

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 24 of the New York State Environmental Conservation Law (“ECL”) and Section 663.4(20) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

**RULING ON
MOTION TO
COMPEL**

-by-

DEC Case No.
R4-2015-0105-1

**ALEXANDRO GIACOMELLI,
ORCHARD EARTH & PIPE CORP., and
STEWART’S LOGGING, INC.,**

Respondents.

Procedural Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation (“Department”) that respondents violated 6 NYCRR § 663.4(20) when fill was deposited in Class 1 freshwater wetland ON-6 and its adjacent area, located in the Town of Oneonta, Otsego County. The second amended complaint alleges that respondents Orchard Earth & Pipe Corp. (“Orchard”) and Stewart Logging, Inc. (“Stewart”) deposited the fill in the wetland and adjacent area located on property owned by respondent Alexandro Giacomelli, with the knowledge of Mr. Giacomelli, and on neighboring property owned by Norfolk Southern Railway Company.

Currently before me is Department staff’s motion (i) to compel respondents Orchard and Stewart to state in writing, within five days of the ruling on this motion, whether respondents have withheld documents in response to staff’s first notice for production of documents and, if respondents have so withheld, and (ii) to require respondents to submit to Department staff, within ten days of the ruling, a notice pursuant to CPLR 3122(b) regarding the basis for withholding the documents and certain identifying information with respect to the documents. Staff further requests that, if respondents do not provide the notice required pursuant to CPLR 3122(b), that respondents be directed to submit the withheld documents to the undersigned, within 30 days of the ruling, for an in camera review and determination of whether respondents properly withheld the documents.

In support of its motion, staff served respondents Orchard and Stewart by certified mail,¹ with a Notice of Motion and a Motion to Compel attaching seven exhibits.² In response to staff's motion to compel, respondent Orchard served an affirmation of counsel dated August 10, 2017, attaching respondent Orchard's response to staff's notice to produce.³

Respondent Orchard stated in its response to staff's motion that it did not produce a privilege log because it did not claim privilege with respect to any of staff's document requests. See Affirmation of Steven C. Shahan, Esq., dated August 10, 2017, at ¶ 16. Orchard also stated that it had objected to one request as vague and overbroad, and staff never sought to narrow the request and did not move to compel production of documents related thereto. See id. ¶¶ 9, 10. Finally, Orchard offered (i) to produce a copy of the entire contract file relating to this site, comprised of approximately a thousand pages, if staff would pay the copying costs; or (ii) to provide staff with an opportunity to review the entire file at a mutually convenient time, and allow staff to select documents that it wishes to copy. See id. at ¶¶ 11-13.

Following receipt of Orchard's response to staff's motion to compel, staff withdrew the motion as against respondent Orchard. See Email from D. Tinsley, Esq., dated August 15, 2017 (copied to all parties).

Respondent Stewart has not filed any papers in response to staff's motion.

Discussion

Pursuant to CPLR 3122(b), a person who, in response to a notice to produce documents, withholds one or more documents that appear to be responsive, must provide notice to the requesting party that the documents are being withheld. The notice must indicate the legal ground for withholding each document and must provide several pieces of information as to each such document, unless providing such information would result in the disclosure of privileged information.

Department staff served its notice for production of documents on respondent Stewart by certified mail on or about January 12, 2016. See Affirmation of Dusty Renee Tinsley dated July

¹ It is not necessary to serve motion papers by certified mail; first class mail is sufficient. See 6 NYCRR § 622.6(a) (stating that CPLR 2103 governs the service of papers, and identifies various methods of serving papers, not including certified mail).

² Staff's papers do not reflect whether staff also served respondent Giacomelli. Even though staff does not in its motion papers seek any relief against respondent Giacomelli, the regulations require that motion papers be served on all parties. See 6 NYCRR § 622.6(c) ("Motions ... must be filed in writing with the ALJ and served upon all parties"). Department staff is directed to provide copies of the motion papers to respondent Giacomelli immediately upon receipt of this ruling.

³ Respondent Orchard served its responsive papers on all parties, by first class mail. See Affidavit of Service by Mail of Michele Ciamarro, sworn to August 10, 2017.

31, 2017 (“Tinsley Aff.”), at second unnumbered page, ¶ 6.⁴ Respondent Stewart received the notice for production and produced documents in response. See id. at second unnumbered page at ¶ 7, and id. at third unnumbered page at ¶ 10.⁵ Respondent Stewart did not, however, provide to Department staff a written notice that it had withheld from production any documents otherwise responsive to staff’s request. See id. at third unnumbered page, ¶¶ 10, 14.

Department staff thereafter sent an email to respondent Stewart specifically requesting that Stewart produce a privilege log associated with its responses. See Motion to Compel, Exhibit 5. Staff received no response to that email. See Tinsley Aff. ¶ 13.⁶

Department staff states that it “has not received the required CPLR §3122(b) notice[]” from respondent Stewart. See id., ¶ 14. Staff has submitted no evidence, however, that respondent Stewart has withheld any documents responsive to staff’s requests, or claimed privilege with respect to any responsive documents. Staff has not submitted a copy of respondent Stewart’s written response to staff’s requests, and has not otherwise stated that respondent Stewart interposed any objections to a specific document request or part thereof.

The notice under CPLR 3122 is “required” only where the responding party has withheld responsive documents. Absent the service of a CPLR 3122(b) notice by a responding party, there is admittedly no way for the requesting party to know with absolute certainty whether the responding party has or has not withheld responsive documents. The Rules of Professional Conduct state in relevant part, however, that “[a] lawyer shall not . . . suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce,” or “conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.” Rules of Professional Conduct, 22 NYCRR 1200, rules 3.4(a)(1), (3).

It would have been helpful for respondent Stewart to submit a response to staff’s motion to clarify the record, and perhaps obviate the need for this ruling; Stewart’s failure to submit any papers, however, does not, without more, provide a basis for granting staff’s motion.

On this record, then, given the lack of evidence that respondent Stewart has withheld any responsive documents or otherwise failed to comply with its ethical and disclosure obligations, I decline to issue an order requiring Stewart to provide the notice, log or other information set forth in CPLR 3122(b). Should information later come to light that respondent Stewart withheld responsive documents and failed to comply with its obligations under CPLR 3122(b),

⁴ It is not necessary to serve document requests by certified mail; first class mail is sufficient. See 6 NYCRR § 622.6(a) and CPLR 2103.

⁵ To assist in achieving clarity with respect to citations to the record, I hereby direct the parties in this proceeding to include page numbering on all pleadings, motion papers, affidavits and other papers filed in this proceeding.

⁶ The record does not reflect whether counsel for staff also attempted to communicate with counsel for Stewart by telephone.

staff may seek appropriate relief at that time.

Based on the foregoing, Department staff's motion to compel is DENIED without prejudice.

Dated: August 16, 2017
Albany, New York

_____/s_____
D. Scott Bassinson
Administrative Law Judge