

**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

**RULING ON
DEPARTMENT
STAFF MOTION
TO QUASH**

-by-

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

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

Respondents.

I. Background

The complaint in this administrative enforcement proceeding alleges, among other things, that respondents own and/or operate a solid waste management facility, specifically a construction and demolition (“C&D”) debris processing facility, without a required Part 360 permit, in violation of 6 NYCRR §§ 360-1.5(a)(2), 360-1.7 and 360-16.1(c). See generally Complaint ¶¶ 53-60. Respondents’ affirmative defense asserts that staff’s claims are barred in whole or in part due to the actions of the Department of Environmental Conservation (“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).

On or about October 30, 2017, respondents served personally on David Pollock a subpoena ad testificandum requiring Mr. Pollock to give testimony at the hearing in this proceeding, scheduled to commence on November 8, 2017 at the Department’s Region 1 offices. See Affirmation of Jennifer Andaloro, Esq. dated November 1, 2017 (“Andaloro Aff.”), Exhibit (“Ex.”) A. Mr. Pollock is an environmental engineer employed in the Department’s Region 3 offices.

On November 1, 2017, Department staff filed a motion to quash the subpoena pursuant to 6 NYCRR § 622.10(b)(1)(v), which authorizes an administrative law judge to issue, quash and modify subpoenas upon the request of a party. Staff’s motion was supported by an affirmation of Jennifer Andaloro, Esq. attaching eight exhibits. See Andaloro Aff., Exs. A-H. On November 6, 2017, respondents filed opposition to staff’s motion, attaching three exhibits. See Respondents’ Opposition to DEC’s Motion to Quash dated November 6, 2017 (“Respondents’

Opp.”). Respondents stated in their opposition papers that, depending on other witness testimony at the hearing, respondents might withdraw the subpoena. See Respondents’ Opp. at 3, ¶ 7.

The hearing was commenced on November 8, 2017, and continued through November 9, 2017. Department staff completed its case in chief and rested, and respondents’ first witness completed his testimony. See November 9, 2017 Hearing Transcript (“November 9th Tr.”) at 86:14 (Department rests); 129:25-130:3 (completion of Rigano testimony). The hearing is scheduled to resume on March 6, 2018.

At the hearing, Department staff called two Department employees: (i) James Wade, who has been with the Department for seventeen years, and whose current title is Professional Engineer; and (ii) Lija Jacob, with the Department for six years, and whose current title is Assistant Engineer in Environmental. Both Mr. Wade and Ms. Jacob conducted inspections of respondents’ facility at issue in this proceeding (the “Bohemia facility”), and had contacts with respondent Ernest DeMatteo and his counsel. In addition, Mr. Wade and Ms. Jacob inspected other facilities at which respondents operated prior to respondents’ move to the Bohemia facility.

At the hearing, respondents’ counsel cross-examined both staff witnesses at length. See November 8, 2017 Hearing Transcript (“November 8th Tr.”) at 81:15-194:17, 196:24-199:4 (cross and re-cross of Mr. Wade) and November 9th Tr. at 41:23-79:23; 81:6-86:6 (cross and re-cross of Ms. Jacob).

After reviewing the transcripts of the two days of hearing, counsel for respondents reaffirmed that respondents seek the production of Mr. Pollock to testify when the hearing resumes. See January 3, 2018 email from L. Bennett, Esq. With leave, Department staff thereafter filed a letter in further support of its motion to quash the subpoena. See Letter from J. Andaloro, Esq. dated January 5, 2018.

II. Discussion

Respondents state that they “have never been told why the Bohemia facility required a Part 360 permit,” and that “it is imperative that [respondents] be given the opportunity to explore, to the maximum extent feasible and appropriate, without violating the attorney-client and/or public interest privilege, the circumstances that led to Region 1’s unexplained determination” that a permit was required. Id. at 3, ¶ 6.

Respondents state that Mr. Pollock’s name appears in eight documents listed in staff’s privilege log, which documents relate to “Draft Ecology RR Ties Letter,” “Ecology Compliance issues and enforcement strategy,” “predecisional opinions and recommendations regarding railroad ties operations,” and “settlement negotiations.” Id. at 2, ¶ 3. Respondents argue that these documents demonstrate that Mr. Pollock’s “assistance was enlisted to participate in discussions about the Bohemia Facility on multiple occasions,” and that he “clearly has information relating to the determination by Region 1 that a Part 360 permit was required for the Bohemia facility” at issue in this proceeding. Respondents’ Opp. at 2, ¶ 4.

Respondents thus seek Mr. Pollock's testimony "concerning non-privileged matter that arises from the privilege log," Email from L. Bennett, Esq. dated October 30, 2017, Andaloro Aff. Ex. C, and "intend to ask Mr. Pollock about who was involved in drafting the April 6, 2010 Caruso letter, how they were involved, and the subject matter of the discussions, steering clear of the substance to the extent it is privileged in one respect or another." Email from L. Bennett, Esq. dated October 31, 2017, Andaloro Aff. Ex. E.

Finally, in correspondence sent following the two days of hearing, respondents assert that Mr. Pollock

was clearly involved in discussions regarding DEC's enforcement strategy with respect to Respondents' activities. Thus, his testimony regarding any explanations or determinations provided by Region 1 staff concerning Respondents' activities – and particularly compliance or noncompliance with the parameters – is clearly material to this proceeding.

Email from L. Bennett, Esq. dated January 3, 2018.

In support of its motion to quash, Department staff argues that Mr. Pollock is not a necessary fact witness, that requiring his testimony would unduly burden the Department, and that any factual matters about which he would testify are privileged. See Notice of Motion to Quash dated November 1, 2017, at ¶¶ 1-2.

In response to respondents' submission following the two days of hearing, Department staff argues that respondents

had ample opportunity to, and did, question Region 1 staff member James Wade at length regarding the explanations or determinations provided by Region 1 staff to Respondents. Mr. Wade provided direct testimony as to Respondents' failure to demonstrate compliance with the parameters set forth in the April 6, 2010 Caruso letter.

Letter from J. Andaloro, Esq. dated January 5, 2018. Staff also claimed that producing Mr. Pollock would be burdensome, and that the content of discussions that Mr. Pollock may have had are privileged. See id.

Respondents cite eight documents from staff's privilege log to support respondents' argument that Mr. Pollock should be compelled to testify at the hearing. I have already ruled that respondents were not entitled to production of two of those documents, and respondents did not seek to compel production of the other six cited in their current papers, all of which relate to Mr. Pollock's discussions with other DEC personnel. I agree that the substance of Mr. Pollock's discussions with other DEC personnel regarding the subject matters cited by respondents – drafts of the Caruso letter, enforcement strategy, and predecisional opinions and recommendations regarding railroad tie operations – are clearly privileged. In addition, the documents cited by respondents regarding "settlement negotiations," and any testimony relating thereto, are not admissible.

Staff correctly points out that respondents cross-examined Mr. Wade at length regarding the Caruso letter, Part 360 permits and registrations, the Bohemia facility and other facilities at which respondents operated, and the bases for staff's position that respondents were in violation of legal requirements. See e.g. November 8th Tr. at 109:17-111:21, 125:3-126:23, 132:24-137:13, 142:23-151:23, 155:12-159:12, 162:6-164:4, 172:24-173:12, 189:14-23, 192:22-25, 197:2-199:2. In addition, respondents cross-examined staff witness Ms. Jacob regarding her interactions with respondents and her inspections of the Bohemia and other facilities at which respondents operated.

Respondents have thus examined the two Department staff witnesses with primary responsibility for, and personal knowledge of, inspections of facilities operated by respondents, and ensuring compliance by respondents with respect to the Bohemia facility, including questioning concerning the Department's conclusions that respondent's Bohemia facility did not comply with the Caruso letter, and required a Part 360 permit. In addition, respondents examined Mr. Wade regarding the formulation of the Caruso letter, including the number of internal discussions concerning the letter, when such discussions occurred, who was involved in the discussions, and how they were involved. See November 8th Tr. at 142:23-144:14; see also Andaloro Aff. Ex. E, Email from L. Bennett, Esq. dated October 31, 2017 (stating that respondents "intend to ask Mr. Pollock about who was involved in drafting the April 6, 2010 Caruso letter, how they were involved, and the subject matter of the discussions").

Based on the record before me, nothing indicates that Mr. Pollock, a Department employee located in Region 3, had any responsibility for inspecting any of the facilities at which respondents operated, ever visited or inspected any such facility, or ever communicated with respondents regarding their operations or compliance with legal requirements. Rather, respondents apparently seek to compel Mr. Pollock's testimony regarding "predecisional" discussions he may have had with other Department employees prior to the issuance of the Caruso letter in 2010, and internal discussions regarding settlement negotiations and enforcement strategy prior to the initiation of this administrative enforcement proceeding in 2015. Respondents are not entitled to examine Mr. Pollock with respect to such matters.¹

III. Conclusion

Department staff's motion to quash the subpoena ad testificandum served on David Pollock is GRANTED.

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

Dated: January 29, 2018
Albany, New York

¹ In addition, to the extent if at all that respondents seek to examine Mr. Pollock regarding whether a non-party entity known as Ray's Transportation in Region 3 complied with legal requirements concerning the processing of C&D materials, such testimony is irrelevant to the issue in this enforcement proceeding, which is whether respondents complied with legal requirements concerning the processing of C&D materials.