitrarily and without any substantive basis demanded that a Part 360 Permit was or is required for the handling of railroad ties by Respondents Ecology Sanitation and/or Ecology Transportation." See Answer dated December 21, 2015, at ¶ 67; see also 6 NYCRR § 622.4(c).

In accordance with the burdens and standards of proof applicable in this administrative enforcement proceeding, Department staff bears the burden of establishing at hearing by a preponderance of the evidence that respondents constructed or operated a C&D debris processing facility at the site without the required Part 360 permit. See 6 NYCRR §§ 622.11(b)(1), (c).[2] With respect to respondents' affirmative defense, respondents bear the burden of establishing at hearing by a preponderance of the evidence that their activities at the site did not require a Part 360 permit. See 6 NYCRR §§ 622.11(b)(2), (c).

Currently pending before me are: (i) Department staff's Motion to Compel and for a Protective Order; and (ii) Respondents' Motion for a Protective Order and to Compel. The papers submitted by the parties with respect to these motions are listed in Appendix A to this ruling.

II. Discussion

A. Staff's Motion to Compel and Respondents' Motion for Protective Order

Staff seeks a ruling compelling respondents to respond to discovery demands nos. 1.b, 1.f, 1.g, 2.b, 2.c, 9, 10, 11, 13, 14, and 15 as well as its demand for photographs, demand for statements, and demand for witnesses, as set forth in staff's Combined Discovery Demands, dated May 8, 2017. See Motion to Compel and for a Protective Order, dated August 7, 2017 ("Staff Motion"), ¶¶ 15, 17-41.[3] The motion papers specifically seek production of (i) documents regarding all C&D debris received, transported from, sold, stored or processed at the facility; (ii) a privilege log that includes sufficient subject matter information so that staff may determine whether to challenge respondents' privilege claims; and (iii) certain information relating to witness identification, witness statements and photographs. As discussed below, staff's motion to compel is granted in part, and denied in part.

[1] On March 21, 2017, I issued a ruling granting in part staff's motion to clarify or dismiss respondents' affirmative defenses. See Matter of Ecology Sanitation Corp., Rulings on Staff Motion to Clarify or Dismiss Defenses and Motion to Strike, March 21, 2017. I denied staff's motion with respect to respondents' second affirmative defense, which is relevant to the motions decided herein.

[2] Staff bears the same burden with respect to staff's second cause of action, which alleges that respondents violated a consent order by failing to make payments for an environmental monitor.

[3] Although staff's motion papers identify demand no. 11 as one of the demands at issue, see Notice of Motion to Compel and for a Protective Order, dated August 7, 2017, at ¶6; see also Staff Motion at ¶ 15, staff did not provide any argument with respect to that demand, an omission noted by respondents. See Respondents' Opposition to DEC Motion to Compel and for a Protective Order, dated August 14, 2017, at 11 n.1. To the extent, if at all, staff's motion seeks relief with respect to demand no. 11, the motion is denied.

1. Documents Regarding Facility Operations and Materials

Staff's document demands at issue here relate to facility operations and materials delivered to and sent from the facility, as summarized below:

- Demand No. 1 – documents involving the facility "by and between" respondents and their agents, and
  - (f) "[s]olid waste management facility to which [respondents] dispose material generated at the facility or transported from the facility;"
  - (g) "[p]arties to which [respondents] sell materials;"

- Demand No. 2- documents "relating to the allegations in Staff's Complaint" including
  - (b) "the material received at the Facility;"
  - (c) "the material that was received at the Facility and ultimately disposed at a landfill or other solid waste management facility;"

- Demand No.9 – invoices, receipts, emails, letters etc. "referencing activities at the Facility"

- Demand No. 10 – "documents relating to the transport of material to or from the Facility"

- Demand No. 13 – scientific documents, data, analyses, statistics, calculations, photographs, reports, logs, memoranda, etc. regarding the facility

- Demand No. 14 – standard operating policies and procedures or routines for the facility; and

- Demand No. 15 – all "media" concerning the facility, including video, audio, etc.

See Staff Motion, Exhibit ("Ex.") 4, NYSDEC Staff's Combined Discovery Demands, dated May 8, 2017, at 5-6.

Although the words "material" and "materials" are not defined in staff's demands, staff has clarified that the demands relate to C&D debris and the operation of a solid waste management facility. See e.g. Staff Motion, Ex. 10, Letter from J. Andaloro, Esq. to L. Bennett, Esq. dated June 26, 2017 ("Staff June 26 Letter"), at second unnumbered page (limiting demand nos. 2, 9, 10, 13, 14 and 15 to "construction and demolition debris as referenced in paragraph 57 of the complaint").[4]

Respondents' position is that staff is entitled to only documents that relate to creosote-treated railroad ties, because that has been the primary focus of this proceeding. See e.g. Respondents' Opposition to DEC Motion to Compel and for a Protective Order, dated August

[4] Paragraph 57 of the complaint states: "Pursuant to 6 NYCRR §360-16.1(c) an operator of a solid waste management facility that processes C&D debris must apply for and receive a Department permit therefor."

14, 2017 ("Respondents' Opp."), at 1-3; see also Respondents' Motion for a Protective Order and to Compel, dated August 7, 2017 ("Respondents' Motion"), at 5-7; Staff Motion, Ex. 5, Respondents' Responses and Objections to DEC's Combined Discovery Demands, dated June 13, 2017 ("Respondents' Demand Response"), at Response to Demand Nos. 2 (objecting to the extent demand "seeks information regarding materials other than those that are the subject of this proceeding, i.e., creosote-treated railroad ties"), 9 (same objection), 10 (same), 13 (same), 14 (same), 15 (same); Staff Motion, Ex. 11, Letter from L. Bennett, Esq. to J. Andaloro, Esq. dated July 12, 2017 ("Respondents' July 12 Letter"), at 3-5.

The scope of discovery in this administrative enforcement proceeding "must be as broad as that provided under article 31 of the CPLR." 6 NYCRR § 622.7. The CPLR provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a). The New York Court of Appeals has held that the words "material and necessary"

> are … to be interpreted liberally to require disclosure … 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, 406-407 (1968). Information is "material … in the prosecution" of a case "if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief." Id. at 407 (internal citations and quotations omitted).

As staff and respondents acknowledge, the issues identified in the pleadings determine the scope of discovery. See Staff Motion at 5, ¶ 20 ("The issues framed in the complaint and answer determine the scope of discovery in a particular action"); Respondents' Opp. at 1, ¶ 1 (quoting staff's paragraph 20, and stating "[r]espondents do not disagree"); see also Kern v. City of Rochester, 261 A.D.2d 904, 905 (4th Dep't 1999).

Staff's first cause of action in the complaint contains the sub-heading "Operating a Solid Waste Management Facility without the Required 360 Permit," and alleges that respondents own and/or operate a C&D debris processing facility on the site without a permit, in violation of three solid waste management regulations. See Complaint ¶¶ 53-60 (citing violations of 6 NYCRR §§ 360-1.5(a)(2), 360-1.7, and 360-16.1(c)). The discovery demands at issue seek, among other things, documents relating to "material" and "materials" received or generated at, or transported from, the facility, and staff has clarified that the "material" to which the demands refer is C&D debris.

Even if much of the focus of the parties' interactions to date has related to railroad ties, the asserted cause of action, and the disclosure demands, address "C&D debris," a category of

solid waste much larger than simply railroad ties. See 6 NYCRR § 360-1.2(b)(38).[5] Given the broad scope of discovery and the nature of the asserted cause of action, I conclude that staff's demands seek information material and necessary to the prosecution and defense of the case. Staff's motion to compel with respect to demands 1.f, 1.g, 2.b, 2.c, 9, 10, 13, 14, and 15 as they relate to C&D debris, is granted. Respondents shall produce all documents and media (as defined in staff's demands and as modified or clarified during the parties' good faith efforts to resolve their disputes) within 28 days of the date of this ruling.

2. Staff's Motion to Compel Response to Demand for Statements

Staff's discovery demands include a "demand for statements," comprised of three paragraphs, summarized as follows: (1) every statement by any witness relating to the allegations in the complaint; (2) for oral statements not otherwise transcribed, identify who made the statement, the date, persons present, location and substance of statement; (3) for written statements (including transcribed or otherwise recorded), identify who made the statement, date, persons present, location and produce a copy, irrespective of media format. See Staff Motion, Ex. 4, at 7, Demand for Statements ¶¶ 1-3.

To the extent any statements have been memorialized in any format, for example, paper, recording, and so on, they would fall within the scope of the definition of "document" set forth in staff's discovery demand, see Staff Motion, Ex. 4 at 1, and would be responsive to staff's demand number 2. See id. at 5, Demand No. 2 (seeking documents relating to the allegations in staff's complaint). Notwithstanding respondents' objection to paragraph 1 of staff's demand for statements, respondents agreed to search for and produce documents "pertinent" to this demand. See Staff Motion, Ex. 5, Respondents' Demand Response, at 7, ¶ 1. To the extent, if any, respondents have not yet produced statements within the scope of this demand,[6] they are hereby directed to so produce.

With respect to the other two paragraphs in staff's demand for statements, I agree with respondents that staff's demands are essentially in the nature of interrogatories. Staff's motion to

[5] Section 360-1.2(b)(38) defines C&D debris as

> uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads; and uncontaminated solid waste resulting from land clearing. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood (including painted, treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes, empty buckets 10 gallons or less in size and having no more than one inch of residue remaining on the bottom, electrical wiring and components containing no hazardous liquids, and pipe and metals that are incidental to any of the above.

[6] To the extent, if at all, respondents argue that discovery of otherwise relevant statements is limited to a party's obtaining a copy of his own statement under CPLR 3101(e), see e.g. Respondents' Opp. at 6-7, respondents are incorrect. Respondents shall produce to Department staff responsive and relevant statements by any person.

compel with respect to paragraphs 2 and 3 of its demand for statements is denied.[7] Staff's request in the alternative for permission to treat these demands as interrogatories, and to compel responses thereto, is also denied.

3. Staff's Motion to Compel With Respect to Demand for Witnesses

Staff's discovery demands include a "demand for witnesses," comprised of three paragraphs, summarized as follows: (1) identify all witnesses to events underlying any allegation in the complaint, and provide name, address, telephone, dates, locations, and "the paragraph numbers in the complaint with respect to which Respondent(s) contend that the events they witnessed are relevant;" (2) seeking the same information with respect to all witnesses to events underlying affirmative defenses; and (3) identify all contractors, agents, representatives, consultants, and employees of the facility for the past five years, their positions, dates of employment, job responsibilities, professional credentials and, for those persons not currently employed by respondents, last known addresses and telephone numbers. See Staff Motion, Ex. 4, at 7-8, Demand for Witnesses ¶¶ 1-3.

Respondents objected to staff's demand for witnesses as beyond the scope of CPLR 3101 and because, in respondents' view, the demands constitute interrogatories. See Respondents' Demand Response at 8, ¶¶ 1-3. Notwithstanding such objections, however, respondents served staff with a list (entitled "Witnesses to Relevant Events") containing 43 names and each person's affiliation (e.g. "DEC," "LIRR"). See Staff Motion, Ex. 17 (email from L. Bennett to J. Andaloro dated August 4, 2017, attaching two-page list of names). Respondents thereafter served a list of witnesses whom respondents intend to call at the hearing, and provided expert disclosure. See Respondents' Witness List and Expert Disclosure, dated August 15, 2017.

In its motion, staff acknowledges that respondents provided the large list of witnesses,[8] but argues that it needs the additional information requested in the demand for witnesses to "identify and evaluate the relevancy of such witnesses." Staff Motion at 8, ¶ 36. Respondents argue in opposition to staff's motion to compel that the witnesses were identified by respondents based upon the documents produced by the parties, and that each witness's involvement may be ascertained from the documents. See Respondents' Opp. at 8, ¶ 20. Respondents also continue to assert that the demands for information are interrogatories. See id. at 8, ¶ 19.

Respondents have provided a list of 43 witnesses to relevant events in response to staff's demand for witnesses, have identified witnesses who will testify, and have identified a person they seek to proffer as an expert, at the adjudicatory hearing. I agree with respondents that staff's requests for the many types of information regarding each identified witness are in the nature of interrogatories. Staff's motion to compel with respect to staff's demand for witnesses is denied. Staff's request in the alternative for permission to treat these demands as interrogatories, and to compel responses thereto, is also denied.

[7] The existence and content of any responsive oral statement that has not been transcribed may be explored, if at all, at hearing.

[8] Respondents' later witness and expert disclosure post-dated the parties' filings with respect to the motions decided herein.

4. Staff's Motion to Compel With Respect to Demand for Photographs

Staff's discovery demands include a "demand for photographs" which seeks all photographs that respondents will introduce and on which they will rely at hearing, as well as the date of each photograph and the identity of the person taking the photograph. See Staff Motion, Ex. 4, at 8. In response, respondents objected to this demand to the extent it constitutes an interrogatory, and stated that respondents had not at that time identified the documents they will use or on which they will rely at hearing. See Respondents' Demand Response, at 9.

Staff argues in its motion to compel that the demand "requests basic information about the photographs to determine what the photographs are," and that a demand for photographs is clearly covered within the scope of CPLR 3101(i). Staff Motion at 8, ¶¶ 38, 39. Staff also acknowledged that respondents produced photographs, but did not provide the requested information regarding each photograph. See id. Respondents argue in opposition that CPLR 3101(i) does not require production of the requested information in addition to the photographs, and that these issues could be resolved during the parties' discussions of the exhibit lists prior to the hearing. See Respondents' Opp. at 9, ¶¶ 22-24.

I agree with respondents that CPLR 3101(i) requires the production of photographs, etc. involving a person referred to in CPLR 3101(a)(1),[9] but does not require the production of the additional information sought by staff. Moreover, I also agree with respondents that the information sought by staff regarding photographs will likely be provided during the parties' discussions of exhibits to be introduced at hearing.[10]

Staff's motion to compel with respect to its demand for photographs is denied, and its request in the alternative for permission to treat the demands as interrogatories and to compel responses thereto, is also denied.

5. Documents as to Which a Privilege Has Been Asserted

Staff's discovery demand no. 1.b seeks:

> copies of any and all correspondence, communication and/or document(s) involving the Facility by and between Respondent(s), its respective agent(s), representative(s), subsidiary(ies) and/or attorney(s) and … (b) Respondent(s) and/or any other named Party(ies) in this action.

Staff Motion, Ex. 4, at 4.

[9] Persons identified therein are "a party, or the officer, director, member, agent or employee of a party." CPLR 3101(a)(1).

[10] I note that, in accordance with the scheduling order dated May 10, 2017, the deadline by which the parties were to have exchanged exhibit lists, stipulated to the extent possible to the admissibility of exhibits, and completed fact stipulations, was August 30, 2017.

Prior to the filing of the parties' motions here at issue, the parties exchanged several emails and letters regarding this demand and respondents' objections thereto. In its written response to staff's demands, respondents characterized this demand as "an abuse of the discovery process" to the extent it seeks all documents involving the facility by and between respondents and their attorneys. Respondents' Demand Response at 2-3, Response to Demand No. 1.

Staff thereafter limited this demand to documents "involving the Bohemia Facility," and limited the time frame for documents to the period between April 10, 2010 to October 16, 2015, noting that, because the lease for the Bohemia facility began on July 1, 2013, there would likely be no responsive documents during the period of April 10, 2010 to July 1, 2013. See Staff Motion at 6, ¶ 24 (citing Staff Motion, Ex. 10, Staff June 26 Letter). Staff also stated that it did not expect respondents to produce documents protected by the attorney-client privilege or the work product doctrine, but is entitled to a privilege log to ascertain whether a motion to compel is appropriate. See id. at 1 (citing CPLR 3122(b)).

Counsel for respondents thereafter stated that the parties' conflict regarding demand no. 1 generally "would be resolved if you limited it to 'relating to the allegations in Staff's Complaint.'" Respondents' July 12 Letter, at 1. With respect to the issue of privileged documents, respondents' counsel objected to the demand as

> one that expressly asks for all attorney-client communications regarding the subject matter of the action, as opposed to a request that asks for responsive documents, which may or may not include such communications within a document or series of attached documents.

Id. at 2.

Respondents also stated that they had identified and produced documents that include attorney-client communications, had redacted the privileged portions, and reviewed and redacted approximately 100 documents. See id. Respondents argued that staff's request for all attorney-client communications would require an overly burdensome review of 700-800 additional documents, and that such review "would serve no useful purpose, since these documents contained communications concerning the legal import of numerous actions and contacts with others regarding the underlying issues." Id. Finally, respondents' counsel stated that staff "is not entitled to an identification of each and every occasion that the client consulted with counsel regarding the underlying subject matter that led to this administrative proceeding." Id. at 3.

By email dated August 2, 2017, counsel for Department staff provided further clarification of the scope of demand no. 1.b:

> The Department is not requesting the release of all attorney client communications. To the extent that communications between Respondents[] and [their] attorneys exist that would be responsive to the other requests made in Staff's demands, the Department is entitled to know of their existence and a basic description of the contents of such documents so that the Department can ascertain if a motion to compel is warranted.

Staff Motion, Ex. 14, Email from J. Andaloro to L. Bennett dated August 2, 2017. Staff stated that it provided respondents with a list of all its attorney-client communications regarding this matter, and requested of respondents additional information regarding the subject matter of 70 documents. See id. [11]

In their response to staff's August 2nd email, respondents reiterated their claim that responding to staff would be unduly burdensome "and would not yield productive information." Email from L. Bennett to J. Andaloro, dated August 3, 2017. In addition, respondents claimed that staff "add[ed] that providing a description by grouping the documents in question may resolve this issue." Id. Respondents then described apparently responsive emails and correspondence as documents:

> between J. Rigano or other counsel on the one hand and Respondents on the other hand regarding communications with DEC about the need for a Part 360 permit issue with respect to the railroad ties, communications with LIRR about the permit issue, correspondence to the Solicitor General, and settlement discussions regarding the railroad tie issue.

Id. Respondents also provided brief descriptions with respect to the 70 documents identified in staff's August 2nd email. See e.g. id. ("permit issue," "LIRR default notice," "LIRR contract issues," "DEC inspection," "potential registration issue").

Department staff has moved to compel respondents to produce responsive, non-privileged documents, and to provide a privilege log, containing "sufficient information … including subject matter description" regarding documents withheld so that staff may determine whether a motion to compel production of such documents is appropriate. See Staff Motion at 6-7, ¶¶ 22-28. Respondents have moved for a protective order, arguing that staff's "astounding demand" seeks all communications between respondents and their counsel, that "there would appear to be little if any purpose to require Respondents to identify all communications between client and counsel other than to obtain a timeline and the subject matter for all those communications," which respondents argue "is highly inappropriate." Respondents' Motion at 7-8, ¶¶ 18-23.

In its motion to compel, staff repeats that it does not expect respondents to produce privileged documents. Rather, staff argues that respondents are required to produce documents responsive to the demand and, to the extent such documents are purportedly privileged, staff is entitled to sufficient information regarding the documents so that staff can determine whether a motion to compel is warranted. Staff repeats its request for a privilege log. See Staff Motion at 6-7, ¶¶ 25-27.

The parties' motion submissions essentially raise two issues relating to respondents' disclosure obligations: (i) whether respondents must review every potentially responsive document, including each email and email attachment in an "email chain," for responsiveness,

[11] It is unclear whether the 70 documents to which staff refers were produced but redacted, or were not produced at all.

including documents and emails between respondents and their counsel; and (ii) what information must respondents provide to staff with respect to responsive documents/emails/attachments, etc., or portions thereof, as to which respondents claim privilege?

a. Review of Potentially Responsive Documents

As to the first of these two issues – the scope of review required of respondents – respondents are required to review all documents, emails, and attachments, including each email in an email chain, etc. that are potentially responsive to staff's demands. In that regard, there apparently exists a universe of 700-800 potentially responsive documents that respondents have yet to review. See Respondents' July 12 Letter at 2. If such documents are potentially responsive to one or more of staff's demands, then respondents are required to review them and, to the extent not privileged, produce them.

I find unpersuasive respondents' argument that they are not required to review such documents because such review "would serve no useful purpose, since these documents contained communications concerning the legal import of numerous actions and contacts with others regarding the underlying issues." Id. Documents "regarding the underlying issues" are potentially responsive. Absent review, respondents simply do not know, for example, whether some of the documents, or emails anywhere within an email chain, are responsive and not privileged.

Moreover, given respondents' statement that these documents relate to "communications concerning … contacts with others regarding underlying issues," Respondents' July 12 Letter at 2, it may be that such communications were copied to or later forwarded to third parties, which would vitiate any claimed privilege. See e.g. Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 624 (2016) (communications made in the presence of third parties not privileged; subsequently revealing privileged communication to a third party waives privilege).[12]

To summarize, respondents are required to review all potentially responsive documents, including all emails in email chains and all attachments to emails, and including documents and emails between respondents and their counsel, to determine whether they are responsive. Only after such review can respondents determine whether subsets or portions of any responsive documents are entitled to protection because they are privileged.

b. Privilege Log Issues

The second underlying issue with respect to respondents' claims of privilege concerns the information that respondents must provide to Department staff to support their claims that

[12] Respondents state that prior counsel "was in constant communication with DEC, LIRR and respondents throughout the relevant time period," but do not state that all communications with the Department or LIRR (or others) have been reviewed and, if responsive, produced. See Respondents' Opp. at 4, ¶ 10; see also Respondents' Motion, Ex. 6, 20th unnumbered page, email from L. Bennett to J. Andaloro dated August 3, 2017, at Item 6 (citing communications with the Department, the LIRR, the Solicitor General, and "settlement discussions regarding the railroad tie issue").

documents are privileged. The party asserting privilege bears the burden of establishing its applicability. See e.g. Spectrum Sys. Int'l v. Chemical Bank, 78 N.Y.2d 371, 377 (1991); Ambac Assurance Corp., 27 N.Y.3d at 624. As discussed below, on the record submitted on these motions, respondents have not provided sufficient information regarding their claims of privilege to enable Department staff to assess the validity of, or to challenge, respondents' assertion of privilege.

CPLR 3122(b) provides the general rule with respect to privilege logs, requiring the party asserting privilege with respect to documents, to provide, "as to each such document" (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document. The New York Court of Appeals has stated that a privilege log "should specify the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege." Matter of Subpoena Duces Tecum to Jane Doe, 99 N.Y.2d 434, 442 (2003) (citing United States v. Construction Products Research, 73 F.3d 464, 473 (2d Cir. 1996) (privilege log to identify each document and the individuals who were parties to the communications, providing sufficient detail to allow judgment whether document protected from disclosure)).

In their opposition to staff's motion, and in their motion for a protective order, respondents again argue burden, and claim that staff agreed to accept "a description by grouping the affected documents to the extent feasible," and a privilege log by "categorization" rather than by document-by-document is preferable. See Respondents' Opp. at 4-5, ¶ 12; see also generally Respondents' Motion at 7-9. The record before me, however, does not reflect such agreement on the part of staff.

Citing a rule applicable to the Commercial Division of the New York State Supreme Courts, respondents also argue that a "categorical privilege log" is appropriate here. See id. at 5-6, ¶ 13 (citing 22 NYCRR § 202.70(g), Rule 11-b(b)(1)). Although the Commercial Division rule cited by respondents states a "preference" for categorical privilege logs, the rule also requires parties to meet and confer "at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, [and] the use of categories." 22 NYCRR § 202.70(g), Rule 11-b(b)(1). The rule reflects an expectation that the parties address "in good faith as part of the meet and confer process" the use of categorical privilege logs to reduce time and costs associated with log preparation. Id.

Even were the Commercial Division rule applicable here – and it is not – respondents have submitted nothing to support a claim that the parties discussed or agreed to, early in this litigation or at any time prior to the current motions, the use of categorical privilege logs. Respondents' argument with respect to a categorical privilege log is rejected.

Similarly, to the extent respondents argue that they should not be required to review or identify in any privilege log each email in email chains, that argument is rejected. In accordance with CPLR 3122(b) and case law cited above, staff is entitled to sufficient information "as to each document" (emphasis added) so that staff may reasonably assess whether to challenge respondents' claim of privilege. This also applies to email strings or chains; each email in the chain as to which a privilege is asserted must be reviewed, identified and described, and each

author and recipient, including the direct recipient and all persons copied on the email, along with their affiliation, must be provided.

To allow respondents to simply identify one email in an email chain rather than every email in each chain, would risk "stealth claims of privilege which, by their very nature, could never be the subject of a meaningful challenge by opposing counsel or actual scrutiny by a judge." Universal Service Fund Telephone Billing Practices Litigation, 232 F.R.D. 669, 672-73 (D. Ks. 2005); see also EEOC v. BDO USA, L.L.P., 856 F.3d 356, 364-65 (5th Cir. 2017) (citing Universal Service and stating that emails involving counsel are problematic, and whether a log entry consists of one email or a chain, the distinction may be dispositive as to whether a privilege applies); Breathablebaby, LLC v. Crown Crafts, Inc., No. 12-cv-94, 2013 WL3350594, *10 (D. Minn. May 31, 2013) (opinion/order of Magistrate Judge) ("requiring individual entries for each e-mail in a chain helps to ensure that parties do not bury non-privileged communications in e-mail chains that were forwarded to counsel for legal advice"), adopted by District Judge, 2013 WL3349999 (D. Minn. July 1, 2013).

Respondents shall, after reviewing all potentially responsive documents in their possession, custody or control, prepare and produce, within 28 days of the date of this ruling, a privilege log with respect to each document (including each email in an email chain) or portion thereof, as to which respondents claim privilege. Respondents shall provide in the log (1) the type of document; (2) the general subject matter of the document, sufficient so that staff may assess the validity of respondents' privilege claims; (3) the date of the document; (4) the identity and affiliation of the sender, direct recipient(s) and all persons copied on each document; and (5) privilege(s) claimed.

B. Respondents' Motion to Compel and Staff's Motion for Protective Order

Respondents' motion to compel seeks a ruling compelling Department staff to: (i) produce documents relating to Part 360 permits and other facilities; (ii) identify all witnesses to the events underlying the allegations in the complaint; and (iii) provide to the undersigned for in camera review twelve documents as to which staff has claimed privilege, to determine whether any portions of such documents are not privileged and should be disclosed. See Respondents' Motion, at 9-16. Staff's motion for a protective order relates to the first portion of respondents' motion to compel, and seeks an order "[s]triking, denying or limiting Respondents' Discovery Demands No. 5, 6, 9, 10, 13, and 15." Staff Motion at 10, Request for Relief ¶ II; see also id. at 9-10, ¶¶ 42-49.

As discussed below, respondents' motion is granted in part, and denied in part.

1. Respondents' Motion to Compel Information Regarding Other Facilities

Respondents' motion to compel does not explicitly state that it seeks an order compelling production of documents in response to any specific demand. The point heading in respondents' motion states that the motion to compel is "for information regarding the application of the DEC General Counsel's letter to the removal of railroad ties for sale out of state." Respondents'

Motion at 9. Respondents' discovery demands do not contain a request explicitly seeking such information. See Respondents' Motion, Ex. 3, Respondents' Combined Discovery Demands dated June 30, 2017 ("Respondents' Demands"), at 6-9, Demand Nos. 1-27.

The discovery demand that comes closest to the substance of this point heading is demand No. 17, which seeks "[a]ll documents that pertain to the process, procedure or method used by DEC to determine whether an entity is exempt from the requirements of Part 360 pursuant to the Caruso letter." Respondents' Demands at 8. Respondents do not mention Demand No. 17 in their motion to compel, and staff stated in its written response to that demand that it does not possess any responsive information. See Respondents' Motion, Ex. 4, NYDEC Staff's Objections and Response to Respondents' Discovery Demands, dated July 17, 2017 ("Staff Demand Response"), at 9-10.

In their motion, respondents mention demand nos. 5, 6, 9, and 10, which relate to Part 360 permits and facilities other than respondents' facility, involved in the transport, sale or remarketing of railroad ties. See id. at 10-11, ¶ 32; see also Respondents' Motion. I interpret respondents' motion as one seeking an order compelling staff to produce documents in response to demand nos. 5, 6, 9, 10.[13]

Respondents essentially argue that they were treated differently than an entity referred to as Ray's Transportation, and that respondents are entitled to documents relating to that entity as well as documents concerning whether the Department has "ever required any other facility to obtain a Part 360 permit for such services." Respondents' Motion at 10-11, ¶ 32. Staff recounts its objections to respondents' demands, and repeats its arguments that (i) the requested information is not part of staff's claims and does not relate to respondents' remaining affirmative defense, and is therefore irrelevant, and neither material nor necessary in the prosecution or defense of the action; (ii) the demands are not limited to any time frame and do not specify the type of Part 360 permit to which the demands relate; and (iii) the demands are unduly burdensome and would require the Department to search every record regarding all C&D debris processing facilities within New York. See Affirmation in Opposition of Jennifer Andaloro, Esq., dated August 14, 2017 ("Staff Opp."), at ¶¶ 18-26; see also Staff Motion 9-10, ¶¶ 43-49.

Both parties have referred to an April 6, 2010 letter from the Department's Office of General Counsel to respondent DeMatteo ("DEC counsel letter"), relating to used railroad ties. See Respondents' Motion, Ex. 3.A. The DEC counsel letter responded to respondents' "inquiries regarding the permit requirements to operate a solid waste management facility … for a facility that will only accept used railroad ties." Id. at 1. The letter states, among other things:

> Used railroad ties are presumed to be part of the solid waste stream and must be disposed of pursuant to ECL Article 27 Title 25, or the laws of the state of disposal, unless it can be demonstrated to the Department's satisfaction that used

[13] Staff's motion for a protective order relates to demand nos. 5, 6, 9, 10, 13 and 15. See Staff Motion at 9. In their opposition to staff's motion for a protective order, respondents state that they have not sought to compel responses to demand nos. 13 or 15, and that "those demands can be deemed withdrawn." Respondents' Opp. at 10, ¶ 27.

> railroad ties containing creosote, with a useful life remaining in them, are sold as a commodity to an end-user outside of the state.

Id. The letter thereafter provides a list of "parameters" under which a facility must operate "[i]n order to satisfy the burden that used railroad ties are a commodity, and not a waste," id., and states further that:

> If a facility fails to satisfy the burden that railroad ties are a commodity, and not a waste, or does not properly manage the ties as a commodity, the Department may require the facility to register or become permitted. If the railroad ties are not waste in the first instance, the question of whether they are adulterated is not reached.

Id. at 2.

Staff apparently relies at least in part on the DEC counsel letter as establishing the circumstances in which a Part 360 permit or registration would or would not be required for respondents' activities with respect to used railroad ties. See e.g. Complaint ¶¶ 39-42. Similarly, respondents apparently rely at least in part on the DEC counsel letter as establishing that respondents did not need a Part 360 permit. See e.g. Respondents' Motion at 3 ("Based on the interpretation provided by DEC's General Counsel to Respondents on this issue, Respondents likewise would not require a Part 360 permit"); see also Respondents' Motion, Ex. 2, Respondents' Demand Response at 5, Response to Demand No. 11 (respondents produced documents "supporting their position that the activities they performed were consistent with the parameters set forth in DEC's April 6, 2010 letter"); Respondents' July 12 Letter, at 5 (characterizing respondents' activities as "consistent with the April 6, 2010 letter"); Respondents' Motion, Ex. 8, Verified First Amended Complaint in Ecology Sanitation Corp. v. Long Island Rail Road Company, Index No. 600135/2016 (Sup. Ct., Suffolk County), at ¶¶ 19, 21 (allegations that respondents' operations complied with the parameters set forth in DEC counsel letter).

The primary issues in this proceeding are whether respondents have operated a C&D debris processing facility, and whether a permit was required. The record is clear that staff's claims, and respondents' affirmative defense, turn in part on whether respondents' railroad tie-related activities complied with the parameters of the DEC counsel letter. Resolution of staff's claims and respondents' defense thus turns on facts specific to respondents' facility and operations, and the requirements for a Part 360 permit relating to C&D processing facilities. Activities of other entities, with respect to railroad ties or other C&D debris, are not material or necessary to the resolution of the claims and defense asserted in this matter.

Moreover, requiring the Department to review all C&D-related files Statewide, with or without a timeframe, would be unduly burdensome, and would not in any event result in the production of documents material and necessary to the prosecution or defense of this proceeding. Respondents' motion to compel is denied, and staff's motion for a protective order is granted.

2. Respondents' Motion to Compel In Camera Review

Respondents move to compel Department staff to provide to the undersigned for in camera review twelve documents withheld in whole or in part based upon staff's claim that they are subject to the attorney-client privilege or the "official information" privilege. Respondents argue that any portions of the documents that contain purely factual information should be produced to respondents, and that the descriptions of document contents for some of the documents are insufficient to establish the basis for staff's assertion of privilege. See generally Respondents' Motion at 12-16, ¶¶ 38-47.

Staff argues in response essentially that the documents withheld under the official information privilege are "communications between Staff that contain recommendations, draft documents, suggestions, opinions, ideas, or advice exchanged as part of the deliberative process of government decision making." Staff Opp. at ¶ 34. Staff states that the final determinations made by staff regarding these issues are reflected in the Notice of Violation issued to respondents, see Staff Opp. Ex. A, and the complaint. See Staff Opp. ¶ 35.

With respect to the three documents withheld under an assertion of attorney-client privilege, staff identifies the persons involved in the communication, briefly describes the documents and process of which they were a part, and re-asserts that the documents are protected. See id. at ¶¶ 37-39. For example, with respect to a January 15, 2014 email, which was withheld in its entirety, staff describes the document as "a response made by Staff to a request of counsel … for information regarding enforcement issues at the facility." Id. ¶ 38. With respect to two emails dated April 2010, staff argues that the documents are protected by the attorney-client privilege but, in the alternative, they are also protected by the official information privilege and, "if necessary, Staff will supplement its privilege log to reflect same." Id. ¶ 39.

Respondents' motion for an in camera inspection of the twelve documents is granted. Staff shall provide the documents to the undersigned within seven days of the date of this ruling. Following my review, I will issue a supplemental memorandum regarding staff's privilege claims with respect to these documents.

3. Respondents' Motion to Compel Witness Identification

Respondents move to compel Department staff to identify all witnesses to the events underlying the allegations in the complaint, as demanded in respondents' discovery demand. See Respondents' Motion at 12, ¶ 36; see also Respondents' Demands at 10. Respondents argue that staff "apparently misunderstood this demand and instead identified the witnesses it intends to call at the administrative hearing." Respondents' Motion at 12, ¶ 36. In response, staff states that it provided a list of witnesses to events that are relevant to this proceeding, which includes activities at the facility and interactions with the owners and operators of the facility regarding the violations alleged in the complaint. See Staff Opp. at ¶¶ 27-28.

In response to staff's motion to compel certain information with respect to witnesses identified by respondents, discussed above, respondents argued that the witnesses were identified by respondents based upon the documents produced by the parties, and that each witness's

involvement may be ascertained from the documents. See Respondents' Opp. at 8, ¶ 20. I agree with respondents that documents produced, or identified in privilege logs, identify persons involved in the events relevant to this proceeding.

To the extent, if at all, staff is aware of any witnesses other than those identified in documents produced by the parties, documents withheld based on privilege, or in staff's list of witnesses who will testify at hearing, staff shall produce a list of such witnesses to respondents within seven days of this ruling

III. Conclusion

A. Staff's motion to compel responses to demand nos. 1.f, 1.g, 2.b, 2.c, 9, 10, 13, 14, and 15 is GRANTED, and respondents' motion for a protective order is DENIED, as discussed in section II.A.1 of this Ruling.

B. Staff's motion to compel responses to its demand for statements, demand for witnesses, and demand for photographs, is DENIED, as discussed in sections II.A.2, II.A.3, and II.A.4 of this Ruling.

C. Staff's motion to compel is GRANTED, and respondents' motion for a protective order is DENIED, with respect to documents as to which respondents have asserted privilege, as discussed in section II.A.5 of this Ruling. Respondents shall review all potentially responsive documents, shall produce responsive non-privileged documents, and shall prepare and produce to Department staff a privilege log, as discussed in section II.A.5 of this Ruling, within 28 days of the date of this Ruling.

D. Respondents' motion to compel information regarding other facilities, as reflected in respondents' demand nos. 5, 6, 9, and 10, is DENIED, and Department staff's motion for a protective order is GRANTED, as discussed in section II.B.1 of this Ruling.

E. Respondents' motion for an in camera review is GRANTED, as discussed in section II.B.2 of this Ruling.

F. Respondents' motion to compel identification of witnesses is GRANTED, as discussed in section II.B.3 of this Ruling.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: September 15, 2017
Albany, New York

APPENDIX A

Matter of Ecology Sanitation Corp., Ecology Transportation Corp. and Ernest DeMatteo, Individually and as Owner and Operator of Ecology Sanitation Corp. and Ecology Transportation Corp., Case No. CO 1-2014-0507-159

Papers Submitted with Respect to Department Staff's Motion to Compel and for a Protective Order

1. Department Staff's Notice of Motion to Compel and for a Protective Order, dated August 7, 2017
2. Motion to Compel and for a Protective Order, dated August 7, 2017 attaching 17 exhibits
3. Affirmation of Jennifer Andaloro, Esq., undated
4. Respondents' Opposition to DEC Motion to Compel and for a Protective Order, dated August 14, 2017, attaching 1 exhibit

Papers Submitted with Respect to Respondents' Motion for a Protective Order and to Compel

1. Respondents' Motion for a Protective Order and to Compel, dated August 7, 2017 attaching 12 exhibits
2. Affirmation of Jennifer Andaloro, Esq. in Opposition, dated August 14, 2017, attaching 4 exhibits