

In the Matter of Alleged Violations  
of article 24 of the Environmental  
Conservation Law (ECL) and part 663 of  
title 6 of the Official Compilation of  
Codes, Rules and Regulations of the  
State of New York (6 NYCRR) by

RULINGS

ANTHONY VENDITTI, KATHY VENDITTI,  
TINA SANJOUR GOUGH, PETER L.  
WOHLER and CLAUDIA SANJOUR,

DEC Case Nos.  
R2-20011119-223  
and R2-0179-96-02

May 20, 2005

Respondents.

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This hearing concerns alleged violations of the Freshwater Wetlands Act and regulations at a site in Richmond County, New York. On March 17, 2005, Richard A. Rosenzweig, Esq., on behalf of Anthony and Kathy Venditti (Vendittis), submitted a motion to dismiss "all pending violations" in the above matter. This is the second motion to dismiss concerning this complaint. The first motion, also on behalf of the Vendittis, argued that the documents attached with that motion showed that there are no questions of fact and that the complaint should be dismissed as a matter of law. The first motion to dismiss was made on January 27, 2004 and was denied in a ruling dated June 15, 2004.

The present motion to dismiss states that the Department of Environmental Conservation (DEC or the Department) failed to meet the statutory timeliness requirement of State Administrative Procedure Act (SAPA) section 301. The motion is presented in a two-page letter that makes arguments concerning timeliness, to which is attached a copy of the January 27, 2004 motion to dismiss that includes an affidavit from Mr. Venditti. The Vendittis also moved to take the deposition of Joseph Pane, a Biologist in the DEC Region 2 office.

On March 25, 2005, DEC Staff submitted a reply opposing the second motion to dismiss. DEC Staff also requested that I set a schedule in which discovery would conclude within four weeks and the hearing would take place approximately eight weeks from the date of the ruling on the second motion to dismiss. DEC Staff argued that the request for a deposition was unwarranted because Mr. Pane would be presented as a witness at the hearing. DEC Staff also sought leave to amend the complaint, not to introduce new facts but to allege violations of the statute and regulations governing solid waste.

The Vendittis replied to DEC Staff's March 25, 2005 correspondence on March 28, 2005, arguing that the motion to amend the complaint is untimely and would add factual questions. The Vendittis argued that it was "incredible" that DEC Staff would want to proceed on the schedule it proposed in view of the time that had passed since the date of the complaint. The Vendittis also replied to DEC Staff's arguments opposing the motion to dismiss.

On March 29, 2005, I sent an electronic mail message to Udo Drescher, Esq., of DEC Region 2, with a copy to Mr. Rosenzweig, asking for a copy of the notice of hearing in this matter (which was not attached with any of the papers sent to me as of that date) and the addresses of the other Respondents and of any persons who might be representing them. On March 31, 2005, Mr. Drescher replied regarding the other Respondents and sent me the notice of hearing. He provided Ms. Sanjour's address, but stated that Ms. Gough apparently had passed away and that DEC Staff does not have a current address for Mr. Wohler.

Neither the Vendittis' second motion to dismiss nor their March 28, 2005 reply was sent to Ms. Sanjour, although DEC Staff's March 25, 2005 correspondence was sent to her. On April 13, 2005, I asked Mr. Rosenzweig to send Ms. Sanjour the two documents, and I allowed Ms. Sanjour an opportunity to respond to the second motion to dismiss.

On May 2, 2005, Ms. Sanjour submitted an answer and responded to the motion, arguing that the proceeding should be dismissed against her. She also moved for summary judgement to dismiss the complaint against her. I notified the parties on May 10, 2005 that I would treat this motion as a motion for order without hearing, as I had done with the Venditti's original motion to dismiss, and that the other parties could respond to Ms. Sanjour's motion.

The Vendittis responded on May 10, 2005, stating that to the extent Ms. Sanjour's motion to dismiss sets forth a basis to dismiss the entire proceeding, they support it, but otherwise they take no position regarding it. DEC Staff responded on May 11, 2005 by withdrawing the complaint against Ms. Sanjour without prejudice.

## Vendittis' Motion to Dismiss

The Vendittis' second motion to dismiss was based upon SAPA section 301(1), which states that, "In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time."

The Vendittis argued that the alleged violations "date from 1996 to 2001" and that DEC Staff has failed to proceed in a reasonably timely manner. The Vendittis argued that this delay has seriously prejudiced their ability to present a case because conditions at the site of the alleged violations have changed so it would be difficult to show whether or not it was a wetland at the time of the alleged violations. The Vendittis also argued that the "actual wrongdoers" (i.e., the prior owners or their agents) are unavailable as witnesses. The motion states that, beyond actual prejudice to the Vendittis' efforts to defend themselves, the Vendittis "have all but been effectively precluded from mounting any defense at all as a result of the delay."

DEC Staff argued that it is within DEC Staff's burden of proof to show that the lots contained portions of a regulated wetland system and that the official wetland map demonstrates the site was within a regulated adjacent area of a freshwater wetland. DEC Staff noted that one of the prior owners could be called as a witness and that there is other evidence available to establish the conditions at the site.

Both DEC Staff and the Vendittis made arguments concerning an additional factor identified in the decision in Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 495 NYS2d 927 [1985]) concerning application of SAPA section 301(1), specifically, the causal connection between the conduct of the parties and the delay. It is not necessary to discuss these other arguments here, however, because issues of fact exist that require a denial of the Vendittis' motion.

The Vendittis' answer in this matter identified untimeliness under SAPA section 301 as an affirmative defense. There are disputed questions of fact about whether the timing of events in this case caused prejudice to the Vendittis' ability to present a defense. The Vendittis have the burden of proof concerning their affirmative defenses (6 NYCRR 622.11(b)(2)), and DEC Staff has the opportunity to contest the affirmative defense in the hearing.

In addition to DEC Staff disputing whether the timing of this matter prejudiced the Vendittis' ability to present their case, Mr. Venditti's affidavit calls into question the motion's assertion that the Vendittis have "all but been effectively precluded from mounting any defense at all." The affidavit includes assertions that the alleged violations occurred before Mr. Venditti and his wife bought most of the lots, that the Vendittis did not do certain actions, that DEC has documents showing that the first violation occurred before the Vendittis owned the lots in question, and that the wetland boundary has moved. With regard to the last assertion, the affidavit makes reference to a 1999 survey and states that the Vendittis reserve their right to contest the wetland boundary in the hearing.

Where facts are in dispute concerning a claim of prejudice due to the timing of a hearing, an adjudicatory hearing with an opportunity for cross-examination would be necessary before such prejudice could be found to have occurred (see, Matter of Robert J. Ward (Green Island Tree Spray), Ruling of the Administrative Law Judge (ALJ), December 17, 1997, at 5 - 8; Matter of Bath Petroleum Storage, Inc., Ruling of the ALJ, March 18, 2004, at 7 - 8). In the present case, it does not appear that DEC Staff's direct case will be lengthy, nor that any other reasons exist for hearing the Vendittis' evidence about their affirmative defense before proceeding with the rest of the hearing.

The allegations in the present case concern observations made on December 6, 1995 and April 9, 2001, leading to a complaint dated March 3, 2003. As in the Ward hearing, to evaluate the issue of delay one must look at each charge and consider whether the hearing was unreasonably delayed for one charge but not the other.

Ruling: The motion to dismiss based on timeliness is denied, without prejudice to considering the related affirmative defense after the hearing record is complete.

#### Request for Deposition

The Vendittis moved to take the deposition of Mr. Pane, if the complaint is not dismissed. They made a motion for this deposition in June 2004. On June 28, 2004, Mr. Drescher wrote to me stating that DEC Staff would oppose the motion and that he had contacted Mr. Rosenzweig to attempt to resolve this dispute about discovery without resort to a motion. He stated he would contact Mr. Rosenzweig after reviewing the file and determining whether

to proceed with a hearing or submit a settlement offer. Also on June 28, 2004, Mr. Rosenzweig withdrew the request for a deposition without prejudice to renewing it.

In his March 17, 2005 letter that included the second motion to dismiss, Mr. Rosenzweig also renewed his motion to depose Mr. Pane. Mr. Rosenzweig stated that he had withdrawn the earlier motion, anticipating that Mr. Drescher would submit a proposal to resolve all violations, but that no such proposal was received. DEC Staff's reply opposed the motion for a deposition and also briefly mentioned settlement efforts in December 2004.

Paragraph 622.7(b)(2) of 6 NYCRR provides that, "Depositions and written interrogatories will only be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding." The Vendittis have not shown that a deposition of Mr. Pane would expedite the proceeding. The only purpose they stated for the deposition is "to investigate, clarify and narrow exactly what violative acts were committed by the Vendittis" and they provided no explanation of how this would expedite the hearing although they stated their conclusion that the hearing would be expedited. DEC Staff stated it intends to call Mr. Pane as a witness for DEC Staff and that the request for a deposition is unwarranted.

Depositions are rarely used in DEC hearings, and the Vendittis have not shown how deposing Mr. Pane would expedite the hearing. On the contrary, based upon the information in the correspondence to date, it is likely that the requested deposition would duplicate information already provided in the notices of violation, in Mr. Pane's affidavit that accompanied DEC Staff's response to the first motion to dismiss, or in interactions between the parties. DEC Staff and the Vendittis have engaged in settlement discussions and have provided documents to each other; DEC Staff proposed ensuring that both parties have had the opportunity to obtain all relevant documents. These documents and discussions provided, or could provide, avenues for clarification of the parties' positions. In addition, DEC Staff stated that it intends to call Mr. Pane as a witness. Rather than expedite the proceeding, the requested deposition appears likely to consume time on the part of both parties unnecessarily.

Ruling: The Vendittis' motion to take the deposition of Mr. Pane is denied.

Motion to Amend the Complaint

In its March 25, 2005 reply to the Vendittis' motion, DEC Staff moved for leave to amend the complaint. DEC Staff stated the amendment would not introduce new facts but would add the "obvious legal element" that the wood chips placed on the site constitute solid waste. DEC Staff proposed to add a cause of action on the basis of the factual allegations already in the complaint, by adding ECL article 27 and 6 NYCRR part 360 to the list of provisions that are alleged to have been violated. DEC Staff stated this amendment would not cause any prejudice to the Respondents because a date for the hearing has not yet been set and because DEC Staff has also asked for a hearing date in the very near future.

The Vendittis objected both to amending the complaint and to establishing the schedule for discovery proposed by DEC Staff. The Vendittis argued that although DEC Staff claims it would merely add a legal theory to the complaint, the amendment would add factual questions. Although the Vendittis' characterization of the possible additional factual questions is hard to interpret, their overall point appears valid.

DEC Staff's proposed amendment of the complaint assumes that wood chips are always solid waste. While wood chips can be a form of yard waste, they also can be a landscaping material. The complaint does not contain any allegations of facts that would support a conclusion that the wood chips one or more of the Respondents allegedly placed at the site fall within the definition of solid waste, as defined in 6 NYCRR 360-1.2(a). The existing complaint does not identify the quantity or source of the wood chips, although the reference to "grading and filling with wood chips" in paragraph 8 of the complaint suggests the chips were not piled in large piles on the site, as for composting or storage. DEC Staff does not propose to amend the complaint to allege facts that would support identifying the wood chips as solid waste.

In addition, part 360 is a lengthy regulation with many requirements, and simply adding ECL article 27 and part 360 to a list of provisions allegedly violated would not be a specific description of additional alleged violations. This could lead to a motion for a more definite statement of the complaint, a response (and a ruling if necessary), in addition to an amended answer, which would unnecessarily delay resolution of this matter.

Ruling: The motion to amend the complaint is denied.

## Motion to Dismiss the Complaint against Claudia Sanjour

Claudia Sanjour's May 2, 2005 correspondence included a motion to dismiss the complaint against her. As noted above, her motion is being treated as a motion for order without hearing (see, 6 NYCRR 622.12).

Ms. Sanjour stated that she was not an owner of any of the lots involved in the complaint at the time when either violation allegedly occurred, although she was an owner of four of the lots during a period between these times. Ms. Sanjour's correspondence included an affidavit in which she described her role in assisting Tina Sanjour Gough, who was Ms. Sanjour's father's first cousin, in interacting with DEC Staff concerning a letter about the first alleged violation. The affidavit also identified the owners of the lots during the 1995 to 2000 time period, asserted that Ms. Sanjour had not engaged in or permitted any conduct violating the ECL at either of the times in question, and stated that Tina Sanjour Gough passed away in Albany County on June 24, 2003.

In response to Ms. Sanjour's motion, DEC Staff withdrew the complaint against Claudia Sanjour without prejudice. DEC Staff stated that although Ms. Sanjour was temporarily one of the owners of some of the lots involved in this hearing, DEC Staff no longer has reason to believe that she was responsible for the violations alleged in the complaint. DEC Staff stated that although it has no reason to believe that Ms. Sanjour's factual statements concerning her role are not truthful, the complaint was withdrawn without prejudice in the interest of caution in case newly discovered evidence compels a different conclusion.

Ruling: The complaint against Claudia Sanjour was withdrawn by DEC Staff. As a result, she is no longer a Respondent in this case. In future documents concerning this hearing, her name will be removed from the caption. If new evidence leads DEC Staff to reinstate a complaint against her regarding alleged violations of the ECL at these lots, DEC Staff will need to serve upon her a new complaint.

## Clarification concerning Tina Sanjour Gough

Although Claudia Sanjour's May 2, 2005 correspondence stated that Tina Sanjour Gough (referred to as Tina Sanjour) passed away in 2003, Claudia Sanjour did not move to dismiss the complaint

against Tina Sanjour Gough. Ms. Sanjour stated that her role as Tina Sanjour Gough's attorney ended due to Tina Sanjour Gough's death.

DEC Staff's May 11, 2005 response dealt only with Claudia Sanjour's role as a respondent and the motion to dismiss the complaint against Ms. Sanjour. DEC Staff did not address the status of Tina Sanjour Gough as a respondent.

DEC Staff's letter of March 25, 2005, at footnote 1, states that the notice of hearing and complaint were not served upon Tina Sanjour Gough. I am requesting that DEC Staff state whether or not it intends to proceed against Tina Sanjour Gough in this hearing. Please provide this clarification, to be received by May 30, 2005, with copies to Mr. Rosenzweig and to Claudia Sanjour for her information.

#### Schedule of Hearing

DEC Staff asked that discovery be completed within four weeks from this ruling. DEC Staff identified the remaining discovery as exchanging witness lists, ensuring that both parties had the opportunity to obtain all documentary evidence, and trying to obtain some additional aerial photography. The Vendittis objected to this schedule, apparently as being too short, but did not say why other than that it was "incredible" that DEC Staff would propose this along with an amendment of the complaint.

Exchanging witness lists and exchanging, or completing the exchange of, documentary evidence would not appear to require a long time in this case. It is not clear whether DEC Staff's efforts to obtain additional aerial photographs would involve getting information from the Vendittis. In view of this question, I will schedule a conference phone call with Mr. Rosenzweig and Mr. Drescher to set a date for completing discovery, rather than identify the date in this ruling.

The hearing could occur shortly after discovery is complete. I intend to schedule the hearing taking into account any schedule conflicts that exist for the parties' representatives or witnesses as of the time of the conference call about discovery. I am requesting that the parties be prepared to discuss a hearing date when we have the conference phone call. A hearing date in July or August appears feasible.

Albany, New York  
May 20, 2005

\_\_\_\_\_/s/\_\_\_\_\_  
Susan J. DuBois  
Administrative Law Judge

TO: Richard A. Rosenzweig, Esq.  
Udo Drescher, Esq.  
Claudia Sanjour, Esq.