

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violation  
of Article 17 of the Environmental  
Conservation Law, Article 12 of the New  
York State Navigation Law, and Titles 6  
and 17 of the Official Compilation of  
Codes, Rules and Regulations of the  
State of New York,

**RULING**

DEC File No.  
R2-20060501-194

- by -

**EINHORN ENTERPRISES, LLC, and  
JONATHAN EINHORN,**

Respondents.

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Appearances of Counsel:

-- Stern & Stern (David Lyle Stern of counsel), for  
respondents

-- Alison H. Crocker, Acting Deputy Commissioner and  
General Counsel (John K. Urda, Assistant Regional  
Attorney, Region 2), for the Department of  
Environmental Conservation

Respondents Einhorn Enterprises, LLC, and Jonathan  
Einhorn move for an extension of time to respond to a motion for  
order without hearing filed by staff of the Department of  
Environmental Conservation ("Department"). For the reasons that  
follow, respondents' motion is denied.

PROCEEDINGS

Department staff commenced this administrative  
enforcement proceeding by service of a complaint dated August 23,  
2006. Department staff agreed to least two extensions for the  
time to answer, the final extension being through November 17,  
2006. On November 17, 2006, Department staff received  
respondents' answer of the same date.

On November 21, 2006, Department staff served, by  
certified mail, its motion for order without hearing on its  
complaint. The motion was received by respondents' counsel on

November 22, 2006. In its motion, staff gave respondents twenty days following receipt of the motion, or until December 12, 2006, to file a response to the motion. Respondents did not file a response on or before that date.

By letter dated and received on December 15, 2006, respondents filed a formal written application for a 30-day extension of the time to respond to Department staff's motion. The sole ground asserted for the extension was that "[r]espondents will not be able to fashion an adequate response to the moving papers in the 20 days allotted by the moving papers." No further ground or explanation is offered in support of the extension request.

By letter dated December 19, 2006, Department staff oppose the extension request.

#### DISCUSSION

As an initial matter, Department staff's motion is not being used in lieu of complaint (see 6 NYCRR 622.12[a]). Instead, Department staff's motion for order without hearing is in essence a motion seeking summary judgment on its August 23, 2006 complaint, to which respondents filed a timely answer.

Thus, contrary to the assertion in Department staff's motion papers, respondents' failure to respond to the motion is not a failure to respond to a complaint that would result in a default in answering and a waiver of respondents' right to a hearing (see 6 NYCRR 622.12[b]; 6 NYCRR 622.15[a]; 6 NYCRR 622.3[a][2]). If Department staff's motion was served in lieu of complaint, the proper procedural course for respondents would be to move to reopen a default in answering (see 6 NYCRR 622.15[d]). To be successful on such a motion, a respondent would have to demonstrate good cause for the default, and that a meritorious defense is likely to exist, as demonstrated in an affidavit of merit (see id.).

Here, because staff's motion is a motion for summary judgment on its complaint, it is governed by the general rules of practice for motions provided for at 6 NYCRR 622.6. The consequence of a default in responding to such a motion is that the motion will be deemed unopposed and decided accordingly.

Pursuant to the general rules of practice, the presiding administrative law judge ("ALJ"), or Chief ALJ when, as here, an ALJ has yet to be assigned, may grant a motion to modify all rules of practice involving time periods "[t]o avoid

prejudice to any of the parties" (6 NYCRR 622.6[f]). Respondents' application, however, fails to provide a sufficient basis for granting a motion pursuant to section 622.6(f). First, respondents' request for an extension was made after the time to respond to the motion expired, and no excuse is provided for the late extension request. Second, respondents' unsupported assertion that twenty days to respond to staff's summary judgment motion is insufficient to establish prejudice, particularly because respondents have already filed an answer in this case, and the twenty days provided by staff is more than ten days longer than the time ordinarily provided for under the regulations (see 6 NYCRR 622.6[c][3], [b]).

Accordingly, respondents' late application for an extension of time to respond to Department staff's motion must be denied.

#### RULING

Respondents' motion for an extension of time to respond to Department staff's motion for order without hearing filed in addition to the complaint is denied. Department staff's motion is deemed unopposed and will be decided accordingly.

\_\_\_\_\_/s/\_\_\_\_\_  
James T. McClymonds  
Chief Administrative Law Judge

Dated: December 27, 2006  
Albany, New York

TO: (Via facsimile and regular mail)

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