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In the Matter of alleged Violations  
of the Environmental Conservation  
Law of the State of New York (ECL)  
article 15 and Title 6 of the  
Official Compilation of Codes,  
Rules and Regulations of the  
State of New York (6 NYCRR)  
part 666 by

Notice of adjournment  
and Ruling on motion by  
Respondent's counsel for  
leave to withdraw

DEC Case No.  
R1-20051102-240

DONALD SUTHERLAND,  
Respondent.

August 27, 2007

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### Proceedings

Staff from the Region 1 Office of the New York State Department of Environmental Conservation (Department staff) initiated the captioned enforcement matter by duly serving a Notice of Hearing, Pre-hearing Conference, and verified Complaint dated November 5, 2005 upon Donald Sutherland by certified mail, return receipt requested. Mr. Sutherland filed an answer dated August 21, 2006 by his counsel, McGreevy and Henle, LLP, Riverhead, New York (Peter R. McGreevy, Esq.).

With a cover letter dated April 25, 2007, Department staff filed a statement of readiness consistent with the requirements outlined at 6 NYCRR 622.9. The matter was assigned to Administrative Law Judge (ALJ) Daniel P. O'Connell on May 9, 2007. After a telephone conference call with the parties' counsel on June 11, 2007, the adjudicatory hearing was scheduled for August 28 and 29, 2007.

A second telephone conference was held on August 17, 2007. The purpose of the conference was to inquire whether the parties were ready for the upcoming adjudicatory hearing. During the conference call, Ms. Wilkinson stated that Department staff had served its first discovery demand upon Respondent's counsel on February 5, 2007, but had not received any response. Mr. McGreevy stated that he had asked his client on numerous occasions to provide him with any documents responsive to Staff's discovery demand. Mr. McGreevy stated further that his client had ignored his many requests. Ms. Wilkinson stated that Department staff would file a motion pursuant to 6 NYCRR 622.7(c)(3), and move to preclude from the hearing record any documents responsive to Staff's February 5, 2007 discovery demand. Ms. Wilkinson filed Staff's motion and supporting papers with a cover letter dated August 20, 2007.

During the August 17, 2007 conference call, Mr. McGreevy stated that he would be filing a motion for leave to withdraw as Respondent's counsel. According to Mr. McGreevy, his client has not cooperated with him and, as a result, Mr. McGreevy has been unable to prepare for the upcoming hearing. With a cover letter dated August 24, 2007, Mr. McGreevy filed a motion for leave to withdraw as Respondent's counsel with an affirmation dated August 24, 2007. I received Mr. McGreevy's motion on Monday, August 27, 2007.

Motion for leave to withdraw as Respondent's Counsel

Referring to Civil Practice Law and Rule (CPLR) § 321(b)(2) Mr. McGreevy requests leave to withdraw as Respondent's counsel. In his affirmation, Mr. McGreevy states that his client has: (1) failed to cooperate with his attorney; (2) insisted that his attorney present a claim or defense in the captioned matter that is not warranted under New York law; (3) conducted himself in a manner which renders it unreasonably difficult to represent Respondent; and (4) insisted that Mr. McGreevy engage in conduct which is contrary to his counsel's judgment and advise.

In addition to requesting leave to withdraw, Mr. McGreevy also requested a 30 day adjournment to allow Mr. Sutherland the opportunity to retain new legal counsel.

I initiated a telephone conference call this morning to hear from the parties about Mr. McGreevy's motion. Ms. Wilkinson stated that Department staff opposed Respondent's motion for an adjournment. Ms. Wilkinson expressed concern that Mr. Sutherland would attempt to delay the proceeding further by not cooperating with any new counsel that he may retain. Ms. Wikinson stated further that Department staff is prepared to forward.

In response to Staff's opposition to the adjournment, Mr. McGreevy stated that his client would be prejudiced if the hearing commenced as scheduled.

During this morning's telephone conference, I proposed an order that would provide Mr. Sutherland with an opportunity to retain counsel within 21 days, and to adjourn the hearing to October 2, 2007. Under these conditions, Department staff agreed to the adjournment.

### **Ruling and Order**

Therefore, I grant Respondent's motion. Based on the reasons provided in his August 24, 2007 affirmation, Mr. McGreevy, and all other members from the law firm of McGreevy and Henle, LLP, may withdraw, effective today, as Mr. Sutherland's legal counsel.

In addition, the adjudicatory hearing concerning the captioned matter is adjourned from August 28, 2007 to October 2, 2007. At the conclusion of this morning's telephone conference call, Mr. McGreevy agreed to telephone Mr. Sutherland about the adjournment. Because Mr. McGreevy and his law firm no longer represent Mr. Sutherland, I will send a copy of this notice of adjournment and ruling to Mr. Sutherland by certified mail, return receipt requested.

Furthermore, Mr. Sutherland shall take notice of the following:

1. Mr. Sutherland will have the opportunity to retain new legal counsel. Mr. Sutherland's counsel shall file a notice of appearance with me no later than 4:30 p.m. on Friday, September 21, 2007. Respondent's new legal counsel shall provide Ms. Wilkinson with a copy of the notice of appearance at the same time and in the same manner as the notice is filed with me;
2. The hearing concerning the captioned matter will convene at 10:00 a.m. on Tuesday, October 2, 2007 at the Department's Region 1 Offices on the SUNY Stony Brook Campus. If necessary the adjudicatory hearing will continue on Wednesday, October 3, 2007 at the same time and location; and
3. Pursuant to 6 NYCRR 622.9(e), I am required to notify Mr. Sutherland that his failure to appear at the hearing at 10:00 a.m. on October 2, 2007 will constitute a default and a waiver of his right to a hearing.

### Staff's motion to preclude evidence

With a cover letter dated August 20, 2007, Department staff filed a motion to preclude evidence at the adjudicatory hearing as provided for by 6 NYCRR 622.6(c). Ms. Wilkinson stated in her

affirmation dated August 20, 2007 that Department staff served Mr. McGreevy with a notice to produce documents dated February 5, 2007, and that, to date, Department staff has not received any response.

In his August 24, 2007 affirmation, Mr. McGreevy identifies the numerous occasions that he asked Mr. Sutherland for information related to Staff's February 5, 2007 discover demand. During this morning's conference call, Mr. McGreevy stated that he received Staff's August 20, 2007 motion.

I request that Ms. Wilkinson provide Mr. Sutherland with a copy of Department staff's first notice to produce documents dated February 5, 2007, and with a copy of Staff's notice of motion to preclude evidence, and supporting papers dated August 20, 2007. I note that Mr. Sutherland is obliged to comply with Staff's February 5, 2007 request.

I will reserve ruling on Staff's August 20, 2007 motion until September 21, 2007. A response from either Mr. Sutherland, or his new legal counsel, will be due by that time.

\_\_\_\_\_/s/\_\_\_\_\_  
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Dated: Albany, New York  
August 27, 2007

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