

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

RULING

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

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

November 15, 2005

Respondents.

On November 3, 2005, I received by fax a letter of that same date from Richard A. Rosenzweig, Esq., on behalf of Respondents Anthony Venditti and Kathy Venditti (the Vendittis). The letter requested that I issue a ruling requiring the Department of Environmental Conservation Staff (DEC Staff) to prove its case in this hearing "beyond a reasonable doubt."

The letter cited an Exhibit A as stating that the Respondents could face the "imposition of criminal sanctions." Neither the faxed copy of the letter nor the mailed copy included an Exhibit A, however. I sent an electronic mail message to Mr. Rosenzweig on November 7, 2005 inquiring about Exhibit A. On November 7, 2005, Mr. Rosenzweig sent to me by fax the document identified as Exhibit A. This document is a November 16, 2001 letter from Joseph J. Pane, Principal Fish and Wildlife Biologist in the DEC Region 2 Office, to Anthony Venditti and Tina Sanjour, concerning alleged violations of ECL Article 24 (Freshwater Wetlands Act).

Matthew Ruderman, Legal Intern in the DEC Region 2 Office, responded to the motion by letter dated November 5, 2005. DEC Staff did not ask to supplement its response after receipt of Exhibit A.

On November 9, 2005, Mr. Rosenzweig submitted a reply to DEC Staff's reply. I received the November 9 letter on November 14, 2005. The response on behalf of the Vendittis was not authorized (see 6 NYCRR 622.6(c)(3)), and it does not contain any argument that would change the ruling on this motion.

The Vendittis's motion states that the DEC enforcement hearing procedures, at 6 NYCRR 622.11(c), provide that "the general standard for enforcement proceedings is a 'preponderance of the evidence'... 'unless a higher standard has been established

by statute or regulation.'" The Vendittis argued that in criminal cases the government is required to prove its case beyond a reasonable doubt, and that this standard should apply in the present case because "at least one of the violations issued to Respondents states that the Respondents could face the 'imposition of criminal sanctions...' See exhibit 'A.'" In support of their motion, the Vendittis cited the decision in People v Bondi, 104 Misc 2d 627, 429 NYS2d 146 (Webster Town Ct 1980).

DEC Staff opposed the motion, arguing that because DEC Staff is "merely seeking civil penalties," the present hearing is not a criminal case and the decision in People v Bondi does not apply. DEC Staff stated that, in a "civil case," the ECL does not require a higher standard of proof than a preponderance of the evidence. DEC Staff cited an enforcement section of the ECL as providing a "more relaxed standard" than the standard of proof in part 622.

Discussion

The complaint in this matter alleges that Respondents conducted certain regulated activities in or adjacent to a freshwater wetland without a permit, in violation of ECL article 24 and 6 NYCRR part 663. The complaint seeks civil penalties under ECL 71-2303 and an order of the Commissioner requiring Respondents to remediate the site according to a plan approved by DEC Staff.

ECL 71-2303, concerning enforcement of the Freshwater Wetlands Act, includes two sections. ECL 71-2303(1) governs administrative sanctions (including civil penalties) for violations of this act and ECL 71-2303(2) governs criminal sanctions.

The November 16, 2001 letter that is Exhibit A of the motion was sent to two of the Respondents by a member of DEC Staff prior to the March 3, 2003 date of the complaint. The letter ordered the two Respondents to cease and desist from work that, according to DEC Staff, constituted violations of the Freshwater Wetlands Act. The letter also stated, "Section 71-2303 of the Environmental Conservation Law provides for monetary penalties and the imposition of criminal sanctions for failure to comply." The letter concluded by directing the two Respondents to contact the Regional Attorney in order to resolve the alleged violations.

The quoted sentence in the November 16, 2001 letter is not a basis for requiring proof beyond a reasonable doubt in this administrative hearing. The complaint, which was served after the letter was sent, does not seek any criminal sanctions. Moreover, a DEC administrative enforcement hearing would not be the forum in which to seek criminal sanctions.

The present case is an administrative enforcement hearing under the DEC enforcement hearing procedures set forth in 6 NYCRR part 622. Subdivision 622.11(c) identifies the standard of proof for such hearings and states, in part, that: "Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation."

State Administrative Procedure Act article 3 is part of the statutory authority for 6 NYCRR part 622 and governs New York State administrative adjudicatory proceedings generally. SAPA section 306(1) states, in part, that: "No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence."

ECL article 71 title 23 governs enforcement of ECL article 24, the Freshwater Wetlands Act. ECL 71-2303(1), Administrative Sanctions, provides for civil penalties to be assessed "after a hearing or opportunity to be heard upon due notice and with the rights to specification of the charges and representation by counsel at such hearing." ECL 71-2303(1) also authorizes the Commissioner of the Department of Environmental Conservation to direct a violator to cease his or her violation of the Freshwater Wetlands Act and to restore the affected wetland "following a hearing held in conformance with the procedures set forth in section 71-1709" of the ECL. ECL 71-1709(2) states, "The commissioner and those designated by him [or her] shall not be bound by the laws of evidence in the conduct of hearing proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it."

Subdivision 622.11(c) of 6 NYCRR requires proof "by a preponderance of the evidence unless a higher standard has been established by statute or regulation." The Vendittis did not cite any statute or regulation that would establish a standard of proof in this hearing other than a preponderance of the evidence, nor any statute or regulation that would require proof beyond a reasonable doubt.

The decision in People v Bondi concerns a criminal case in Town Court, not an administrative enforcement hearing in which agency staff is seeking civil penalties and remedial action. The Bondi decision does not address the standard of proof to be applied in an administrative hearing. The Vendittis's motion describes this decision as holding that "enforcement of Wetlands Act with potential criminal charges 'obligates the State to prove beyond a reasonable doubt...'" . The decision, however, states, "The enforcement of the Act *by criminal charges* further obligates the State to prove beyond a reasonable doubt that its actions under the Act were in strict compliance with the law, as passed by the legislature." (104 Misc 2d 627, 628 (emphasis added)). The decision goes on to state that the Court has reasonable doubt about whether violations occurred in that case. The Bondi decision does not support the Vendittis' motion in the present hearing.

Ruling: The motion that DEC Staff be required to prove its case beyond a reasonable doubt is denied.

/s/

Albany, New York
November 15, 2005

Susan J. DuBois
Administrative Law Judge

TO: Richard A. Rosenzweig, Esq.
Udo Drescher, Esq.
Matthew Ruderman, Legal Intern, DEC Region 2