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 MOTION TO QUASH DEPOSITIONS

DEC Case No.
R2-20120613-353

I. Background

By letter dated February 17, 2016, respondents requested, among other things, permission to take depositions pursuant to 6 NYCRR § 622.7(b)(2). By ruling dated March 1, 2016, I denied respondents' request for permission to take depositions. See Matter of Plagianakos and Felice, ALJ Ruling on Request for Reconsideration (March 1, 2016) ("March 1 ALJ Ruling"), at 4-5. The denial of respondents' request to take depositions was based, in part, on respondents' failure to identify any potential deponent, to demonstrate that depositions would expedite this proceeding, and to demonstrate a particularized need or that unique or unusual circumstances exist warranting depositions. See id. at 4.

During a teleconference involving respondents and Department staff (collectively the "Parties"), and the undersigned, counsel for respondents stated that certain potential witnesses had been identified. A March 4, 2016 memorandum from the undersigned to the Parties set March 9, 2016 as the "[d]eadline for respondents to serve *and file* their request to take depositions," and stated that "[t]he timing of Department staff's response to respondents' request to take depositions will be governed by 6 NYCRR § 622.6." Memorandum to Parties dated March 4, 2016 (emphasis added). Neither during the conference call nor in the Memorandum to the Parties were respondents granted permission to take depositions or serve deposition notices.[1] On March 9, 2016, respondents served on staff four notices of deposition. Respondents did not file the notices with the undersigned.

Currently before me is staff's motion to quash respondents' notices to take deposition. See Letter from U. Drescher, Esq., dated March 14, 2016, attaching Affirmation With Points of Law by Udo Drescher in Support of Staff's Motion to Quash Respondents' Notices to Take

[1] In the March 15, 2016 cover letter enclosing respondents' opposition papers, counsel for respondents states that "it was my understanding that Respondents were to submit Notices of Deposition by last Wednesday (March 9). I apologize if I misunderstood and respectfully request that the enclosed submission be accepted as Respondents' request and as opposition to the Department Staff's motion." See Letter dated March 15, 2016.

Depositions, with exhibits ("Staff's Motion to Quash"). Respondents have submitted opposition to Staff's Motion to Quash, dated March 15, 2016 ("Respondents' Opposition").

II. The Parties' Arguments

In its motion to quash the deposition notices, staff argues, among other things, that, although respondents have now cured their earlier failure to identify specific witnesses for deposition, respondents have still failed to demonstrate that the depositions will expedite this proceeding, and have failed to establish that unique or unusual circumstances exist to support allowing the depositions. See Staff's Motion to Quash, at 3, ¶¶ 14-16.

Respondents include in each deposition notice a narrative "basis" for seeking to depose the witness, comprised of three parts each. Two of the three parts of respondents' stated "basis" are the same in all four deposition notices. Respondents state that each deponent:

> (1) was, upon information and belief, involved directly with the administration and processing of Respondent Felice's 1989 and 1992 Tidal Wetlands Permit Applications … and (3) is familiar with NYSDEC tidal wetlands permitting policies and changes thereto from and after 1992.

Notice to Take Deposition of Stephen Zahn dated March 9, 2016 ("Zahn Notice"), at p. 2; Notice to Take Deposition of Michelle Moore dated March 9, 2016 ("Moore Notice"), at p. 2; Notice to Take Deposition of John J. Ferguson dated March 9, 2016 ("Ferguson Notice"), at p. 2; Notice to Take Deposition of James J. Gilmore, Jr. dated March 9, 2016 ("Gilmore Notice"), at p. 2.

The second "basis" for each deposition is different for each deponent. See Zahn Notice, at p. 2 (Zahn "personally participated in inspections and observations made at Respondents' property in 1993 and 1994"); Moore Notice, at p. 2 (Moore "was involved directly in discussions with other NYSDEC staff members concerning observations made at Respondents' property in 1993 and 1994, as reflected in NYSDEC Staff memoranda dated November 10, 1993 and January 27, 1994"); Ferguson Notice, at p. 2 (Ferguson "was involved directly in discussions with other NYSDEC staff members concerning observations made at Respondents' property in 1993 and/or 1994 as well as the decision to pursue enforcement against Respondents in 1994 and 2015"); Gilmore Notice, at p. 2 (Gilmore "was involved directly in discussions with other NYSDEC staff members concerning and personally participated in observations made at Respondents' property in 1993 and/or 1994 as well as the decision to pursue enforcement against Respondents in 1994 and 2015").

Respondents further state with respect to each proposed deponent that, because the scope and breadth of the witness' knowledge is unknown, a deposition "will enable Respondents to investigate the facts concerning their affirmative defenses and will drastically reduce, if not eliminate, the examination of this witness" at hearing. See all four notices, at p. 2.

In their papers opposing staff's motion to quash, respondents argue that events that transpired in 1994, and earlier, are relevant to the current enforcement proceeding and respondents' defenses. See e.g. Respondents' Opposition at 2 (proposed deponents "had a direct

involvement in events that are integral to Respondents' defenses"). For example, respondents argue that the depositions relate to respondents' defenses of laches and statute of limitations, which are based upon respondents' claims that this proceeding "involves facts and events which transpired over a period of decades," Respondents' Opposition at 2, and that the Department has delayed bringing this enforcement proceeding for "more than twenty (20) years." Id. at 5.

Citing their defense of unclean hands, respondents further assert that "DEC Staff intentionally misled Respondents to believe that their 1989 permit application would not be granted." Id. at 5. With respect to their defenses of res judicata and claim preclusion, respondents argue that a 1994 Consent Order bars the current enforcement proceeding, and that respondents "have a right to prove their defenses and must be permitted access to the information that we believe will enable them to do so." Id.

Finally, respondents claim that one of the purposes of the proposed depositions "will be to determine who else, whether current of [sic – probably should be "or"] former DEC employees, are likely to have information that relates to Respondents' defenses." Id. According to respondents, such information "will be of little value to Respondents if it is obtained once the hearing is underway, or will result in adjournments that will only serve to prolong the process." Id.

III. Discussion

As stated in the March 1 ALJ Ruling, depositions are seldom allowed in Part 622 proceedings. A party seeking to take depositions must demonstrate that the depositions will expedite the proceedings, and that unique or unusual circumstances exist warranting a departure from the typical administrative practice of examination of witnesses only at hearing. The regulatory language makes clear that depositions in Part 622 enforcement proceedings are the rare exception, and that depositions "*will only be allowed … upon a finding that they are likely to expedite the proceeding*.' 6 NYCRR § 622.7(b)(2) (emphasis added). This regulatory limitation on the circumstances in which depositions may be allowed is consistent with other disclosure limitations in Part 622, see e.g. 6 NYCRR § 622.7(b)(3) (bills of particulars are not permitted) and § 622.7(b)(2) (written interrogatories only allowed with ALJ permission and upon finding that they are likely to expedite the proceeding), and is fully authorized by State Administrative Procedure Act ("SAPA") § 305.[2]

In addition to the clear regulatory limits regarding depositions, prior administrative rulings further demonstrate the rarity of pre-hearing depositions in Part 622 practice. See e.g. Matter of U.S. Energy Development Corporation, Ruling of Chief ALJ on Motion for Leave to Conduct Depositions, May 9, 2014, at 5 (depositions "are seldom allowed absent a showing of particularized need arising from unique or unusual circumstances").

Respondents assert that "[t]his matter does not involve a finite set of facts or a single event about which testimony can be easily circumscribed," and that "[t]his matter is

[2] SAPA § 305 states: "Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings."

extraordinary and hearing testimony without the benefit of dispositions [sic] would be prolonged, inefficient and a waste of resources." Respondents' Opposition at 4. Based upon submissions to date, however, I am not persuaded that this proceeding does not involve a "finite set of facts," or is "extraordinary."

This matter involves allegations that a 2012 inspection revealed that respondents have undertaken construction without first obtaining the required permits. Respondents have argued that DEC policy "changed" at some point between 1994 – when respondents entered into a consent order with respect to structures existing at the site at that time – and 2012, when the inspection that is the subject of this proceeding occurred, and that the current structures at the site would have been permitted in 1994. Respondents have not, however, asserted that respondents or their agents have conducted no construction at the site since 1994, or that any such construction was permitted and complied with applicable law or policy in effect at the time of the construction.

Indeed, these and other factual questions were discussed in the ruling on reconsideration, and remain for resolution at the hearing. See March 1 ALJ Ruling at 3-4 (discussing respondents' statements regarding "similar" deck and other structures at the site, and the open question of the dates that the structures inspected in 2012 were constructed); see also Respondents' Opposition at 6 (stating that the structures at the site have "existed for many years").[3]

Moreover, the "bases" stated in each deposition notice to explain the purpose of the deposition do not establish that conducting depositions will expedite this proceeding. As to the first and third bases, contained in all four notices – the deponent's involvement, "upon information and belief," in respondent Felice's 1989 and 1992 permit applications, and each witness' familiarity with NYSDEC tidal wetlands permitting policies and changes thereto from and after 1992 – there is nothing in the record that supports a pre-hearing deposition rather than simply calling each witness at the hearing. Similarly, respondents have not demonstrated that deposing these witnesses, rather than examining them at hearing, regarding inspections, discussions or decision-making regarding enforcement will expedite the proceeding.

Respondents' legal argument is based upon due process. See e.g. Respondents' Opposition at 3-4 ("the very principals [sic] of due process will be compromised if we are not permitted to depose these witnesses"). Respondents have not demonstrated that denial of their request to depose witnesses – whom they may examine at hearing – would violate due process. Respondents' due process rights are protected and satisfied sufficiently by providing an opportunity to examine these or other witnesses at the adjudicatory hearing.

[3] Respondents state that, "if DEC had brought this proceeding within any reasonable period of time, steps could have been taken to obtain a permit for Respondent's deck." Respondents' Opposition at 3. Although not entirely clear, this statement may be read to imply that respondents believe that steps to obtain a permit for construction need not be taken until after an enforcement proceeding is commenced. To the extent, if at all, that respondents are asserting this position, the law is to the contrary. A permit must be obtained prior to construction. See e.g. ECL § 15-0503(1)(b).

Respondents also argue that the cost to the Department "is little, if at all, impacted by permitting the depositions," and that permitting depositions "will result in less of a hardship to the DEC than requiring lengthy testimony at the hearing." Id. As stated in the ruling on reconsideration, however, the possibility of a multi-day hearing is not "unique or unusual." See March 1 ALJ Ruling at 4.

IV. Conclusion

Respondents have not demonstrated that conducting pre-hearing depositions will expedite this proceeding. Staff's motion to quash the four deposition notices is granted. In addition, construing respondents' cover letter and opposition papers as a request pursuant to 6 NYCRR § 622.7(b)(2) for permission to take the depositions of the four identified witnesses, respondents' request is denied.

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

Dated: Albany, New York
April 4, 2016