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 ON REQUEST FOR RECONSIDERATION

DEC Case No. R2-20120613-353

I. Background

By motion dated December 24, 2015 ("Respondents' Motion to Compel"), respondents Peter W. Plagianakos and Madeline Felice ("respondents") moved to compel staff of the Department of Environmental Conservation ("Department") to produce documents in response to Respondents' Second Request for Documents dated August 6, 2015. On January 4, 2016, Department staff served papers in opposition to respondents' motion to compel. On January 27, 2016, the undersigned issued a ruling denying respondents' motion to compel. See Ruling of Administrative Law Judge on Motions to Compel ("ALJ Ruling"), at 4-6.

By letter dated February 17, 2016 ("Respondents' Letter-Request"), respondents now request: (i) reconsideration of the ALJ Ruling denying respondents' motion to compel production of documents; and (ii) permission to take depositions pursuant to 6 NYCRR § 622.7(b)(2). As set forth in Department staff's letter dated February 25, 2016 ("Staff Response"), staff opposes both of respondents' requests.

As discussed below, respondents' requests for reconsideration of the ALJ Ruling and for permission to take depositions are denied.

II. Discussion

A. Request for Reconsideration

In Departmental proceedings, motions for reconsideration of prior rulings are generally analyzed as motions for leave to reargue under CPLR 2221(d). See e.g. Matter of Pierce, Ruling of the Commissioner on Motion for Reconsideration, June 9, 1995, at 1; see also Matter of 2526 Valentine LLC, Ruling of ALJ on Motion for Reconsideration, March 10, 2010, at 3. Motions for reconsideration of prior ALJ rulings are granted upon a showing that, in determining the prior motion, the ALJ "overlooked or misapprehended" matters of fact or law, "but shall not include

any matters of fact not offered on the prior motion." See CPLR 2221(d); see also Ahmed v. Pannone, 116 A.D.3d 802, 805 (2d Dep't 2014), lv dismissed, 25 N.Y.3d 964 (2015); Matter of Pierce, at 1. A motion for reconsideration "'is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.'" Pannone, 116 A.D.3d at 805 (quoting Anthony J. Carter, DDS, P.C. v. Carter, 81 A.D.3d 819, 820 (2d Dep't 2011); see also Matter of Village of Elbridge, Ruling of Commissioner, September 26, 1995, at 1 (reconsideration may not be used to reargue points already considered and rejected, or to bring up arguments that could have been made in the first instance but were not).

In their request for reconsideration, respondents argue that: (i) after a 1994 inspection of "a deck in the same location and of similar size and configuration as the Deck that is the subject of the Complaint," Respondents' Letter-Request at 1, Department staff delayed instituting this enforcement action for more than 20 years; (ii) "the Department's prolonged delay in bringing this action deprived Respondents of the ability to reapply for a permit in the 1990s that would have legitimized the construction of the Deck in question," causing respondents to suffer "actual injury and prejudice" because changes in Department regulations, policies and procedures "impose restrictions that would not have applied in 1994," id. at 2; (iii) the documents requested will reflect that Department policies have changed since 1994, and "will show that the Deck would have been permitted in 1994," id.; (iv) any burden on the Department in producing the requested documents "is self-imposed due to the Department's 21 year delay in bringing this enforcement action," id. at 3; (v) discovery is broad, and the documents sought are "critical" to respondents' defenses of laches and unclean hands; and (vi) the public has a right to review, and the Department has an obligation to provide, government records. See id. at 3.

In response to respondents' letter-request, Department staff takes issue with respondents' claim that the Department has delayed this proceeding for 21 years, and disputes respondents' factual assertions regarding the deck upon which staff allegedly stood in 1994, and whether the Department "was prepared to issue a permit" in 1989. See Staff Response at 1.

Respondents advanced all of their points, albeit in a more limited way, in their motion to compel. See Respondents' Motion to Compel at 2-5. Respondents do not argue that the undersigned overlooked any specific facts that they asserted in the underlying motion; nor do they argue that the undersigned overlooked or misapprehended any applicable law. Rather, respondents repeat their general argument that the requested documents – all tidal wetlands permits and all tidal wetlands permit applications, and all documents relating to tidal wetlands enforcement proceedings in the five boroughs of New York City over the ten-year period of 1998-2008 – will support their claim that the Department delayed its current enforcement for more than 20 years, causing respondents to suffer "actual injury and prejudice," thereby warranting the dismissal of this proceeding based upon the defenses of laches and unclean hands. See id. at 1-3.

Respondents have also submitted two documents with their letter requesting reconsideration, neither of which was submitted with respondents' initial motion to compel. Respondents have not denominated their motion as one to renew, see CPLR 2221(e), and have not in any event argued that the documents were not available at the time of the prior motion, or

provided some reasonable justification for the failure to present the documents on the prior motion. See CPLR 2221(e)(1)-(3).

In their letter requesting reconsideration, respondents also offer, for the first time, "two reasons" for having requested documents for the period 1998-2008: (i) a "good faith effort to limit the breadth of the request, rather than encompassing the entire 21 years (1994-2015) during which the Department delayed in commencing this action;" and (ii) respondents believed that the Department's tidal wetlands permitting policies changed at some point during that decade. Respondents' Letter-Request at 2.

Respondents state a willingness to "narrow" their document request, by changing the time period to which it applies, and to accept a production of responsive documents for the period 1992-1996. Id. This is not, however, a "narrowing" of their document request. The four-year period of 1992-1996 is wholly outside the time frame of their document request, which sought documents dated between 1998 and 2008. See Respondents' Letter-Request at 2. A request for reconsideration of an ALJ ruling denying a motion to compel is not the proper vehicle by which to change the substance of a document request. Nor does an offer to revise the underlying document request address or satisfy respondents' burden on a request for reconsideration to establish that the ALJ overlooked or misapprehended matters of fact or law on the initial motion.

Respondents' request for reconsideration thus fails to show that the undersigned overlooked or misapprehended matters of fact or law with respect to respondents' motion to compel. Indeed, respondents do not even argue that facts or law were overlooked; rather, respondents' request for reconsideration is comprised of: (i) a more detailed version of the same arguments offered in their motion to compel; (ii) the submission of new material and arguments that could have been – but were not – provided or made on the initial motion; and (iii) expressing a willingness to change the document request. These submissions are insufficient to warrant the grant of respondents' request for reconsideration.[1]

The parties' submissions to date leave open certain factual and legal questions, to be resolved at the hearing. For example, respondents' submissions may be read to imply that the structures existing at the time of the Department's 2012 inspection are not the same structures that existed in 1994. See e.g. First Amended Answer ¶ 102 (at the time of the September 1994 inspection, "the deck and a ramp and dock *substantially similar to those which currently exist at the site* were located at the site" (italics added); Respondents' Motion to Compel at 2 (in 1994, "a wooden deck supporting piles, floating dock, and access ramp, *similar in size and shape as the deck that is the subject of this enforcement proceeding*, already existed at the site") (italics added); Respondents' Letter-Request at 1 (in 1994, Department staff "stood upon *a deck in the*

[1] As to respondents' argument regarding the public's "right to review" government records, respondents appear to be equating the Department's obligations under New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90 ("FOIL"), and its obligations in administrative enforcement proceedings under 6 NYCRR Part 622. In this Part 622 proceeding, respondents are required to demonstrate that the documents sought are "material and necessary in the … defense of an action." CPLR 3101(a). Respondents failed to make such a demonstration on their initial motion, and have not met the requirements for reconsideration of the prior ruling on the issue.

same location and of similar size and configuration as the Deck that is the subject of the Complaint" (italics added).

Similarly, the parties' submissions do not provide the specific dates that respondents constructed the structures that were inspected in 2012 and are the subject of this enforcement action. Such dates are relevant to determining whether such structures were constructed in compliance with the relevant law at the time of such construction. It is expected that these factual questions will be resolved at the hearing in this matter.

B. Request to Take Depositions

Respondents request permission to take depositions pursuant to 6 NYCRR § 622.7(b)(2). Respondents state generally that "[d]epositions will expedite this enforcement proceeding," arguing that that the time period at issue here "spans decades and there are a large number of potential witnesses." Respondents' Letter-Request at 3. Respondents argue that, absent depositions, the enforcement hearing will last for several days or more. Id. In opposition, Department staff argues that respondents "have not demonstrated a particularized need or that unique or unusual circumstances exist" warranting depositions, and that the potentially large number of depositions would cause delay. Staff Response at 2.

In Part 622 enforcement proceedings, "[d]epositions …will only be allowed with the permission of the ALJ upon a finding that they are likely to expedite the proceeding." 6 NYCRR § 622.7(b)(2). Depositions "are seldom allowed absent a showing of particularized need arising from unique or unusual circumstances." Matter of U.S. Energy Development Corporation, Ruling of Chief ALJ on Motion for Leave to Conduct Depositions, May 9, 2014, at 5.

Respondents have not provided an estimate or actual number of witnesses they seek to depose. Indeed, respondents have not specifically identified a single witness for deposition. Thus, respondents provide no basis on which to conclude that taking pre-hearing depositions will actually expedite this proceeding. Respondents simply argue that, absent the pre-hearing depositions, the hearing "would last for several days or more," Respondents' Letter-Request at 3. As staff argues in response, there is nothing "unique or unusual" about the possibility of a multi-day hearing. Staff Response at 2.

Respondents have not demonstrated sufficiently that conducting pre-hearing depositions will expedite this proceeding, and their request for permission to take depositions is therefore denied.

III. Conclusion

Respondents' request for reconsideration of the January 27, 2016 ALJ Ruling is denied. Respondents' request for permission to take depositions is also denied.

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

Dated: Albany, New York
March 1, 2016