STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

U.S. ENERGY DEVELOPMENT CORPORATION,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO STAY PROCEEDINGS

DEC File No. R9-20111104-150

July 10, 2013

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO STAY PROCEEDINGS

In this administrative enforcement proceeding, respondent U.S. Energy Development Corporation is charged with violations of two orders on consent executed with the New York State Department of Environmental Conservation (Department). The consent orders addressed violations of New York State water quality standards for the Yeager Brook, a stream located in New York's Allegany State Park, as a result of alleged discharges into the stream from respondent's natural gas development operations across the border in Pennsylvania. Respondent moves to stay the present administrative proceeding pending its appeal from an order of Supreme Court, Erie County, dismissing its CPLR article 78 proceeding and declaratory judgment action. For the reasons that follow, respondent's motion to stay proceedings is denied.

I. Facts and Procedural Background

The Yeager Brook flows into New York from McKean County, Pennsylvania. In New York, the Yeager Brook (Waters Index No. Pa 53-8-8), a tributary of Quaker Run, is designated as a class B(T) water body (or class B trout stream) (see 6 NYCRR 802.4, Item No. 65; 6 NYCRR 701.7 [Class B fresh surface waters]; 6 NYCRR 701.25 [Trout waters (T or TS)]). The best usages for class B streams are primary and secondary contact recreation and fishing (see 6 NYCRR 701.7). The T designation indicates that the stream is suitable for trout habitat (see 6 NYCRR 701.25; 6 NYCRR 700.1[a][67]).

ECL 17-0501 and its implementing regulations prohibit the discharge of organic or inorganic matter into the waters of the State so as to cause or contribute to a condition in contravention of the water quality standards adopted by the Department pursuant to ECL 17-0301. The water quality standards applicable to class B trout streams prohibit the introduction of color producing substances in amounts that adversely affect the color of the water or impair the water for its best usages (see 6 NYCRR 703.2). The standards also prohibit increases in turbidity (cloudiness) that result in a substantial visible contrast to natural conditions (see id.).[1]

Respondent U.S. Energy Development Corporation is a privately held New York-based oil and natural gas exploration and development company with corporate offices located in Getzville, Erie County (see Amended complaint at 1, ¶ 3; Amended answer ¶ 3). Respondent is registered in New York as a domestic business corporation (see Amended complaint at 1, ¶ 3; Amended answer ¶ 3). Respondent conducts oil and gas drilling operations in McKean County, Pennsylvania (see Amended answer ¶ 5).

[1] The State's water quality classification system and standards (see 6 NYCRR parts 701-703, and 800 et seq.), which were promulgated by the Department and its predecessor agencies pursuant to ECL 17-0301 and predecessor statutory enactments, have been legislatively approved and adopted (see ECL 17-0301[7], [8]). The water quality standards have also been reviewed and approved by the federal Environmental Protection Agency (EPA) pursuant to section 303 of the Clean Water Act (33 USC § 1313).

In 2010, Department staff alleged that on August 10, 2010, respondent violated ECL 17-0501, and 6 NYCRR 701.1[2] and 703.2 as a result of discharges from an oil or gas well drilling operation in Pennsylvania that entered a stream in Pennsylvania and flowed into the Yeager Brook in New York. The discharges caused the Yeager Brook to appear cloudy and milky white in color. Respondent entered into a consent order in December 2010 to resolve the August violations (see Order on Consent No. R9-20100913-39, Malcomb affirmation, exhibit A). Respondent agreed, among other things, to return to compliance by taking action to prevent the recurrence of violations in the future, and to "on-going, continued compliance" (id. ¶ II and Schedule A).

Subsequently, Department staff alleged that in November 2010, discharges from respondent's oil and gas development operations in Pennsylvania again resulted in the violation of water quality standards in the Yeager Brook in New York. Staff alleged that storm water runoff from respondent's oil and gas operations in Pennsylvania were again causing cloudy conditions and turbidity in the Yeager Brook in New York in violation of ECL 17-0501, and 6 NYCRR 556.5, 701.1,[3] and 703.2. Respondent entered into a second consent order in August 2011 to resolve the November 2010 violations (see Order on Consent No. R9-20110111-1, Malcomb affirmation, exhibit B). Respondent again agreed, among other things, to return to compliance by implementing erosion and sediment controls at its operations "to prevent contravention of stream standards in New York," to take action to prevent recurrence of the violations at the location of its operations, and to "on-going, continued compliance" (id. ¶ II and Schedule A).

Department staff further alleged that in September 2011, December 2011, and January 2012, Yeager Brook again became cloudy, discolored, and turbid as a result of respondent's failure to comply with the consent orders and implement effective erosion and sediment controls at their operations in

[2] The December 2010 consent order cites 6 NYCRR 703.1 (see Order on Consent No. R9-20100913-39, Malcomb affirmation, exhibit A, ¶¶ 10, 13). However, the operative regulatory language quoted in the consent order is that of 6 NYCRR 701.1 (compare id. ¶ 10 with 6 NYCRR 701.1).

[3] Again, the August 2011 consent order cites 6 NYCRR 703.1 (see Order on Consent No. R9-20110111-1, Malcomb affirmation, exhibit B, ¶¶ 10, 23). Again, however, the operative regulatory language quoted in the consent order is that of 6 NYCRR 701.1 (compare id. ¶ 10 with 6 NYCRR 701.1).

Pennsylvania. Accordingly, Department staff commenced this administrative enforcement proceeding by serving respondent with a notice of hearing and complaint dated January 24, 2012 (see Malcomb affirmation, exhibit C). In the January 2012 complaint, staff charged respondent with violations of ECL 17-0501, and 6 NYCRR 701.1 and 703.2, and the December 2010 and August 2011 consent orders (see id.). Respondent served an answer on March 28, 2012.

In March 2012 and May 2012, the parties engaged in some pre-hearing discovery.[4] Meanwhile, respondent filed a CPLR article 78 petition dated March 28, 2012, in Supreme Court, Erie County, seeking, among other things, an order enjoining this administrative proceeding and dismissing the January 2012 complaint on the ground that the Department is proceeding in excess of its jurisdiction (see Malcomb affirmation, exhibit D). Staff subsequently served respondent with an amended complaint dated April 24, 2012, in which staff charged respondent only for violations of the two consent orders (see id., exhibit E). Respondent filed in Supreme Court an amended verified CPLR article 78 petition/complaint dated May 4, 2012, again seeking, among other things, an order enjoining this proceeding and dismissing the amended complaint on the ground that the Department is proceeding in excess of its jurisdiction (see id., exhibit F). In this administrative proceeding, respondent also filed an answer to the amended complaint dated May 14, 2012 (see Brady affirmation, exhibit A).

By order dated October 17, 2012, and entered October 26, 2012, Supreme Court, Erie County (Devlin, J.), granted the Department's motion to dismiss the article 78 proceeding/action, and dismissed the amended verified petition/complaint (see Malcomb affirmation, exhibit G). Supreme Court issued no opinion with its order. In November 2012, respondent filed a notice of appeal from the October 26, 2012, order (see id., exhibit H).

In December 2012 and January 2013, the parties engaged in settlement negotiations before Administrative Law Judge (ALJ) Richard R. Wissler. When those negotiations proved unfruitful, Department staff served a statement of readiness for adjudicatory hearing dated January 30, 2013, and the matter was

[4] Respondent also made a Freedom of Information Law (FOIL) request in January 2012, seeking records pertaining to its and other operations in Pennsylvania. The Department responded to respondent's FOIL request.

assigned to the undersigned ALJ for administrative adjudicatory proceedings.

During a telephone conference call with the parties convened to schedule the hearing, respondent orally moved to stay this proceeding pending the appeal in the article 78 proceeding/action. During the call, respondent indicated that a decision on the appeal would not be likely until the end of the year. After some discussion between the parties, I directed respondent to file its motion in writing.

On March 26, 2013, respondent filed its written notice of motion to stay administrative proceeding together with an affirmation in support of the motion and a memorandum of law. On April 16, 2013, Department staff filed an affirmation in opposition to respondent's motion. Staff also filed a motion to dismiss several of respondent's affirmative defenses.

By letter dated April 17, 2013, respondent requested that its time to respond to staff's motion to dismiss affirmative defenses be extended to no less than twenty days following a final decision on its motion for a stay. Based upon Department staff's consent, in an email dated April 22, 2013, I directed that in the event respondent's motion for a stay is denied, respondent will have twenty days following a ruling on respondent's pending motion for a stay to respond to staff's April 16, 2013, motion to dismiss affirmative defenses.

II. Discussion

Respondent argues that the present proceeding should be stayed because the appeal before the Appellate Division may result in a decision that is potentially dispositive. If the Appellate Division reverses Supreme Court and concludes that the Department is acting in excess of its jurisdiction, respondent contends that this administrative proceeding may be enjoined. Respondent asserts that to proceed with the administrative hearing at this time may result in unnecessary and costly discovery and other hearing preparations if the Appellate Division ultimately concludes that this proceeding should be enjoined.

In opposition, Department staff argues that the stay should be denied because respondent's likelihood of success on

the merits of its appeal is minimal, and the State has a strong public interest in going forward with this administrative enforcement proceeding. Staff also points out that as of March 26, 2013, respondent had not yet perfected its appeal and, thus, a decision is not imminent. Staff further asserts that if it is successful on its pending motion to dismiss affirmative defenses, the volume of material to be produced in discovery will be greatly reduced.

In determining whether to stay administrative adjudicatory proceedings pending an appeal in a related CPLR article 78 proceeding, the Department applies the standards governing CPLR 2201 motions for a stay (see Matter of Winter 1-A, Ruling and Interim Decision of the Commissioner, Oct. 20, 2008, at 3; Matter of New York City Dept. of Envtl. Protection, ALJ Ruling on Motion for Stay of Proceedings, Oct. 31, 2005, at 4). Under CPLR 2201, the court has the discretion to grant a stay of proceedings "in a proper case, upon such terms as may be just." Because the stay of a proceeding may be a drastic remedy, a stay should not be granted unless the proponent makes a compelling showing of good cause (see Winter 1-A at 3; see also Estate of Salerno v Estate of Salerno, 154 AD2d 430, 430 [2d Dept 1989]).

Whether a particular proceeding is "a proper case" varies with the circumstances and equities of that proceeding (see Winter 1-A at 3; Salerno, 154 AD2d at 430). For example, the mere circumstance that a potentially dispositive issue is pending appeal is an insufficient basis to warrant a stay, unless a decision on the appeal is imminent (see Matter of Weinbaum's Estate, 51 Misc2d 538, 539 [1966]; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:11). In addition, the tribunal must be satisfied that awaiting the appellate decision will expedite rather than delay the case (see Siegel, Practice Commentaries, CPLR C2201:11). The fact that the parties may have to engage in discovery and other hearing preparations pending the appeal, without more, is insufficient prejudice to justify a stay (see Congel v Malfitano, 2010 WL 8354946 [Trial Order] [Sup Ct, Dutchess County, March 22, 2010, No. 2007/220, Wood, J.])

Here, respondent makes no showing that a decision on its appeal in the CPLR article 78 proceeding is imminent. As noted by staff, as of March 2013, respondents had not perfected

their appeal. By respondent's own estimate, a decision is not likely until the end of the year.

In addition, it is more likely than not that awaiting the appellate decision will delay rather than expedite the matter. Although Supreme Court did not articulate its reasons for dismissing the CPLR article 78 petition/complaint, multiple grounds were presented to the court, any one of which provide a valid basis. As noted by staff, those grounds include lack of aggrievement (based upon respondent's consent to the consent orders), non-finality of the administrative proceeding, and respondent's failure to exhaust administrative remedies, among other grounds. As to the finality ground, courts have dismissed CPLR article 78 petitions challenging an agency's jurisdictional determination when the agency has not yet reach a final determination, as in this case (see Matter of Essex County v Zagata, 91 NY2d 447, 455-456 [1998]). Similarly, courts have denied writs of prohibition when issues of federal pre-emption have arisen (see Matter of Chasm Hydro, Inc. v New York State Dept. of Envtl. Conservation, 14 NY3d 27, 31-32 [2010]). Thus, it cannot be concluded that a reversal of Supreme Court's order is inevitable, or even likely. Accordingly, respondent has not shown that an appellate decision is imminent or that it will likely expedite the present proceeding.

Nor has respondent articulated any prejudice beyond the costs of discovery and other hearing preparations pending the appeal to justify a stay (see Congel, supra). In contrast, the Department has a strong interest in the efficient and expeditious enforcement of the State's environmental laws, including the consent orders involved here. This matter has been pending since early 2012 and is proceeding apace. Reasonable further steps can be taken to advance the proceeding, including addressing Department staff's motion challenging the pleadings, while respondent's appeal is pending. Accordingly, respondent's motion for a stay should be denied.

III. Ruling

Department staff's public interest in proceeding with this administrative enforcement proceeding outweighs any prejudice to respondent that might arise from proceeding during the pendency of respondent's appeal in its CPLR article 78 proceeding. Respondent has failed to establish that an

appellate decision is imminent or that any such decision will likely expedite the present proceeding. Nor has respondent demonstrated any undue prejudice. Accordingly, respondent's motion to stay this administrative enforcement proceeding is denied.

Respondent has twenty days from the date of this ruling to file a response to Department staff's pending motion to dismiss affirmative defenses. Accordingly, respondent's response to staff's motion is due by close of business, July 30, 2013. Filing by electronic means is hereby authorized, provided a conforming hard copy of any filing is sent by regular mail to staff and the undersigned ALJ, and postmarked by July 30, 2013.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: July 10, 2013
Albany, New York