

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 15, 25 and 27 of the New York State Environmental Conservation Law (ECL) and Parts 360, 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING OF THE
COMMISSIONER**

--by--

364 MEREDITH AVENUE LLC; S.I. ASPHALT COMPANY, LLC; MCCZ, LLC; RM ASPHALT, LLC; MICHAEL CAPASSO, personally and as a member/managing member/responsible corporate officer of S.I. Asphalt Company, LLC and MCCZ, LLC; and RICHARD MARTUCCI, personally and as member/managing member/responsible corporate officer of 364 Meredith Avenue, LLC, S.I. Asphalt Company, LLC, and RM Asphalt, LLC,

**DEC File No.
R2-20170630-246**

Respondents.

This ruling relates to a motion dated November 21, 2022 (Motion) by respondents Michael Capasso and MCCZ, LLC (Moving Respondents) for permission to file an expedited appeal from the November 7, 2022 ruling issued by Administrative Law Judge (ALJ) Richard Sherman (Ruling). The Ruling arises from an enforcement proceeding commenced by staff of the New York State Department of Environmental Conservation (Department or DEC) by notice of hearing and complaint dated March 30, 2021 (Complaint) against the above-captioned respondents. The Complaint lists fifteen causes of action alleging multiple violations of ECL articles 15, 25, and 27, and their respective regulations at a site located at 354 and 364 Meredith Avenue, Staten Island, New York.

In the enforcement proceeding, Moving Respondents served a demand for production of documents on respondents 364 Meredith Avenue LLC, RM Asphalt, LLC, and Richard Martucci, and subsequently served a motion to compel disclosure dated June 1, 2022. The motion to compel sought full compliance with the disclosure demand and with a subpoena dated February 28, 2022 or, in the alternative, preclusion of the Membership Interest Purchase Agreement between the respondents (see Ruling at 2). ALJ Sherman reviewed the scope of disclosure in DEC enforcement proceedings, and in particular the threshold requirement that a disclosure request must be reasonably calculated to yield material and necessary information (see Ruling at 4-8). Based on his review, the ALJ determined that Moving Respondents failed to make the threshold showing under either the disclosure demand or the subpoena that the materials sought were material and necessary for Moving Respondents' defense in this proceeding (see id. at 8).

The Motion of the Moving Respondents included a notice of motion and an affirmation of Nicholas C. Rigano, Esq., dated November 21, 2022 in support of the Motion with accompanying exhibits (Rigano Affirmation). Respondents 364 Meredith Avenue LLC, RM Asphalt, LLC, and Richard Martucci, by their attorneys Mintzer Mauch PLLC, filed an affirmation of Helen C. Mauch, Esq., dated December 12, 2022 in opposition to the Motion (Mauch Affirmation).

During the course of a proceeding, any ruling (other than recusal) may be appealed to me by seeking permission to file an expedited appeal “upon a demonstration that the failure to decide such an appeal on an expedited basis would be unduly prejudicial to the one of the parties, or would result in significant inefficiency in the hearing process. In all such cases, the commissioner’s determination to entertain the appeal on an expedited basis is discretionary” (6 NYCRR 622.10[d][2][ii]; see also 6 NYCRR 622.10[d][3] [motion for permission to file an expedited appeal must demonstrate that the ruling in question falls within the criteria set forth in 6 NYCRR 622.10(d)(2)(ii)]).

I have given due consideration to the Ruling, the arguments set forth in the Rigano Affirmation for reversal of the ALJ’s determination (see Rigano Affirmation, ¶¶ 18-24) as well as its discussion of the nature of the dispute and regulations governing disclosure (see id., ¶¶ 4-17), and the Mauch Affirmation which supports the Ruling and contends that Moving Respondents have failed to meet their burden (see Mauch Affirmation ¶¶ 4-18).

Based upon my review of the record, I find that the Moving Respondents have not met their burden under 6 NYCRR 622.10(d)(2)(ii). Accordingly, the request of the Moving Respondents for permission to file an expedited appeal of the Ruling is denied in its entirety.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: /s/
Basil Seggos
Commissioner

Dated: January 12, 2023
Albany, New York