

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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”),

**RULING ON MOTION  
AND CROSS-MOTION**

DEC Case No.  
R2-20120613-353

-by-

**PETER W. PLAGIANAKOS and MADELINE FELICE,**

Respondents.

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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, 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 id., 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 five of what they refer to as “defenses:” (1) laches; (2) statute of limitations; (3) res judicata; (4) claim preclusion; and (5) unclean hands.

During the course of discovery, respondents served three sets of document requests and, according to staff, staff produced 1,687 pages of documents in response thereto. See “Affirmation with Points of Law” of Udo Drescher, Esq. dated December 14, 2016 (“Drescher Aff.”), at ¶¶ 6-12. Respondents’ second document request sought all tidal wetlands permits and related permit applications for sites located within New York City during the ten year period 1998-2008, as well as all documents relating to Department tidal wetlands-related enforcement proceedings for “for sites located within the City of New York between 1998 and 2008.” See id. ¶ 8.

Following staff’s objection to these requests, respondents moved to compel production of the requested documents. Respondents’ motion was denied in a ruling dated January 27, 2016.

Respondents' subsequent motion for reconsideration was denied by ruling dated March 1, 2016. Respondents thereafter served a third set of document requests, seeking all tidal wetlands permits and permit-related applications, and all documents relating to Department tidal wetlands enforcement proceedings, for property located at 2458 National Drive, Brooklyn, New York. Staff produced more than 1,000 pages of documents in response to respondents' third set of requests. See id. ¶¶ 11-12.

Discovery closed in April 2016, and Department staff served a statement of readiness dated June 16, 2016. Less than one week prior to the original hearing date of October 12, 2016, respondents' then-counsel wrote a letter informing the undersigned and counsel for staff that respondents had dismissed their counsel. The hearing was adjourned without date while respondents retained new counsel.

Respondents retained new counsel shortly thereafter, and the hearing is currently scheduled to commence tomorrow, December 20, 2016 at 10:30 a.m. On or about December 9, 2016, Respondents served a Trial Subpoena Duces Tecum dated December 9, 2016 ("subpoena") on staff. The subpoena seeks the production of "[a]ll DEC permits, DEC Notices of Violation, DEC Orders and DEC Orders on Consent, from 1976 to the present, pertaining to the residences having the addresses set forth on Attachment A." Attachment A to the subpoena lists 20 addresses in Brooklyn, New York.

By letter-motion dated December 14, 2016, Department staff moved to quash the subpoena. By letter dated December 15, 2016, respondents served a cross-motion to compel compliance with the subpoena, supported by an Affirmation of Robert M. Lustberg, Esq. ("Lustberg Aff."), and attaching one Exhibit. By letter dated December 15, 2016, Department staff served a "reply" to respondents' cross-motion to compel. By letter dated December 16, 2016, respondents served a reply in response to staff's December 15, 2016 letter.<sup>1</sup>

Staff's motion to quash the subpoena is granted, and respondents' cross-motion to compel compliance therewith is denied. As staff points out in its papers, the subpoena, served by recently retained counsel, is an attempt to obtain through a trial subpoena documents that could have been – but were not – requested specifically during discovery in this matter.<sup>2</sup> See e.g., Mestel & Company, Inc. v. Smythe Masterson & Judd, Inc., 215 A.D.2d 329, 329-330 (1<sup>st</sup> Dept. 1995) (trial court properly quashed subpoenas where party "improperly utilized the overbroad trial subpoenas as a discovery device and a fishing expedition to secure ... wide-ranging discovery that ... counsel had neglected to obtain in pretrial disclosure"). Respondents served three document requests during discovery, including serving a third set of requests following the denial of their motion to compel regarding the second document request. There was ample time and opportunity for respondents to seek and obtain during discovery the documents now

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<sup>1</sup> To the extent the filing of staff's December 15 and respondents' December 16 letters require permission pursuant to 6 NYCRR § 622.6(c)(3), such permission is hereby granted. I have considered all of the papers submitted on the motion and cross-motion.

<sup>2</sup> Because the subpoena seeks the production of documents from the Department, it could be argued that service of the subpoena first required permission from the undersigned. See e.g., Matter of Suffolk County Water Authority, ALJ Ruling on Motion to Quash Subpoena Duces Tecum, August 17, 2006; see also CPLR 2307.

demanded in the trial subpoena. New counsel's apparent desire to obtain documents that were not requested by his predecessor may reflect his preferred litigation strategy, but does not warrant re-opening discovery, literally on the eve of trial.

Moreover, the subpoena seeks the production of documents relating to 20 properties "closest to" respondents' properties, covering a period of 40 years. Even though this may be a smaller universe of documents than reflected in respondents' second document request (seeking ten years' of documents for all properties in the five boroughs of New York City), it is still overbroad and unduly burdensome.<sup>3</sup>

Finally, respondents have not demonstrated that the documents are material and necessary to their defense. Respondents argue that "the central threshold issue in this case" is "[w]hether and to what extent DEC has jurisdiction to regulate decks placed high in the air on top of pre-existing pilings within the US Pierhead and Bulkhead line, over property owned in fee by the landowner." *Id.* at 6. Respondents argue further that the Department lacks jurisdiction over respondent Felice's "replacement and/or placement of a deck on pre-existing pilings at and landward of the US Pierhead and Bulkhead line over property she owns in fee," and that the Department's "course of dealing on National Drive Brooklyn, from 1976 to the present confirms that conclusion." *Id.* at 5.

Although not entirely clear, it appears that respondents are conflating legal and factual matters, that is, claiming that the requested documents will "prove" that the Department lacks legal authority to enforce against respondents. According to the legal theory proffered in respondents' papers, the Department's alleged failure to enforce against neighboring properties that have allegedly conducted activities similar to those at issue here "proves" either that the Department lacks jurisdiction outright or that the Department has conceded such lack of jurisdiction by its failure to enforce.

The Department's legal authority to enforce is a legal question which the requested documents will not determine. Assuming that staff moves forward with the hearing, it is apparently staff's position that the Department possesses legal "jurisdiction" to enforce the statutes and regulations cited in the complaint based on the facts here. Respondents may of course examine witnesses regarding the facts relevant to staff's asserted claims and respondents' asserted defenses.

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<sup>3</sup> It bears repeating that, following the denial of respondents' motion to compel production of documents in response to their overbroad second document request, respondents still had time to, and did, serve an additional document request seeking documents relating to one property. Department staff produced more than 1,000 pages of documents in response to that document request.

Staff's motion to quash respondents' trial subpoena duces tecum is granted, and respondents' cross-motion to compel compliance with the trial subpoena duces tecum is denied.

\_\_\_\_\_/s/\_\_\_\_\_  
D. Scott Bassinson  
Administrative Law Judge

Dated: December 19, 2016  
Albany, New York