

**New York State Department of Environmental Conservation
Office of Hearings and Mediation Services, 1st Floor**

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Joe Martens
Commissioner

Via Email and Regular Mail

M E M O R A N D U M

TO: Attached Service List

FROM: James T. McClymonds, Chief Administrative Law Judge

DATE: October 29, 2014

RE: Matter of Finger Lakes LPG Storage, LLC
DEC Project Application No. 8-4432-00085

Confidentiality Agreement and Order

Attached please find the final draft confidentiality agreement and order to be used in the above referenced matter. This draft was proposed by applicant Finger Lakes LPG Storage, LLC, with some modifications proposed by staff of the Department of Environmental Conservation, and myself as presiding Administrative Law Judge (ALJ).

Applicant has designated many of the application documents submitted in support of DEC Project Application No. 8-4432-00085 as confidential, and has requested those documents be safeguarded from disclosure to third parties. The purpose of the confidentiality agreement and order is to provide potential intervenors in the permit hearing proceeding on the application with a means of obtaining access to the documents for which confidentiality is asserted without requiring the ALJ to make a prior determination on the confidentiality claims on the merits.

Potential intervenors who wish to obtain access to the subject documents in order to participate in the issues conference and any subsequent adjudicatory proceedings on the application (see Notice [dated Oct. 22, 2014], available at <http://www.dec.ny.gov/enb/99319.html>) may execute the confidentiality agreement and order and forward it to

applicant's representative. Applicant will then forward the signed agreement to myself to be so ordered.

As per the terms of the agreement, execution of the agreement is without prejudice to any party seeking a determination of confidentiality on the merits from the ALJ.

Thank you for your attention. Please let me know if there are any questions.

Attachments

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Matter of FINGER LAKES LPG STORAGE, LLC

DEC Permit ID No. 8-4432-00085

SERVICE LIST
(as of October 7, 2014)

ACTIVE PARTIES

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CONFIDENTIALITY AGREEMENT AND ORDER

MATTER OF APPLICATION 8-4432-00085 BY FINGER LAKES LPG STORAGE, LLC,
FOR AN UNDERGROUND GAS STORAGE PERMIT PURSUANT TO ECL ARTICLE
23, TITLE 23, BEFORE THE
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

1. General. This Confidentiality Agreement and Order, including Exhibit A, shall govern the use of all Protected Materials produced by, or on behalf of, the Applicant. Notwithstanding any order terminating this Proceeding, this Confidentiality Agreement and Order shall remain in effect until specifically modified or terminated by the Administrative Law Judge (“ALJ”).

2. Definitions. For the purposes of this Confidentiality Agreement and Order:

(a) “Applicant” shall mean Finger Lakes LPG Storage, LLC.

(b) “Department” or “DEC” shall mean New York State Department of Environmental Conservation.

(c) “Notes of Protected Materials” means memoranda, hand written notes, or any other form of information, in any format whatsoever, created by any Participant which copies or discloses Protected Materials.

(d) “Participant” shall mean those entering into this Confidentiality Agreement and Order and executing a Non-Disclosure Certificate.

(e) “Proceeding” shall mean any Proceeding held in accordance with the Department’s regulations at 6 NYCRR Part 624 for the proposed Finger Lakes project, DEC Project No. 8-4432-00085.

(f) “Protected Materials” shall mean (i) materials provided by the Applicant in response to discovery requests and designated by the Applicant as protected; (ii) any information contained in or obtained from materials designated by the Applicant as protected; (iii) any other materials which are made subject to this Confidentiality Agreement and Order by the ALJ, any court, or other body having appropriate authority; (iv) Notes of Protected Materials; (v) copies, in any format whatsoever, of Protected Materials; (vi) materials which the Applicant designates as protected due to such materials being customarily treated by the Applicant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject the Applicant or its customers to risk of competitive disadvantage or other business injury; (vii) materials which the Applicant designates as protected due to such materials containing critical infrastructure information, as that term is defined in Article 6 of the New York State Public Officers Law (“Critical Infrastructure Information”); (viii) any information or document contained in the files of the DEC regarding the Applicant that has been designated as Critical Infrastructure Information; and (ix) all documents which prior to the date of this Confidentiality Agreement and Order have been determined to be exempt from disclosure by the DEC.

The term Protected Materials does not include (i) any information or document that has been filed with and accepted in the public files of the DEC, or contained in the public files of any federal or state agency, or any federal or state court, unless the information or document has been determined to be protected from disclosure by such agency or court; or (ii) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Confidentiality Agreement and Order.

(g) “Non-Disclosure Certificate” means the certificate annexed hereto as Exhibit A.

3. Availability and Use.

(a) Protected Materials shall be made available under the terms of this Confidentiality Agreement and Order.

(b) Each Participant shall execute a Non-Disclosure Certificate prior to receiving any Protected Materials. All Non-Disclosure Certificates executed by an individual or entity shall be served by the Applicant on those on the official service list maintained by the ALJ in this Proceeding.

(c) Notwithstanding anything herein to the contrary, provided an attorney qualified as a Participant has executed a Non-Disclosure Certificate, the other attorneys, paralegals, secretaries, and other clerical personnel under the attorney’s instruction, supervision, or control shall not be required to execute a Non-Disclosure Certificate. Such attorney shall be responsible for ensuring such other attorneys, paralegals, secretaries, and other clerical personnel comply with the terms of this Confidentiality Agreement and Order.

(d) Notwithstanding anything herein to the contrary, a Participant may grant access to Protected Materials to such of its officers, principals, employees, and agents as the Participant deems necessary to facilitate its participation in this Proceeding and such officers, principals, employees and agents shall not be required to execute a Non-Disclosure Certificate. Counsel or the authorized representative of a Participant who executes a Non-Disclosure Certificate on behalf of a Participant shall be responsible for ensuring that the Participant, including its officers, principals, employees, and agents comply with this Confidentiality Agreement and Order.

(e) If a Participant desires to grant access to the Protected Materials to a consultant or other expert (“Expert”) who is not an officer, principal, employee, or agent of the Participant, but is retained to assist the Participant in its participation in this Proceeding, the Participant must: (i) provide the Expert with a copy of this Confidentiality Agreement and Order; (ii) obtain an executed Non-Disclosure Certificate, and serve copies of the executed Non-Disclosure Certificate on all parties on the official service list maintained by the ALJ in this Proceeding; and (iii) obtain the Applicant’s advance written consent. If the Applicant does not object to access being granted to the Expert within five (5) business days following service of the executed Non-Disclosure Certificate, consent to such access will be deemed granted. If the Applicant does object

to any or all of its Protected Materials being given to the Expert, the terms of Paragraph 5 shall apply.

(f) Protected Materials shall remain available to Participants until the later of the date that an order terminating this Proceeding is no longer subject to judicial review or the date that any other DEC proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so, in writing, after that date, the Participants shall, within fifteen (15) days of such request, return the Protected Materials to the Applicant and/or destroy the Protected Materials and certify such destruction to the Applicant.

(g) If any Participant desires to include, utilize, or refer to any Protected Materials or information derived therefrom in testimony or exhibits during this Proceeding in such a manner that might require disclosure of such Protected Materials to persons other than Participants, such Participant shall first notify the ALJ, Department Staff, and Applicant's counsel of such desire and identify with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the ALJ.

(h) At any part or stage of this Proceeding, no person may remain in attendance when Protected Materials are being disclosed unless that person is entitled to access to that information under the terms of this Confidentiality Agreement and Order. In order to facilitate the management of such disclosures, counsel or the authorized representative of a Participant will advise the other Participants, Department Staff, and the ALJ as far in advance as possible, and no less than 24 hours, that particular testimony, questioning, discussions or presentations are expected to include Protected Materials.

(i) Subject to any special protection granted by the ALJ or the Commissioner of the Department ("Commissioner"), Participants may refer to Protected Materials in briefs, motions, testimony, exhibits, or other materials filed in this Proceeding (collectively, "Pleadings"), provided that separate versions of such Pleadings are prepared that include and omit the Protected Materials (the "Unredacted Version" and the "Redacted Version", respectively), and that the Unredacted Version of any Pleadings be provided solely to the ALJ, Department staff, and Participants. Under no circumstances should Protected Materials be included in copies of the Pleadings that Participants file with the DEC for inclusion in the DEC's public files. The Unredacted Version of a Pleading must bear a conspicuous notation on the cover page and on each page containing Protected Materials as detailed in Paragraphs 4(d), (e) and (f). The Unredacted Version of any Pleading will be treated as Protected Materials pursuant to this Confidentiality Agreement and Order.

(j) No Participant may use any information contained in any Protected Materials obtained through this Proceeding to give a commercial advantage to any Participant, or any competitor thereof. Unless Applicant (or, if applicable, one or more of its affiliates) has filed information contained in Protected Materials with any federal or state agency or court with jurisdiction over Applicant (or, if applicable, one or more of its

affiliate), and subject to any confidentiality restrictions established by or for any such proceedings by the agency or court of competent jurisdiction, Participant's use of information contained in Protected Materials will be limited solely to this Proceeding.

(k) Nothing in this Confidentiality Agreement and Order shall be construed as precluding any Participant from (i) objecting to the use of Protected Materials on any legal grounds; (ii) requesting the ALJ or any other body having appropriate authority find that this Confidentiality Agreement and Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Confidentiality Agreement and Order; (iii) independently seeking, through discovery in any other administrative or judicial proceeding, information or materials produced in this Proceeding under this Confidentiality Agreement and Order; (iv) questioning, challenging, and objecting to the admissibility of all Protected Materials; (v) contesting the protected status of any Protected Materials; (vi) appealing any finding that specific information is or is not entitled to protected status; or (vii) seeking changes to this Confidentiality Agreement and Order from the ALJ as appropriate.

4. Confidentiality and Security.

(a) Each Participant shall treat Protected Materials as confidential and in accordance with the terms of this Confidentiality Agreement and Order. Protected Materials shall not be used except as necessary for the conduct of this Proceeding, nor shall they be disclosed in any manner to any person, except as provided herein.

(b) All Protected Materials shall be maintained by the Participants in a secure place and in the same manner as such Participant would maintain its own confidential information. Access to Protected Materials shall be strictly limited to the Participant.

(c) The ALJ shall place any Protected Materials filed with the DEC in a non-public file; however, the placement of the Protected Materials in a non-public file shall not be deemed to be a determination by the DEC of any claim of privilege. The DEC and/or the ALJ retains the right to make determinations regarding any claim of privilege and the discretion to release Protected Materials necessary to carry out its jurisdictional responsibilities.

(d) The Applicant shall physically mark each page of any Protected Materials it produces with the phrase "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included to indicate that such materials are Protected Materials.

(e) If the Protected Materials produced by the Applicant contain Critical Infrastructure Information, the Applicant shall additionally mark on each page containing such information the phrase "Contains Critical Infrastructure Information – Do Not Release".

(f) All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which

refer to Protected Materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Confidentiality Agreement and Order. Such documents shall be marked with the phrase "PROTECTED MATERIALS" and served on all parties on the official service list maintained by the ALJ in this Proceeding. For anything filed under seal, redacted versions, or where an entire document is deemed Protected Material, a letter indicating such will also be filed with the DEC and served on all parties on the official service list maintained by the ALJ in this Proceeding.

5. Disputes.

(a) The ALJ shall resolve any disputes arising under this Confidentiality Agreement and Order. Prior to presenting any dispute under this Confidentiality Agreement and Order to the ALJ, the parties to such dispute shall use their best efforts to resolve it.

(b) Any Participant that contests the Applicant's designation of materials as Protected Materials shall notify the Applicant and the ALJ by specifying, in writing, the materials of which the designation is contested. This Confidentiality Agreement and Order shall automatically cease to apply to such materials ten (10) business days after the notification unless the Applicant within such ten (10) day period files a motion with the ALJ with supporting affidavits demonstrating that the materials should continue to be Protected Materials. In any such contest, the burden of proof shall be on the Applicant. If the ALJ finds that the contested materials are not entitled to protection, the following procedure shall apply:

- (i) those materials, which the ALJ has determined are not entitled to protection shall nevertheless be subject to the protection afforded by this Confidentiality Agreement and Order for five (5) business days from the date of the issuance of the ALJ's determination, and, if the Applicant files a motion for reconsideration with the ALJ pursuant to 6 NYCRR § 624.6(c) or seeks leave for an expedited appeal to the Commissioner pursuant to 6 NYCRR § 624.8(d), for an additional five (5) days.
- (ii) No Participant waives its rights to seek additional administrative or judicial remedies after the ALJ's decision regarding the protected status of the Protected Materials or the Commissioner's denial of any appeal thereof.

6. Amendments and Termination. The ALJ may alter, amend, or terminate this Confidentiality Agreement and Order on his own initiative or at the request of any participant at any time during the course of this Proceeding.

7. Violations.

(a) A Participant's violation of this Confidentiality Agreement and Order shall constitute a violation of an order of the DEC and such Participant may be subject to

sanctions as may be imposed by the ALJ or the Commissioner, which may include denial of its petition for party status in this Proceeding or, if already a party hereto, revocation of its party status. In addition, the Applicant may pursue all legal remedies available to it under relevant federal and state statutes and regulations, including, but not limited to, criminal and/or civil penalties, for any violation of this Confidentiality Agreement and Order.

(b) If a Participant believes it may have disclosed Protected Materials to a person not entitled to receive them under the terms of this Confidentiality Agreement and Order (the "Disclosing Participant"), it will notify the Applicant and the ALJ immediately and provide detailed information concerning all the steps taken or being taken to reverse or minimize the impacts of the violative disclosure. If the Applicant agrees to share its Protected Materials with persons not previously entitled to receive it, the Applicant will inform the ALJ and Disclosing Participant promptly and the Disclosing Participant shall be required to (i) provide the person with a copy of this Confidentiality Agreement and (ii) obtain an executed Non-Disclosure Certificate, and serve copies of the executed Non-Disclosure Certificate on all parties on the official service list maintained by the ALJ in this Proceeding.

8. Survival. In the event that any Participant to whom Protected Materials have been disclosed ceases to be engaged in this Proceeding or no longer qualifies as a Participant, such person or entity's access to Protected Materials shall terminate and it shall be subject to the provision in Paragraph 3(f) regarding the return and/or destruction of the Protected Materials. Even if no longer engaged in this Proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Confidentiality Agreement and Order. Notwithstanding anything herein to the contrary, to the extent any Protected Materials have not been returned and/or destroyed in accordance with this Section 8, Participant's obligations of confidentiality set forth in this Confidentiality Agreement will survive the termination hereof.

FINGER LAKES LPG STORAGE, LLC

By: _____

Name:

Its:

SO ORDERED:

James T. McClymonds
Chief Administrative Law Judge

Exhibit A

TO THE CONFIDENTIALITY AGREEMENT AND ORDER ADOPTED
IN THE MATTER OF APPLICATION 8-4432-00085 BY FINGER LAKES LPG
STORAGE, LLC, FOR AN UNDERGROUND GAS STORAGE PERMIT PURSUANT TO
ECL ARTICLE 23, TITLE 23, BEFORE THE
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

On behalf of _____:

I acknowledge receipt of a copy of the Confidentiality Agreement and Order described above, and affirm that I have read and understand its terms and provisions.

In return for the opportunity to receive, without delay, information submitted in this Proceeding that the Applicant claims to be Protected Materials as defined in the Confidentiality Agreement and Order, I certify that the party for whom I am signing this Exhibit A will be bound by, and will comply fully with, the terms and conditions of the Confidentiality Agreement and Order. I assume responsibility for ensuring such party's compliance therewith and will be responsible for any breach of the Confidentiality Agreement by such party.

I further certify that I am an attorney representing the party named above, or an authorized representative of such party, and that I have full authority to execute this document and bind the party hereto.

I acknowledge the importance of maintaining the confidentiality of the Protected Materials, the release of which could expose the Applicant to economic and competitive harm. I further acknowledge that upon the use or disclosure of the Protected Materials contrary to the terms of this Confidentiality Agreement and Order (e.g., directly or indirectly leaking or causing to leak any of the Protected Materials to third parties, such as the press), I will be subject to such sanctions as may be imposed by the Administrative Law Judge or the New York State Department of Environmental Conservation, which may include the denial of my petition for party status in this Proceeding or, if already a party hereto, revocation of my party status, and/or report to a professional conduct committee or licensing authority. I also acknowledge that if I use or disclose Protected Materials contrary to the terms of this Confidentiality Agreement and Order, the Applicant may pursue all legal remedies available to it under relevant federal and state statutes and regulations, including, but not limited to, criminal and/or civil penalties.

By: _____

Print Name: _____

Title: _____

Job Responsibility: _____

Date: _____