STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law (ECL) and Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

U.S. ENERGY DEVELOPMENT CORPORATION,

Respondent.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON RENEWED MOTION FOR A PROTECTIVE ORDER

DEC File No. R9-20111104-150

June 1, 2015

Appearances of Counsel:

-- Edward F. McTiernan, Deputy Commissioner and General Counsel (Maureen A. Brady, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Hodgson Russ LLP (Daniel A. Spitzer and Charles W. Malcomb of counsel), for respondent U.S. Energy Development Corporation

-- Darci Frinquelli, Counsel, for the New York State Office of Parks, Recreation and Historic Preservation

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON RENEWED MOTION FOR A PROTECTIVE ORDER

I. Proceedings

Staff of the Department of Environmental Conservation (Department) filed a notice of motion dated January 30, 2015, seeking a protective order in the above referenced matter. Specifically, Department staff sought an order vacating a December 31, 2014, notice to admit served upon it by respondent U.S. Energy Development Corporation. By letter dated March 6, 2015, I denied staff's motion with leave to renew upon the filing of an attorney's affidavit of good faith efforts to

resolve the dispute without resort to a motion as required by 6 NYCRR 622.7(c)(1).

On March 25, 2015, Department staff renewed its motion seeking a protective order, pursuant to CPLR 3103(a), denying the request for admissions, and vacating the notice to admit, except those requests answered by the Department. Filed with staff's notice of motion are an attorney's affirmation in support of the motion for a protective order, an attorney's affidavit of good faith efforts to resolve the dispute regarding the notice to admit, and the Department's response to respondent's notice to admit.

In response, respondent filed an attorney's affirmation dated April 8, 2015, with exhibits, in opposition to Department staff's motion. Staff of the New York State Office of Parks, Recreation and Historic Preservation (Parks) has not filed any papers on this motion.

II. Discussion

In the Department's response to the notice to admit, staff responded to 14 of the 211 requests to admit. Staff indicates that it is renewing its motion for a protective order as to all requests to which it has not responded. Staff asserts that the notice to admit is burdensome, unnecessarily wordy, and replete with convoluted statements. Staff also argues that instead of seeking admissions as to matters of fact and uncontroverted evidence, the majority of items call for ultimate conclusions that can only be made after a complete hearing, consist of requests for matters that are wholly or partially immaterial to the issues, or concern allegations the Department believes are disputed. Staff asserts respondent is using the notice to admit as an improper substitute for other discovery devices, such as depositions and examinations before trial, to obtain discovery about the credentials, observations, and work protocols of Parks staff. Thus, staff asserts that the notice to admit goes beyond the scope of CPLR 3123 and constitutes an abuse and misuse of that section.

In response, respondent argues that staff has failed to support its refusal to answer the 197 requests for admission beyond submitting the same affirmation it supplied on the original motion and, thus, has failed to meet its burden of

specifying why those requests are objectionable. Respondent also asserts that Department staff has the obligation to address questions regarding Parks staff because both the Department and Parks are part of the State, and the two agencies worked together to investigate and prosecute this matter. Because Department staff has failed for the second time to respond to the notice of admit, respondent asserts it is entitled to an order holding that the 197 ignored requests are deemed admitted. Respondent's argument is unpersuasive.

As previously held, the scope of discovery under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]) is as broad as that provided under CPLR article 31 (see 6 NYCRR 622.7[a]; Matter of U.S. Energy Develop. Corp., Ruling of the Chief Administrative Law Judge [ALJ] on Motion for Leave to Conduct Depositions, May 9, 2014, at 4). Subject to some exceptions and restrictions, the parties may employ any disclosure device contained in CPLR article 31 (see 6 NYCRR 622.7[b][1]).

Any party against whom discovery is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR 3103, to deny, limit, condition or regulate the use of any discovery device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (see 6 NYCRR 622.7[c][1]).

Notices to admit are authorized by CPLR 3123. Any party may serve upon any other party a written notice requesting that facts set forth in the notice be admitted (see CPLR 3123[a]). The device may be used only when the requesting party "reasonably believes there can be no substantial dispute" about the matter and when the matter is within the knowledge of the other party, or can be ascertained "upon reasonable inquiry" (CPLR 3123[a]).[1]

The purpose of the device is to save a party the trouble and expense of proving readily admittable "clear-cut matters of fact" concerning which there is general agreement and whose exclusion as an issue for litigation would expedite the trial (see Hodes v City of New York, 165 AD2d 168, 170-171 [1st

[1] A notice to admit may also be used to obtain admissions as to the genuineness of a paper or document, or the correctness of photographs. However, respondent is not using the notice to admit in this proceeding for these purposes.

Dept 1991]). Although it may be used to obtain admissions on central issues in a case (see Seaside Medical, P.C. v General Assur. Co., 16 Misc 3d 758, 764 [Dist Ct, Suffolk County]), it may not be used to seek admissions concerning ultimate and fundamental issues that can only be resolved after a full trial, or to seek admissions on matters that are in actual dispute (see Villa v New York City Hous. Auth., 107 AD2d 619, 620 [1st Dept 1985]; Groeger v Col-Les Orthopedic Assocs., P.C., 136 AD2d 952 [4th Dept 1988]). Nor may it be used as a substitute for other discovery devices, such as written interrogatories or depositions (see Taylor v Blair, 116 AD2d 204, 206 [1st Dept 1986]).

Review of the 197 requests not responded to by Department staff reveals that they go well beyond the scope and purpose of a notice to admit. Those requests do not seek admissions concerning clear-cut, uncontroverted issues of fact or facts that are easily provable. Rather, many of the requests improperly seek admissions on contested ultimate issues concerning the sources of the alleged turbid discharges that form the bases of staff's charges against respondent and, thus, improperly seek to undermine the basic premises of staff's complaint (see Miller v Hilman Kelly Co., 177 AD2d 1036 [4th Dept 1991]; Washington v Alco Auto Sales, 199 AD2d 165 [1st Dept 1993]). In addition, the more than 80 requests for admission concerning the credentials, observations, and work protocols of Parks staff, who act as Department staff's witnesses in this matter, amount to a deposition or written interrogatories (see Berg v Flower Fifth Ave. Hosp., 102 AD2d 760, 760 [1st Dept 1984]). Inasmuch as I have previously denied respondent's request, pursuant to 6 NYCRR 622.7(b)(2), to conduct depositions in this matter (see Ruling of the Chief ALJ, May 9, 2014), it is inappropriate for respondent to use the notice to admit as a substitute discovery device (see Hodes, 165 AD2d at 170).

Finally, contrary to respondent's assertions, Department staff's objections to the notice to admit are sufficiently detailed and specific to carry its burden on this motion.

In sum, even assuming, without deciding, that a few proper requests are interspersed in the notice to admit, because respondent's 197 requests for admissions mostly concern ultimate and material issues of fact that will be disputed at trial, or are being used as a substitute for other discovery devices, they

should be vacated in their entirety (see Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison, 214 AD2d 453 [1st Dept 1995]).

III. Ruling

Accordingly, based on the foregoing, it is hereby ordered that:

(1) Department staff's motion for a protective order is granted, and respondent's notice to admit is vacated, with the exception of requests 16, 22, 28, 34, 40, 136, 142, 148, 153, 159, 176, 186, 209, and 211, to which Department staff has provided responses; and

(2) Respondent's request for a ruling deeming each of the unanswered requests in the notice to admit to be admitted is denied.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: June 1, 2015
Albany, New York