

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

In the Matter of the Alleged Violations of Articles 15, 25, and 34 of the New York State Environmental Conservation Law (“ECL”) and Section 663.4(20) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

-by-

ROBERT I. TOUSSIE; JOGLO REALTIES, INC.;
T.Z. BROTHERS GENERAL CONTRACTORS, INC.;
LELLO G. ZODIACO; and ANTONIO ZODIACO,
personally and as chief executive officer/sole shareholder
of T.Z. Brothers General Contractors, Inc.,

**RULING ON
REQUEST TO SERVE
INTERROGATORIES**

DEC Case No.
R2-20130724-348

Respondents.

This matter involves staff’s allegations that respondents performed certain construction and other activities following Hurricane Sandy in 2012, without required permits and/or outside the scope of the “Hurricane Sandy General Permit,” GP-2-13-002 and GP-2-13-003, issued following the Hurricane, at property in Brooklyn, Kings County. Staff alleges, among other things, that respondents (i) placed different types of fill in a regulated tidal wetland adjacent area, in a Coastal Erosion Hazard Area (“CEHA”), and below the mean high water line in a navigable water of the State; (ii) were involved in constructing a “shoreline erosion structure” in a regulated tidal wetland and below the mean high water line in the Atlantic Ocean, a navigable water of the State, and in a CEHA; (iii) were involved in constructing a concrete wall with associated concrete footing in a regulated tidal wetland adjacent area and in a CEHA; (iv) were involved in constructing a fence in a regulated tidal wetland adjacent area and in a CEHA, and a “cast-iron fence piece” in a regulated tidal wetland and CEHA; and (v) performed activities that were not within the scope of various Notices of Intent submitted by respondents under the Hurricane Sandy General Permit. See generally Amended Complaint dated July 13, 2016, at ¶¶ 77-112.

In addition to denying liability, respondents Robert Toussie and Joglo Realities, Inc. (“Toussie Respondents”) have asserted what they refer to as fifteen (15) affirmative defenses, including asserting that the site is outside the Department’s jurisdiction under ECL articles 15, 25 and 34, and that certain of respondents’ alleged activities are not within the scope of the provisions cited by staff. See generally Answer to Amended Complaint dated August 15, 2016, at ¶¶ 114-154.

By letter dated September 30, 2016 (“Letter Request”), the Toussie Respondents have requested, pursuant to 6 NYCRR § 622.7(b)(2), permission to propound interrogatories to

Department staff. The Toussie Respondents have appended the proposed set of interrogatories to their Letter Request. By letter dated October 5, 2016, Department staff opposes the Toussie Respondents' request.¹

In their Letter Request, the Toussie Respondents state that the proposed interrogatories generally are "directed at the factual basis for Staff's jurisdictional claims and clarification of the Amended Complaint." Letter Request at 2. Respondents seek (i) "the basis for the Staff's assertion of jurisdiction under the various causes of action" in the complaint, Letter Request at 1; and (ii) "a precise statement of the relief sought by the Staff and the bases for that relief." Id. Finally Respondents state that allowing service of interrogatories "is likely to expedite the proceeding." Id.

The Toussie Respondents argue that their proposed interrogatories will require Department staff "to disclose with particularity the jurisdictional boundaries it is alleging, and the basis for those assertions." Letter Request at 1. In its response, staff argues that the complaint defines the site boundaries and the bases for the Department's assertion of jurisdiction. See Letter from Jessica Steinberg Albin, Esq. dated October 5, 2016 ("Staff Letter").²

Interrogatories are allowed in proceedings under 6 NYCRR Part 622 only "with permission of the ALJ upon a finding that they are likely to expedite the proceeding." 6 NYCRR § 622.7(b)(2). Upon review of the parties' pleadings, the proposed interrogatories and arguments of counsel, I hold that the service of interrogatories are not likely to expedite the proceeding, and therefore deny respondents' request.

Respondents' many requests in the interrogatories for "particularity," see e.g. proposed interrogatories 1, 3(i), 4(i), (ii), 5(i), 6(i), 7(i), suggest that respondents' proposed interrogatories are in fact a bill of particulars, a discovery device explicitly prohibited in Part 622 proceedings. See 6 NYCRR 622.7(b)(3). Some of the interrogatories also request that staff "identify any documents" related to the subject matter of the interrogatory. See e.g. proposed interrogatories 1, 2, 3(ii), 4(iv), 5(ii), 6(iii), 7(iii), 9(iii). Seeking the "identification" of documents in response to an interrogatory is an unnecessary interim step likely leading to a request to produce. Under the current scheduling order, respondents are free to serve a supplemental document request on or before October 31, 2016 seeking documents in the categories described in the proposed interrogatories.

The pleadings provide sufficient notice to respondents so that respondents may prepare a defense. Moreover, staff has the burden of demonstrating at hearing all of the factual predicates for establishing that respondents' actions comprised violations under the jurisdictional reach of the statutes and regulations alleged. See 6 NYCRR § 622.11(b)(1). Respondents have personal

¹ Respondents T.Z. Brothers General Contractors, Inc., Lello G. Zodiaco and Antonio Zodiaco did not file any papers with respect to the Toussie Respondents' request.

² In addition, in its letter opposing respondents' request, Staff argued that the request was premature, and that documents to be produced in response to respondents' document request would provide additional information. During an October 12, 2016 conference call with the parties after the document production had been made, counsel for the Toussie Respondents stated that the document production did not alter respondents' request to serve the interrogatories.

knowledge of their own actions and construction activities at the site, and are not at risk of “surprise” at trial regarding such activities.

Respondents’ request to serve interrogatories is denied.

Dated: October 19, 2016
Albany, NY

_____/s/_____
D. Scott Bassinson
Administrative Law Judge