STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations Environmental Conservation Law Article 25 and Part 661 of the Official Compilation of Codes, Rules and Regulations of the State of New York by	RULINGS OF THE ADMINISTRATIVE LAW JUDGE Respondents' Motion to Dismiss/Compel and Staff's Cross-Motion to Dismiss Affirmative Defenses and for Protective Order
KENNETH GAUL and RICHARD WIEDERSUM, individually and d/b/a KEN-RICH, a New York Partnership, and d/b/a KEN-RICH CORPORATION, Respondents.	Case No. R1-20080313-52

Background

Department of Environmental Conservation (DEC or Department) staff issued a notice of hearing and complaint to the respondents, Kenneth Gaul and Richard C. Wiedersum, individually, and to their d/b/a's, Ken-Rich and Ken-Rich Corporation, on or about August 29, 2008. In the complaint, staff alleges that the respondents failed to obtain a permit pursuant to Article 25 of the Environmental Conservation Law (ECL) and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) for various activities conducted in the adjacent area of a tidal wetland. The location of the alleged activities is 820 Dune Road, Westhampton Dunes, New York, Town of Southampton, County of Suffolk - tax map number 907-2-1-30.2.[1] On March 8, 2002, DEC staff issued to Ken-Rich Corporation a permit (1-4736-05725/00001) that authorized the subdivision of this 2.7 acre parcel. Staff alleges that construction on the property was not authorized by this permit and therefore, the activities performed subsequently - construction of a single family dwelling including decks, stairs, septic system, and placement of fill in the adjacent area - were performed without a required permit. In addition, staff alleges that the respondents also failed to comply with a number of

[1] In footnote 2 of ¶ 12, p. 8 of Mr. Snead's affirmation in support of the respondents' motion, he explains that while the Department staff identify the site at issue as 820 Dune Road, the subdivision resulting from the DEC-issued permit resulted in 3 parcels of land: 818, 820, and 822 Dune Road.

conditions in the permit that was issued relative to this parcel.

The respondents have made discovery requests of the Department staff on two occasions prior to this motion practice and the staff has responded with production of records. However, because the staff did not provide all the documents requested by the respondents, they have moved to compel their production. The respondents have also moved for dismissal of the staff's enforcement proceeding. Staff has moved to dismiss respondents' first, second, sixth and seventh affirmative defenses, and for a protective order.

In these proceedings, staff is represented by Susan H. Schindler, Assistant Regional Attorney, and respondents are represented by J. Lee Snead, Esq., of Bellport, New York.

I have reviewed the following submissions to make these rulings:

1. Notice of pre-hearing conference, hearing and complaint dated August __, 2008
2. Verified answer dated September 10, 2008
3. Respondents' notice for production of documents dated September 10, 2008
4. Respondents' motion to dismiss and alternatively to compel discovery dated October 27, 2008
5. Affirmation of counsel in support of motion to dismiss or to compel discovery dated October 27, 2008 with annexed exhibits 1-7
6. Combined affirmation and memorandum of law in opposition to respondents' motion to dismiss and alternatively to compel discovery and in support of motions to dismiss affirmative defenses and for a protective order dated December 3, 2008 with annexed exhibits A - J
7. Reply affirmation on motion to dismiss and alternatively to compel discovery, and in opposition to cross-motions dated December 18, 2008 with annexed exhibits 1 - 3
8. Affidavit of Gary Vegliante, Mayor of Incorporated Village of West Hampton Dunes dated December 17, 2008 with accompanying exhibits 1 - 4.

Discussion

Motion to Dismiss

CPLR § 214(2)

The respondents have moved to dismiss this enforcement proceeding on the grounds that it is barred by the statute of limitations contained in § 214(2) of the Civil Practice Law and Rules (CPLR) and that it is barred by the State Administrative Procedure Act (SAPA) § 301(1). Staff has responded that CPLR § 214 does not apply to administrative proceedings and that staff has brought these proceedings within the "reasonable time" parameters of SAPA. Staff prevails in their arguments and I deny the respondents' motion to dismiss.

As noted by Ms. Schindler in her affirmation, CPLR § 214 restricts the time for bringing actions "to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." to three years. The Department's administrative enforcement proceedings are not actions pursuant to CPLR § 105(d) and therefore, CPLR § 214 does not apply to them. I have reviewed all of the cases cited by the respondents and none of them support their theory. For example, in the unreported case cited by the respondents, State of New York v. Exxon Corporation, et al, 2002 WL 532101, former Justice Thomas J. Spargo of Albany County Supreme Court applied the 3 year statute of limitations to penalties that the State was seeking in an action in state supreme court concerning violations of the Navigation Law.

In Hartnett v. NYCTA, 86 NY2d 438 (1995), another case cited by respondents, a complaint by the Commissioner of the New York State Department of Labor was referred to the Attorney General but because no action was taken by the Attorney General for more than 3 years after the events in question, the court found that the action was time-barred.

The respondents answer this argument by stating that it is fruitless to proceed in this matter because if the Commissioner's order is eventually litigated in state court, it will then be time-barred. Snead Reply Aff., ¶ 8, p. 4. However, in the event that the Commissioner finds the respondents liable for penalties and they fail to comply with his order, the Attorney General will have 3 years from the Commissioner's Order to seek a judgment in supreme court that will enforce the administrative order. At such time, the Attorney General will be bringing an action that is governed by the CPLR. Contrary to the claims of the respondents, there is nothing in ECL § 71-2503 or CPLR § 214 that

limits the Department from commencing an enforcement proceeding when it is seeking penalties rather than injunctive relief or vice versa.

The respondents' motion to dismiss is denied and their first affirmative defense is stricken.

SAPA

Respondents allege that the Department staff has been aware of construction activities on lots 2 and 3 at the location in question since 2003 and 2004. Among other things, the respondents point to documents in staff's files such as the notice of commencement of construction dated February 17, 2003 signed by Robert Strecker for subdivided properties at 820 Dune Road; a certificate of occupancy dated July 26, 2004 obtained by Meadow Crest along with a building permit and photographs of a constructed home; a notice of commencement of construction dated February 27, 2003 signed by Robert Strecker for subdivided properties at 820 Dune Road; a notice of completion dated July 30, 2004 identifying Ken-Rich Corp. as the permittee and both Meadow Crest and Strecker as the contractors. The respondents point to the notices of violation issued to Ken-Rich Corp. by the Department staff in May 2005 and September 2006 as further support of their argument that these proceedings have not been commenced in a timely manner. Moreover, the respondents claim that the Department staff is aware that the respondents have not owned lots 2 and 3 at this location since 2004 and 2002, respectively.

Accordingly, the respondents argue that this proceeding has not been brought within the reasonable time requirement of SAPA § 301(1). The respondents state that their private interests have been prejudiced by the Department's lengthy delay because they can no longer implement the requirements of the permit and thereby mitigate any damages alleged by DEC. The respondents also claim that because the Department staff was aware of the ongoing construction, the respondents relied upon the terms of the General Permit as authority for moving forward with construction. The respondents maintain that they are not responsible for the delay in bringing this matter to a hearing and that the alleged violations are at most "paper" violations and *de minimis*.

The staff has answered these claims by stating that the respondents have failed to meet the criteria set forth in Cortlandt Nursing Home v. Axelrod, 66 NY2d 169 (1985) that have been established by the Court of Appeals to be weighed in

determining whether or not the delay has substantially prejudiced a party requiring dismissal. These four factors are: (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation. The Department staff denies knowledge of the alleged violations since 2003 and 2004 based upon the filing of the notices of commencement and completion of construction. The staff maintains that it considered these notices to be filed in accordance with General Condition # 9 of Ken-Rich Corporation's permit with respect to the DEC-approved subdivision - not actual construction.[2] Staff argues that the respondents have failed to specifically identify what private interests have been compromised by any delay in the proceeding and disputes the respondents' claims that the violations are unimportant stating that penalties are important to deter future violations of the relevant laws. The staff claims that the delay has in fact benefitted the respondents by giving them a longer time to benefit from the funds that would otherwise be paid in penalties. Staff states that the respondents have not identified any information or evidence that is unavailable to them to defend their case.

With respect to the causal connection between the delay and the conduct of the respondents, the staff maintains that the respondents were very familiar with the relevant regulatory requirements. In addition, staff provides that at a March 1, 2007 compliance conference, the respondents committed to supply DEC with the ownership history of the parcels and have failed to do so. Staff states that in April 2008, it attempted to resolve the matter through a consent order and that subsequent delays in reviewing that order and responding to staff were caused by the respondents.

DEC staff emphasize that the critical importance of the regulation of tidal wetlands in New York State outweighs the

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[2] This permit condition states: "[a]t least 48 hours prior to commencement of the project, the permittee and contractor shall sign and return the top portion of the enclosed notification form certifying that they are fully aware of and understand all terms and conditions of this permit. Within 30 days of completion of project, the bottom portion of the form must also be signed and returned, along with photographs of the completed work and, if required, a survey." See, Schindler Aff., Exhibit B, p. 3.

respondents' concerns regarding any delay.

I find that the respondents have insufficiently established that the "reasonableness" of the delay is an appropriate matter for consideration at the hearing. The respondents have failed to state any specific facts relative to how they are prejudiced in their defense of this matter. The respondents have not claimed that they cannot locate witnesses, that the witnesses cannot recollect the pertinent facts, or any other evidence based upon this time lapse. See, Matter of Manor Maintenance Corp. et al. (Ruling of ALJ Edward Buhrmaster, 3/25/92). Accordingly, if they wish to pursue this affirmative defense, they must provide "a statement of facts" in an amended answer pursuant to 6 NYCRR § 622.4(c). Certainly, if the respondents can establish that staff was aware of the construction and failed to act upon it earlier, the respondents may be prejudiced by an inability to mitigate the violations. However, this is not related to the affirmative defense pursuant to SAPA.

While the Department staff alleges that the respondents knew of their permit responsibilities, that is not responsive as to the causal connection between the conduct of the parties and the delay. The staff's statements with respect to delays in review of the draft consent order this past spring allude to recent events and are not relevant to the period between 2003 and 2008. With respect to the importance of adherence to Article 25 and its implementing regulations, I agree with staff that the so-called "paper" violations at issue are critical to the core enforcement capability of the program. Without a permit and adherence to its terms, violations would be even more numerous and damaging.

I do not find, without further evidence, that the respondents' second affirmative defense is a basis for dismissal. If they wish to maintain this affirmative defense, the respondents are directed to submit an amended answer. Otherwise, I will dismiss the defense. In either case, the respondents will be permitted at hearing to present evidence concerning the delay and its impact with respect to mitigation of any penalties.

I deny the respondents' motion to dismiss the complaint, I direct the respondents to submit an amended answer to clarify their second affirmative defense, and I deny the staff's motion to dismiss this affirmative defense at this time.

Affirmative Defenses

I have addressed the respondents' first and second affirmative defenses above. In addition to these, staff has

moved to dismiss the respondents' sixth and seventh affirmative defenses.

An affirmative defense is a matter that is the respondents' burden to plead and prove. See, CPLR 3018(b); New York Practice, 4th Ed., Seigel (2005) at 368-370. CPLR 3211(b) allows a party to move to dismiss a defense if it "is not stated or has no merit." The obvious reason is to avoid addressing matters at trial that have no relevancy to the claims. In evaluating an affirmative defense, a court accepts the truth of the factual allegations of the defense and analyzes whether there are grounds for the defense in question. CPLR 3211(a)(7). Section 622.4(c) of 6 NYCRR requires that the respondent's answer "assert[s] any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted."

The General Permit Authorizes Construction Alleged by the Department

In this sixth affirmative defense, the respondents claim that the Department's proceeding is unwarranted based upon its issuance of the General Tidal Wetlands Permit # 1-4736-01887/00001 dated August 6, 1999 issued to the Village of Westhampton Dunes to conclude the litigation in Rapf v. County of Suffolk, 84 Civ.7659 (EDNY 1994). I understand the respondents' defense here to be that this General Permit authorizes construction in the Village of Westhampton as long as the landowner submits a building application and plot plan/survey to the Village prior to utilizing the permit.

Citing to a letter issued by former regional permit administrator John W. Pavacic (Exhibit E to Schindler Aff.), the Department staff counters that the General Permit was only intended to address the reconstruction of houses previously destroyed by storms "as well as the construction of new homes on existing lots within the village boundaries." The staff claims that lots 2 and 3 of the subject subdivision (818 and 820 Dune Road) were not pre-existing lots and there were no houses destroyed by past storms on these lots. In addition, staff points to special condition # 2 of the permit at issue that provides:

> No regulated activities will be conducted on these parcels (Parcels 1, 2, and 3) until a Tidal Wetlands Permit is issued for each such activity by the NYS Department of Environmental Conservation. The terms and conditions of the West Hampton Dunes General Permit are not

applicable to regulated activities on the three parcels which are authorized to be created by this permit. Exhibit B to Schindler Aff.

In response, the respondents have submitted the affidavit of Gary Vegliante, the mayor of the Village of West Hampton Dunes. In his affidavit, Mayor Vegliante states that as mayor of the Village since 1993, he has been very familiar with the circumstances regarding the cited Rapf litigation and its resolution. He maintains that the statements from Mr. Pavacic's memorandum are wrong and that the General Permit "was designed to make whole all of the landowners and residents of the Village of West Hampton Dunes who had either lost or had their homes damaged due to the actions of the State, the County and the Federal government in improperly constructing a beach erosion control and hurricane protection project, as well as to provide a mechanism for building, rebuilding and repairing existing and new homes within my Village." Vegliante Aff., ¶ 8. Mayor Vegliante cites to the Stipulation of Settlement and Consent Judgment in Rapf at 24, §12(b)(1): ". . . allowing the building, rebuilding or repair of structures in the Damage Area substantially within the same footprint as, and with no greater ground area coverage than, existed prior to the damage or loss; and, in the case of a lot on which there never had been a structure, allowing the building of a structure in compliance with the Tidal Wetlands Act and other applicable laws and regulations[.]"[3]

Mayor Vegliante further alleges that prior to October 21, 1994, there existed three structures at 820 Dune Road and as of the 2002 subdivision permit, two of the structures still remained in the same locations as the present structures at 818 and 820 Dune Road. The mayor states that the process for applying the General Permit is to have landowners apply to the Village Building Department and the Chief Building Inspector who then coordinate with DEC to confirm compliance with the General Permit. Vegliante Aff., ¶ 14.

Mr. Pavacic's memo is one interpretation of the General Permit and may not be a correct one. Yet even if the mayor is correct in his view of the General Permit's applicability, issues are raised by Mayor Vegliante's affidavit as to what structures, if any, existed on the relevant site prior to the settlement in Rapf and/or whether these structures fall under the intent of the General Permit. Other questions that are raised by these

[3] Only a portion of this stipulation is provided in the respondents' reply as Exhibit 2 to Mr. Snead's affirmation.

competing versions of the applicability of the General Permit are whether the structures that were built are "substantially within the same footprint." And, if there were no previously existing structures, the very terms cited by the mayor provide for compliance with Article 25 - e.g., application for a tidal wetlands permit.

But the fundamental difficulty with this defense is that there can be no question that the permit issued to the respondents by DEC specifically puts the actions of the respondents outside of the provisions of the General Permit. Presumably, they were aware of those restrictions when the permit was issued to them. See, Exhibit B to Schindler Aff., p. 4, ¶ 2. A permit confers on a person the right to do something which has been subjected to regulation. See, Madden v. Queens County Jockey Club, 296 N.Y. 249 (1947). It confers a personal privilege to be exercised under existing and future restrictions. See, People ex rel. Lodes v. Department of Health, 189 N.Y. 187 (1907). Regardless of whether the General Permit could have applied to the subject site, the respondents agreed to be bound by the terms of the tidal wetlands permit in order to proceed with their subdivision. As the permit specifically prohibited further work without a permit, I find that this defense is inapplicable.

I grant staff's motion to dismiss this affirmative defense.

Abuse of Process

The respondents claim in their seventh affirmative defense that the Department's "initiation and continuation of this enforcement proceeding is punitive, violative of lawful procedure, frivolous, discriminatory, and an abuse of process, and is undertaken for reasons not governmental but for the otherwise improper and personal motives of a member or members of the Department's staff . . ." The respondents claim that a DEC staff member procured the use of the respondent Kenneth Gaul's property for fire-fighting training and when this property was not made available to this staff member, he retaliated by initiating these proceedings. Answer, ¶¶ 76-88.

The staff argues that these claims are constitutional ones that cannot be addressed in an administrative forum. Staff maintains that these claims of the respondents are false and only meant to distract attention from the violations and that claims of selective enforcement are not adjudicable in DEC proceedings. Schindler Aff., pp. 17-19. In their reply, the respondents point to the Vegliante affidavit for factual support of their claims

and also assert that selective enforcement is not their defense but rather abuse of process. Respondents agree that constitutional and selective enforcement claims must be brought in the courts. Snead Reply Aff., ¶¶ 42-51. In support of their arguments, the respondents cite Parkin v. Cornell University, 78 NY2d 523 (1991), a case brought by Cornell employees against the University for abuse of process - the filing of criminal charges. Abuse of process is a tort that can be addressed in court. Dobbs, *The Law of Torts*, § 440, pp. 1241-1243 (2000).

In Chief Administrative Law Judge (CALJ) McClymonds' ruling in Matter of McCulley, (9/7/07), he states that to prevail on a defense of abuse of process, respondents must establish: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. See, Curiano v Suozzi, 63 NY2d 113, 116-117 (1987). With respect to the third element, if the legal process is used for the immediate purpose for which it is intended, the motives of the party, even if malicious, will not give rise to an abuse of process claim. *Id.* at 117; Hauser v. Bartow, 273 NY 370, 373 [1937]). The conduct complained of must include some interference with property or person - the commencement of a proceeding is insufficient to establish this claim. Curiano, *supra* at 116.

Accordingly, it appears that the respondents' claim is more one of wrongful civil litigation. Dobbs, *The Law of Torts*, *supra*, § 436, pp. 1228-1229. In McCulley, CALJ McClymonds explains that "[a]n essential element of a malicious prosecution claim is that the proceeding terminated in favor of the defendant or respondent [citing Curiano v. Suozzi, *supra*]. Such a claim cannot be interposed as a defense in the very civil action or proceeding that is claimed to be wrongly instituted [citing Sasso v. Corniola, 154 AD2d 362, 363 (1989)]."[4]

The staff has the burden to prove by a preponderance of the evidence that the respondents violated the applicable law and regulations. 6 NYCRR § 622.11(b). The Department staff must prove that the respondents are in violation of Article 25 and

[4] Malicious prosecution can only be asserted with respect to a criminal prosecution; however wrongful civil litigation, based upon similar elements, may be pursued with respect to civil or administrative proceedings. *Law of Torts*, *supra* at §§ 430, 436, pp. 12-15, 1228-1229.

Part 661 in order to prevail in this matter. If the respondents believe that there has been abuse of process/wrongful civil litigation, they may pursue this claim in a court of law and/or file a complaint with the Commission on Public Integrity, or the Attorney General's Public Integrity Bureau. This forum can offer no relief.

While I do not find abuse of process (or wrongful civil litigation) to be appropriate affirmative defenses, I will allow the respondents to present evidence at the hearing with respect to the matters asserted by Mayor Vegliante vis a vis the Department staff's presence at the site during construction. The mayor alleges in his affidavit that staff members were present at 820 Dune Road, were involved in siting the homes, and observed ongoing construction there. Vegliante Aff., ¶¶ 4 - 6. I believe that such evidence is relevant to the allegations and the potential mitigation of any penalties. While normally the State is not estopped from enforcing its laws (see, Matter of Francesca Scaduto, ALJ Report, http://www.dec.ny.gov/hearings/50081.html), if the respondents can show that a staff member with supervisory responsibility for the enforcement of the Tidal Wetlands Act observed the construction and did not take timely action with respect to the alleged violations, I find that is relevant to the issue of mitigation. Because these contentions are also relevant to the respondents' SAPA claims, that may be the appropriate time to consider them.

I grant staff's motion to strike the seventh affirmative defense but will consider evidence of the staff's alleged observations of the construction as set forth above.

Fourth Affirmative Defense - Failure to Join Necessary Parties

In their fourth affirmative defense, the respondents assert that because none of the named respondents had title to either Lots 2 or 3 when the construction upon these lots was conducted, the Department has failed to name the individuals responsible for the alleged activities and no effective determination can be made without their inclusion. As I stated in Matter of ExxonMobil Corporation (ALJ Ruling, 9/23/02), it is solely up to the discretion of staff as to whom it decides to prosecute. As noted above, the Department staff has the burden of proof in this matter and if it fails to establish the respondents' liability, the Commissioner will find for the respondents. The staff may pursue these other landowners in a separate proceeding if it wishes. In any case, the respondents will be permitted to present evidence of the ownership at the times in question and this does not require the joinder of these additional parties.

As noted in his ruling on the motion to join a third party in Matter of Karta Corp. (12/8/08), CALJ McClymonds found that the respondent seeking joinder could subpoena the third party in question. So too can the respondents here subpoena the landowners that they contend are responsible for the construction at issue.

Although staff did not move to dismiss this affirmative defense, I have decided to take this action *sua sponte* in order to ensure that there is no expectation that these additional parties will be added to this proceeding without the staff's decision to take such action.

Discovery

The respondents have sought discovery from the Department staff on several occasions. According to Ms. Schindler, on July 23, 2008, the staff provided documentation in response to Mr. Snead's June 25, 2008 verbal request. Schindler Aff., p. 2, ¶ 3. On September 15, 2008, the staff received respondents' notice for production of documents that accompanied their answer. *Id.*, ¶ 6. According to Ms. Schindler, the respondents agreed to give staff until the October 16, 2008 pre-hearing conference to respond. *Id.* On October 28, 2008, staff received respondents' motion to dismiss and alternatively to compel discovery and the respondents agreed to extend the staff's time to respond to December 3, 2008. *Id.*

My understanding from reading the parties' motion papers is that the respondents are satisfied, in part, with the Department staff's production of materials. The respondents made 18 numbered requests in their September 10, 2008 document request. Of these, the staff's responses to those numbered 1, 2, 3, 6, 10 and 11 are not in dispute. Moreover, the respondents agree that if there are no documents that are responsive to request number 9, production cannot be compelled.

Section 622.7(a) allows discovery in DEC enforcement proceedings to be as broad as provided under Article 31 of the CPLR. Section 622.7(b) requires that the requested documents must be furnished within 10 days of receipt of the discovery request unless a motion for a protective order is made. Pursuant to 6 NYCRR § 622.7(c), a party may seek a protective order to deny or limit the use of any disclosure device "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." What discovery documents are "material and necessary" in an action is determined by a test of usefulness and reason. Allen v. Crowell-Collier Publ. Co., 21 NY2d 403, 407

(1968). The documents that meet this test will be those that would logically be obtained to prepare for a hearing. *Id.*, at 407. The burden of meeting discovery requirements must be weighed against the benefits that information will provide the seeker. Andon v. 301-304 Mott St. Associates, 94 NY2d 740,746 (2000).

In this matter, it appears that the Department staff determined that it was appropriate to provide some but not all of the documents sought by the respondent but failed to make a motion for a protective order until it was faced with a motion to compel discovery.[5] Below is my analysis of the requests, the Department staff's objections, and my rulings with respect to each one.

Document Request Nos. 4, 5, 7, 8, 17

In these requests, the respondents are seeking: 4) copies of all correspondence between the Department and its employees with respect to this matter; 5) copies of correspondence between and documents received from the Department and the Town of Southampton with respect to 818 or 820 Dune Road; 7) copies of all memoranda of correspondence, telephone calls, e-mails, voice mail messages, or statement received from the Department and any other person concerning 818 or 820 Dune Road; 8) copies of all memoranda of correspondence, documents sent or received between the County of Suffolk, Town of Southampton, Town of Southampton Trustees, or Village of Westhampton Dunes or representatives of these entities regarding 818 or 820 Dune Road; and 17) unredacted copies of any document forwarded by Charles T. Hamilton to any

[5] In her affirmation, Ms. Schindler responds to this failure to object by noting that she sent the respondents' counsel a letter dated October 14, 2008 with her correspondence of October 28, 2008 to Mr. Snead that details staff's objections to the discovery request. See, Schindler Aff., p. 25, ¶¶ 14-16; Exhibit G. Staff had meant to include this letter with the documents staff had prepared for the October 16, 2008 conference. *Id.*, ¶ 15. In any case, the letter described is short and states the Department's objection to items 12-16 and 18 based on relevance. In addition, this letter describes five documents excluded on the basis of attorney-client and deliberative privileges. Exhibit G. Apparently, until Ms. Schindler included this letter with her October 29, 2008 letter to CALJ McClymonds regarding the parties' agreement to extend staff's time to file its response to the respondents' motion, the respondents had not received it.

other person, agency department, municipal or other local government or board, or board of trustees, with regard to the subject properties known as 818 or 820 Dune Road.

In Ms. Schindler's affirmation she recites the documents that the Department staff has provided to the respondents in reply to these requests. In addition, she states that "[t]he Department has already provided all documentation in its possession that are responsive to [these requests], both through their initial document request [June 25, 2008] . . . and with [the September 10, 2008 demand.]" If that is the case, the Department staff cannot produce what it does not have in its files. Therefore, it is puzzling as to why Ms. Schindler goes on to criticize the respondents' requests as a "fishing expedition" and lacking in specificity. Accordingly, my ruling is to require the staff to review their files again and to produce any responsive documents to these 5 requests that have not been previously provided to the respondents. In the event that such review confirms that the Department staff has no other documents responsive to these requests, I direct that Ms. Schindler make a written representation to that effect.

Document Request No. 12

In this request, the respondents seek "[c]opies of any Departmental field logs or reports regarding ongoing construction on properties within the Incorporated Village of Westhampton Dunes, New York made by the Department during the time period December 1, 2002 through July 30, 2005, inclusive." The Department staff objects to this demand on the ground that this activity is unrelated to the construction at issue.

The respondents support their demand for this information by stating that from January 2000 through December 2004, there was much residential construction in the Village of Westhampton Dunes that would likely require DEC permits and inspections. Snead Reply Aff., ¶ 52. Mr. Snead argues that information regarding these inspections would assist in the identification of DEC's knowledge of ongoing construction in the area. *Id.* In addition, the respondents claim that this information would relate to how the Department handled other ongoing projects that were authorized under the General Permit.

I agree with staff that this demand is not relevant to this proceeding. How the Department staff handled other projects and permits is not related to the facts at issue here. The respondents imply that if the staff was inspecting another building site, it may have also taken notice of what activity was

ongoing on the site in question. However, that is too speculative. And, as I have ruled that the affirmative defense regarding the General Permit is stricken, information regarding other projects authorized by this permit is irrelevant.

I deny the respondents' motion to compel the production of records responsive to document request number 12 and grant the staff's motion for a protective order on these documents.

Document Request Nos. 13, 14, 15, 16, 18

In requests numbered 13 - 15, the respondents are seeking documentation regarding the Department-sponsored or run instruction on fire-safety, fire-fighting, or smoke-jump education. The Department staff objects to these demands on the grounds that they seek no other purpose than to "harass and embarrass the Department, and cause the Department unnecessary expense and further delay this case." Schindler Aff., ¶ 25. In addition, the staff argues that these items relate solely to the respondents' abuse of process affirmative defense which is not appropriate for this forum.

Respondents maintain that they have set forth sufficient facts to support a relationship between Mr. Hamilton's involvement in the fire safety program and the housing of attendees in respondents' property and the termination of that arrangement and the commencement of these proceedings. Snead Aff., ¶¶ 54 - 55.

Because this information pertains exclusively to the abuse of process defense raised by the respondents and which I have stricken, I find that the demand for its discovery is not relevant. Accordingly, I grant staff's motion to preclude discovery of these records and deny the respondents' motion to compel their production.

In document requests numbered 16 and 18, the respondents seek copies of the diaries or daily work schedules for Mr. Hamilton from January 1, 2003 through July 30, 2005 and unredacted copies of any document forwarded by Mr. Hamilton to any other entity with respect to the 818/820 Dune Road property.

Staff claims that these requests are not relevant to the charges in the staff's complaint and will not lead to the discovery of admissible evidence. Schindler Aff., ¶ 25. In addition, staff raises objections based upon two privileges - attorney client and deliberative. Schindler Aff., ¶ 20. The respondents assert that these materials relate to the timing of

staff's review of the alleged violations and the Department staff's knowledge of construction activities in the community. Snead Aff., ¶ 48. Accordingly, the respondents conclude that the materials relate to "the delay the department has shown in bringing this enforcement hearing." *Id.*

With respect to request number 16, I agree with the respondents that these records could reveal information relevant to the staff's knowledge of the construction at the subject property and I direct staff to provide the material for that purpose. This material may relate to mitigation of penalties based upon the staff's alleged implicit approval of the activity. Of course, any diaries subject to production are only Mr. Hamilton's DEC diaries and not personal ones. With respect to any claims of privilege the staff is making concerning these documents, I direct staff to present copies of these documents to me along with an index that specifically recites how these privileges relate to each document.[6] The index should be made available to the respondents as well. I will review the records *in camera* (see, Matter of Mt. Hope Asphalt Corp., *et al*, [Ruling of ALJ Kevin Casutto, 12/17/94]) and make a determination as to the applicability of these claims.

As for document request number 18, this request is relevant and I believe it is subsumed by request numbers 4 - 8. To the

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[6] Mr. Snead acknowledges that any communications subject to attorney-client privilege are not discoverable. Snead Reply Aff., ¶ 62. However, the respondents do not concede to the "deliberative process privilege." *Id.*, ¶¶ 63 - 67. Respondents seem to be confusing this privilege with the material prepared for litigation or attorney work product privileges. The deliberative privilege is an established evidentiary privilege against disclosure of inter- and intra- agency documents containing recommendations which comprise part of a process by which agency decisions and policies are formulated. Deliberative documents constitute or reflect the "mental processes" of the agency. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The privilege covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). Based upon my review of the staff's documents and its index identifying how this privilege is asserted, I can determine whether the privilege is properly asserted or not and/or whether the documents should be released subject to redaction.

extent, if any, that the staff has not produced any of these records, I direct them to do so subject to the ruling I have made with respect to privilege. By making this ruling, I do not alter my determination that the abuse of process defense is stricken. These records may relate to any number of issues related to this proceeding such as the staff's knowledge of the construction at the site.

CONCLUSION

I deny respondents' motion to dismiss and I grant staff's motion to strike the respondents' first, sixth, and seventh affirmative defenses. I have also determined to strike the fourth affirmative defense. I deny staff's motion to strike the respondents' second affirmative defense at this time but direct the respondents to submit an amended answer by February 12, 2009 to clarify their second affirmative defense. While I have agreed to strike the seventh affirmative defense, to the extent that the respondents' proof with respect to Department staff's activities relates to staff's knowledge of the alleged illegal activities and may constitute a basis for mitigation of any penalties, I will consider it.

With respect to the discovery motions, I direct staff to review the relevant files in detail and by no later than February 12, 2009 to provide written confirmation that they do not possess additional materials that are responsive to respondents' document request numbers 4, 5, 7, 8, 17, and 18. In the event that it finds additional documents responsive to these requests, it will produce those documents to the respondents by no later than February 12, 2009 subject to my ruling on any claims of attorney-client or deliberative privileges.

I deny the respondents' motion to compel production of records responsive to document request numbers 12, 13, 14, and 15.

I direct the staff to prepare an index of the any records responsive to the respondents' document request numbers 16 and 18 indicating specifically how any claims of attorney-client or deliberative privilege apply. The index is to be produced along with copies of the records to me by no later than February 12, 2009 with a copy of the index sent to Mr. Snead. In the event that staff determines not to continue to assert any privilege with respect to any of these records, it is directed to provide the documents to the respondents by February 12, 2009.

Dated: January 12, 2009
Albany, New York

/s/
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Helene G. Goldberger
Administrative Law Judge