STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Articles 25 and 71 of the New York State 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"),

- by -

ANTHONY J. SEGRETO,

Respondent.

RULING ON DEPARTMENT STAFF'S MOTION TO DIRECT SERVICE OF AN AMENDED ANSWER OR TO CLARIFY RESPONDENT'S ANSWER

DEC Case No. R1-20061026-268

Appearances:

- Alison H. Crocker, Deputy Commissioner and General Counsel (by Assistant Regional Attorney Vernon G. Rail, of counsel) for staff of the New York State Department of Environmental Conservation.

- Anthony J. Segreto, respondent pro se.

INTRODUCTION

By notice of motion with a supporting "affirmation and memo of law" dated November 5, 2007, staff of the Department of Environmental Conservation ("Department") moved to direct respondent Anthony J. Segreto ("respondent") to serve an amended answer or, in the alternative, to strike scandalous matter from and to clarify respondent's answer in this proceeding.

By letter dated November 9, 2007, and received November 14, 2007, respondent submitted a five-page typewritten response to staff's motion. The response does not address either the substance or merits of staff's motion; it consists primarily of respondent's grievances against Department attorney Vernon Rail and Regional Director Peter Scully, and allegations of mis-management of the Department's Region 1 office. However, given the nature of staff's motion and the relief requested therein, coupled with the status of the pleadings served by the parties to date, a more particularized response from respondent is not necessary in order to render a determination on the motion.

BACKGROUND AND PROCEDURAL HISTORY[1]

Department staff initially attempted to commence this administrative enforcement proceeding against respondent in April 2007 by mailing copies of a notice of pre-hearing conference, notice of hearing and verified complaint, via certified mail, to respondent at two of his known addresses in New York and California. Those attempts failed. The notice of hearing and verified complaint were eventually served upon respondent in person, in June 2007, in accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulation of the State of New York ("6 NYCRR").

According to staff's verified complaint, respondent owns real property located at 135 Blue Point Road, Oakdale, Town of Islip, County of Suffolk, State of New York, having Suffolk County Tax Number 500-378-2-25 (the "site"). The complaint alleges that the site contains regulated tidal wetlands subject to the Department's jurisdiction and that respondent undertook certain activities within "the regulated adjacent area to a regulated tidal wetland, at the subject site, without the required DEC permit."

Following respondent's appearance at a pre-hearing conference in July 2007, Department staff filed a motion for default judgment, along with supporting papers, against respondent. As grounds for its default motion, staff alleged that respondent failed to file a timely verified answer to the complaint by a date certain that had been established by staff, *i.e.*, August 20, 2007 (see 6 NYCRR 622.4[a], and 622.15).

In a ruling issued October 12, 2007, I denied staff's motion for default judgment based upon respondent's written submissions to the Department dated August 20, 2007 (see Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, Oct. 12, 2007, at 5-7, 10-11). In particular, I determined that respondent's August 20, 2007 submissions to the Department, containing denials of the Department's jurisdiction over the site, were adequate to put staff on notice of respondent's denial of liability and constituted a timely answer to staff's complaint (see id.). Consequently, Department staff was directed to file a statement of readiness for adjudicatory hearing (see id. at 11).

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[1] For a detailed description of the history of this proceeding, see Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, Oct. 12, 2007.

PROCEEDINGS AND DISCUSSION

In lieu of filing its statement of readiness for adjudicatory hearing, Department staff served the present motion seeking the following relief: (1) a ruling directing respondent to amend his answer; or, in the alternative (2) a ruling striking all matter in respondent's answer that is irrelevant or scandalous.

Additionally, as part of its request for alternative relief, staff seeks further clarification as to whether it has been placed on notice of any affirmative defenses by respondent's answer, as well as a determination as to what specific allegations made by staff have been either admitted and/or denied by respondent. Staff's requests are discussed, in turn, below.

1. Staff's Motion to Direct Respondent to Amend His Answer

Department staff contends that respondent's August 20, 2007 answer in this proceeding "amount[s] to nothing more than general denials" (see November 5, 2007 affirmation of Assistant Regional Attorney Vernon G. Rail submitted in support of staff's Motion for Amended Answer ["Rail Affirmation"], at ¶ 8). Accordingly, in order to avoid an "unnecessary burden on both Staff and the subsequent adjudicatory hearing," Department staff requests that respondent be directed to amend his answer (see id.) In support of its request, staff cites to the provisions of 6 NYCRR 622.4 and 622.5, and Rouse v Champion Home Builders Co., 47 AD2d 584 (4th Dept 1975) (see Rail Affirmation, at ¶¶ 6-10).

Staff correctly notes that 6 NYCRR 622.4 provides that "respondent must specify in its answer which allegations it admits, which allegations it denies and which allegations it has insufficient information upon which to form an opinion regarding the allegation" (see 6 NYCRR 622.4[b]). Staff argues that since respondent's August 20, 2007 submissions to the Department do not comply with these requirements, staff is entitled to a properly amended answer from respondent because 6 NYCRR 622.5 allows a party to amend pleadings with permission of the Administrative Law Judge ("ALJ") (see Rail Affirmation, at ¶¶ 9-10).

Section 622.5 of 6 NYCRR applies to the amendment of pleadings in administrative enforcement proceedings such as this. As relevant here, 6 NYCRR 622.5(b) states as follows:

"Consistent with the CPLR [Civil Practice

> Law and Rules] a party may amend its pleadings at any time prior to the final decision of the commissioner by permission of the ALJ or the commissioner and absent prejudice to the ability of any other party to respond" (see 6 NYCRR 622.5[b])*(emphasis added).*

CPLR 3025 sets forth the rules of practice for amended and supplemental pleadings in civil proceedings in New York. Similar to 6 NYCRR 622.5(b), CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties" (see CPLR 3025[b]) *(emphasis added).*[2]

As evident by the language emphasized in the two provisions cited above, the law clearly allows a party to amend its own pleadings. That does not, by logical extension, support the proposition argued by staff that those provisions supply a party with an approved method for requiring another party to amend its pleadings. To the contrary, New York only allows a party to compel another party to amend a pleading in two limited instances.

CPLR 3024 provides two statutorily recognized corrective motions that seek to compel an amendment of a pleading: (i) a motion for a more definite statement; and (ii) a motion to strike objectionable matter from a pleading (see CPLR 3024[a] and [b]). Notably, the motion for a more definite statement is available only to a party required to respond to the objectionable pleading (see CPLR 3024[a]). Thus, it may be used by the defendant against the plaintiff's complaint but it is unavailable to the plaintiff if the answer does not contain a counterclaim because in that case a plaintiff does not have to respond to the answer (see CPLR 3011; see also Cambridge Factors v State Bank of Long Beach, 35 Misc2d 188 [Sup Ct, New York County 1962]).

Here, staff does not allege that respondent raised a counterclaim to staff's complaint in the August 2007 submissions comprising his answer, necessitating a more definite statement (see Rail Affirmation). Because staff did not raise CPLR 3024(a) as a basis for the instant motion and request for an amended

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[2] CPLR 3025 also permits "pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just" (see CPLR 3025[c]).

answer from respondent, that provision is not relevant to this discussion.

Despite Department staff's arguments in support of its proposition to direct respondent to amend his answer, legal research has not revealed any case, either in an administrative or civil proceeding, where a party used the provisions of CPLR 3025 or its equivalent (such as 6 NYCRR 622.5[b]) to direct or otherwise compel another party to amend its answer. Instead, the law provides a party with various recognized methods of discovery designed to obtain clarification or further amplification of another party's pleadings or legal theories. Examples of such discovery devices include oral and written depositions, written interrogatories, demands for discovery and inspection, and requests for admission (see CPLR 3102[a]; see also 6 NYCRR 622.7[a] and [b]).[3] Nothing in this ruling precludes Department staff from attempting to utilize any of these approved methods of discovery to obtain further information about respondent's answer from him prior to a hearing.

Department staff's citation to Rouse v Champion Home Builders Co., 47 AD2d 584 (4th Dept 1975) is inapposite here. In Rouse, the complaint was verified and specific, but the answer, prepared by defendant's attorneys, consisted solely of a single sentence general denial (see id. at 584) *(emphasis added)*. Despite the court's criticism of such a tactic, which it characterized as "dilatory," the Appellate Division nevertheless permitted the defendants in Rouse "to serve an appropriate amended answer" rather than strike the original answer (see id.). Notably, the court in Rouse did not direct the defendants in that case to amend their "lackadaisical" answer because "the pleadings before the court indicate that several questions of fact are involved which should be decided by a jury" (see id.).

Unlike in Rouse, respondent in this matter is pro se; he is not an attorney and, to date, he has not been represented by an attorney. As a person not trained or versed in legal procedures, respondent cannot be criticized for submissions that might otherwise be viewed as inartful pleading if filed by an

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[3] While a bill of particulars is also frequently used as a means of obtaining additional information in civil proceedings, it is more akin to a pleading and is technically not a discovery device under the CPLR (see CPLR 3041). Bills of particulars are not permitted in Department enforcement proceedings pursuant to 6 NYCRR 622.7(b)(3). Moreover, while New York does allow motion practice to separately state and number paragraphs in a pleading (see CPLR 3014), that provision was not raised by staff as grounds for its relief here.

attorney. Notwithstanding that, and given the record in this case, respondent's August 20, 2007 submissions to the Department have been deemed to be an answer to staff's complaint and raise questions of fact requiring a hearing (see CPLR 3026;[4] see also Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, Oct. 12, 2007). Staff did not seek leave to file an expedited appeal from the determination in the October 12, 2007 ruling, and the time to file such a motion has expired (see 6 NYCRR 622.6[e][1]).

Moreover, as CPLR 3026 provides, defects in pleading, such as strict compliance with 6 NYCRR 622.4(b) and (c), are to be ignored unless a substantial right of a party is prejudiced. Staff does not argue any substantial prejudice in, nor is any substantial prejudice evident from, its motion papers by allowing respondent's August 20, 2007 submissions to the Department to constitute an answer. Lastly, as discussed above, staff's legal argument in support of its request to direct respondent to amend his answer is not persuasive. Accordingly, Department staff's request to direct respondent to amend his answer is denied.

2. Staff's Alternative Motion to Strike Scandalous Matter and to Clarify Respondent's Answer

If the relief requested by staff in the foregoing discussion was denied, staff's November 5, 2007 motion seeks, in the alternative, to strike scandalous and irrelevant matter from respondent's answer and to clarify whether respondent has raised an affirmative defense to the complaint in his answer (see Rail Affirmation, at ¶¶ 11-17; see also CPLR 3024[b]). In order to evaluate staff's request for this alternative relief, a discussion of staff's complaint and respondent's August 20, 2007 submissions to the Department is necessary.

Staff's April 30, 2007 verified complaint in this matter consists of twelve consecutively numbered paragraphs, identified as "FIRST" through "TWELFTH." Paragraphs "FIRST" and "SECOND" of the complaint describe, in general terms, the Department and its authority for enforcing environmental laws in New York. Paragraphs "THIRD" and "FOURTH" of the complaint describe the real property subject to this proceeding, as well as respondent's alleged ownership of the site.

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[4] CPLR 3026 states that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced" (see CPLR 3026).

Paragraph “FIFTH” of the complaint alleges as follows:

> “FIFTH: Upon information and belief, Respondent ANTHONY J. SEGRETO caused or directed all of the activities at the Site made the basis of violation during all of the periods of time when the violations alleged herein were committed.”

Paragraph “SIXTH” indicates that the use of the term “Respondent” in the complaint refers to respondent Anthony J. Segreto.

Paragraph “SEVENTH” of the complaint is a specific allegation that respondent’s property contains regulated tidal wetlands subject to the express jurisdiction of the Department as set forth in the Environmental Conservation Law (“ECL”) and its implementing regulations. Paragraph “SEVENTH” states:

> “SEVENTH: Upon information and belief, the Site contains regulated tidal wetlands which are subject to the jurisdiction of the Department pursuant to ECL § 25-0401.1 and Part 661 of 6 NYCRR.”

Paragraphs “EIGHTH” and “NINTH” of the complaint describe the various types of activities that are subject to regulation by the Department in a tidal wetland and its adjacent area, and state that a Department-issued permit is required to undertake regulated activities in tidal wetland areas.

Paragraphs “TENTH” and “ELEVENTH” of the complaint contain the two separate causes of action alleged against respondent. Those paragraphs state:

> “TENTH: Upon information and belief, the Respondent has violated ECL § 25-0401.1 and Part 661 of 6 NYCRR, by causing and/or permitting to be caused, the clearing of vegetation in the regulated adjacent area to a regulated tidal wetland, at the subject site, without the required DEC permit, on or before December 2, 2005.”; and

> “ELEVENTH: Upon information and belief, the Respondent has violated ECL § 25-0401.1 and Part 661 of 6 NYCRR, by causing and/or permitting to be caused, the placement of fill in the regulated adjacent area to a regulated tidal wetland at the subject site without the required DEC permit, on or before December 2, 2005.”

Lastly, paragraph "TWELFTH" of the complaint sets forth the potential penalties for persons determined to have violated any duty imposed by ECL Article 25 and 6 NYCRR part 661.[5]

As the October 12, 2007 Ruling on Department Staff's Motion for Default Judgment held, respondent submitted a total of four documents to the Department in August 2007 in response to staff's complaint (see Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, Oct. 12, 2007, at 4-7). The four documents comprising respondent's answer were:

> 1. A two-page typewritten letter dated August 20, 2007 directed to Assistant Regional Attorney Vernon Rail and Peter Scully, Regional Director, of the Department's Region 1 office;
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> 2. A two-page typewritten letter dated August 20, 2007 directed to Commissioner Grannis;
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> 3. A one-page typewritten copy of respondent's brief biographical history that was attached to respondent's August 20, 2007 letter to Commissioner Grannis; and
>
> 4. A three-page typewritten document entitled "Notes for Article 78 Filing - NYSDEC Region #1 - Preservation of the Pepperidge Hall Estate Lodge" that was attached to respondent's August 20, 2007 letter to Commissioner Grannis.[6]

Taken together, respondent's August 2007 submissions to the Department raise issues related to his property at 135 Blue Point Road, Oakdale, New York and the Department's jurisdiction over the site subject to this proceeding. For example, respondent's August 20, 2007 letter directed to Commissioner Grannis includes the following affirmative statements:

> "I am a resident of California; however, in February, 2005, I purchased a New York State

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[5] See Department staff's April 30, 2007 verified complaint attached as Exhibit "C" to Department staff's previous motion for default judgment dated September 25, 2007.

[6] For a description of the contents of respondent's August 20, 2007 submissions to the Department, see Matter of Anthony J. Segreto, ALJ's Ruling on Department Staff's Motion for Default Judgment, Oct. 12, 2007, at 4-7.

residence, the Pepperidge Hall Estate Lodge, built in the 1890's in Oakdale."

* * *

"There are no endanger *[sic]* species on the site and it is not a 'tidal wetlands' site based on historical records dating to 1880s country *[sic]* records" *(emphasis added)*.

Additionally, the three-page document entitled "Notes for Article 78 Filing - NYSDEC Region #1 - Preservation of the Pepperidge Hall Estate Lodge" accompanying respondent's August 20, 2007 letter to Commissioner Grannis, contains further denials about the presence of tidal wetlands on respondent's property and the Department's jurisdiction over the site subject to staff's complaint including:

"The Lodge is now located on manmade wetlands but historically was always on a dry land site. All the water on the 3.6 acre site parcel has been manmade and/or altered in the past 40 years by events and community development which in turn has inflicted significant environmental destruction and alterations. The New York State Department of Environmental Conservation Region #1 claim of jurisdiction based on 'Tidal Wetlands' has no merit based on historical maps and photos dating back over 100 years" *(emphasis added)*.

* * *

"The NYSDEC Region #1 position based on the site being conserved as a state controlled 'Tidal Wetlands' parcel has no merit and restoring it to an unnatural state of 'Tidal Wetlands' is in total contradiction to the state charter" *(emphasis added).*

* * *

"NYSDEC Region #1 classifying the 120 year old Lodge structure (which has been occupied and used as a lodge and residence continuously for the past 120 years and is compliant to all building codes) as a non conforming structure that 'needs to be flooded' because of its location, and 'should not be there' based on

> an erroneous classification as a state wetlands site (NYSDEC code for wetlands, non conforming structure location, circa 1970's) and delaying all actions to allow corrective action and attempting to inflicted *[sic]* damages on the 120 year old lodge via hurricane damage thereby achieve their desire of structure destruction and removal is contrary to NYSDEC Charter."

As described herein, Staff's complaint is relatively brief, consisting of 12 numbered paragraphs set forth in two pages. Staff asserts in its motion that the complaint contains specific allegations requiring respondent to specify in his answer which allegations he admits or denies (see Rail Affirmation, at ¶¶ 6-8). Upon close reading of the complaint, however, it appears that only four of the 12 paragraphs in the complaint comprise the gravamen of specific allegations against respondent. The language of these four paragraphs, numbered "FIFTH," "SEVENTH," "TENTH" and "ELEVENTH," respectively, are fully set forth above.

In response, the language in respondent's submissions to the Department on August 20, 2007 and cited herein, read cumulatively, represent both a specific admission of ownership of the property subject to the complaint (see complaint ¶¶ "THIRD" and "FOURTH"), as well as a denial of tidal wetlands being present at the site (see complaint ¶ "SEVENTH"). Given respondent's repeated denial of tidal wetlands being present at the site, it necessarily follows that respondent had effectively denied staff's allegations concerning violations of tidal wetlands law at the site, the Department's jurisdiction over the subject property, and the need for a Department-issued permit to conduct activities such as clearing vegetation or placing fill at the site (see complaint ¶¶ "FIFTH," "TENTH" and "ELEVENTH").

In its request for alternative relief, staff maintains that, because paragraphs "TENTH" and "ELEVENTH" of its complaint allege respondent conducted activities at the site without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall be an affirmative defense (see Rail Affirmation, at ¶¶ 13-14). As this discussion highlights, given respondent's assertions in his August 20, 2007 submissions to the Department denying both the presence of tidal wetlands on his property and the Department's jurisdiction over the site, respondent had raised the affirmative defense of inapplicability of a permit requirement for the activity alleged

in staff's complaint (see 6 NYCRR 622.4[c]).[7]

Accordingly, staff had notice of respondent's affirmative defense based upon the assertions and denials highlighted herein (see CPLR 3013; see also footnote 7 below). Therefore, staff's request for notice of an affirmative defense by respondent has been rendered academic. Respondent bears the burden of proof on his affirmative defense of inapplicability of a permit requirement at any future hearing in this matter (see 6 NYCRR 622.11[b][2]).

As part of its request for relief in the alternative, Department staff's motion also asks that allegedly "scandalous and irrelevant matter" be stricken from respondent's answer (see CPLR 3024[b]). For the reasons that follow, staff's request is denied.

Staff alleges, without elaboration, that respondent's August 20, 2007 submissions to the Department include "irrelevant and scandalous matter that should be stricken" from his answer (see Rail Affirmation, at ¶ 17). However, a mere showing that a pleading contains irrelevant matter is insufficient to prevail on a motion under CPLR 3024(b) (see Matter of Emberger's Estate, 24 AD2d 864 [2d Dept 1965]). Moreover, motions to strike matter from pleadings are not favored, rest in the sound discretion of the fact finder, and will be denied unless it clearly appears that the allegations being attacked have no possible bearing on the subject matter of the litigation (see Vice v Kinnear, 15 AD2d 619 [3d Dept 1961]).

Because relevancy is the best way to determine whether matter has been "unnecessarily inserted" in a pleading, the focus hinges upon whether such matter would be admissible at trial or hearing (see Talbot v Johnson Newspaper Corp., 124 AD2d 284 [3d Dept 1986]). Given that this proceeding is still in its early stages, and respondent is a pro se party, it would be premature at this juncture to evaluate whether and to what extent certain statements or allegations set forth in respondent's submissions to the Department in August 2007 would be admissible at a future

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[7] Additionally, based upon the content of respondent's submissions to the Department thus far, particularly his August 20, 2007 letter to Messrs. Rail and Scully, as well as his October 2, 2007 letter to Mr. Rail in opposition to staff's default motion, it is likely that respondent communicated his assertions and denials to Department staff in person when he (and his wife) appeared at the pre-hearing conference held in this matter on July 11, 2007 at the Department's Region 1 office.

hearing in this case. This would require me to parse through respondent's submissions and make admissibility findings about them insofar as they relate to his proposed affirmative defense which may or may not be his sole defense raised at the hearing (see 6 NYCRR 622.4[d]). Such a determination is best reserved for the hearing. Consequently, staff's alternative motion to strike allegedly "scandalous and irrelevant matter" from respondent's answer is denied.

A. Staff's Request for Notice of Any Affirmative Defenses

As the preceding discussion clarifies, given respondent's assertions in his August 20, 2007 submissions to the Department denying both the presence of tidal wetlands on his property and the Department's jurisdiction over the site, respondent has raised the affirmative defense of inapplicability of a permit requirement for the activity alleged in the complaint (see 6 NYCRR 622.4[c]). Accordingly, staff is on notice of respondent's affirmative defense based upon the assertions and denials highlighted herein (see also footnote 7 herein). Thus, staff's request for notice of an affirmative defense by respondent has been rendered academic (see Rail Affirmation, at ¶¶ 13-15).

B. Staff's Request for Determination as to What Specific Allegations Made by Staff Have Been Admitted or Denied

Lastly, staff's motion for relief in the alternative requests a determination as to "what specific allegations made by Staff have been either admitted and/or denied by the Respondent" (see Rail Affirmation, at ¶ 18). As the foregoing discussion in this ruling notes (see pp. 6-11 herein), based upon respondent's submissions to the Department in August 2007, it is clear that respondent has admitted and denied certain allegations in staff's complaint.

In particular, the language in respondent's submissions to Commissioner Grannis on August 20, 2007 and cited previously, represent both a specific admission of ownership of the property subject to the complaint (see complaint ¶¶ "THIRD" and "FOURTH"), as well as a denial of tidal wetlands being present at the site (see complaint ¶ "SEVENTH"). Given respondent's repeated denials in his submissions that there are no tidal wetlands at the site, it necessarily follows that respondent effectively denied staff's allegations concerning violations of law at the site, as well as the Department's jurisdiction over the subject property and the

need for a Department-issued permit to conduct activities such as clearing vegetation or placing fill at the site (see complaint ¶¶ "FIFTH," "TENTH" and "ELEVENTH").

Consequently, respondent has admitted the allegations contained in paragraphs "THIRD" and "FOURTH" of the complaint, and has denied the allegations set forth in paragraphs "FIFTH", "SEVENTH," "TENTH" and "ELEVENTH" of the complaint. In addition, because paragraph "SIXTH" of the complaint merely states that the use of the term "Respondent" in staff's complaint refers to respondent Anthony J. Segreto, it is reasonable to presume that respondent has admitted that allegation as well. These denials and admissions represent responses to seven of the 12 paragraphs comprising staff's complaint against respondent.

As for the five other paragraphs in the complaint that staff contends remain unanswered by respondent, each of those paragraphs merely contain recitations of the Department's legal authority to enforce environmental laws or delineate the ECL provisions and implementing regulations (including potential penalty provisions) applicable to the alleged tidal wetland violations enumerated by staff (see complaint ¶¶ "FIRST," "SECOND," "EIGHTH," "NINTH" and "TWELFTH").

Staff acknowledges in its motion, however, that respondent's submissions comprising the answer in this case are "general denials" (see Rail Affirmation, at ¶ 8). Based upon staff's acknowledgment, it is reasonable to conclude that staff was, at a minimum, on notice that respondent had presumably denied, among others, the allegations in paragraphs "FIRST," "SECOND," "EIGHTH," "NINTH" and "TWELFTH" of the complaint.

Furthermore, given respondent's status as a non-lawyer pro se party, he can be afforded some leeway for being unfamiliar with the statutory framework establishing the Department's legal authority to enforce environmental laws or the specific ECL provisions and regulations (including penalty provisions) applicable to tidal wetlands as enumerated by staff in paragraphs "FIRST," "SECOND," "EIGHTH," "NINTH" and "TWELFTH" of its complaint. This leeway is not unfettered; if it were to result in prejudice to Department staff it can be restrained. Under the present circumstances, however, there is no prejudice to staff by concluding that respondent likely had no knowledge one way or the other about the legal allegations set forth in those five paragraphs such that his response can be construed as being a lack of knowledge or information sufficient to form a belief as to those allegations (see CPLR 3018[a]). In that instance, such response "shall have the effect of a denial" (see id.).

RULING

For the foregoing reasons, Department staff's November 5, 2007 motion to direct respondent to amend his answer or, in the alternative, to strike any scandalous or prejudicial matter from respondent's answer to the complaint is hereby denied. Staff's request for notice of the affirmative defense of inapplicability of a permit requirement for the activity alleged in the complaint is rendered academic based upon respondent's submissions to the Department comprising his answer.

Furthermore, unless and until the pleadings in this matter are amended by permission of the ALJ or the Commissioner in accordance with the provisions of 6 NYCRR 622.5, it is determined that respondent's answer admits the allegations of paragraphs "THIRD," "FOURTH" and "SIXTH" in staff's April 30, 2007 complaint, and denies the allegations of paragraphs "FIRST," "SECOND," "FIFTH," "SEVENTH," "EIGHTH," "NINTH," "TENTH," "ELEVENTH," and "TWELFTH" of the complaint.

Finally, because respondent has denied the allegations set forth in paragraph's "SEVENTH," "TENTH" and "ELEVENTH" of staff's complaint (alleging respondent conducted certain regulated activities at a site containing tidal wetlands without a required permit), he has raised the affirmative defense of inapplicability of a permit requirement for the activities alleged in the complaint. Respondent bears the burden of proof on this affirmative defense at the hearing in this matter.

Department staff is directed to file a statement of readiness for adjudicatory hearing in this matter in accordance with 6 NYCRR 622.9(b) by Friday, November 30, 2007. Upon receipt of Department staff's statement of readiness for adjudicatory hearing, this matter will be placed on the hearing calendar and the undersigned will contact the parties in order to schedule a conference call for the purpose of establishing a mutually convenient hearing date, time and location.

_____
Mark D. Sanza
Administrative Law Judge

Dated: November 15, 2007
Albany, New York

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