STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 15 and 25 of the Environmental Conservation Law ("ECL") of the State of New York and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

-by-

PETER W. PLAGIANAKOS and MADELINE FELICE,

Respondents.

RULING OF ADMINISTRATIVE LAW JUDGE ON MOTIONS TO COMPEL

DEC Case No.
R2-20120613-353

BACKGROUND

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Peter W. Plagianakos and Madeline Felice ("respondents") by service of a notice of hearing and complaint, both dated April 14, 2015. The complaint alleges that, in June 2012, Department staff observed that, at residential waterfront property in Brooklyn, New York (the "Site"), respondents had "undertaken, caused, or allowed" several regulated activities without obtaining required permits, in violation of ECL § 15-0503(1)(b), ECL § 25-0401(1), and 6 NYCRR §§ 608.4 and 661.8. See Complaint dated April 14, 2015, attached as Exhibit ("Ex.") 4 to the Affirmation by Udo Drescher in Support of Staff's Motion to Compel Disclosure, dated November 4, 2015 ("Drescher Aff."), at ¶¶ 26-27, 38-89.

Department staff seeks an order of the Commissioner finding that respondents violated the cited statutes and regulations, imposing on respondents, jointly and severally, a civil penalty of "no less than two hundred thousand dollars," and directing respondents to perform several remedial activities. See Complaint, Wherefore Clause ¶¶ I-III.

Respondents served an Answer dated May 29, 2015, and a First Amended Answer dated June 12, 2015. In addition to denying that staff is entitled to the requested relief, respondents assert the following defenses: (1) laches; (2) statute of limitations; (3) res judicata; (4) claim preclusion; and (5) unclean hands. In addition, respondents assert a "reservation of other defenses," seeking to "reserve the right to plead additional defenses as appropriate" based upon respondents' investigation and discovery. See Drescher Aff., Exs. 6 and 7.

Respondents served their First Set of Requests for Documents dated May 7, 2015, and staff provided a written response dated May 19, 2015 and produced "some 197 pages" of documents to respondents. See Drescher Aff. ¶ 4, and Exs. 8 and 9. On May 7, 2015, staff served on respondents a First Notice to Produce Documents, and respondents provided a written

response on May 18, 2015. See id. ¶ 5.[1] A site visit was conducted on September 21, 2015 pursuant to a July 2015 notice to permit entry. See id. ¶ 6.

Respondents' Second Request for Documents, dated August 6, 2015 ("Respondents' Second Request"), is comprised of three requests, seeking all tidal wetlands permits and all tidal wetlands permit applications for those permits, and all documents relating to Department administrative enforcement proceedings for alleged tidal wetlands permit violations or actions alleged to have been taken without required tidal wetlands permits. All three requests seek documents relating to sites "within the City of New York between 1998 and 2008." See Drescher Aff., Ex. 11, at ¶¶ 22-24.

Department staff asserted general and specific objections to Respondents' Second Request, including that respondents seek documents neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and that the requests were overbroad, unduly burdensome, vague and prejudicial. See Staff's Response to Respondents' Second Request for Documents, dated August 17, 2015 ("Staff's Document Response"), Drescher Aff. Ex. 12, at 3-5. Staff also asserted in its written response that the Department issued "close to 1,200 tidal wetlands permits," and that there were "in excess of 1,600 tidal wetlands permit applications" between January 1, 1998 and December 31, 2008. Id. at 4.

On October 1, 2015, staff served on respondents an Expert and Lay Witness List Production Demand ("Staff's Expert Demand"), seeking (A) the identity of each expert witness respondents expect to call at hearing and the subject matter and substance of the facts and opinions concerning which each expert is expected to testify; (B) each such expert's qualifications, and a summary of the grounds for each expert's opinion; and (C) the identity and addresses of all eyewitnesses "to any statement, fact, or circumstance upon which Respondent [sic] will rely at the hearing." Drescher Aff. ¶ 10 and Ex. 13.

Respondents' October 13, 2015 response to Staff's Expert Demand ("Respondents' Expert Response") was comprised of objections only, and contained no identification of expert or lay witnesses, or any of the other expert-related information requested by staff.

Currently pending before me are two motions: (1) Department staff's unopposed motion to compel respondents to produce the expert-related information sought in paragraphs A and B of Staff's Expert Demand;[2] and (2) respondents' motion to compel Department staff to produce all documents responsive to Respondents' Second Request. As discussed below, I grant staff's motion to compel and deny respondents' motion to compel.[3]

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[1] It is not clear from the record before me whether respondents produced documents in response to staff's notice to produce or, if respondents produced documents, the quantity of documents produced.

[2] The record submitted on the motions does not reflect whether respondents provided any information responsive to request "C" relating to eyewitness identification. Staff's motion to compel does not seek any relief relating to request "C."

[3] With respect to Department staff's motion to compel, counsel for staff states that he "reached out to Respondents' counsel by phone to try to discuss resolving this matter without a motion but to no avail." Drescher Aff. ¶ 14. In contrast, respondents' papers are silent with respect to whether respondents made any good faith efforts to resolve

DISCUSSION

The scope of discovery in Departmental administrative enforcement proceedings "must be as broad as that provided under article 31 of the CPLR." 6 NYCRR § 622.7(a). The CPLR generally requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a). With some limitations not relevant here, parties to administrative enforcement proceedings may employ any disclosure device available under the CPLR. See 6 NYCRR § 622.7(b).

Staff's Motion to Compel

As set forth above, staff served a written request seeking the identification of respondents' experts and expert-related information. CPLR article 31 expressly requires parties, upon request, to identify experts and provide expert-related information:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

CPLR 3101(d)(1)(i).

Respondents filed no opposition to staff's motion to compel. I will consider as respondents' "opposition" to the motion the objections respondents asserted in Respondents' Expert Response. Upon review of these objections, I hold that respondents' refusal to provide the requested information is without merit.

In Respondents' Expert Response, respondents first assert that they are preserving objections as to relevancy, materiality, admissibility and undue burden. See Respondents' Expert Response, ¶ 1. Respondents then assert four objections, the first three of which reflect respondents' apparent belief that their obligation to respond to staff's expert-related demand is contingent upon staff's document production in response to respondents' document requests. See id. ¶ 2 (claiming that staff's expert demand is "premature" because respondents have not yet received a "full and complete response" to respondents' document demands); id. ¶ 3 (claiming that staff's expert demand "seeks to ascertain Respondent's [sic] defense strategy prior to the Department's satisfaction of its document production obligations"); id. ¶ 4 (claiming that staff's expert demands "leave Respondents with no opportunity to receive and review documents produced by the Department" in response to respondents' document requests).[4]

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the dispute concerning staff's document production without resort to a motion, as required by the regulations. See 6 NYCRR § 622.7(c)(1); see also Respondents' cover letter dated December 24, 2015; Respondents' Motion to Compel Disclosure, dated December 24, 2015 ("Respondents' Motion"); Affirmation of John-Patrick Curran in Support of Motion to Compel Disclosure, dated December 24, 2015.

[4] Respondents' fourth objection is based upon claims of privilege. See Respondents' Expert Response, ¶ 5. Respondents have provided nothing, however, to support an argument that staff seeks privileged material.

Contrary to respondents' position, however, each party's discovery obligations are independent of the other parties' discovery obligations. Respondents do not get a "pass" on their obligation to comply with a valid discovery demand simply because, in their view, staff's document production is less than to their liking. Rather, any dissatisfaction with a party's response to a valid discovery request may be raised by motion to compel. Even such a motion such as respondents' motion to compel, however, does not authorize respondents to violate their independent discovery obligations.

I grant staff's motion to compel in its entirety. Respondents shall, within 21 calendar days of service of this Ruling upon them: (i) identify each and every expert witness respondents expect to call at the hearing in this matter and, with reasonable detail, the subject matter and substance of the facts and opinions of each such expert's expected testimony; and (ii) provide the qualifications of each expert witness expected to testify at the hearing in this matter, and a summary of the grounds for each such expert's opinion.

Respondents' Motion to Compel

As discussed above, Respondents' Second Request seeks all tidal wetlands permits, all tidal wetlands permit applications, and all documents "relating to" Department administrative enforcement proceedings for alleged tidal wetlands permit violations or actions alleged to have been taken without required tidal wetlands permits, for sites located "within the City of New York between 1998 and 2008." Staff objected to Respondents' Second Request on several general and specific grounds, including that the request: (i) seeks documents protected by one or more privileges; (ii) seeks documents neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; (iii) is overbroad because permit decisions are site-specific and take into account particular and unique factors at the time and location of the proposed project and affected natural resource; (iv) is unduly burdensome as to time frame, and lacks particularity; (v) is ambiguous and lacks specificity. See Staff's Document Response, at 3-6.

Respondents state that the requested documents are "material and necessary" because they will "provid[e] the context to Staff's analysis and conclusions regarding the alleged violations at Respondent's [sic] property." Respondents' Motion, at 5; see also id. at 7 (the documents "are material and necessary to a full analysis of Staff's practices with respect to tidal wetlands permitting and enforcement"). Respondents also state that it would be "manifestly unfair and procedurally defective if parties are denied the ability to examine the basis and context of Staff's determinations with respect to the Site." Id. at 5.

In response, staff argues that determinations regarding permit applications are fact- and site-specific, and therefore other permit determinations are irrelevant to the analysis of respondents' property. See Staff's Response to Respondents' Motion to Compel Disclosure, dated January 4, 2016 ("Staff's Motion Response"), at 5; see also id. at 2 ("[c]omparison of over 1,600 sites located along approximately 600 miles of coastline completely ignores the unique

Moreover, respondents' assertion of the "deliberative process privilege," see id., is inappropriate, as that privilege applies to governmental entities and is not available to respondents.

conditions at each site"). In support of its claim that the requests are overbroad and unduly burdensome, staff states that, between January 1, 1998 and December 31, 2008, the Department received 1,642 tidal wetlands permit applications and issued 1,195 permits, and that those numbers do not include applications for permit modifications or renewals. See Affidavit of Tamara Greco in Support of Staff's Response to Respondents' Motion to Compel Disclosure, sworn to December 30, 2015, at ¶ 6.[5]

With respect to respondents' request for "[a]ll documents relating to DEC administrative enforcement proceedings for alleged tidal wetlands permit violations or alleged actions taken without required permits," staff argues that this request is overbroad and unduly burdensome in that respondents' request defines "relating to" as "constituting, identifying, reflecting, referring to, concerning, responding to, indicated with, commenting on, regarding, discussing, showing, describing, implying and analyzing." Respondents' Second Request, ¶ 9.

Given the very large universe of documents responsive to Respondents' Second Request – thousands of applications and permits, and an unspecified amount of documents "relating to" enforcement proceedings, over an eleven year period in the five New York City boroughs – and the concomitant burden involved in review and production of such documents, it is incumbent on respondents to fully support their claimed entitlement to such production. Respondents, however, have provided nothing more than conclusory statements that the requested documents are "material and necessary." They simply allege, without explanation, that the thousands of documents requested will provide "the context to Staff's analysis and conclusions regarding" respondents' property.

Respondents will be free at the hearing to explore the nature of staff's analysis and conclusions with respect to respondents' alleged violations, including staff's "practices" with respect to tidal wetlands permitting and enforcement, as it relates to the violations alleged in this proceeding. Rejecting their overbroad and unduly burdensome document request will not result in the denial of their "ability to examine the basis and context of Staff's determinations with respect to the Site." See Respondents' Motion, at 5.

Moreover, respondents make no effort to explain the relevance of the 1998-2008 time frame of their requests. Indeed, the only "facts" in either the complaint or the amended answer alleged to have occurred during this time frame relate to respondent Felice's ownership of real property in 2002. See Complaint ¶ 13 (alleging ownership since August 7, 2002); First Amended Answer ¶ 13 (admitting ownership since July 11, 2002); see also id. ¶ 4 (admitting that respondent Felice has owned 2686 National Drive since August 2002).

The complaint alleges that, in March 1993, the Department issued to respondent Felice a permit authorizing the construction of a dock facility comprised of a fixed dock, ramp and two floats, with certain dimensions, and that a subsequent administrative enforcement proceeding

[5] In Matter of Haley, Decision of the Commissioner, February 2, 2010, the Commissioner held that certain documents relating to permits involving a site adjacent to the site at issue were relevant and admissible. The record before me, however, does not reflect that respondents have made any effort to narrow their requests, whether to seek, for example, documents relating to adjacent properties or even to properties in the Mill Basin neighborhood in Brooklyn in which respondents' property is located.

alleging that respondent violated a special condition of the permit was resolved by a consent order in 1994. See Complaint ¶¶ 19-25. The complaint asserts claims based upon a 2012 inspection of the site, but does not allege that respondent Felice is currently in violation of the 1994 consent order.

Respondents have asserted an "additional statement of facts" in their First Amended Answer, alleging, among other things: (i) certain facts in 1988 and 1989 relating to an application for a permit by respondent Felice, which respondent ultimately withdrew; (ii) that respondent Felice applied for a permit in June 1992 and obtained a permit in March 1993; and (iii) facts relating to the 1994 inspection that resulted in an enforcement proceeding against respondent Felice. See First Amended Answer, Drescher Aff. Ex. 7, at ¶¶ 90-119. Respondents admit that the 1994 enforcement proceeding was resolved by a consent order in 1994. See First Amended Answer ¶ 23.

The complaint and first amended answer thus discuss events in 1988, 1989, 1992, 1993, 1994 and 2012, and discuss only one fact, relating to site ownership in 2002, occurring between 1998 and 2008. Respondents' Second Request seeks no documents from 1988, 1989, 1992, 1993, 1994 or 2012. Respondents provide no discussion of *how* any documents within their requested time frame are "material and necessary" to their defenses. In light of the foregoing, I deny respondents' motion to compel.

CONCLUSION

Staff's motion to compel is granted, and respondents' motion to compel is denied. I will hold a conference call with the parties, to occur during the week of February 29, 2016, regarding scheduling the hearing in this matter.

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

Dated: Albany, New York
January 27, 2016