

**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 703 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING ON AMENDED
MOTION TO COMPEL
DISCLOSURE**

DEC File No.
R4-2010-0330-24

- by -

April 28, 2011

WILLIAM WOLF,

Respondent.

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Jill T. Philips of counsel), for staff of the Department of Environmental Conservation

-- Lewis & Stanzione (Ralph C. Lewis, Jr., of counsel), for respondent (no appearance on motion)

Staff of the Department of Environmental Conservation (Department) moves for a ruling compelling respondent William Wolf to respond to discovery demands detailed in the Department's motion. For the reasons that follow, Department staff's motion is granted.

PROCEEDINGS

Staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated October 20, 2010. In the complaint, staff alleges that respondent is the owner of a 44 acre parcel located on Sunside Road (County Route 20), south of Edison Timmerman Road, in the Village of Cairo, Green County (Tax Map # 65.00-5-23) (the site). In its first cause of action, staff charges that on or about January 26, 2010, respondent engaged in construction

activity at the site that disturbed approximately 15 acres without filing a notice of intent for coverage under the general permit for stormwater discharges from construction activity, GP-0-10-001 (General Permit) in violation of ECL 17-0505 and 6 NYCRR 750-1.4(b). In its second cause of action, staff charges that respondent discharged stormwater from the site causing turbidity in an unnamed tributary of the Catskill Creek, a Class C water body, in violation of 6 NYCRR 703.2. Accordingly, staff seeks a civil penalty in the amount of \$37,500 and certain specified remedial relief.

Respondent filed an answer dated November 12, 2010, denying the allegations of the complaint. Thereafter, staff served a notice of discovery dated November 19, 2010, upon respondent's attorney.

When respondent failed to respond to the notice of discovery, Department staff filed a motion dated January 18, 2011, to compel disclosure. Respondent did not respond to the motion.

In a letter ruling dated February 11, 2011, the undersigned Chief Administrative Law Judge (ALJ) denied the motion on the ground that staff had failed to provide an affidavit of good faith efforts to resolve the discovery dispute as required 6 NYCRR 622.7(c)(1). I granted staff leave to renew the motion upon the filing of the required affidavit.

Department staff now files an amended motion to compel discovery dated April 15, 2011. Attached to the motion is an affirmation of staff counsel, with attachments, detailing staff's efforts to resolve the discovery dispute without resort to motion practice and respondent's failure to respond to staff's discovery demands. Respondent has not filed a response to staff's amended motion to compel discovery, nor has respondent moved for a protective order.

DISCUSSION

Pursuant to the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 ["Part 622"]), the scope of discovery is as broad as that provided for under article 31 of the CPLR (see 6 NYCRR 622.7[a]). Except as expressly provided

for in the regulations, parties may employ any disclosure device authorized by CPLR article 31 (see 6 NYCRR 622.7[b]).

A party against whom discovery is demanded may make a motion to the ALJ for a protective order in general conformance with CPLR 3103 (see 6 NYCRR 622.7[c][1]). If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the ALJ to compel disclosure (see 6 NYCRR 622.7[c][2]). The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded (see 6 NYCRR 622.7[c][3]). A failure to comply with the ALJ's direction will allow the ALJ or the Commissioner to draw the inference that the material demanded is unfavorable to the non-complying party's position (see id.).

The Department's November 19, 2010, discovery demands were authorized by CPLR article 31 and Part 622, and duly served upon respondent. Respondent failed to respond to the Department's demands, and neither raised a timely objection to the Department's demands nor moved for a protective order. Respondent has not provided any good cause for the failure to respond to the discovery demands or the motion to compel, notwithstanding Department staff's good faith efforts to resolve the dispute without resort to a motion.

RULING

Accordingly, Department staff's motion to compel discovery is granted. Respondent William Wolf is hereby directed to respond to Department staff's November 19, 2010, notice of discovery by close of business on Wednesday, May 18, 2011.

Take notice that if respondent William Wolf fails to comply with this ruling, the material demanded in Department staff's November 19, 2010, notice of discovery shall be precluded from the hearing, and the assigned ALJ and the Commissioner may draw the inference that the material demanded is unfavorable to respondent William Wolf's position, pursuant to 6 NYCRR 622.7(c)(3).

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: April 28, 2011
Albany, New York

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