STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),	**RULING ON MOTION TO COMPEL DISCLOSURE** DEC Case No. R5-20170301-2241
- by -	PBS No. 5-462969
BELLMONT L.M. INC. and ANDREW B. CHASE, Individually,	August 22, 2018
Respondents.	

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Appearances of Counsel:

    --   Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

    --   No appearance for respondents

        Staff of the Department of Environmental Conservation (Department) moves for a ruling compelling respondents Bellmont L.M. Inc. and Andrew B. Chase, individually, to respond to staff's combined discovery demands dated February 13, 2018. For the reasons that follow, Department staff's motion is granted as to respondent Andrew B. Chase, individually, and denied without prejudice as to respondent Bellmont L.M. Inc.

<u>PROCEEDINGS</u>

        Staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated May 15, 2017 upon respondent Bellmont L.M. Inc., and a duplicate notice of hearing and complaint dated October 26, 2017, upon respondent Andrew B. Chase, in his individual capacity as

responsible corporate officer of Bellmont L.M. Inc.[1] In the
complaints, staff alleges that respondents are jointly and
severally liable for multiple violations of the Department's
regulations governing petroleum bulk storage (PBS) facilities at
a facility known as Mountain Marketplace located at 3851 Route
374, Lyon Mountain, Clinton County. Respondents each filed
answers to the respective complaints (see Affirmation of Scott
Abrahamson in Support of Department Staff's Motion to Compel
Disclosure dated June 11, 2018, Exhs 2 and 4).

Department staff now files a notice of motion and
motion to compel disclosure dated June 11, 2018. Attached to
the motion is an affirmation of staff counsel, with attachments,
detailing respondents' failure to respond to staff's combined
discovery demands dated February 13, 2018, and staff's efforts
to resolve the discovery dispute without resort to motion
practice. Respondents have not filed a response to staff's
motion to compel discovery, nor have respondents 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

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[1] Service of the complaint on respondent Andrew B. Chase, individually, was
completed pursuant to a ruling authorizing service of process on respondent
Chase by first class mail and email (see Matter of Bellmont L.M. Inc., Ruling
on Motion for Permission to Use Alternative Method of Service, Oct. 6, 2017
[October 2017 Ruling]).

the Commissioner to draw the inference that the material demanded is unfavorable to the non-complying party's position (see id.).

I.   Service of Papers

      Under Part 622, service of papers – that is, papers other than those served to obtain jurisdiction over a respondent (i.e., service of process) -- is governed by CPLR 2103 (see 6 NYCRR 622.6[a][1]). Where, as here, the parties are not represented by an attorney, service of interlocutory papers is governed by CPLR 2103(c) (see J.C. Ryan EBCO/H&G, LLC v Cyber-Struct, Inc., 134 AD3d 901, 902 [2d Dept 2015]). Among the authorized methods for serving interlocutory papers on an unrepresented party is service by first class mail to either an address designated by the party or its last known address (see CPLR 2103[b][2]; J.C. Ryan EBCO/H&G, LLC, 134 AD3d at 902).

      Here, Department staff's affidavit of service of the notice of motion and motion to compel disclosure was served on respondent Andrew B. Chase by first class mail to his last known mailing address (see Affidavit of Service of Renee Fitzgerald, dated June 13, 2018, at 1-2). Accordingly, staff has established service of the motion to compel on respondent Chase individually.[2]

      With respect to the corporate respondent, Bellmont L.M. Inc., however, nothing in staff's affidavit of service indicates that the corporate respondent was separately served the motion to compel by first class mail to the corporation's last known address, or by any other method authorized by CPLR 2103(c). Nor has staff provided a separate affidavit of service establishing that the corporate respondent was separately served with the motion to compel. Finally, nothing in the record indicates that staff separately served the February 13, 2018 combined discovery demands on the corporate respondent.

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[2] Department staff also served the motion to compel on respondent Chase by email. In support of this method of service, staff relies on the October 2017 Ruling authorizing email as an alternative method of service of the notice of hearing and complaint on respondent Chase. However, the October 2017 Ruling concerned service of process, not service of papers, and should not be construed as authorizing email service of papers in contravention of electronic service authorized by CPLR 2103(b)(7). Nevertheless, because staff's motion papers were properly served upon respondent Chase by first class mail, staff's additional service of the motion by email was harmless.

Accordingly, staff's motion to compel disclosure should be denied as to respondent Bellmont L.M. Inc. without prejudice to renew upon a showing of proper service of the discovery demands and the motion to compel on the corporate respondent.

II. Motion to Compel Disclosure

The Department's February 13, 2018, discovery demands were authorized by CPLR article 31 and Part 622, and duly served upon respondent Chase. Notwithstanding multiple extensions of the time to respond authorized by Department staff, respondent Chase 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 Chase 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. Accordingly, staff's motion to compel disclosure should be granted as to respondent Chase.

RULING

Department staff's motion to compel disclosure is granted as to respondent Andrew B. Chase, individually. Respondent Andrew B. Chase, individually, is hereby directed to respond to Department staff's February 13, 2018, combined discovery demands by close of business on Tuesday, September 4, 2018.

Take notice that if respondent Andrew B. Chase, individually, fails to comply with this ruling, the material demanded in Department staff's February 13, 2018 combined discovery demands shall be precluded from the hearing, and the assigned ALJ and the Commissioner may draw the inference that the material demanded is unfavorable to the position of respondent Andrew B. Chase, individually, pursuant to 6 NYCRR 622.7(c)(3).

Department staff's motion to compel disclosure is denied as to respondent Bellmont L.M. Inc. without prejudice to renew.

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James T. McClymonds
Chief Administrative Law Judge

Dated: August 22, 2018
          Albany, New York