

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

In the Matter of the Alleged Violations of Article 24 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-

DEC Case No.
R4-2015-0105-1

**ALEXANDRO GIACOMELLI,
ORCHARD EARTH & PIPE CORP., and
STEWART LOGGING, INC.,**

Respondents.

RULING ON MOTION TO COMPEL

Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation (“Department”) that respondents violated 6 NYCRR § 663.4(20) when fill was deposited in Class 1 freshwater wetland ON-6 and its adjacent area, located at 572 Main Street, Town of Oneonta, Otsego County. The complaint alleges that respondents Orchard Earth & Pipe Corp. and Stewart Logging, Inc.¹ deposited the fill in the wetland and adjacent area with the knowledge of property owner and respondent Alexandro Giacomelli (“Giacomelli”).

Currently pending before me is Department staff’s motion seeking a ruling (i) compelling respondent Giacomelli to respond to staff’s First Notice for Production and Inspection of Documents (“Staff’s Document Request”) within ten days of the date of this ruling; and (ii) that, if respondent Giacomelli does not timely respond to Staff’s Document Request in accordance with this ruling, excludes all evidence that would have been produced in response to Staff’s Document Request. See Motion to Compel Response to First Notice for Production and Inspection of Documents to Alexandro Giacomelli, dated November 7, 2016 (“Staff’s Motion”), at first and second unnumbered pages; see also Affirmation of Dusty Renee Tinsley dated November 7, 2016 (“Tinsley Aff.”) at third unnumbered page, Wherefore clause.

Respondent Giacomelli has not filed a response to staff’s motion.

As discussed briefly below, Department staff’s motion is granted.

¹ The complaint initially named “Ronald Stewart dba Stewart’s Logging & Excavation” as a respondent. By ruling dated August 4, 2016, I granted staff’s motion to amend the caption to remove “Ronald Stewart dba Stewart’s Logging & Excavation” and replace it with “Stewart Logging, Inc.” See Matter of Giacomelli et al., Ruling on Motions to Amend and Motion to Add Parties, August 4, 2016, at 4.

Discussion

Within 10 days of receipt of a request for production and inspection of documents, a party must produce the requested documents. See 6 NYCRR § 622.7(b)(1). Upon a party's failure to comply with a discovery demand, or to assert a timely objection to such discovery, the discovery proponent may apply to the administrative law judge ("ALJ") to compel disclosure. See 6 NYCRR 622.7(c)(2). The ALJ may rule upon the motion directing the party to comply with the discovery demand and, if the party fails to comply after being directed to do so by the ALJ, the ALJ may direct that such party "suffer preclusion from the hearing of the material demanded." 6 NYCRR § 622.7(c)(3). Moreover, 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 noncomplying party's position." Id.

In support of its motion, Department staff has established that it served Staff's Document Request on counsel for respondent Giacomelli by certified mail on September 25, 2015, that the document request was delivered and signed for by respondent's counsel's agent on September 30, 2015, and that respondent has not served a response to Staff's Document Request or made a motion for protective order. See Tinsley Aff. ¶¶ 3, 4, 7, 9; see also id. Attachments 1-3. Respondent has filed no papers in response to Staff's Document Request or Staff's Motion.

Based on the foregoing, I hold the following:

- I. Department staff's unopposed motion to compel is granted;
- II. Respondent Alexandro Giacomelli is hereby directed to produce documents responsive to Department staff's First Notice for Production and Inspection of Documents no later than ten days after the date of this Ruling;
- III. If respondent Alexandro Giacomelli fails to produce documents in accordance with this Ruling, respondent shall suffer preclusion from the hearing of the documents requested, and the undersigned and the Commissioner may draw the inference that the documents requested are unfavorable to respondent's position.

Dated: February 24, 2017
Albany, New York

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