

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

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

ANTHONY VENDITTI and KATHY VENDITTI,

Respondents.

February 3, 2006

On January 26, 2006, DEC Staff served a subpoena and subpoena duces tecum on Claudia Sanjour, Esq. The subpoena directed Ms. Sanjour to appear at the Department of Environmental Conservation's Region 2 Office at 2:00 P.M. on February 9, 2006 to provide testimony in the above hearing, and to bring with her and produce certain documents as described in the subpoena. The hearing began on two days in December 2005 and is scheduled to continue on February 8 and 9, 2006.

DEC Staff had stated, in an e-mail to Ms. Sanjour on February 1, 2006, that it intended to call Ms. Sanjour as a rebuttal witness. Later on that same day, Respondents objected to the subpoena on the basis that DEC Staff was attempting to obtain documents and testimony that Respondents described as pertaining to DEC Staff's direct case, and was seeking these documents after DEC Staff rested its case. Respondents stated that because they have not yet put on their defense, there is nothing for DEC Staff to rebut.

By letter dated February 1, 2006, Respondents moved "either to quash the subpoena or to 'table' it until the end of the scheduled hearing dates to see if the subpoena is relevant and/or necessary at that point." Respondents stated they took no position on the validity of the subpoena or its service. On February 2, 2006, DEC Staff replied, opposing the motion. I received DEC Staff's reply on February 3, 2006 because it arrived at the Office of Hearings and Mediation Services after close of business on February 2, 2006.

I am interpreting the portion of the motion that requests "tabling" the subpoena as being a request to modify the subpoena so that it does not become effective until after February 9, 2006, and would only become effective at that time after a

decision that the testimony or documents sought are relevant and necessary.

The subpoena seeks testimony from a person who formerly owned a portion of the site that is the subject of a violation alleged in the complaint. The complaint initially included Ms. Sanjour as a respondent. On May 2, 2005, Ms. Sanjour moved to dismiss the complaint against her. In response to her motion, DEC Staff withdrew its complaint against her without prejudice. She is no longer a respondent in this case (see May 20, 2005 ruling, at page 7).

The subpoena also seeks documents concerning the site, including photos, surveys, or other images, sales or purchase contracts, and contracts for materials placed on the site or landscaping work done at the site. DEC Staff, in its reply to the motion to quash the subpoena, described how several of these categories of documents are relevant to two affirmative defenses stated in Respondents' answer, and asserted that the remaining documents are also relevant. These two affirmative defenses are: "The areas in question are not protected areas or wetlands" and "The acts complained of herein were caused by others not parties hereto, with no culpable conduct on the part of Respondents." DEC Staff's reply demonstrates how the requested documents, and information one could reasonably expect would be or might be in those documents, would be relevant to these affirmative defenses.

Although it is unknown at present whether Respondents will actually present testimony regarding either of these affirmative defenses, Respondents asserted these affirmative defenses and it is reasonable to expect that they will present testimony regarding them. If this occurs, DEC Staff would be allowed to present rebuttal testimony. Respondents have not cited any authority that would prevent DEC Staff from issuing a subpoena for a rebuttal witness prior to Respondents actually presenting testimony about their affirmative defenses.

There is also no reason to modify the subpoena as suggested by the request to "table" it. As stated above, it is reasonable to expect that Respondents will present testimony regarding the affirmative defenses to which the subpoenaed documents and testimony would be relevant.

Ruling: Respondents' motion to quash or to "table" the subpoena is denied.

Albany, New York
February 3, 2006

_____/s/_____
Susan J. DuBois
Administrative Law Judge

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

cc: Claudia Sanjour, Esq.
(All copies by fax and first class mail)