

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

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In the Matter of the Alleged Violations of Title 10 of  
Article 17 of the Environmental Conservation Law and 6  
NYCRR Part 613,

- by -

**NICKI L. KOGUT, JOANNE E.  
MINICHELLO, and ARTEMIS  
ENTERPRISES PLUS, LLC,**

Respondents.

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**RULING ON MOTION  
TO COMPEL  
DISCLOSURE**

DEC Case No.  
R6-20170804-39

PBS No. 6-600225

December 12, 2018

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Randall C. Young, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.

-- Antonucci Law Firm LLP (David P. Antonucci of counsel), Watertown, for respondents (no appearance).

I. PROCEEDINGS

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondents Nicki L. Kogut, Joanne E. Minichello, and Artemis Enterprises Plus, LLC, by service of a notice of hearing and complaint dated June 4, 2018. In the complaint, Department staff alleges multiple violations of the statutes and regulations governing petroleum bulk storage (PBS) facilities at a facility located at the intersection of State Routes 180 and 12E, Limerick, NY 13657 (Town of Brownville, Jefferson County) on real property owned by respondents (see Affidavit of Randall Young [Young Affid], Exh RCY-1).

David P. Antonucci, Esq., of Antonucci Law Firm LLP, filed an answer dated June 5, 2018, on behalf of respondents (see Young Affid, Exh RCY-2).

On July 16, 2018, Department staff served a first discovery demand on Mr. Antonucci (see Young Affid, Exh RCY-3). On July 24, 2018, Mr. Antonucci requested an extension of time to respond to the discovery demands (see id., Exh RCY-4). Staff granted

respondents an extension until August 13, 2018 to respond to staff's demands (see id., Exh RCY-5).

A pre-hearing conference was held on August 16, 2018, before Administrative Law Judge (ALJ) Michael S. Caruso. Mr. Antonucci appeared at the pre-hearing conference on behalf of respondents. Respondents had not provided the demanded materials at the time of the pre-hearing conference and Mr. Antonucci indicated that he would provide the requested materials by August 24, 2018. (See Young Affid ¶ 9.)

As of November 21, 2018, Department staff had still not received a response to its discovery demands. Under cover letter dated November 21, 2018, Department staff served a motion to compel disclosure on respondents. The motion consists of a notice of motion and motion to compel disclosure, and an affidavit of Randall Young, Esq., with attachments. The motion seeks a ruling of the ALJ directing respondents to fully respond to Department staff's first discovery demand and a further ruling precluding respondents from introducing any document or item demanded into the record of this proceeding if it was not provided to staff as ordered.<sup>1</sup>

Respondents failed to respond to Department staff's motion 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 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 notwithstanding the grant of several extension requests by staff, respondents failed to respond to staff's first disclosure demands or

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<sup>1</sup> 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]).

raise objections to the demands in a timely manner. Accordingly, staff's motion to compel disclosure should be granted.

III. RULING

Department staff's motion to compel disclosure is granted. Respondents are hereby ordered to respond fully to the first discovery demand served in this proceeding within ten (10) days of the date of this ruling.

It is further ordered that respondents are precluded from introducing any document or item demanded into the record of this proceeding if it was not provided to staff as ordered.

\_\_\_\_\_/s/\_\_\_\_\_  
James T. McClymonds  
Chief Administrative Law Judge

Dated: December 12, 2018  
Albany, New York