

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

In the Matter of the Alleged Violations of Article 15 of the New York State Environmental Conservation Law, and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

**NICHOLAS KELLY and KELLY'S CUSTOM
DOCKS LLC,**

Respondents.

**RULING ON MOTIONS
TO COMPEL
RESPONSE TO FIRST
NOTICE FOR
PRODUCTION AND
INSPECTION OF
DOCUMENTS**

DEC File No.
R8-20170309-31

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**NICHOLAS KELLY and KELLY'S CUSTOM
DOCKS LLC,**

Respondents.

- and -

DEC File No.
LER8-17002295

October 23, 2017

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Dennis P. Harkawik, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.
- Fitzsimmons Law Firm (Daniel J. Fitzsimmons of counsel), for respondents (no appearance).

I. PROCEEDINGS

Department staff commenced these administrative enforcement proceedings against respondents Nicholas Kelly and Kelly's Custom Docks LLC, alleging violations of ECL article 15 and its implementing regulation at two locations. The first captioned matter (DEC File No. R8-20170309-31) concerns a parcel of land located at 3583 Vineyard Road, Himrod, Yates

County, New York; the second (DEC File No. LER8-17002295) concerns a parcel of land located at 4948 East Lake Road, Romulus, Seneca County, New York.

On July 28, 2017, Department staff served a first notice for production and inspection of documents to respondents in each matter (see Affirmation of Dennis P. Harkawik, DEC File No. R8-20170309-31, Sept. 20, 2017, Attachment A; Affirmation of Dennis P. Harkawik, DEC File No. LER8-17002295, Sept. 20, 2017, Attachment A). Respondents' counsel accepted email service of both notices (see id., Attachment B). Respondents served no responses to staff's notice. Nor did respondents make a motion for a protective order in response to staff's notice.

Under cover letter dated September 20, 2017, Department staff served a motion to compel responses to its disclosure demands in each matter. Each motion consists of a notice of motion and motion to compel response to first notice for production and inspection of documents, and an affirmation of Dennis P. Harkawik with attachments.¹ The motions seek a ruling of the Administrative Law Judge (ALJ) in each matter compelling respondents to respond to Department staff's disclosure requests within ten days of the ruling and, if a response is not timely received pursuant to the ruling, excluding all evidence that would have been produced under staff's requests, and such further relief as the ALJ deems just and proper.²

Respondents failed to respond to Department staff's motions and the time to do so has expired.

II. DISCUSSION

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622), the scope of disclosure is as broad as that provided for under CPLR article 31 (see 6 NYCRR 622.7[a]). Where production and inspection of documents is sought by a party, the requested documents must be furnished within 10 days of the receipt of the discovery request unless a motion for a protective order is made (see 6 NYCRR 622.7[b][1]). A party against whom disclosure is demanded may make a motion to the ALJ for a protective order within 10 days of the discovery demand (see 6 NYCRR 622.7[c][1]). If the 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 discovery (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]). Furthermore, a failure to comply with the ALJ's direction will allow the ALJ or the

¹ The captions on the motions incorrectly reference alleged violations of ECL article 24. The captions on the notices of motion, the Harkawik affirmations, and the notices for production all reference alleged violations of ECL article 15 and its implementing regulations. There being no prejudice to respondents, the defective captions on the motions are disregarded and deemed corrected (see CPLR 2101[f]).

² Where an ALJ has not been assigned to a particular matter, the Chief ALJ may ruling on pre-hearing motions (see 6 NYCRR 622.6[d][1]).

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

Here, Department staff has established that respondents failed to respond to staff's notices demanding production and inspection of documents in both proceedings, or raise objections to the demands in a timely manner. Accordingly, staff's motions to compel disclosure should be granted.

III. RULING

Department staff's motions to compel responses to the first notices for production and inspection of documents served in the above referenced matters is granted. Respondents have ten (10) days from the date of this ruling to respond to the first notices for production and inspection of documents served in these proceedings.

Failure to comply with this ruling will result in preclusion from the hearings of the materials demanded, and will allow the ALJ or Commissioner to draw the inference that the materials demanded are unfavorable to respondents' position.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: October 23, 2017
Albany, New York

TO: (Via email and first class mail)

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