September 30, 2008

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Office of General Counsel
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Frederick Neroni, Esq.
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Mrs. Tatiana Neroni
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Re: NYSDEC v. Frederick Neroni

Dear Ms. Lapinski, Mr. Neroni and Mrs. Neroni:

Please consider this my letter Ruling on the July 12, 2007 motion of respondent seeking my recusal in the above matter. Department Staff opposed the motion by letter dated July 27, 2007. Mr. Neroni alleges that I granted Department Staffs motion for order without hearing (granted in part by Ruling dated August 16, 2006) when it should have been denied due to lack of subject matter jurisdiction.

The respondent has been found to have disturbed a protected stream located on his property in Hamden, New York. Respondent alleges that an exhibit which was attached to Department Staffs motion was not sufficient to locate the stream on his property and as such, subject matter jurisdiction has not been established. He claims that the map is in his words "impossible to read." The map in question is contained in the Department's regulations at 6 NYCRR §815.9. The map identifies the location of the intermittent stream. In addition to referencing this map in the Fraine affidavit, the Fraine affidavit also attaches a NYS Department of Transportation (DOT) quadrangle map, Quad Map Walton East Quadrangle with the stream drawn on it and the location of respondent's property labeled. Mr. Fraine's affidavit states the DOT map is offered "simply to locate the stream and the site on a map that is easily readable".

(Fraine affidavit, April 20, 2006, paragraph 5) Mr. Fraine identifies the location of the stream on. respondent's property after first explaining his training and background to establish his expertise and knowledge in the area. He then states that he located the stream from the above noted map at 6 NYCRR 815.9 and then after visiting the site to confinn that a stream was located on the property.

Mr. Neroni alleges that I knew the DOT map was not sufficient and was altered and I relied on it to make my ruling on iability with that knowledge.

Section 622.1O(b)(2) of 6 NYCRR provides that "[a]ny party may file with the ALJ a motion ... requesting that the ALJ be recused on the basis of personal bias or other good cause. *(6 NYCRR 622.lO[b}[2}[iii}).* The ALJ's determination on a motion for recusal is part of the hearing record *(see id.; see also* 6 NYCRR 622.17[b]). A denial of such a motion is appealable as of right to the Commissioner, either on an expedited, interlocutory basis, or after the completion of all testimony in a proceeding *(see* 6 NYCRR 622.1O[d][l], [2] [i]). The State Administrative Procedure Act (SAPA) also contains a provision concerning the recusal of a hearing officer. SAPA section 303 provides that "[u]pon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding."

The New York State Bar Association' Committee on Professional Ethics has expressly concluded that the provisions of the Code of Judicial Conduct governing judicial disqualification are applicable to ALJs *(see* 1991 Opns NY State Bar Assn Comm on Professional Ethics 617). In addition, the New York Court of Appeals has held that ALJs are subject to Judiciary Law section 14, which codifies common law grounds for disqualification of judges by reason of interest or consanguinity that parallel similar grounds in Canon 3(E) *(see Matter of Beer Garden, Inc. v New York State Liq. Auth., 79 NY2d 266, 278 [1992]).* Public Officers Law section 74 establishes a code of ethics applicable generally to officers and employees of State agencies and, therefore, to ALJs employed by such agencies. The standards for disqualification contained in these various sources are therefore appropriately considered on this motion (see also Rules of the Chief Administrator of the Court, 22 NYCRR 100.3[E] [regulatory codification of Canon 3(E)]).

I have no personal bias or prejudice concerning either of the parties to this proceeding, nor do I have any personal knowledge of disputed evidentiary facts concerning the proceeding (see Canon 3[E][l][a]; 22 NYCRR 100.3[E][l][a]; see also *Matter of 1616 Second Ave. Rest., Inc. v New York State Liq. Auth., 75NY2d158, 161-162 [1990]).* The only knowledge I have of the matter is based upon the papers submitted by the parties. I have no knowledge that the map attached to the Jerome Fraine affidavit is inaccurate and Mr. Neronisubmitted no proof that the map in question was altered to falsely identify a stream on his property.

Mr. Neroni seems to imply that I relied on the DOT quad map as the sole evidence in deciding Department Staffs motion for order without hearing. As Mr. Neroni is aware, Department Staff submitted an affidavit of Department biologist Jerome Fraine dated A.pril 20, 2006 in support of the motion. The affidavit had eight exhibits. Also, a second affidavit of Mr. Fraine was submitted in support of Department Staffs motion, that affidavit was dated June 12, 2006. The motion was also supported by the affirmation of DEC attorney Ann Lapinski. Photographs of the site were submitted in support of the motion and Mr. Fraine referenced

several site visits he made to confinn that a stream was located on the property. Mr. Neroni fails to address the remaining proof in the case and the role it played in establishing subject matter jurisdiction.

Mr. Neroni has made several statements in his motion to recuse questioning the honesty and motives of Department Staff and myself. However, I have seen no evidence of dishonesty on the part of Department Staff. I also have not lied to the parties in this action, despite Mr. Neroni's allegations that I have lied. I have seen no proof that any evidence was tampered with and accept the explanation of DEC Attorney Ann Lapinski concerning the map Mr. Neroni questions.

RULING

Mr. Neroni's motion is denied. Mr. Neroni also moved to vacate the August 2006 Ruling but he brought the same motion on the same grounds on June 5, 2007 and the motion was denied and it will not be heard again at this time.

As noted above, an ALJ ruling denying a motion for recusal may be appealed as of right to the Commissioner on an expedited, interlocutory basis (see 6 NYCRR 622.1O[d][2][i]). Any ruling of an ALJ may also be appealed to the Commissioner at the conclusion of proceedings before the ALJ (see 6 NYCRR 622.lO[d][l]).

Ordinarily, an expedited interlocutory appeal must be filed within five days after the date of the ruling, ten days if notification of the ruling is by ordinary mail (see 6 NYCRR 622.6[e][l], [b][2][i]). To avoid prejudice to any party, the ALJ is authorized to extend any time period provided by the regulations (see 6 NYCRR 622.6[£]).

Accordingly, if respondent wishes to pursue an expedited appeal at this time, any such appeal must be received at the Office of Commissioner Alexander B. Grannis (attention: Louis A. Alexander, Assistant Commissioner for Hearings), New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233, no later than the close of business on October 15, 2008. Moreover, a response to any appeal is authorized and must be received no later than the close of business on October 27, 2008.

Any appeal and response sent to the Commissioner's Office must include an original and one copy. In addition, one copy of all appeal and response papers must be sent to opposing counsel and to me at the same time and in the same manner as to the Deputy Commissioner. Service upon the Deputy Commissioner of any appeal or response thereto by facsimile transmission (FAX) or e-mail is permitted as long as a hard copy follows by overnight delivery.

Molly T. McBride

Administrative Law Judge