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"),

RULING ON RESPONDENTS' ORAL MOTIONS

-by-

DEC Case No. R2-20120613-353

PETER W. PLAGIANAKOS and MADELINE FELICE,

Respondents.

I. BACKGROUND

After four days of hearing in this proceeding, staff of the New York State Department of Environmental Conservation ("Department") finished its case-in-chief and rested. See Hearing Transcript ("Tr.") at 619:13-18. Respondents thereafter moved orally for relief in several respects. See id. at 620:5-639:22. Respondents' motions are listed below:

- Motion to strike hearing exhibits 4, 10, 15, 16, 17, and 20-26, and some testimony of staff witnesses George Stadnik and Susan Maresca based upon a prior, written, motion to dismiss staff's second, third, fourth, sixth, seventh and ninth causes of action relating to tidal wetlands. See Tr. at 621:22-25.[1]
- Motion to strike hearing exhibits 11, 12, 14, 15, 16, 17, and 18 and strike all testimony relating thereto because the exhibits post-date the complaint. See Tr. at 636:18-638:20.
- Motion to dismiss all claims against respondent Peter W. Plagianakos. See Tr. at 623:2-624:3.
- Motion to dismiss the third and fourth causes of action regarding six round pilings and eight square pilings in a tidal wetland. See Tr. at 624:4-630:16.
- Motion to dismiss the second cause of action regarding structure erected in a wetland. See Tr. at 630:17-631:17.

[1] Respondents' written motion sought dismissal of all tidal wetlands-related claims. I denied respondents' written motion, and denied respondents' related oral motions to strike hearing exhibits 4, 10, 15, 16, 17 and 20-26, and to strike the testimony of staff witnesses Stadnik and Maresca. See Matter of Plagianakos, Ruling on Respondents' Motion to Dismiss and to Strike, April 3, 2017. The Commissioner affirmed my April 3, 2017 Ruling. See Matter of Plagianakos, Interim Decision and Order of the Commissioner, October 3, 2017. Respondents thereafter commenced an Article 78 proceeding in Albany County Supreme Court, challenging the Commissioner's Interim Decision and Order. See Felice v. Seggos, Sup Ct, Albany, County, Breslin, J., Index No. 907054-17.

- Motion to dismiss the first cause of action regarding deck over navigable waters. See Tr. at 631:18-636:17.
- Motion to dismiss the fifth, sixth, seventh, eighth and ninth causes of action as they relate to a gangplank/ramp, and floats. See Tr. at 638:21-639:22.

As discussed below, I deny respondents' motion to strike hearing exhibits 11, 12, 14, 15, 16, 17, and 18 and testimony relating thereto. I reserve on respondents' motions (i) to dismiss all claims against respondent Peter W. Plagianakos; and (ii) to dismiss the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action. I will convene a conference call with the parties to schedule the remaining days of hearing.

II. RESPONDENTS' MOTION TO STRIKE ALL EXHIBITS POST-DATING COMPLAINT, AND TO STRIKE RELATED TESTIMONY

Respondents move to strike hearing exhibits 11, 12, 14, 15, 16, 17, and 18, and all testimony of staff witness George Stadnik relating thereto, arguing that the exhibits post-date the complaint. See Hearing Transcript ("Tr.") at 636:18-638:20. In their reply memorandum, respondents expand on this argument:

> [E]vidence generated by an administrative agency after it makes a determination to file a Complaint, is not part of the administrative record because it formed no part of the agency's determination that a party committed a violation, and is inadmissible and incompetent as a basis for any [cause of action] as per basic administrative law principles.
>
> An agency is bound by its administrative record *at the time it determines to commence an enforcement proceeding*. A decision to prosecute must be based on specific facts in the record at the time the decision is made. With respect to any agency enforcement proceeding, anything less would be arbitrary and capricious, an abuse of discretion, and a denial of due process.

Reply Memorandum of Law in Support of Oral Motions Directed to DEC's Case, dated April 28, 2017, at 21 (italics in original).

Although not entirely clear, a fair reading of respondents' argument above reflects respondents' apparent belief that staff's (i) determination that respondents committed violations, and (ii) decision to commence an enforcement proceeding against respondents, were each "final agency determinations" that froze the administrative record with respect to the causes of action asserted here. Respondents cite no legal authority for their position, and their argument would in effect prevent Department staff from seeking discovery and utilizing any evidence thereby obtained.

Respondents' argument is rejected. Although Department staff must have a good faith basis for commencing an enforcement proceeding asserting causes of action based upon alleged violations, staff is not required to have obtained all proof of such violations before deciding to pursue a respondent for alleged violations. The only "final determination" with respect to this

proceeding will be a Commissioner's decision or order finally determining whether Department staff has, or has not, met its burden of proof on its causes of action, and whether respondents have, or have not, met their burden of proof on their affirmative defenses.

Moreover, respondents waived any objection to the admission of these exhibits and related testimony when they failed to object on this basis at the time the exhibits and testimony were offered into evidence. See e.g. Miano v. Westchester Gulf Service Station, 90 A.D.2d 269, 270 (1st Dept. 1982); see also Horton v. Smith, 51 N.Y.2d 798 (1980) ("When a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived"); Juric v. Bergstrassaer, 133 A.D.3rd 951, 954 (3rd Dept. 2015). Respondents asserted no objections to the admission into evidence of Hearing Exhibits 15, 17 and 18. See Tr. at 98:12-14 (Ex. 15); id. at 109:4-110:9 (Ex. 17 – no objection with the understanding that the witness was not testifying as to the distance between bulkhead and docks); id. at 112:21-113:10 (Ex. 18). With respect to Hearing Exhibits 11, 12 and 16, respondents' only objection was that counsel believed they were not produced until after discovery closed and that, subject to confirmation with prior counsel that the documents had in fact been produced by Department staff during discovery, counsel had no other objection. See Tr. at 67:9-70:5 (Ex. 11); id. at 82:25-83:14 (Ex. 12); id. at 107:7-101:22 (Ex. 16).[2]

III. CONCLUSION

A. Respondents' motion to strike hearing exhibits 11, 12, 14, 15, 16, 17, and 18, and all testimony of staff witness George Stadnik relating thereto, is DENIED.

B. I hereby reserve ruling on respondents' motions:

   i. to dismiss all claims against respondent Peter W. Plagianakos; and
   ii. to dismiss the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action.

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

Dated: January 8, 2018
Albany, New York

[2] Although the record does not reflect that Department staff moved Exhibit 14 into evidence, both Department staff and respondents examined staff witness Stadnik regarding Exhibit 14. See Tr. at 90:5-95:10 (direct); id. at 198:6-202:7; 211:7-214:2 (cross); 315:13-25 (redirect).