STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 33 of the New York State Environmental Conservation Law ("ECL") and Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR")

-by-

SATUR FARMS, LLC,

Respondent.

RULING OF THE ADMINISTRATIVE LAW JUDGE

DEC Case No. CO 1-20031229-415.

Background

This ruling addresses a discovery dispute in the above-referenced matter, which involves alleged violations of regulations governing the use and application of pesticides. This matter was assigned to me on February 19, 2010, by Chief Administrative Law Judge ("ALJ") James T. McClymonds, who oversaw it after the previously assigned ALJ, Kevin J. Casutto, left the Office of Hearings and Mediation Services in January, 2009. Upon taking the assignment, I set up a conference call with the parties' counsel, which was held on March 5, 2010, to discuss the matter's status. The call included Jennifer L. Maglienti (for Department of Environmental Conservation ("DEC") Staff) and Eric J. Bressler (for Respondent).

This matter was placed on the hearing calendar after former DEC Staff counsel Alyce M. Gilbert filed a statement of readiness dated October 16, 2007. Although hearing dates were scheduled, the hearing did not go forward, due to DEC Staff's understanding that it had reached a settlement with Respondent, which prompted Staff to cancel the arrangements for a January 3, 2008, hearing date. When no consent order was executed, DEC Staff requested in April 2008 that the hearing be rescheduled, and at the same time moved to amend the complaint, which had been amended once previously. Respondent objected to the motion, but it was granted by ALJ Casutto in a ruling dated June 10, 2008. DEC issued its second amended complaint, dated June 11, 2008, and, after Respondent's motion for a more definite statement was denied by ALJ Casutto on July 31, 2008, Respondent filed its answer to the second amended complaint, dated August 6, 2008. Ms. Gilbert subsequently left DEC and Ms. Maglienti

became DEC Staff's attorney of record. Since then, the parties have had additional settlement talks, but the matter remains unresolved.

During the March 5, 2010, conference call, Ms. Maglienti said she wanted additional discovery of Respondent prior to rescheduling this matter for hearing. Mr. Bressler said he would oppose such discovery, and, seeing there was no agreement on this point, I directed that the parties proceed in accordance with Section 622.7 of Title 6 of the Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which controls discovery in all administrative enforcement proceedings brought pursuant to the Environmental Conservation Law ("ECL") and DEC regulation.

More particularly, in a letter dated March 5, I directed DEC Staff to make its request for additional documents by March 19. I granted Respondent 10 days from receipt of the request to either furnish the documents or move for a protective order. In the event Respondent moved for a protective order, I granted DEC Staff 10 days from service of the motion to file its response. Once discovery was completed, I wrote, hearing dates would be established.

Subsequently, DEC Staff served a set of 19 discovery demands, dated March 17, on Respondent's counsel, who then filed a motion, dated March 29, to strike such demands in their entirety. On behalf of DEC Staff, Ms. Maglienti filed an affirmation in opposition to the motion to strike, dated April 8, 2010. All submittals were timely and have been considered in this ruling.

By letter of April 14, 2010, Mr. Bressler sought leave to serve and file a reply to Ms. Maglienti's affirmation. I denied this request in a letter dated April 23, 2010, indicating that I had reviewed both parties' papers and did not find that additional submittals were necessary to decide the pending motion.

Position of Respondent

Respondent opposes DEC Staff's discovery demands on three grounds. First, Respondent argues that the passage of almost nine years between the incidents alleged in the complaint and the discovery now sought by DEC Staff warrants striking the demands as untimely. Second, Respondent argues that DEC Staff waived all discovery in the statement of readiness it filed in

October 2007, and therefore discovery now would be improper. Third, Respondent argues, particular Staff demands are vague, overbroad, duplicative of each other, and irrelevant to or outside the scope of the complaint. Overall, Respondent contends that the demands constitute an improper fishing expedition, in derogation of well-defined rules about such demands' scope and content.

Position of DEC Staff

Responding to the motion, DEC Staff argues that its demands are proper because they seek documents that are material and necessary to prosecution of this matter. According to DEC Staff, production of these documents would not result in unreasonable annoyance, expense, embarrassment or prejudice to Respondent, and Respondent has not shown how the timing of the demands is objectionable. According to DEC Staff, its waiver of discovery in the previously filed statement of readiness is of no moment, because, after the statement was filed, the case was "marked off the calendar" by virtue of cancellation of scheduled hearing dates. Finally, DEC Staff says that a motion to strike discovery demands is not allowed by DEC regulation, and was not authorized by me. Staff maintains that in administrative proceedings, a motion to strike may be used to vacate references to factual matters in pleadings or testimony which do not bear any relation to the matter being prosecuted, and that, consistent with 6 NYCRR 622.7(c)(1), the proper way to challenge a discovery demand is by a motion for protective order.

Discussion

A protective order against the discovery requested by DEC Staff is warranted because of DEC Staff's waiver of discovery in the statement of readiness it filed on October 16, 2007. According to 6 NYCRR 622.9(a), a case will be placed on the hearing calendar upon DEC Staff filing a statement of readiness with DEC's hearing office. The statement of readiness must include:

(1) the name, address and telephone number of each of the parties and their attorneys;

(2) a statement that discovery is complete or has been waived or an explanation as to why it hasn't been completed;

(3) an affirmative assertion that a reasonable attempt has been made to settle, and that the case is ready for adjudication; and

(4) a request for setting of a hearing date [6 NYCRR 622.9(b)].

On receipt of a statement of readiness that conforms to these requirements, an ALJ is assigned to hear the case and a hearing date is scheduled [6 NYCRR 622.9(d)].

In the statement of readiness Ms. Gilbert submitted on behalf of DEC Staff, she wrote that DEC Staff had made a reasonable attempt to settle this matter. She wrote that the case was ready for adjudication and that DEC Staff requested a hearing date be set. About discovery, she wrote that DEC Staff had responded to a request Mr. Bressler made on behalf of Respondent, and that "[d]iscovery has been waived by [DEC] Staff." [See copy of statement of readiness, attached as Exhibit "E" to Respondent's motion.]

DEC's enforcement hearing procedures authorize discovery of a scope as broad as that provided under Article 31 of the Civil Practice Law and Rules, and specifically authorize demands for the production and inspection of documents [6 NYCRR 622.7(a), (b)(1)]. In fact, prior to waiving discovery, Ms. Gilbert did make requests for the production of documents [see demands dated January 9, 2007, attached as part of Exhibit "H" to Staff's papers], and sent Mr. Bressler a letter [dated April 19, 2007, part of the same exhibit] alleging that he had not responded to her requests, though she had responded to his.

In the April 19, 2007, letter, Ms. Gilbert wrote that she was "in the process of preparing" a statement of readiness for adjudicatory hearing, to be filed on behalf of DEC Staff, and that she proposed to state that discovery had been waived. She requested that Mr. Bressler notify her if he objected to this decision.

According to Ms. Maglienti's affirmation, following the January 9, 2007, demands, Respondent failed to either furnish the requested documents or file a motion for protective order. According to 6 NYCRR 622.7(c)(2), if a party fails to comply with a discovery demand without having made a timely objection, the demand's proponent may apply to the ALJ to compel disclosure. In her affirmation, Ms. Maglienti writes that "[t]here is no explanation as to why a motion to compel was not filed, in light of the fact that Respondent showed absolutely no inclination of complying with the January 2007 demands," and that in her letter of April 19, 2007, "it appears Ms. Gilbert gave up and considered whether discovery should just be waived."

Consistent with 6 NYCRR 622.9(b)(2), Ms. Gilbert could have explained in her statement of readiness that discovery was not complete because Respondent had not complied with her demands. Instead, she waived discovery on behalf of her client, DEC Staff, relinquishing the agency's rights and relieving Respondent of any obligations it had in relation to her prior demands. Particularly in light of her prior letter proposing the waiver to Respondent, there is no question that, when the waiver was made, it was knowing and intentional.

According to Ms. Maglienti, the waiver is a nullity and further discovery is permissible because, after the waiver was made, the case was removed from the hearing calendar, which returned it to the status it had before the statement of readiness was filed. I disagree, and find that the waiver still stands. Ms. Maglienti's analysis is based on analogizing DEC hearing procedure to that of the state's civil courts, whose rules do not apply here except to the extent indicated in DEC's Part 622 regulations. A court may vacate a certificate of readiness - - the functional equivalent of DEC's statement of readiness - - if a material fact in the certificate is incorrect or if the certificate fails to comply with regulatory requirements in some material respect. However, according to 6 NYCRR 622.9(c), the accuracy and sufficiency of a statement of readiness in a DEC enforcement proceeding will not be subject to motion practice or any form of adjudication. Where a court vacates a certificate of readiness, the case is stricken from the court calendar, and the parties are returned to their original discovery status, as Ms. Maglienti argues. However, a DEC statement of readiness cannot be vacated, as there is no procedure to do so.

Ms. Maglienti cites an opinion in a medical malpractice action, Carte v. Segall, 134 AD.2d. 396 (2d.Dept. 1987), where plaintiffs were deemed not to have waived their right to further discovery, despite having filed a certificate of readiness - - which the court vacated - - that falsely declared that preliminary proceedings had either been completed or waived, when in fact extensive discovery had yet to be completed. There, the Appellate Division said that by vacating the certificate and striking the action from the court calendar, the parties had been returned to their original discovery status.

Here, however, the statement of readiness was not vacated, nor was it false or in any way insufficient. To the extent the case was struck from the hearing calendar, it was not by ALJ Casutto, but by Ms. Gilbert, unilaterally and without the ALJ's

prior permission. No new hearing dates were set by the ALJ, but not because the case was not ready for adjudication; it was because DEC Staff advised him that the matter had been settled. In fact, the ALJ said he would retain jurisdiction over the matter pending receipt of a fully executed consent order, which never came.

With ALJ Casutto's permission, DEC Staff subsequently amended the complaint, and Respondent filed an amended answer. However, Staff's amended complaint does not introduce any new factual claims; it merely changes the source of authority for the third cause of action, which involves an alleged failure to provide pesticide safety training. Also, Respondent's answer is essentially the same as the one filed previously, before DEC Staff waived discovery. Because Respondent has not shifted its position or introduced new claims in its amended answer, there is no basis for providing DEC Staff an additional discovery opportunity.

In his ruling granting DEC Staff's motion to amend the complaint, ALJ Casutto directed Staff to file a superseding statement of readiness to advise him when the matter was ready to be rescheduled for an adjudicatory hearing. This did not vacate or nullify the initial statement of readiness, which had served the same purpose previously. Nor did it release Staff from it prior discovery waiver. DEC Staff's subsequent substitution of counsel also did not affect the waiver, as it was not personal to Ms. Gilbert, but made on behalf of the agency as her client.

Staff's waiver of discovery, by itself, entitles Respondent to a protective order for all 19 demands in Staff's list of March 17, 2010; therefore, it would be superfluous to discuss each demand separately. I accept DEC Staff's assertion that its demands (in particular, No. 1, for all documents concerning Respondent's application of pesticides in 2001) are not intended to investigate possible violations beyond those that are now alleged. Though broadly written, the demands can be read as seeking information that would corroborate claims in Staff's complaint, investigate the denials in Respondent's answer, and determine how Respondent would defend itself and prove its affirmative defenses.

In her affirmation, Ms. Maglienti points out that Respondent bears the burden of proof regarding all affirmative defenses [see 6 NYCRR 622.11(b)(2)], and argues that Respondent's answer does not recite any facts or legal argument

which would put DEC Staff on notice of the basis of such defenses. Staff could have moved for clarification of affirmative defenses, on the grounds that, as pled, they are vague or ambiguous and that Staff is not thereby placed on notice of the facts or legal theory upon which such defenses are based. [See 6 NYCRR 622.4(f).] However, such a motion must be made within 10 days of completion of service of the answer; at this point, such a motion would be time-barred.

Even without additional corroboration, I presume that DEC Staff has evidence on the charges and other matters affirmatively asserted in its complaint, on which Staff bears the burden of proof [6 NYCRR 622.11(b)(1)], and that the hearing can go forward on the basis of that evidence, in the absence of any corroborating documentation that would be secured through additional discovery. After Staff presents its case on the charges, Respondent will have the opportunity to present a case of its own, and Staff will have the opportunity to inspect any documents that are produced and to cross-examine any witnesses who testify on Respondent's behalf.

Addressing the parties' remaining claims, Respondent asserts in its motion that the passage of nine years from the incidents alleged in the complaint warrants striking Staff's discovery demands. No authority is cited for this proposition, and I know of none myself.

Separately, Respondent claims in its answer that the causes of action asserted in the complaint are barred by the doctrine of laches (second affirmative defense) and the provisions of the State Administrative Procedure Act ("SAPA") which require a timely hearing (third affirmative defense). As I said during our conference call, the common law doctrine of laches is not available against a state agency acting in a governmental capacity (see Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]).

However, a claim may be raised under SAPA 301(1), which states that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." In Cortlandt, the Court of Appeals elaborated on this standard, holding that in determining whether a period of delay is reasonable within the meaning of SAPA 301(1), an administrative body must weigh certain factors, including (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 (66 NY2d 169, at 178; see also Matter of Douglas Giambrone and Marcon Erectors, Decision and Order of the Commissioner, March 17, 2010, at 11). Respondent claims in its answer that it was prejudiced because this hearing was not timely commenced. Respondent will bear the burden of demonstrating such prejudice, and Staff will have the opportunity to respond to all evidence in that regard. Where a respondent has not been afforded a hearing within a reasonable time, the Commissioner may dismiss DEC's charges, as happened in another pesticide case over which I presided (Matter of Manor Maintenance Corp. and Richard Schultheis, Order of the Commissioner, February 12, 1996, adopting my hearing report).

In that Respondent's motion is defined as one to "strike" its document demands, DEC Staff objects on grounds of procedure, noting that such a motion is properly used in relation to pleadings or testimony, and that a discovery demand should be challenged through a motion for protective order, consistent with the direction in my March 5 letter. In fact, while the pending motion is one to strike, Respondent's papers confirm it is made pursuant to 6 NYCRR 622.7(c), which addresses motions for protective order. According to DEC Staff, a motion to strike its demand is inappropriate and should therefore be disregarded; however, it is clear that Respondent intends that each of Staff's demands be stricken, or deleted. Consistent with 6 NYCRR 622.6(c)(2), the motion clearly states its objective, and is certainly in the nature of a motion for protective order, regardless of what it is called.

DEC Staff also claims that, as a motion for protective order, Respondent's motion must fail because it does not explain why a good faith effort was not made to resolve its concerns with DEC Staff. According to 6 NYCRR 622.7(c)(1), a motion for protective order "must be accompanied by an affidavit . . . reciting good faith efforts to resolve the dispute without resort to a motion." According to Ms. Maglienti's affirmation, Mr. Bressler did not contact her prior to filing his motion, and, in his own affirmation, Mr. Bressler does not suggest such contact was attempted. On the other hand, Respondent asserts, correctly as it turns out, that DEC Staff had waived discovery; this is a legal argument that challenged Staff's right to make its demands, not the contents of those demands. In other cases, a discussion of the language of the demands might have brought about an understanding between the parties as to what is requested and what will be produced, and no motion would have been necessary. However, in this case, given the nature of the

objection, discussions between counsel would not have been productive.

Finally, DEC Staff claims that Respondent's motion fails to explain why its discovery demands should be denied on the basis of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. As Staff points out, Respondent does not argue that the demands are covered by any privilege, that the requested documents are unavailable, or that the documents would be difficult or expensive to produce. However, standing alone, Staff's prior waiver of discovery is sufficient basis for a protective order, and Respondent's failure to assert other grounds, as referenced in 622.7(c)(1), has no consequence.

Ruling

Respondent's motion is granted as one for a protective order, and it need not provide documents in response to DEC Staff's discovery demands.

My office will schedule a conference call with Ms. Maglienti and Mr. Bressler to establish hearing dates, based on their availability and the availability of their witnesses.

/s/

Edward Buhrmaster
Administrative Law Judge

Dated: May 20, 2010
Albany, New York

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